1953
*Oct. 29, 30
Nov. 2, 3, 4, 5, 6

1954
*Apr. 1

TRANS-CANADA FOREST PRODUCTS LIMITED (*Plaintiff*) ..... APPELLANT.

AND

HEAPS, WATEROUS LIMITED and LIPSETT ENGINE AND MANUFACTURING COMPANY LIMITED (*Defendants*) ..... RESPONDENTS.

AND

ADA FLORA HOFF, EXECUTRIX OF CHRIS BERGVIN HOFF, DECEASED (*Plaintiff*) ..... APPELLANT;

AND

HEAPS, WATEROUS LIMITED and LIPSETT ENGINE AND MANUFACTURING COMPANY LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Damages—Master and Servant—Fire started while mechanic was testing engine which he had repaired—Fire due to short circuit in cables leading from batteries to engine—Worn out insulation—Failure to make proper inspection of cables—Repair man in general employment of general distributor of engine—Repair contract given to local distributor—Repair man was servant of whom—Actions in contract and in tort—Indemnity right of local distributor from general distributor.

*PRESENT: Rinfret C.J. and Taschereau, Estey, Locke and Cartwright JJ.

When trouble developed in a diesel engine used to operate a planer mill, the property of the appellant Hoff and occupied by the appellant Trans-Canada Forest Products Ltd. as tenant, the respondent Heaps, Waterous Ltd. as the local agent who had sold the engine was asked by Trans-Canada to have the repairs made. Pursuant to an established practice between this local agent and Lipsett Engine and Manufacturing Co. Ltd. the general agent for the Province, the latter sent Martin, an experienced mechanic, and his helper, both in its general employment, to effect the repairs.

The mechanics found the engine, which was situate in a lean-to adjoining the mill, in a dirty condition, and so were the cables running from its starting mechanism to the two batteries required to start it. The cables and the batteries had not been purchased from either dealer.

After the men had completed the repairs, they replaced the cables and the batteries which they had removed to do their work. They wiped the cables in a casual manner and seeing no defect in them except for being covered with oil and sawdust, replaced and reconnected them. As at their first try to start the engine, it would not turn, they transposed the cables. On the fourth attempt, a fire, which eventually destroyed the mill, was seen to commence on the floor near the cables.

The appellants brought actions for damages against both respondents, and Heaps, Waterous Ltd. took third party proceedings against Lipsett Engine and Manufacturing Co. Ltd. The actions were consolidated and the trial judge, who found that Martin had been negligent, gave judgment to Trans-Canada against both respondents and allowed the third party proceedings. The appellant Hoff was awarded damages against the Lipsett company. The Court of Appeal held that Martin had not been negligent and dismissed the actions.

Held: (Locke J. dissenting), that the appeals should be allowed.

Per: Rinfret C.J., Taschereau, Estey and Cartwright JJ. The trial judges' finding that the fire was caused by a short circuit due to a defective insulation of the cables was fully justified upon the evidence.

2. It would be included in Martin's duty to test his work by starting the engine, and the evidence supported the view that he was negligent in not continuing to exercise reasonable care to see that the cables remained as he had replaced them separate and apart from each other: he permitted them to become crossed and inspected them only casually.

3. Even if the evidence did not affirmatively establish the negligence, this was a proper case for the application of the *res ipsa loquitur rule*. The repair men were given complete charge and control of the engine and room.

4. The contract for repairs having been given to the Heaps Company by Trans-Canada, the negligent performance of the work under this contract constituted a breach thereof.

5. In the circumstances of this case, the repair men were the servants of the Lipsett company.

6. The evidence did not establish contributory negligence on the part of Trans-Canada in supplying the cables in the condition in which they were. Martin was an expert and the evidence showed that he was aware of the dangerous condition created by the defective cables. Moreover, the evidence did not establish that fire extinguishers would have controlled the fire.

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7. Trans-Canada was entitled to recover damages against the Heaps company in contract and against the Lipsett company in tort, and the latter should indemnify the former. The appellant Hoff was entitled to recover from the Lipsett company.

8. Damages varied. A tenant having an option to purchase in the event of a fire can recover in damages only the value of the option.

Per Locke J. (dissenting): As the purpose of the work was to produce a satisfactorily operating engine, it could not be said that to test the effectiveness of the work by starting up the motor was not within the scope of the employment of Martin.

2. That the fire was commenced by a short circuit was the only proper inference to be drawn from the evidence, but it was not possible, on the evidence, to reach a sound conclusion as to how the short circuit was caused.

3. No actionable negligence on the part of Martin was disclosed by the evidence. The fact that the batteries and the cables had been apparently in effective use until a short time before the fire and the further fact that the batteries were connected to the engine when Martin arrived to do the repairs would undoubtedly lead him to believe that they were in a safe condition to be used. It would place the duty of Martin on too high a plane to say that he should have detected that the cables were in such a defective condition and that his failure to do so was actionable negligence.

4. Assuming that the principle *res ipsa loquitur* applied in the circumstances of this case, this would not impose upon the respondents the duty of showing how the fire was caused but simply to show that Martin was not negligent. (*Woods* v. *Duncan* [1946] A.C. 401).

5. The evidence did not disclose that Martin knew that the insulation of the cables was defective or that crossing them had anything to do with the starting of the fire.

6. There was no breach of any duty imposed upon the Heaps company by the contract.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, O'Halloran J.A. dissenting, the judgment at trial in consolidated actions and proceedings for indemnity arising out of a fire.

Alfred Bull Q.C. and *C. C. I. Merritt* for the appellants.

C. W. Tysoe Q.C. for Heaps, Waterous Limited.

J. W. de B. Farris Q.C. and *F. A. Sheppard Q.C.* for Lipsett Engine and Manufacturing Co. Ltd.

The judgment of Rinfret C.J. and Taschereau and Estey JJ. was delivered by:—

ESTEY J.:—The appellant Hoff as owner and appellant Trans-Canada Forest Products Limited as lessee of a planing mill at Prince George, B.C., respectively brought the above-named actions to recover damages suffered when the

(1) [1953] 3 D.L.R. 672.

mill was largely destroyed by fire. The mill was operated by a Murphy diesel engine and, after certain repairs had been completed thereon, in the course of efforts to start and test the engine this fire occurred. The actions were brought against both respondents because Trans-Canada Forest Products Limited had requested Heaps, Waterous Limited to make the repairs which were, in fact, made by two men, Martin and Benson, while in the general employment of the respondent Lipsett Engine & Manufacturing Co. Ltd. In this action both respondents contend that these men were at the material times the servants of the other.

After the actions were commenced respondent Heaps, Waterous Limited initiated proceedings for, in the event of its being found liable, indemnity from respondent Lipsett Engine & Manufacturing Co. Ltd. These actions and the proceedings for indemnity were consolidated prior to trial.

The parties, for convenience, will be referred to hereafter as Hoff, Trans-Canada, Heaps and Lipsett.

The trial judge found the expert Martin negligent and gave judgment in favour of Trans-Canada against Heaps and Lipsett jointly and severally in the sum of $125,653.79. The trial judge dismissed Hoff's action against Heaps, but gave judgment in favour of Hoff against Lipsett in the sum of $23,180.91 and directed that Heaps was entitled to be indemnified by Lipsett in the sum of $125,653.79. In the Court of Appeal (1) the majority held that Martin was not negligent and, therefore, dismissed both actions and the proceedings for indemnity. Mr. Justice O'Halloran, dissenting, would have found both Martin and Trans-Canada negligent and varied the judgment to the extent of holding Trans-Canada 80 per cent responsible and Heaps 20 per cent responsible, with the right of Heaps to be indemnified by Lipsett.

