1942

*June 15.
*Oct. 6.

OTTO MARSHMENT (PLAINTIFF).....APPELLANT;

AND

CARL BORGSTROM (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and servant—Negligence—Responsibility of master for injury to servant arising from use of defective system of working supplied and operated by independent contractor.

Plaintiff was employed by defendant to assist in sawing wood on defendant's farm. The sawing equipment was supplied and operated by one L., who was paid for it, including his own labour, at $1.25 per hour. In the course of the operations, a large cast iron fly-wheel on the equipment burst and a section of it struck and injured plaintiff, who sued defendant for damages.

There were findings at trial, held in this Court to be justified on the evidence, that the accident occurred while the saw was running free and that the excessive speed at which it was then operated caused the fly-wheel to burst; that the method of the sawing operations was a defective system and that, having regard to the danger, L. was not a competent person to take charge of and operate the equipment; and that plaintiff's injury was due primarily to the dangerous system of working.

Held: Assuming (as defendant contended) that L. was an independent contractor, nevertheless defendant was liable. It was defendant's duty to plaintiff to supply and install proper equipment for sawing the wood and a proper system of work so far as care and skill could secure these results, and to select properly skilled persons to manage and superintend the equipment, and this obligation is personal to the employer who cannot free himself from his duty by a mere delegation (*Wilsons & Clyde Coal Co.* v. *English*, [1938] A.C. 57; [1937] 3 All E.R. 628); and the employer can no more escape the consequences of non-performance of said personal obligation to his employee merely by employing an independent contractor than he could by placing the responsibility on the shoulders of another employee (this is implicit in the reasons in the *Wilsons'* case, *supra*).

Per the Chief Justice: It flows from the reasoning in the judgments in the *Wilsons'* case (in the House of Lords, *supra*, and in the Court of Session, 1936, S.C. 883) that the obligation which the law imposes upon the employer, and which is involved in the contract, is that he shall provide a safe system of working in so far as the exercise of reasonable care and skill will enable him to do so; but he does not perform this obligation by simply employing an agent who is an independent contractor to whom he delegates the performance of it. (*McKelvey* v. *Le Roi Mining Co.*, 32 Can. S.C.R. 664, and other cases in this Court, also discussed).

* PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (without written reasons) reversed the judgment of the trial judge, Roach J. (2), which was given in favour of the plaintiff for $4,000 damages for injury to him caused by his being struck by a section of a fly-wheel which burst during the course of the operations of a certain equipment, supplied and operated by one Laidlaw, which was being used for sawing wood on the defendant's farm. The plaintiff had been employed by the defendant to work in connection with the sawing of the wood and was so employed when the accident happened. The material facts of the case and the questions involved in the appeal sufficiently appear in the reasons for judgment in this Court now reported.

The formal judgment of the Court of Appeal ordered that judgment be entered dismissing the action, "but reserving to the plaintiff the right to bring action against any other persons whom he conceives have done him an injustice."

By the judgment of this Court now reported, the appeal to this Court was allowed and the judgment of the trial judge restored, with costs throughout.

H. F. Parkinson K.C. for the appellant.

T. N. Phelan K.C. for the respondent.

THE CHIEF JUSTICE—I have had an opportunity of reading the judgment of my brother Kerwin and I agree with it. I am writing mainly for the purpose of calling attention to some earlier decisions of this Court.

For the purpose of ascertaining the principle of law applicable for the decision in this appeal, I quote some passages from the judgments of the Lords in *Wilsons & Clyde Coal Co.* v. *English* (3). At p. 640 Lord Wright says:

> In *Lochgelly Iron & Coal Co. Ltd.* v. *M'Mullen* (4), this House overruled the decision of the Court of Appeal in *Rudd's* case (5), on the scope of the employer's liability to his workpeople for breach of a statutory duty. In *Rudd's* case (5), the Court of Appeal, applying their

(1) Noted in [1941] 4 D.L.R. 804. No written reasons were delivered.
(2) [1941] O.W.N. 197; [1941] 3 D.L.R. 428.
(3) [1937] 3 All E.R. 628.
(4) [1934] A.C. 1.
(5) *Rudd* v. *Elder Dempster & Co. Ltd.*, [1933] 1 K.B. 566.

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general views which I have just stated, held that the employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in this sense, that he was bound to perform it, by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold, "the provision of a competent staff of men, adequate material, and a proper system and effective supervision."

The points in this statement which, I think, may usefully be emphasized are, first, that the duties specified as the duties of the employer are "fundamental obligations of a contract of employment", and, in the next place, that these obligations fall within the same category as a statutory duty in respect of the characteristic that the employer cannot fulfil them by entrusting their fulfilment to competent employees.

