

1904  
\*March 23.  
\*May 4.

JOHN BELLAMY MILLER (DEFEND- } APPELLANT ;  
ANT) .....

AND

ELIZABETH KING, ADMINISTRA- }  
TRIX OF THE PROPERTY OF } RESPONDENT.  
PETER KING, DECEASED (PLAIN- }  
TIFF) .....

ON APPEAL FROM THE COURT OF APPEAL FOR  
ONTARIO.

*Negligence—Master and servant—Workmen’s Compensation Act.*

M., proprietor of iron works, had built an engine in the course of business, and while it was standing on a railway track in the workshop a heavy dray standing near owing to the horses attached being startled was thrown against it whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman’s estate the jury found that the accident was due to the negligence of M. in not having the engine properly braced.

*Held*, that this finding was justified by the evidence and M. was liable under the Workmen’s Compensation for injuries Act (R. S. O. [1897] ch. 160.

*Held* also, that the accident did not occur through a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises with, intended for or used in the business of the employer.

APPEAL from a decision of the Court of Appeal for Ontario affirming the verdict at the trial in favour of the plaintiff.

The husband of the respondent at time of his death was a machinist, 52 years of age, and had been working in the appellant’s establishment for about a year.

The works of the appellant are situate on the esplanade, Toronto, and occupy a space of about 400 feet by

\*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

400 feet, and are for the manufacture of engines, castings and other machinery. The particular shop in which the accident happened is a large place.

Running from north to south at the east side of the shop is a space 14 feet wide with a large door of same width for entrance, and occupied by a railway track, on which railway cars are taken into the shop for the purpose of loading and taking away machinery, and the space being level is also used by waggons or drays as a roadway for the same purpose. Over this space or roadway a travelling crane extends from the shop, for the purpose of lifting machinery on to the railway or waggons. Close to this roadway and running westward in length with tube some fifty or sixty feet altogether, a dredge engine had been built, preparatory to being shipped to British Columbia. The engine itself, apart from the tube, was about ten feet long, four feet wide and five or six feet high, larger at the top and centre than at the bottom, but how much does not appear. It weighed four or five tons, and had been erected where it was for about three months. Each end rested on a piece of timber about twelve inches square and was supported in addition by timbers against flanges at the side.

The deceased was on the day of the accident, and had been for some time, working at a bench running along the north wall of the shop and some three or four feet from the engine. A large lorry or waggon belonging to the defendant Colville, who had a general contract with appellants for carriage of goods, had been backed into the shop for the purpose of taking away a retort to the Gas Company's works. The waggon and horses backed down the roadway and past the engine in question, and was there loaded on the roadway with the retort under the superintendence of one Dowie in the employment of and representing the

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person for whom the retort had been made, and who had sold it to the Toronto Gas Company. The retort extended over the edge of the waggon a foot or fifteen inches, but there was room for it to pass the engine. The waggon had been loaded, when suddenly the horses started, from what cause does not appear, and going forward swerving to the left, the engine in question was struck by the waggon and thrown over upon the deceased.

The trial took place at Toronto before Mr. Justice Meredith and a jury in September, 1902.

Questions were submitted to the jury which with their answers are as follows :

1. Q. Was Peter King's death caused by a mere accident not attributable to the negligence of any one?—A. No.
2. Q. If not was the proximate cause of it the negligence of the defendants or either of them?—A. Yes.
3. Q. If so, which?—A. Miller.
4. Q. And what was the negligence? State fully and plainly.—A. Improper bracing of engine.
5. Q. Did King voluntarily incur the risk of the injury he suffered so far as the defendant Miller is concerned?—A. No.
6. Q. Might King by the exercise of ordinary care have avoided the injury?—A. No.
7. Q. Assess the damages?—A. Widow King \$1,000; invalid daughter, Bessie, \$200.

Upon these findings judgment was entered by the order of the learned trial judge in favour of the plaintiff against the appellant Miller for \$1,200 and the costs of action, and the action was dismissed as against the defendant Colville with costs.

The appellant thereupon appealed to the Court of Appeal for Ontario, and his appeal was by an unanimous judgment of the court on the 14th day of September, 1903, dismissed.

The appellant's appeal now is from the judgment of the Court of Appeal.

*Riddell K.C.* and *G. L. Smith* for the appellant. The finding of the jury that the engine was improperly braced is against evidence and that is the only negligence imputable to the defendant.

This court will set aside improper findings though affirmed by an intermediate court of appeal. *Montgomerie & Co. v. Wallace-James* (1); *Cowans v. Marshall* (2); *Wood v. Canadian Pacific Railway Co* (3).

The engine was not machinery "connected with, intended for or used in the business of the employer" under the workmen's Compensation for Injuries Act (4) sec. 3; *Griffiths v. London and St. Katharine Docks Co.* (5); *Rudd v. Bell* (6).

*Aylesworth K.C.* and *E. B. Stone* for the respondent. The fact that the engine was overturned was evidence that it was not properly supported. *T. Eaton Co. v. Sangster* (7).

It was a defect in the premises under the Act and also negligence at common law.

The judgment of the court was delivered by:—

DAVIES J.—Without expressing any opinion whatever upon the possible liability at common law of the defendant, a liability which was not charged upon the pleadings and was in no wise in issue at the trial, I concur in the conclusion reached by the Court that the defendant is liable under "The Workmen's Compensation for Injuries Act" for the negligence of the superintendent under whose orders the engine was braced and supported. There cannot be, in my opinion, any reasonable doubt that the findings of the jury are justified by the evidence as to this inefficient shoring

(1) [1904] A. C. 73.

(5) 13 Q. B. D. 259.

(2) 28 Can. S. C. R. 161.

(6) 13 O. R. 47.

(3) 30 Can. S. C. R. 110.

(7) 25 O. R. 78; 21 Ont. App. R.

(4) [1897] R. S. O., ch. 160.

624; 24 Can. S. C. R. 708.

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up or bracing of the engine. It was the duty of the superintendent, considering the position in which the engine was placed, alike with respect to the bench where King was working and to the roadway along which heavy loads were constantly being hauled from the factory, to see not only that the bracing was sufficient to support the inherent weight of the engine and the probable forces the workmen engaged in its construction might bring against it, but also that it was sufficient to securely support the engine against any shock it was reasonably likely to receive from the drays and loads being hauled past it. That it was not so braced the result sufficiently proved, and that the defendant's superintendent ought to have provided against such a shock as the engine received is, under the circumstances of this case, in my opinion quite clear. As a matter of fact the evidence shewed that between the end of the engine where struck by the loaded dray and the load on that dray there was only a space of about five inches. Of course a very slight swerve of the horses was sufficient under these conditions to press the load against the engine. The impact seems to have been slight but it was sufficient to overturn the engine and cause the death of the unfortunate man King. I think this danger of contact between the loaded drays and the engine where placed was one which the defendants' superintendents were under the circumstances reasonably bound to consider and provide against, and that for their neglect to do so the defendant is under the statute liable for the damages resulting.

I am, however, clearly of the opinion that the facts do not shew or constitute any

defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer,

within the meaning of the Act. The engine over-  
turned was not part of the ways, works, plant or  
machinery of the workshop. It was an article in  
process of manufacture or construction for sale and  
could not be held either with respect to its location  
or to its bracing to constitute such a defect as the  
statute was intended to cover, and for which the  
master or owner was to be held liable.

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I think on the ground I have stated above the  
appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Smith, Rae & Green,*

Solicitors for the respondent: *Stratton & Hall.*