In November, 1948, when trouble developed in the Murphy diesel engine, Trans-Canada consulted Heaps. As a consequence, new piston rings were ordered from Heaps. These Heaps obtained from Lipsett and, pursuant to the agreement between Heaps and Lipsett, the latter sent its expert Martin and his helper Benson to install same. In the course of taking the engine apart to install the piston rings Martin found a cylinder lining cracked which he

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reported to Heaps. Then, after a further consultation between Heaps and Trans-Canada, the latter ordered from Heaps a complete new set of cylinder linings. While an order had been given on December 8 for the piston rings and the installation thereof, both the piston rings and the cylinder linings were included in a new order which was dated back to December 8, the material portion of which reads:

> Supplying and installing set of piston rings and cyl. liners (6).

Martin and Benson had completed the installation of both the piston rings and the cylinder linings and, in order to test their work, were endeavouring to start the engine when the fire occurred.

The engine room, about ten feet in width and fifteen feet in length, was a lean-to adjoining the mill. Martin and Benson found the temperature very low and along two of the outer walls they placed tar paper in order to stop the wind from blowing through. They also installed a stove. This room had a dirt floor with two ten-inch planks, approximately two inches apart, placed parallel in front of the engine upon the operator's side and approximately two inches from the skids upon which the engine rested (these skids were embedded in and the tops thereof were even with the earth). There was nothing in the room except the stove, the engine and its accessories. Martin found the room and the engine in a rather dirty condition. The latter he brushed off before taking it apart, in order that dirt might not fall into the engine. The planks had a good deal of oil and grease on them. He complained of the dirt but nothing was done. He did not press his complaint as he says it was no different from other engine rooms in the area and that he concluded it was a safe place to work.

This engine started from two twelve-volt batteries, which would normally be placed in a case provided therefor in the lower part of the engine frame. However, these cables, three and one-half to four feet in length, were too short to permit of the batteries being kept in the case and they were placed, as Martin found them, on the planks with the cables running from the batteries over the planks to the starter and switch of the engine. The cables he estimated to be three quarters of an inch in diameter and he believed the copper strands to be "wrapped with rubber and some kind

of asbestos coat on the outside." Martin, in order that these cables should not be tramped on, removed them before starting to work and placed them on a shelf in the room about four feet high and the batteries he placed outside of the engine room.

In order to clean parts of the engine they used diesel oil and gasoline. While much of the work of cleaning was done in another and warmer room, Martin admits that some oil and gasoline might have been splashed upon the walls or floor.

The learned trial judge found "that the fire was caused by a short circuit due to defective insulation of the cables leading from the batteries to the starting motor." Then, specifically referring to Martin, he stated:

> I have come to the conclusion that Martin, who impressed me as being a competent workman and an honest witness, was, unfortunately, negligent:
>
> (*a*) in endeavouring to start the engine when he knew the insulation of the battery cables was defective;
>
> (*b*) in permitting the battery cables to become crossed;
>
> (*c*) in making only a casual inspection of the battery cables;
>
> (*d*) in failing to advise the plaintiff Trans-Canada that the batteries should be placed in their proper container and that new and longer cables should be procured;
>
> (*e*) in failing to warn the plaintiff Trans-Canada of the danger of continuing to use cables, the insulation of which had deteriorated.

These actions raise a number of issues: (1) Was Martin negligent? (2) If he was negligent, was he, when working upon this engine, the servant of Heaps or Lipsett? (3) If Martin was negligent, was Trans-Canada negligent? (4) Against whom can Hoff as owner of the building claim damages? and finally, if Heaps is liable, can that company recover by contribution or indemnity from Lipsett?

The learned trial judge's finding that the fire was caused by a short circuit due to defective insulation of the cables is fully justified upon the evidence and, as I followed the argument, not contested by any of the parties. Martin had been a diesel engine mechanic for thirteen years and with Lipsett since 1946. Though not an electrician, he had started many of these engines with this equipment and his evidence indicates that he had some knowledge as to composition of the cables, the effect of oil and sawdust upon the insulation and the possibility of the copper strands penetrating the weakened insulation and causing a short circuit.

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On the morning of Tuesday, December 14, when the engine had been assembled and filled with oil and anti-freeze, Martin and Benson brought in the batteries and cables and replaced them as before—the batteries on the end of the planks and the cables running along the top of them and crossing to the engine. Martin described the planks as "saturated in oil." He described the cables as "very badly soaked in oil and covered in sawdust" which, he said, "would deteriorate the insulation." He deposed:

> When we disconnected them from the engine we put them on the shelf so that they wouldn't be stepped on and when ready to use them I took them down and wiped them over with a clean rag, looking for any breaks in the insulation. I saw none. So I connected them back to the engine and the batteries.

and further:

> Q. Did you get all the sawdust and oil off them, so that you were able to examine all the insulation?—A. No sir, I just wiped, pulled the rag over the cable once.

Then again:

> Q. What examination did you make of the cable—just while you pulled the rag across and looked at them, is that all?—A. Yes.
>
> Q. It wasn't a very minute examination?—A. No.
>
> Q. A very casual one, wasn't it?—A. Yes.
>
> Q. And there might have been defects in the insulation which you didn't notice?—A. It would be a fairly small defect.
>
> Q. But my question is there might have been defects there that you didn't notice on that casual inspection?—A. There could have been.

Notwithstanding that Martin realized these cables had been saturated with oil for a long time and were covered with sawdust, he, upon this casual examination, concluded "it was safe to use them in that condition." Such an examination by one who appreciated the possibility of a short circuit cannot be accepted as that of a reasonable man with Martin's knowledge and experience in order to found such a conclusion. However, his conclusion that it was safe to use the cables, when considered in relation to the other relevant portions of his evidence, means no more than that it was safe so long as he exercised that degree of care which would prevent these cables from coming in contact one with the other or some other metallic substance which might cause a short circuit. In considering the circumstances here present, it is important to remember that not only were the cables weakened, but the presence of oil and grease made it a place where a fire might easily start and spread quickly.

Martin appreciated all this and replaced the cables, using care to see that they were at a distance of one and one-half to two inches from each other as they passed from the terminals to the switch and starter.

When attaching the cables Martin could not find any mark indicating the negative or positive terminals on the battery. He, therefore, after connecting them, tested them by endeavouring to start his generator. When it failed to start he transposed the cables on the battery terminals. This of necessity, as Martin says, would cross the cables. He, having regard to the fact that in the low temperature of twenty to thirty degrees below zero the cables were hard and stiff, concluded that they would cross on the ground beside the battery. He did not say they were, nor would it necessarily follow that they were touching.

After so transposing the cable ends Martin "released the compression of the engine and turned it over with the starter several times" and, finding everything in order, he advised Benson they were ready to start the engine. He then directed Benson to go to the manifold side and "hold the governor control," while he himself, on the operating side, handled "the throttle and starting lever." When they attempted to start the engine it turned over freely, the starter functioned properly and everything seemed to be working as it should be, but the engine would not start. There was no ignition or combustion. They then examined the fuel pump, the valves and the injectors and found them in order. They made a second attempt, but with the same result. Martin then instructed Benson to get a blow torch from the office. In a few minutes Benson returned, saying that they had not found one, but would bring it down. In another five or ten minutes the mill superintendent came in and stated it could not be found. A third attempt and then a fourth was made, but still the engine would not start. After the fourth attempt Benson, seeing smoke arising beside Martin, called to him. Martin then saw fire behind and to his right "on the planks between the battery cables . . ." approximately "eight to ten inches from the side of the engine" and ten to twelve inches from the batteries. He estimated the fire to be four inches in diameter and the flame about ten to twelve inches in height.