No doubt an employer may perform a duty by an agent who is an independent contractor, but, if the employer does not perform it and if it is not performed either by his servant or by his agent, then the result is that it is not performed; in other words, there is a breach of duty. At page 643, Lord Wright proceeds:—

> The true question is, what is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs, or can perform, it himself, or whether he does not perform it, or cannot perform it, save by servants or agents. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing. As Lord Macmillan said, in the *Lochgelly* case (1), with reference to a duty to take care:
>
> "It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case and in either case it is a duty imposed by law."
>
> To the same effect Lord Atkin says, at p. 9:
>
> "Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of 'personal' negligence."

(1) [1934] A.C. 1, at p. 18.

The same opinion is expressed by the other members of the House who took part in that case. The House, in overruling *Rudd's* case (1), did, I think, inferentially overrule *Fanton's* case (2).

Lord Maugham says at p. 646:—

> The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far as care and skill can secure this result.

And he proceeds to point out the consequences emerging from the circumstance that the duty of the employer is a duty springing from the contract of employment:

> * * * but it would need an altogether new implied term in the contract between employer and employee before a court could properly hold that this delegation has the result of freeing the employer from his liability. This becomes apparent if we imagine the contract between employer and workman to be written out in full, with all the implied clauses. There would be, for the reasons given by the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.* (3), and by your Lordships, no clause to the effect that the employer was to be freed from his special obligations to the workmen if he delegated them to an agent; and, in the absence of such a clause, the employer would plainly remain liable if the agent was guilty of not using proper care and skill, since, in the contract law of Scotland, as in England, it is impossible to transfer a liability towards the other party to the contract without the consent of that party.

A similar line of reasoning is found in the judgment of the Lord Justice-Clerk in the Court of Session, *English* v. *Wilsons and Clyde Coal Co.* (4):

> The doctrine of collaborateur has always been formulated as a doctrine of implied contract. The law presumes that, when a servant engages to perform work for a master, in the absence of express stipulation he contracts on the footing that he takes the risk of the negligence of his fellow servants, but that his master shall be responsible for his own negligence. As was said by Lord Cairns, L.C., in *Merry & Cunningham* (5): "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do." * * * * *
>
> Bringing the matter to this test, the question is, Upon what terms and conditions is the servant to be presumed to contract in the absence of express stipulation? First, is it a reasonable presumption that the servant contracts upon the basis that the fellow servants selected by his master with whom he shall work shall be persons of reasonable skill and competence? Second, is it reasonable to presume that the servant contracts on the basis that the plant and resources, with which the master's work is to be carried on, shall be adequate plant and proper resources so as not to expose the servant to the risk of injury? Third, is it reasonable to presume that the servant contracts on the footing that the master shall

(1) [1933] 1 K.B. 566.
(2) *Fanton* v. *Denville*, [1932] 2 K.B. 309.
(3) 1935 S.C. 681. (4) 1936 S.C. 883, at 910.
(5) *Wilson* v. *Merry and Cunningham*, 6 Macph. (H.L.) 84, at p. 89, L.R., 1 H.L.Sc. 326.

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carry on his business on a system or method, so far as reasonably practicable, which will not subject him to danger or unnecessary risk? All these can fairly be postulated, in the absence of contrary stipulation, as implied conditions in every contract of service. They are reasonable conditions of service, and the risk of their non-fulfilment is a master's risk. The master cannot say, "They are my duties, but I have left the performance of them to someone else." That does not mean warranty, but it means that the master cannot plead his servant's negligence, *quoad* these duties, as excusing himself.

The judgments in *Wilsons'* case neither in the House of Lords (1) nor in the Court of Session (2) deal with the case of delegation to an independent contractor in explicit terms. It flows, nevertheless, I think, from the reasoning in these judgments, that the obligation which the law imposes upon the employer, and which is involved in the contract, is that he shall provide a safe system of working in so far as the exercise of reasonable care and skill will enable him to do so; but he does not, I repeat, perform this obligation by simply employing an agent who is an independent contractor to whom he delegates the performance of it. As Lord Wright points out in his judgment, difficulty may often arise in deciding in a particular case whether the default which has caused the damage is

> a mere misuse of, or failure to use, proper plant and appliances, due to the negligence of a fellow-servant, or a merely temporary failure to keep in order or adjust plant and appliances, or a casual departure from the system of working,

where such matters can be regarded as the casual negligence of the managers, foremen, or other employees, or to the negligent failure to provide a proper system.

In the present case the learned trial judge has found:—

> The doctrine of common employment does not relieve the defendant. The plaintiff's injuries were due primarily to the dangerous system of working, the danger consisting in the absence of any device which would regulate the maximum speed of the saw, beyond which maximum the centrifugal force would cause the flywheel or the saw to fly apart.

I think this finding is adequately supported by the evidence and that it brings the case within the doctrine I have been discussing.