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The learned trial judge described Martin as a competent workman and an honest witness. He, therefore, accepted his evidence. However, upon his own evidence, Martin makes it clear that in replacing the cables he was, as already stated, careful to keep these cables one and one-half to two inches apart. Thereafter he makes no mention of the cables except to say that they were not crossed at the point of the fire. What, therefore, may have occurred with respect to these cables between the replacing thereof and the fire is not covered by the evidence. A summary of what happened within that time would include motoring the generator, transposing the cables on the battery terminals, an attempt to start the engine, an examination of the fuel, valves and injectors, a second attempt, Benson's going for a blow torch, a third and a fourth attempt. All this would cover some considerable time. The delay incident to the effort to obtain a blow torch would be, upon the record, approximately twenty to thirty minutes. It may be that, frustrated in his efforts and concentrating upon what might be the reason of his failure, he neglected the cables. In any event, apart from the fact that he says they were not crossed at the point of the fire, he makes no reference to them in all that happened after he had replaced them. Even in transposing the cables it is not that he saw but that he surmised he had crossed them. Then as a short circuit did not develop until after the fourth attempt there was no contact as the cables were originally placed and, therefore, the cables must have been disturbed or moved thereafter in order to cause a short circuit.

It was emphasized on behalf of the respondents that there was no proof that where the cables crossed at or near the base of the batteries they touched and no proof that they were crossed at the point of the fire. It is clear, upon the evidence, that unless there was an actual contact of copper to copper or copper to some other metal a short circuit would not, in the circumstances, have been caused. The possibility is suggested of a short circuit caused by a nail or other piece of metal. There is no suggestion that any such material was present either in or on the planks. Then as to the possibility that the short circuit might have been caused by a contact with the frame of the engine, it would seem rather improbable, having regard to the time that elapsed between the affixing of the cables to the starter and

switch and the time of the fire. The transposition of the cables, while it might well disturb the cables for some distance along the boards, would not be so likely, having regard to their condition, to move those parts beside the engine. Moreover, whatever movement there might have been in the cables beside the engine would more probably be a sliding from one side to the other rather than a turning of the cables and, therefore, not likely to effect any additional contact between the cables and the frame of the engine. Apart from all of these considerations, and possibly even more pertinent, is the fact that the fire occurred on the planks eight or ten inches from the engine and points directly to a short circuit occurring at or very near that point. The evidence does not support a view that the fire spread prior to Martin's seeing it. In so far as it might be suggested that gasoline fumes would be present, that possibility was, for all practical purposes, negatived by the fact that all the gasoline had been removed from the engine room some time before any attempt was made to start the engine.

It is true that neither Martin nor Benson saw a spark or a flash, or heard any sound that would suggest a short circuit, nor, indeed, did Martin observe any interruption in the operation of the starter that would suggest a short had been caused. However, the experts indicate that in this type of equipment a short might be caused without those indices and, as the fire was observed only after the fourth attempt, it is not surprising that an interruption in the operation of the starter was not observed.

Martin was under a duty not only to install the piston rings and cylinder linings but to execute that work in such a manner that the engine would the better perform the work for which it was intended. It would, therefore, be included in his duty that he should test his work by starting the engine. It was in appreciation of this part of his duty that he attempted to start the engine, in the usual and normal manner, by using the batteries and the cables. In doing so he would not be outside the scope of his employment. The fact that Lipsett did not supply the batteries and cables with the engine would not affect Martin's position at this time. He was in the course of performing the work he was employed to do and pursuing the only course that was open to him in the circumstances.

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The evidence, with great respect to the opinion of those learned judges who hold a contrary opinion, supports the view that Martin was negligent in not continuing to exercise reasonable care to see that these cables remained as he had replaced them separate and apart from each other. The learned trial judge when he used the word "crossed" had in mind, I think, contact between the cables, more particularly as he would fully appreciate that mere crossing alone would not, without contact, effect a short circuit. I, with great respect to those who hold a contrary opinion, agree with the learned trial judge's finding under both headings (*b*) and (*c*).

Even if the evidence does not affirmatively establish that Martin was negligent, it would seem that this is a proper case for the application of the res ipsa loquitur rule. The fire started because of a short circuit due to the deteriorated and weakened condition of the insulation of the cables. Exception is taken to the finding of the learned trial judge that "He" (Martin) "and Benson were in sole control not only of the engine but of the building in which it was situated when the fire occurred." The evidence fully supports this finding when construed, not in the sense that Trans-Canada had surrendered possession, but that its employees had withdrawn, and, while Martin and Benson were working upon the engine, they were given complete charge and control of the engine and the room. Martin admitted such to have been the position and, further, that he was not at any time interfered with.

In *United Motors Service, Inc.* v. *Hutson* (1), the lessees of a garage were cleaning a cement floor, using gasoline, scrubbing it with a stiff brush and using a metal scraper when necessary, and finally washing it with a preparation known as oakite. A workman had requested that gasoline be poured on the floor in front of him and immediately the fire followed. Kerwin J., with whom my Lord the Chief Justice (then Rinfret J.) and Crocket J. concurred, stated at p. 303:

> The operations being under the control of the appellant and the accident being such 'as in the ordinary course of things does not happen if those who have the management use proper care,' the doctrine res ipsa loquitur serves to make these circumstances 'reasonable evidence, in the

(1) [1937] S.C.R. 294.

absence of explanation by the defendant, that the accident arose from want of care.' *Scott* v. *London & St. Katherine Docks Co.*, (1865) 3 H. & C. 596.

Duff C.J., with whom Davis J. concurred, stated at p. 296:

I am satisfied that the circumstances established in evidence afford reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference is that the damage caused was the result of the negligence of the appellants; and that the explanations advanced are not of sufficient weight either to overturn or to neutralize the force of the inference arising from the facts proved.

Martin, throughout his evidence, does not indicate that he observed the cables with the care that the circumstances required in that interval of time between the placing of them one and one-half to two inches apart and the time of the fire. He admits that a short must have occurred, but he does not know just where or why there was a short circuit. His evidence does not deal with the cables throughout the critical period in a manner that offsets or neutralizes the inference of want of care on his part that the circumstances justify.

The learned trial judge found that Heaps was employed by Trans-Canada to do the work in question. Prior to the negotiations relative to this work it was understood between Trans-Canada and Heaps that orders must be in writing and, as already stated, the order here in question was in writing and covered both the supplying and installation of the piston rings and the cylinder linings. Indeed, apart from some evidence which Wall, the local manager of Heaps at Prince George, gave and which was not accepted by the learned trial judge, all the evidence supports the finding that Trans-Canada contracted with Heaps that this work should be done. As the learned trial judge states: "I accept Lymburner's statement that he did not know of Lipsett's connection with the work until after the fire." In the circumstances here present the negligent performance of the work under this contract constituted a breach thereof for which Heaps is liable in damages to Trans-Canada.

It does not follow that because Heaps contracted with Trans-Canada to do the work that Martin and Benson, in doing same, were, particularly as between Heaps and Lipsett, the servants of the former. This was not an isolated engagement. It was one arising out of the relationship between Lipsett as general and Heaps as local agent for

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these engines and, in particular, the agreement which these parties made with regard to servicing and repairing the engines. The learned trial judge found:

> I find that the arrangement which was made was that if a customer of Heaps required repair work to be done which was beyond the capabilities of Wall, Lipsett would supply the labour and charge Heaps for it.

This finding is supported by the evidence. Under date of September 27 Lipsett, writing to Heaps, included the following: "where the job is too much for you to handle that you call upon us to have the work done." Then under date of January 25, 1949, Lipsett, in writing to Heaps, dealing with the matter of service, recommended that they should keep in stock "a fair amount of fast moving parts" and stated: "In order to do 100 per cent justice to those who have purchased Murphy Diesels from you, adequate service should also be maintained, and, here the services of a qualified mechanic are required." The letter then suggested that it would be desirable that Heaps should employ a qualified mechanic. As that was not a term of the contract it was, in fact, no more than a suggestion which emphasized the necessity of prompt and efficient service which the letter of January 25 further stressed in the statement: "The very important question always is to maintain proper service."

At the trial a portion of the evidence called on behalf of Lipsett rather emphasized that Lipsett was supplying only the men and Van Snellenberg, Manager of Lipsett, stated:

> It was also arranged that the service work, which Mr. Wall couldn't handle, because he didn't have the technical ability to handle them he could call upon us and we would gladly supply him with the men experienced with the engines, to do the work.

Then, in reply to the question "Did you undertake to do anything, besides making these men available?" the answer was "No, we didn't. We just supplied labour." When, however, these statements are read and construed with the other portions of his evidence and the fact that it was in the interests both of Lipsett and Heaps that the servicing and repairing of customers' engines should be both prompt and efficient, it cannot be concluded that Lipsett was to supply only the men. On the contrary, it was to supply men competent to do the servicing of the engines for which purpose Lipsett had selected them or instructed

them and over whom, so far as that work was concerned, Lipsett retained complete control. Heaps directed Martin and Benson to the engines and indicated, as specified by the order of December 8, the nature and extent of the work to be done, but it was not its duty nor was it expected that it would direct or control how the particular work was to be done. In fact it was common knowledge between Lipsett and Heaps that neither Wall nor any other of the employees of Heaps at Prince George was qualified to instruct or direct these men. Martin and Benson were at all times in the general employment of Lipsett from whom they received their pay and by whom such deductions from their wages as required by law or stipulated by the employees were made. Lipsett charged Heaps, as all other local agents, at a rate per hour and Heaps billed the customers. Apart from the guarantee that went with these engines, which had no relevancy in this case, it was the understanding that the customer would pay for servicing and repairing.

Quarman v. *Burnett* (1), decided in 1840, is referred to by Viscount Simon in the *Mersey Docks case* (2), as one that "has always been treated as a guiding authority." In that case the defendants, two elderly ladies, owned a carriage, but hired horses and a coachman from one Mortlock. The ladies directed the coachman where to drive and provided him with a livery. On the day in question, when he had returned to the house of the ladies and they had left the carriage, he, in replacing the hat in the house, left the horses unattended, when they ran away, causing injury to a third party who claimed damages therefor. Baron Parke, delivering the judgment of the Court, stated:

> The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care.

It was held that the ladies were not liable, as the driver remained the servant of Mortlock,

> who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; . . .

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In *Century Insurance Co., Ltd.*, v. *Northern Road Transport Board* (1), respondents, owners of petrol tankers, contracted with Holmes & Co. to deliver petrol to garages. Through negligence of the driver of a tanker a loss was suffered and the appellant, who had insured the respondent, refused to make payment under the policy, as in its view the driver was, at the time of the loss, acting as agent of Holmes & Co. and not of the respondent. Under its contract with Holmes & Co. respondent agreed to insure against fire and spillage in transit, dress all employees as Holmes & Co. might direct, carry workmen's compensation insurance and obey orders of Holmes & Co. respecting delivery and the payment of accounts, and that respondent should dismiss employees failing to obey orders of Holmes & Co. The contract also contained a proviso that the drivers were not servants of Holmes & Co. Lord Wright stated at p. 497:

> Davison (the driver) was subject to the control of Holmes Mullin & Dunn, Ltd., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondent's servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes Mullin & Dunn, Ltd., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests.

Lord Wright, after further emphasizing that the employee in the position of Martin receives instructions from Heaps "so far as is necessary or convenient for the purpose of carrying out the contract" with Lipsett on behalf of and as servant for Lipsett, uses language particularly appropriate to the present circumstances:

> Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services are to be performed being left to the discretion (subject to any contractual limitations) of the other contracting party, there must be someone who is to receive the directions as to performance from the other party, and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work.

In *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Limited* (2), the appellant board owned certain cranes and employed skilled workmen to operate them. The Board leased a crane and driver to respondent company as stevedores to load cargo on a ship. Owing to the negligence of the driver, one MacFarlane was injured. The sole question before the House of Lords was

(1) [1942] 1 All E.R. 491. (2) [1947] A.C. 1.

whether the driver was the servant of the Board or the stevedores. Viscount Simon, at p. 10, refers to the heavy burden resting upon an employer in the position of Lipsett:

> It is not disputed that the burden of proof rests on the general or permanent employer—in this case the appellant board—to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances. It is not easy to find a precise formula by which to determine what these circumstances must be.

Lord Macmillan, after pointing out, at p. 13, that the stevedores, who were in a position comparable to that of Heaps, "were entitled to tell him where to go, what parcels to lift and where to take them, that is to say, they could direct him as to what they wanted him to do," then pointed out "they had no authority to tell him how he was to handle the crane," and concluded: "In driving the crane, which was the appellant board's property confided to his charge, he was acting as the servant of the appellant board, not as the servant of the stevedores."

Lord Simonds, at p. 18, states the consequences that flow from the negligence of one in the position of Martin:

> Here the fault, if any, lay with the appellants who, though they were not present to dictate how directions given by another should be carried out, yet had vested in their servant a discretion in the manner of carrying out such directions. If an accident then occurred through his negligence that was because they had chosen him for the task, and they cannot escape liability by saying that they were careful in their choice.

It is a question of fact in a particular case whether, at the relevant time, an employee is a servant of his general employer or that of another party. An illustration of where he was not in the employment of his general employer is *Bain* v. *Central Vermont Railway Co.* (1), where Lord Dunedin stressed the essential time when the relationship of master and servant must be determined.

> Their Lordships think that this is leaving out of view the point of time at which the position must be determined. In the words of the judgment reported by Sirey and quoted by Brodeur J. you are to look to the 'patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive au moment de l'accident.' It is nothing to the purpose that there may be at the same time a sort of residuary and dormant control of the 'patron habituel.'

(1) [1921] 2 A.C. 412.

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The foregoing authorities emphasize that the onus is upon Lipsett to establish that Martin, as he worked upon and endeavoured to start this engine, was subject to the control and direction of Heaps. That Heaps directed him to the engine and indicated the nature and character of the repairs required, as disclosed by the order of Trans-Canada, does not make him the servant of Heaps. In receiving these directions Martin did so on behalf of Lipsett in order that the arrangement made between the latter and Heaps might be carried out. Throughout, how and in what manner Martin would make the repairs and start the engine was for him to decide, as an expert in the employ of Lipsett. As Lord Porter stated:

> It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.

Mersey Docks and Harbour Board v. *Coggins & Griffith (Liverpool) Limited, supra,* at p. 17.

It, therefore, follows that the finding of the learned trial judge that Martin and Benson were the servants of Lipsett must be affirmed.

It is contended that Trans-Canada was negligent in two respects:

> (*a*) in supplying to Martin cables which it knew, or ought to have known, were unsafe for use and without any warning as to their condition;
>
> (*b*) in permitting fire hazards to exist in and about the premises in which Martin was required to do his work and in failing to have a fire extinguisher readily available.

The learned trial judge found that there was no contributory negligence on the part of Trans-Canada. Mr. Justice O'Halloran was of the opinion that, though the fire was caused by the negligence of Martin, the damage "was contributed to and greatly increased by contributory negligence of Trans-Canada, in permitting fire hazards to exist . . ." or, as he otherwise stated:

> But his inability to put out the small fire at the start, coupled with Trans-Canada's failure to control or prevent its spread, in my judgment at least, cannot reasonably be attributed entirely to Martin; . . .

The learned judge would have apportioned the fault 20 per cent to Martin and 80 per cent to Trans-Canada.