Attention ought to be called to the fact that the principle of responsibility of the employer for injuries arising from a failure on his part to provide a proper system of working was laid down forty years ago in the judgment

(1) [1937] 3 All E.R. 628. (2) 1936 S.C. 883.

of Mr. Justice Davies in *Grant* v. *The Acadia Coal Co.* (1). The judgment of Mr. Justice Davies is based upon the passages in the judgments of the Lords in *Smith* v. *Baker* (2), at pp. 339, 353 and 362 respectively, which are quoted and applied by the Lords in *Wilsons'* case (3). The judgment of Mr. Justice Davies was concurred in by Mr. Justice Girouard, but it cannot be said that it was adopted by the majority of the Court because Mr. Justice Mills, who concurred with Mr. Justice Davies in the result, put his judgment on different ground. In the same year, however, in *McKelvey* v. *Le Roi Mining Co.* (4), Mr. Justice Davies laid down the same doctrine as the basis of his judgment at p. 673, and in that case his reasons were adopted expressly by Mr. Justice Taschereau and Mr. Justice Sedgewick and impliedly by Mr. Justice Girouard. The principle received the sanction of this Court in that case and, apart altogether from the decisions I have been discussing, we should be bound by it in disposing of this appeal.

The question of the duty of the employer with regard to plant was dealt with in two later cases, *Ainslie Mining & Railway Co.* v. *McDougall* (5), and *Brooks* v. *Fakkema* (6), in which it was held that the employer's duty in respect of providing proper plant could not be performed by delegating the performance of it to an employee. The application of the principle was considered in *Western Canada Power Co.* v. *Bergklint* (7). The majority of the Court considered that the doctrine of *McKelvey* v. *Le Roi Mining Co.* (4) and *Ainslie Mining & Railway Co.* v. *McDougall* (5) and the other two cases mentioned, was not applicable to the circumstances disclosed in the evidence. There the Court had to consider the case of *Toronto Power Co. Ltd.* v. *Paskwan* (8). This case is discussed by Lord Wright in *Wilsons'* case (3) and he says at p. 643 that he thinks the decision was correct and that its effect is accurately stated in the headnote. The headnote is in these words:—

(1) (1902) 32 Can. S.C.R. 427, at 438, 439 and 440.
(2) [1891] A.C. 325.
(3) [1937] 3 All E.R. 628.
(4) (1902) 32 Can. S.C.R. 664.
(5) (1909) 42 Can. S.C.R. 420.
(6) (1911) 44 Can. S.C.R. 412.
(7) (1914) 50 Can. S.C.R. 39 (*Bergklint* v. *Western Power Co.*), and (1916) 54 Can. S.C.R. 285.
(8) [1915] A.C. 734.

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The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

Lord Wright's view as expressed in *Wilsons'* case (1) at p. 644 is that:—

> The obligation to provide and maintain proper plant and appliances is a continuing obligation.

It is unnecessary now to consider whether the majority of this Court was right in its view that the principle of the earlier cases did not apply to the facts in *Bergklint's* case (2). It is clear that the reasoning upon which the decisions of this Court were based in the cases mentioned that were decided in 1902, 1909 and 1911 received the sanction of the House of Lords in *Wilsons'* case (1).

The appeal should be allowed and the judgment of the learned trial judge restored, with costs throughout.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

KERWIN J.—The appellant, Marshment, is a labourer who was injured while working for the respondent, Borgstrom, on the latter's farm in the County of Peel, in the Province of Ontario. In an action brought to recover damages for such injuries, the appellant succeeded at the trial and was awarded $4,000 by the trial judge, Roach J. The Court of Appeal for Ontario set aside this judgment and dismissed the action.

The following statement from the judgment of the trial judge clearly sets forth the facts:—

> The plaintiff, a labourer, was employed by the defendant to assist in sawing wood on the defendant's farm. The wood was being sawed by what is described as a portable sawing outfit. This outfit consisted of a frame on which a steel shaft was mounted. A circular saw was affixed to one end of this shaft and on the other end was a large cast iron fly wheel and a pulley. The shaft was made to revolve by power supplied from an old automobile which was placed at a convenient distance from this outfit. The rear end of the automobile was elevated and one of the rear wheels blocked. A canvas belt was placed around the other rear wheel and around the pulley on the shaft. When the automobile

(1) [1937] 3 All E.R. 628.

(2) (1914) 50 Can. S.C.R. 39 and (1916) 54 Can. S.C.R. 285.

engine was started and it was placed in gear, the free rear wheel revolved and the attached belt revolved the shaft. The volume of power transmitted from the engine was controlled by a throttle on the dash board of the automobile, and as this throttle was pulled out or pushed in the amount of gas fed to the engine was accordingly increased or diminished. The power thus generated and regulated could be made constant. The speed depended upon the resistance at the saw. When the saw was actually engaged cutting wood, that resistance diminished the speed, and when it became disengaged the speed would again accelerate. There was no governor to control the maximum speed.