The evidence, with great respect, does not appear to establish contributory negligence on the part of Trans-Canada in supplying the cables in the condition in which Martin found them. It must be conceded that Trans-Canada knew, or ought to have known, the condition of these cables. The fact that Lipsett, in selling these engines, did not supply batteries and cables is not the test. They were an essential accessory providing the only means by which these engines were started. Martin fully appreciated this and stated that he had started many engines using such equipment. Moreover, Lipsett evidenced its concern with regard to these batteries and cables by its letter to Heaps dated January 25, 1949, in which it advised that the "batteries supplied should be of heavy duty 'starting' type, of not less than 15 plates. Cables, also should be of the heavy duty type using '00' wire and should be kept as short as possible." Moreover, the running of lights off these batteries, Lipsett stated, ought not to be permitted as "the batteries are primarily for the purpose of starting the engine."

Martin was never an employee of Trans-Canada and it need not be disputed that in the circumstances he was an invitee. As between the invitor and the invitee it is always a question of fact whether there is an unusual danger and whether the invitee has knowledge of the risk incident thereto. *London Graving Docks Co. Ltd.* v. *Horton* (1). Even if we assume that there was an unusual danger within the meaning of the authorities and that danger existed in an accessory to the engine, the position is that of an owner who contracts for certain repairs and turns the engine and its accessories over to an expert to make those repairs in circumstances in which he had a right to expect that the expert would, as Martin did in regard to the cylinder linings, call his attention to defects or want of repair in respect to both engine and accessories. In the discharge of his duty Martin, as the learned trial judge found, "was aware of the dangerous condition created by the defective cables." As a consequence, and upon such examination as he made, he concluded it was safe to use them as he did. As already pointed out, this conclusion might have been justified had he continued to use due care in using these cables. It was

(1) [1951] A.C. 737.

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his negligence in the using thereof that constitutes the effective cause of the damage which followed. *Davidson* v. *Stuart* (1); *Quebec Light & Power Co. Ltd.* v. *Fortin* (2); *Sharpe Construction Company* v. *Begin* (3).

Moreover, the evidence does not establish that fire extinguishers, as normally placed in an engine room such as this, would have controlled this fire. There was oil and grease about and tar paper put up by Martin and Benson. Martin's clothes almost immediately caught fire and he had to run out in the snow in order to avoid more serious consequences than those which he suffered. Benson does say: "If there was a fire extinguisher in the engine room, we could have put it out." He, however, goes on to say that he had never used a fire extinguisher and admits that he would have had to take time to read the instructions before using it. He says he tried to put it out with a shovel, but "I saw the fire around the bottom of the batteries on the floor, and it started to spread to the walls, and as soon as it hit the tar paper, away she went." When he was asked: "Now, when you first saw or noticed it and showed it to Martin, what did you see?" he answered: "Well, the fire was spreading very rapidly." There were extinguishers in other parts of the mill which were, in fact, used. McKinley, the Assistant Manager, was in the yard when he heard the call "Fire!" and ran to the storage shed where he put out a patch of fire with a pair of coveralls. He then went to the engine room where he endeavoured to put out the fire, but after a short period there was an explosion enveloping the room in flames so he left it. The evidence, having regard to the particular condition of this engine room and the rapidity with which the fire spread, does not establish that the presence of fire extinguishers in the engine room would have restricted the fire.

It was suggested that Hoff had already complained of the fire hazards about the planing mill. In particular, attention is called to the last paragraph of the letter of December 13, 1948, where it is stated: "Mr. Hoff requires the fire hazards around the mill to be cleaned up, and the mill made safe from any possibility of destruction by fire." This letter was written the day before the fire. It makes no particular

(1) (1903) 34 Can. S.C.R. 215. (2) (1908) 40 Can. S.C.R. 181.
(3) (1918) 59 Can. S.C.R. 680.

reference to the engine room and must be read along with Hoff's evidence of his visit to the engine room some time previous to the fire when, because of the noise, he suggested the engine should be overhauled. When asked: "And what condition did you observe that day? You mentioned the noise. Anything else?" he answered: "Well, no. No, I coud not say that I seen anything." Upon the evidence it cannot be said that this room was kept in a manner that took cognizance of the possibility of fire, but Martin himself concluded it was a safe place to work in and, while he did take exception to the presence of dirt, which I assume includes oil and grease, he did not press that point.

Trans-Canada claimed $139,568 for loss of profits and the learned trial judge allowed $76,000. The respondents submit that there was no loss of profits, as Trans-Canada's lease would expire January 9, 1949, and, while it had an option to purchase the mill, it was not in a financial position to do so.

Trans-Canada found a ready market for all of its products and its business had been increasing. At the bank it had a loan of $250,000 for purchases of inventory and lumber. In November the company was financially embarrassed by Lymburner's purchasing too much capital equipment. As a consequence Lome, the largest shareholder and who had, in support of the $250,000 loan, given a guarantee of $50,000 to the bank, visited Prince George and advanced an additional $20,000 to be applied on account of purchasing capital equipment. Upon his return to Toronto he apparently explained the position to the bank, which allowed the line of credit to remain as arranged at $250,000. Lome also had Brooker of Toronto go to Prince George to work with Lymburner and look after his interests.

Lome instructed Brooker to take up the option in the lease. Brooker succeeded in concluding these negotiations on December 13, the day before the fire, subject, however, to approval by the directors of Trans-Canada. As the fire occurred the following day and destroyed the subject matter of the option, no further action was taken and the option lapsed on January 9, 1949. The option would not have been exercised on the terms set out in the lease. The purchase price remained the same. Trans-Canada, however, wanted easier terms of payment and Hoff agreed, provided

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the payments were guaranteed by the bank and certain other obligations, incurred since the date of the option, were paid.

The learned trial judge concluded: "The option would have been exercised before the expiration of the lease." Such a finding, upon the evidence, could be no more than a reasonable probability. Trans-Canada had not bound itself to purchase and there was an important item of financing still to be arranged on its part. At the time of the fire there remained between the parties only the option which at least constituted a contract under which Trans-Canada, during the currency of the lease, might purchase the planing mill. It is that right to purchase which was destroyed by the fire and it is the value of that right that Trans-Canada is entitled to by way of damages. In the determination thereof the probability of its being exercised might well be a factor. The learned trial judge has computed the sum of $76,000 on the basis of loss of profits, which would be the basis had the option been accepted and a binding contract to purchase in existence between the parties. However, I do not think that a reference back to the learned trial judge, with the attendant cost, to determine this item is, in the circumstances, necessary. It was to Trans-Canada a substantial right and one which the evidence of Lymburner indicates the company always intended to exercise and was in the course of doing so when the fire occurred. It would seem that the sum of $40,000 would be a fair and reasonable amount.

Exception is also taken to an item "Cost of cleaning yard —$1,005.74" on the basis that this would be a proper item only if Trans-Canada had continued the operation of the mill. In other circumstances that might be a valid objection, but here the work was done and paid for by Trans-Canada. Had the company not done the work it would be a proper item to be included in the damages awarded to Hoff. Such was not allowed to Hoff, there is no duplication and, therefore, it would seem a proper charge.

Objection was also taken to an item of $10,000 which it is suggested was computed upon the basis of 250,000 feet of lumber rather than 181,000. If the learned trial judge allowed this item at all he included it in some other item

and no facts were drawn to our attention which would support the conclusion that the learned trial judge erred as here suggested.

When the option was not exercised Hoff was in the position of one who owned a planing mill subject to a lease which, when destroyed by fire, entitled him to damages for loss of building and loss of revenue during an estimated period of construction. The learned trial judge appears to have considered all of the facts and fixed amounts which seem fair and reasonable.

It is contended that Hoff has not proved title to the premises. No documents of title were produced. The uncontradicted evidence clearly shows that he has been in possession at least since 1946, when he commenced construction of the planing mill here in question, and that after the fire he rebuilt the mill and sold it. He himself states that he is in possession under and by virtue of a lease. In any event as between the parties he has established possession and, therefore, made a prima facie case of ownership sufficient to support the awarding of damages in this case. *Peaceable* v. *Watson* (1); *Jayne* v. *Price* (2); *Smith* v. *McKenzie* (3); Phipson on Evidence, 9th Ed., 123.

As between Lipsett and Heaps, the work of repairing and testing the engine was of a type the former agreed to and did, in fact, upon this occasion, undertake to perform. The damages arising out of Martin's negligence in the performance of that duty was a liability of Lipsett. In the circumstances judgment has been given against Heaps and Lipsett for the damages suffered by Trans-Canada. These parties were not joint tortfeasors. In so far as Heaps may be called upon to pay these damages, that company is entitled to be indemnified by Lipsett. *Eastern Shipping Co. Ltd.* v. *Quah Beng Kee* (4); *McFee* v. *Joss* (5).

The appeals should be allowed and the judgment of the learned trial judge restored, but varied by deleting the sum of $125,653.79 and inserting the sum of $89,653.79. The appellant Hoff should recover her costs in the Court of Appeal and in this Court from Lipsett. The respondents Lipsett and Heaps have obtained a substantial reduction in

(1) (1811) 4 Taunt 16; 128 E.R. 232.
(2) (1814) 5 Taunt 326; 128 E.R. 715.
(3) (1854) 2 N.S.R. 228.
(4) [1924] A.C. 177.
(5) (1924) 56 O.L.R. 578.

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the damages awarded to Trans-Canada and had such been made in the Court of Appeal it would seem that at least some portion of the costs would have been allowed. It would, therefore, appear that the respondents Lipsett and Heaps should have one-half of their costs in the Court of Appeal against Trans-Canada. Trans-Canada should recover its costs in this Court from Lipsett and Heaps. Heaps should recover its costs of the third party proceedings from Lipsett and is entitled to be indemnified by Lipsett against any costs of the appeal to this Court which it may be required to pay to Trans-Canada.

LOCKE J. (dissenting):—These appeals are taken by the plaintiffs in two actions for damages, which were consolidated for the purpose of trial, arising out of the destruction of a planer mill and its contents by fire. The actions were tried before Clyne J. who gave judgment for the Trans-Canada Company against the respondents and, in the third party proceedings taken by the Heaps Company against the Lipsett Company, directed the latter to indemnify it against the damages recovered by the plaintiffs. In the action brought by the appellant Hoff, damages were awarded against the Lipsett Company but, as against the Heaps Company, the claim was dismissed. For the sake of brevity, I will refer to the respective parties hereafter as Trans-Canada, Heaps, Lipsett and Hoff. C. B. Hoff died during the course of the litigation and the respondent Ada Flora Hoff, the executrix of his will, continued the proceedings in her name.

The relevant facts to be considered in determining the question of the liability of the respondents to the appellants are, in my opinion, as follows: the late C. B. Hoff alleged that on December 14, 1948, he was the owner of a saw mill and planing mill in Prince George, B.C. which on July 8, 1948, he had leased to one Lymburner for a term of six months, with an option to the latter to purchase the premises at the expiration of the term. The property leased contained certain planer mill equipment, including a Murphy Diesel engine which will be referred to in more detail hereafter. Before the expiry of the term, Lymburner assigned his interest under this contract to Trans-Canada. The latter company entered into possession and expended considerable sums in adding equipment and improving the

property and was in possession at the time of the fire. The Diesel engine referred to had been purchased by Hoff from Heaps, a company which had its head office and principal place of business in New Westminster, B.C. but operated a branch at Prince George. Lipsett carried on its business in Vancouver and was the exclusive agent for the sale of Murphy Diesel engines in British Columbia and had appointed Heaps its local agent at Prince George for this sale. Hoff ordered the Murphy Diesel engine from Heaps at Prince George, his order including four batteries and battery cables which would be required, inter alia, for starting the engine. The New Westminster office of Heaps purchased the engine from Lipsett in Vancouver but not the batteries or the cables. The invoice from Heaps to Hoff for the engine dated July 2, 1947, included a charge for these but they had apparently been purchased elsewhere than from Lipsett by Heaps.

The arrangement whereby Heaps was given the agency for the sale of Murphy engines in the Prince George area had been made early in the year 1947. That company did not obtain the exclusive right to the sale of the engines in the area, the Lipsett Company reserving the liberty to itself to also sell there. The Heaps Company did not have the personnel at Prince George with sufficient technical ability to service the engines sold and it was agreed between the companies that Heaps might call upon Lipsett to supply, when requested, properly qualified men on terms agreed upon between the parties.

About the middle of November 1948, the Diesel engine had been operating unsatisfactorily and Lymburner, who was the Manager of the Trans-Canada operations, consulted Jack Wall, the Manager of Heaps at Prince George, and asked him to advise him what the trouble was. Wall, after communicating with Lipsett at Vancouver, told him that new piston rings were required. Thereupon, Lymburner gave a written order to Heaps dated December 8, 1948, to furnish and install the rings. In advance of receiving the written order, Wall had asked Lipsett to send men to do the work and had been told to get in touch with Roy Martin, an experienced Diesel mechanic, and A. C. Benson,

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a mechanic's helper, both of whom were employees of Lipsett and were then working on a job at Huston, B.C. They were sent by Wall to the Trans-Canada mill to perform the work on December 8, 1948.

The Murphy Diesel engine, when purchased by Hoff, had not been installed in the mill proper but placed upon skids outside the building, without any protection from the elements. Later, Hoff had built a roof above it. Trans-Canada had closed the space in and some gravel had been put on the floor. There was no cement work or other flooring and the engine stood upon skids placed beneath it. Martin described the room in which the Diesel engine was placed as being roughly 10 ft. wide and 15 ft. long. One of the sides of the enclosure was the side of the mill and the wall opposite that was double board and fairly tight, but the other two walls were made of one by fours and there were half inch cracks between the boards. It was very cold and, in order to carry on the work with some degree of comfort, Martin and Benson got from Wall a stove and piping and the millwright at the mill gave them a roll of tar paper. The stove was installed and the tar paper put around the inner walls to make the place less drafty. Martin was apparently instructed that they were not to start work until Trans-Canada had written a given order for the work and, when this was done, they commenced work on the engine in the afternoon of December 8.

Martin described the room as having a dirt floor. Beside the engine there were two 12 volt Hart batteries wired together. These were disconnected, the cables connecting them to each other and to the engine were disconnected and put on a shelf and the batteries were carried out of the room. The batteries were not those which had been supplied when Heaps sold the engine to Hoff, they apparently having been purchased later by Trans-Canada. Asked to describe the condition of the cables, Martin said that they were very dirty. The engine was apparently also dirty and the workmen obtained Diesel oil and gasoline and washed the parts which were being used. The rags used for this were thrown into the stove and burned. As the work of taking down the engine progressed, they found a cracked liner and this was reported to Wall. Lymburner, apparently on Wall's advice, ordered six new liners which it was

necessary to get from Lipsett in Vancouver. This necessitated a delay in finishing the work but, when the liners were received, Martin and Benson proceeded to finish it. It is upon what transpired during this work that the question of liability depends. After the rings and liners had been installed and the engine reassembled, Martin told Benson to clean up the engine or, as he expressed it, to try to get as much of the oil and grease off the engine as possible to make it look better. It was then filled with oil and antifreeze and the batteries were brought back into the engine room from outside for a lean-to. These were placed in the same position as before on two planks beside the engine. Martin took the cables off the shelf and said that he then wiped them over with a clean rag and connected the two batteries together and the batteries to the engine.