During the sawing operations part of the pile from which the wood was being carried to the saw rolled, resulting in some entanglement, and while the plaintiff and some of the other men were engaged in straightening out the entanglement the saw was running free. During this interval the flywheel burst and a section of it struck the plaintiff's leg below the knee almost completely severing it. * * *

The whole outfit, that is the saw and the automobile, were supplied by one Laidlaw under an arrangement made with him by the defendant's agent, Campbell, whereby he (Laidlaw) was to supply everything, including his own labour and excluding other necessary labour and to be paid $1.25 per hour. The other labour was supplied by the defendant.

Two main questions were argued before us,—the first being as to the cause of the bursting of the fly-wheel. Watts, an expert witness called on behalf of the respondent, testified that the causes might be "excessive speed or a defect in the fly-wheel due to being severely handled, or possibly a combination of both." He was not asked as to whether there was any defect in the fly-wheel and his evidence as to whether there was excessive speed is unsatisfactory. Hastings, an expert called on behalf of the appellant, found no flaw either in the fragment of the fly-wheel which struck the appellant or in the other piece that remained; and he found no evidence of the wheel having received any heavy blow. His view was that it was never intended that the saw should be driven by power supplied by an automobile in the manner that here existed, as such method involved operating without the use of a governor to control the speed of the saw when running free. The trial judge found that the accident occurred while the saw was running free and that the excessive speed at which it was then operated caused the fly-wheel to burst. We do not know what view the Court of Appeal took of this question, as no reasons were given for their dismissal of the action. We think that the matter is not left in the realm of conjecture and that the finding of the trial judge was fully justified.

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The second main submission on behalf of the respondent was that he had employed Laidlaw as an independent contractor to furnish and operate the equipment and that, therefore, he (the respondent), although the appellant's master, was freed of all responsibility. Presumably this contention found favour with the Court of Appeal, as its order reserves to the appellant "the right to bring action against any other persons whom he conceives have done him an injustice."

It is now definitely settled by the decision of the House of Lords in *Wilsons and Clyde Coal Co.* v. *English* (1) that the duty of the respondent to the appellant was to supply and install proper equipment for sawing the wood and a proper system of work so far as care and skill could secure these results, and to select properly skilled persons to manage and superintend the equipment. This obligation is personal to the employer who cannot free himself from his duty by a mere delegation. Thus in *Wilsons'* case (1), Lord Thankerton, at page 70, states:

> If he [the employer] appoints a servant to attend to the discharge of such duty, such servant, in this respect, is merely the agent or hand of the master, and the maxim *qui facit per alium facit per se* renders the master liable for such servant's negligence as being, in the view of the law, the master's own negligence.

At page 75, Lord Macmillan states:—

> The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by merely proving that he has appointed a competent agent.

At page 78, Lord Wright puts it thus:—

> The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill.

At page 88, Lord Maugham says:—

> He [the employer] can, and often he must, perform this duty by the employment of an agent who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty.

Lord Atkin agreed with all of these opinions.

(1) [1938] A.C. 57.

It was pointed out by counsel for respondent that in *Wilsons'* case (1) the master's duty had been delegated to an employee. That is true,—although the manager was one of a class to which, by statute, the Wilsons Company was obliged to resort. It was also argued that in the present case Laidlaw was an independent contractor. We may assume, for the purposes of this appeal, that this is so. The employer can no more escape the consequences of non-performance of his personal obligation to his employee merely by employing an independent contractor than he could by placing the responsibility on the shoulders of another employee. That is implicit in the reasons of the peers who heard the appeal in *Wilsons'* case (1), each of whom emphasized the personal nature of the employer's obligation. On the evidence, we are satisfied that the trial judge came to the right conclusion that the use of the automobile in conjunction with the saw frame was a defective system. The furnishing of it by Laidlaw, therefore, even if he be an independent contractor, does not assist the respondent. Furthermore, while similar equipment may have been used generally, and in fact this very automobile and saw frame, the danger is such that the trial judge's finding that Laidlaw was not a competent person to take charge of and operate the equipment must also be upheld.

No question was raised before us as to the amount of damages nor (although it was argued at the trial) whether the appellant was *volens*. The appeal should be allowed and the judgment of the trial judge restored, with costs throughout.

Appeal allowed and judgment of the trial judge restored, with costs throughout.

Solicitors for the appellant: *Parkinson, Gardiner & Willis.*

Solicitors for the respondent: *Roebuck, Bagwell, McFarlane, Walkinshaw & Armstrong.*

(1) [1938] A.C. 57.