There was a short length of cable some ten inches in length, which connected the two batteries, and two, described by Martin as being from $3\frac{1}{2}$ to 4 ft. in length, to connect the batteries with the starting mechanism of the engine. Having attached the cables to the terminals of the battery and to the engine, Martin attempted to start it without any result. He then transferred the cables, putting the one which he had connected to what he had thought was the positive terminal on to the other terminal and connected the other cable to the former. He says that the cables were firmly attached to the posts of the battery and to the starting motor on the engine. He then tried again to start the engine and it turned over freely but would not fire. Four attempts in all were made and, apparently, after the last of these, Benson drew Martin's attention to a fire behind him which the latter described as being on the planks between the battery cables some 8 or 10 inches from the side of the engine. The two cables were lying parallel on the planks at this point from $1\frac{1}{2}$ to 2 inches apart and the fire, which was described as being some 4 inches in diameter, was around the cables and on the planks, with flames shooting 10 inches to a foot high. There was no fire around the batteries themselves and at this time none elsewhere in the engine room. Martin attempted to extinguish the blaze but his own clothes caught fire. There was no fire extinguisher in the engine room and, in the result, the fire spread and burned down the engine room and the mill,

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causing very heavy loss. It was the opinion of Martin that if there had been a fire extinguisher available the blaze could have been put out immediately.

The case of the respondent Trans-Canada is that the only manner in which a fire could have been ignited in these circumstances was by a spark resulting from a short circuit, that this could only have occurred if the insulation in the cables was either so defective or so lacking that contact between the two cables, or between one of them and some conductor such as a metallic object, could produce a short circuit and a resulting spark and that Martin failed in his duty, either contractual or at common law, apart from contract, to detect the defect in the cables before using them to transmit electricity from the battery to the starter of the engine. As to the liability in tort, it is said that the principle res ipsa loquitur is applicable, the cause of the fire being the battery with its connections and these being shown to have been in the possession and control of Martin and Benson at the time the fire commenced. As to Hoff, there can be no contractual liability asserted but it is said as to Martin and Benson that their failure to take reasonable care to avoid injury to property of others affects them and their employers with liability for negligence.

It is thus necessary to examine closely the evidence as to the condition of these batteries and their connections as they were found by these workmen when they arrived at the Trans-Canada premises. In strictness, neither the placing of new rings or liners in the Diesel engine required the use of the starting apparatus of the engine. The employment was only to install these parts on the engine but, as the purpose of the work was to produce a satisfactorily operating Diesel engine, I agree with the learned trial Judge that it cannot be said that to test the effectiveness of the work by starting up the motor was not within the scope of the employment of Martin and Benson.

Other than the fact that these were Hart 12 volt batteries, there is no evidence regarding them, either as to the time they were purchased or their condition at the time in question, except that the tops of them were not clean. As to the cables, where they came from is left uncertain by the evidence. The original invoice from Heaps to Hoff dated July 2, 1947, includes a charge for four batteries and four

battery cables. The batteries then supplied were not those that were in the engine room. There is no other description of the four cables than that contained in the invoice. On August 17, 1948, an invoice produced showed that Trans-Canada purchased two 6 ft. cables from Heaps. The cables found by Martin which connected the batteries to the starting motor were, however, only 3½ to 4 ft. in length. Where these came from or how long they had been in use is not disclosed by the evidence. The Trans-Canada Company, as shown by the evidence of Lymburner, employed millwrights whose duties included starting the Diesel engine when required and a mechanic, Russell Dean, who, according to Lymburner:—

> inspected all the equipment of the company, and that was his job, he did nothing else, but whether he changed the oil or whatever you mentioned in that particular machine, I don't know. He was in charge of all the operating equipment.

Dean was not responsible to the millwrights but directly to Lymburner. Dean who, no doubt, could have spoken with some knowledge as to the origin of these cables, their quality, the nature of the insulation and the length of time they had been used, was not called by the plaintiffs nor were the mill superintendent or millwrights. In the result, these matters which seem to me to be of importance in determining the question of liability were not dealt with.

Martin, who appears to have been a very frank witness, was not an electrician and the Lipsett Company did not deal either in batteries or cables of the kind used to connect these with the starting motor of their engines. He was, however, a very experienced Diesel engine mechanic and had worked on a great many of such engines in British Columbia and thus had considerable practical experience with the apparatus used to start them. The batteries were on the planks beside the engine, with cables connected to the starting mechanism, when Martin arrived at the engine room. The engine had apparently been operating up to within a few days of the time the work was undertaken. Martin was not able to give any description from his own knowledge of the nature of the insulation ordinarily used on these cables. As to this, he said that while he was not an electrician he believed that the copper wires were wrapped with rubber and some kind of black asbestos coating on the outside. He could give no further information on the

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subject. He said that the cables were very badly soaked in oil and covered in saw dust and that this would deteriorate the insulation and that they looked to him as if they might have been soaked for a long time. He did not, however, observe any breaks in the insulation. It was very cold and while he wiped the cables over with a clean rag before using them, this did not remove all the saw dust and oil, so that he was not able to closely examine the insulation. He had looked for breaks and had seen none and thought that it was safe to use the cables. In answer to a question as to whether it was a very minute examination, he said it was not, and to a further question as to whether it had not been a very casual one, he said that it had been and that there might have been defects which his inspection did not detect. Following the fire, he had been interviewed by one of the solicitors representing Trans-Canada and had signed a statement which said, amongst other things, that the wire cables were oily and frayed and that it was possible that a short circuit occurred at such a frayed point and caused the fire to start. As to this, he said that he believed the question that had been put to him was whether it would be possible if the cables were frayed to cause a fire and that he had said that, if they were frayed and oil soaked, they could, and followed this up by the direct statement that while they were oily they were not frayed.

The defendants had requested Professor Frank Noakes of the staff of the University of British Columbia and a consulting engineer to make certain tests with two 12 volt batteries and cables which, he said, were one of the standard sizes used in starting internal combustion engines. Whether they were the same as those in the Trans-Canada engine room was not established. He described these generally as consisting of strands of cable wire with rubber insulation bound with a braid which was usually impregnated with some sort of material to reduce mechanical abrasion. The witness had left a piece of this cable in Diesel oil for a few weeks and this resulted in the rubber splitting open and being so soft it could be removed easily. He had also dipped a length of the cable in Diesel oil and, after wiping it off, hung it up so that it was exposed to air and after a few weeks the rubber was found to be softened so it was easily picked away with the fingers. He said, in answer to

a question on cross-examination, that it was likely that, if cables of the kind he had examined were lying loose on the floor of an engine room for some months, they would suffer some damage, and agreed that it would be remarkable if cables used continually like that in an engine room for several months were not defective. Oil on the exterior of such a cable would not be a conductor of electricity.

The plaintiffs could, no doubt, have proven the origin of these cables and their quality, how long they had been in use and their condition immediately prior to the fire, but did not do so. In the absence of any such evidence, we are left with Martin's description of their condition in determining the question as to whether or not he was negligent in using them.

It is not, in itself, an answer to the claim of the respondents that Martin was not employed to examine the starting equipment or that he was not skilled as an electrician. From the evidence in this case, I think the only proper inference to be drawn is that the fire was commenced by a short circuit. The men were not smoking and the fire they had built in the stove was out. It appears to me that such a short circuit might have been caused, assuming that at some place the copper wires of the cables were exposed or the insulation so thin as to be ineffective, either where the cables were crossed if they were brought into contact, or by a cable in this condition touching a nail or some other metallic conductor on the planks or coming into contact with the side of the engine itself before reaching the point at which the connection was made with the starting motor. The inference I draw from the evidence is that the cables which were crossed near the battery did not there come into contact, and the distance where they were thus crossed from the point where the fire was first observed seems to exclude any such contact as the means by which it was started. While it is, of course, possible that an exposed part of one of the cables might have come in contact with the side of the engine itself, there is no evidence of this and the distance of any such place of contact from the point where the fire started would seem to me equally to exclude this as the source of the blaze. The evidence is that the cables, where they lay upon the planks, were some $1\frac{1}{2}$ to 2 inches apart and the evidence of Professor Noakes, in my

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opinion, excludes the view that a spark might have been caused by the cables being in this position. I think it is not possible, on the evidence, to reach any sound conclusion as to how the short circuit was caused.

The learned trial Judge found that Martin who, he said, had impressed him as being a competent workman and an honest witness, had been negligent in endeavouring to start the engine when he knew the insulation of the battery cables was defective, in permitting the battery cables to become crossed, in making only a casual inspection of the battery cables, in failing to advise the plaintiff Trans-Canada that the batteries should be placed in their proper container and that new and longer cables should be procured and in failing to warn the plaintiff Trans-Canada of the danger of continuing to use cables, the insulation of which had deteriorated. I am unable, with great respect, to agree with these findings.

I am in agreement with the judgment of the majority of the Court of Appeal (1) delivered by Sidney Smith, J.A. that no actionable negligence on the part of Martin is disclosed by this evidence. The batteries and the connecting cables had been apparently in effective use by Trans-Canada in starting the Diesel engine until a short time before December 8 and this fact and the further fact that the batteries were connected by the cables to the engine when Martin arrived to commence his work would undoubtedly lead him to believe that they were in a safe condition to be used. Neither the mill superintendent, the millwrights nor Dean had informed Martin that there was any doubt that they might be used with safety. The case for the appellant really is that the cables used in connection with starting the engine were in such a defective condition when Martin arrived that he should have detected that fact and that his failure to do so was actionable negligence.

I think this is to place the duty of Martin on too high a plane. I think it is unnecessary to decide whether the principle res ipsa loquitur applies in the circumstances of this case but, if it be assumed for the purpose of argument that it does, this would not impose upon the respondents the duty of showing how the fire was caused but simply to

(1) [1953] 3 D.L.R. 672.

show that Martin was not negligent (*Woods* v. *Duncan* (1). I agree that, if the condition of the cables had been such that it would be apparent to a man familiar with the operation of starting Diesel engines that it was unsafe to use them, to put the cables into use would have been a negligent act, but I do not think that this was so in the present case. I think that Martin, in answering in the affirmative the question as to whether his examination of the cables had not been a very casual one, was simply agreeing that it was not a minute examination but that, having wiped off some of the accumulated saw dust and oil caked upon the cables, he had simply looked at them and had seen no defect in them. It was, after all, the appellants who had left the cables in this condition and it is not my opinion that, under these circumstances, there was a duty imposed upon Martin to remove, in whatever manner would be necessary, all of the accumulation on the exterior of the insulation of the cables to ascertain if any wires were exposed or the insulation was so defective as to make them unsafe for use. It is pointed out in the reasons for judgment of the majority that if Martin had, when he first arrived, used the batteries and the connecting cables to start the engine to assist him in deciding why it was functioning badly and a fire had resulted, it would be impossible to say that he was acting tortiously. With this I respectfully agree, subject, of course, to the reservation which is implicit in the statement, unless the condition of the cables was such that it should have been apparent to him that it would be dangerous to use them. I think the position was no different after the work on the engine had been completed and the batteries and cables placed again in the position in which they were found.

I am unable to agree with the opinion of the learned trial Judge that the evidence discloses that Martin knew the insulation of the cables was defective or that crossing the cables had anything to do with the starting of the fire.

In so far as the claim of Trans-Canada against Heaps is founded on contract, for the same reasons I think it should fail. There was, in my opinion, no breach of any duty imposed upon the defendant Heaps by the contract.

I would dismiss these appeals with costs.

(1) [1946] A.C. 401.

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CARTWRIGHT J.:—The relevant facts are set out in the reasons of my brothers Estey and Locke. I am in general agreement with the reasons of my brother Estey but wish to add the following observations. In referring to the parties I will adopt the contractions used by my brother Estey.

On the pleadings, the claim of Hoff against both respondents is solely in tort, that of Trans-Canada against Lipsett is solely in tort and against Heaps is in contract and alternatively in tort. In the statements of defence, Heaps denies any contract between itself and Trans-Canada alleging that the contract to repair the engine was made between Trans-Canada and Lipsett the role of Heaps being merely that of intermediary, Lipsett denies any contract between itself and Trans-Canada, both Lipsett and Heaps allege that Martin was the servant of the other, deny that Martin was negligent and plead contribtuory negligence on the part of Trans-Canada.

I agree with the finding of the learned trial judge that the contract for the repairs to the engine was made between Trans-Canada and Heaps and that the relationship of Heaps and Lipsett in regard to the making of the repairs was that of contractor and sub-contractor. For the reasons given by my brother Estey I agree with his conclusion that Martin was at all relevant times the servant of Lipsett and not of Heaps.

In determining the question whether Martin was negligent I am prepared to assume the correctness of the view of Sidney Smith J.A. that there was no contractual obligation to inspect the cables or to advise Trans-Canada as to their condition. It was however within the scope and course of Martin's employment to start the engine after installing the new parts which had been ordered. It was necessary that he should make use of the batteries and cables for this purpose and, in my opinion, the learned trial judge has accurately defined Martin's duty at that point in the words of Lord MacMillan in *Bourhill* v. *Young* (1), which he quotes:—

> The duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable

(1) [1943] A.C. 92 at 104.

and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

It seems to me unquestionable that Martin owed a duty to Hoff the owner of the building in which he was working and to Trans-Canada the tenant of that building and the owner of equipment and material in it, to take reasonable care not to set fire to the building. The question whether a reasonable man in Martin's position, who intending to use the cables became suspicious that their insulation was defective, would have made a more careful inspection than Martin did or would have used greater care in handling them after such inspection as he did make is one of difficulty, as is attested by the difference of opinion in the courts below and in this court. After a careful consideration of the relevant evidence, for the reasons given by my brother Estey, I agree with his conclusion that Martin was negligent. In argument stress was laid upon the fact that the defective cables were supplied for Martin's use by Trans-Canada but, as was pointed out by Atkin L.J. in *Ellerman Lines Ltd.* v. *Grayson* (1), a person in the position of Martin is bound to exercise care not generally but in relation to the conditions which he finds. The judgment of Atkin L.J. was expressly approved in the House of Lords; vide *Grayson* v. *Ellerman* (2).

On the question as to whether Trans-Canada was guilty of contributory negligence I agree with my brother Estey and wish only to add that, in my opinion, to hold, in the circumstances of this case, that Trans-Canada was negligent in permitting conditions to exist which would render the spread of a fire more rapid and in not providing fire-extinguishers would be contrary to the reasoning on which the judgments proceeded in *Grayson* v. *Ellerman Lines Ltd.* (*supra*) and in *C.N.R.* v. *Canada Steamship Lines Limited* (3), affirmed in this Court (4).

I do not understand any party to contend that Heaps would not be liable to Trans-Canada if it should be held that the contract for the repairs was made between Trans-Canada and Heaps and that the loss was caused solely by

(1) [1919] 2 K.B. 514 at 535.
(2) [1920] A.C. 466 at 475, 476, 477.
(3) [1947] O.R. 585; [1948] O.R. 311.
(4) [1949] 2 D.L.R. 461.

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the negligence of Martin. I mention this only for the purpose of making it clear that I express no opinion as to whether it could have been maintained that Lipsett alone was liable.

On the question of the assessment of damages I agree with the reasons and conclusion of my brother Estey.

I would dispose of the appeal as proposed by my brother Estey.

Appeals allowed.

Solicitors for the appellants: *Bull, Housser, Tupper, Ray, Guy & Merritt.*

Solicitors for Heaps, Waterous Limited: *Tysoe, Harper, Gilmour & Langfield.*

Solicitors for Lipsett Engine & Manufacturing Co. Limited: *Guild, Lane, Sheppard, Yule & Locke.*