1902

*Mar. 7.

HENRY WARMINGTON (PLAINTIFF). APPELLANT;

AND

J. J. PALMER AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Work in mine—Entering shaft—Code of signals—Disregard of rules—Damages.

A miner was getting into the bucket by which he was to be lowered into the mine when owing to the chain not being checked his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine owners the jury found that the system for lowering the men was faulty; the man in charge of it negligent; and that the engine and brake by which the bucket was lowered were not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing among other things that signals should be given, by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual in descending to signal with the bells; and that the injured miner knew of the rules but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for plaintiff and ordering a new trial.

Held, reversing said judgment (8 B. C. Rep. 344) and restoring the judgment of the trial judge (7 B. C. Rep. 414), that there was ample evidence to support the findings of the jury that defendants were negligent; that there was no contributory negligence by non-use of the signals the rules having, with consent of the employees and of the persons in charge of the men, been disregarded which indicated their abrogation; the new trial should therefore, not have been granted.

Held further, that as the negligence causing the accident was not that of the persons having control of those going down the mine, it

*PRESENT:—Sir Henry Strong C. J. and Sedgewick, Girouard, Davies and Mills JJ.

1902

WARMINGTON v. PALMER.

was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employees' Liability Act ([1897] R. S. B. C. ch. 69.)

APPEAL from a decision of the Supreme Court of British Columbia (1), setting aside the verdict for the plaintiff at the trial (2) and ordering a new trial.

The action is brought by the plaintiff to recover damages from the defendant for injuries sustained by the plaintiff in falling down a shaft in the defendant's mine. Damages were claimed under the Employees' Liability Act and also at common law.

The plaintiff was employed at the defendant's mine with five other men working underground, two men being employed working on top, namely, Frank Viles, the engineer, and Edward Prendergast, the foreman, the foreman performing the duties of both blacksmith and topman.

The accident happened on the 7th day of May, 1900, the employer having commenced operations in the mine on the 2nd of May. The work done in the mine antecedent to the 2nd of May had been performed by a man named Prendergast under a contract with the defendants. The same man Prendergast was also, at the time of the accident, employed by the defendants as foreman, topman and blacksmith. The mine was under the superintendence of one Macready. The services of the plaintiff, who had been working for the contractor, were continued by the defendants, so that from the 2nd to the 7th day of May the plaintiff was in the service of the defendants.

No ore, refuse or dirt of any description was being hoisted from the mine at the time of the accident or during that day, and there was only one shift working, namely, the day shift, the mine being only a pros-

(1) 8 B. C. Rep. 344. (2) 7 B. C. R. 414.

1902

WARMINGTON v. PALMER.

pecting mine, and but few men employed either underground or on top.

The method of hoisting and lowering was by means of the bucket, which was hoisted by an engine. It was a simple drum friction hoisting engine which had been supplied to the company two and a half or three years before the action. It had been recently overhauled, and was in good order in every respect.

The engine was placed about 75 feet from the pit-head. The engineer when directing his engine was facing the pit-head and could see men come up and enter bucket going down. The man in descending stood with his back or his side to the engineer, and could see the engineer if he chose to look.

The brake when the bucket was on top was held in place by a block of wood placed under the end of the brake beam, the block of wood being 6 in. x 8 in. x 12 in. The brake when so held by the block would sustain 300 pounds, and was not intended to hold this weight with the additional weight of a man or men in the bucket. The engineer held the weight of the men by his foot on the other end of the brake-beam, and as many as three men have safely descended by this means.

Certain rules had been provided by the employer for the management and working of the mine, which were sufficiently posted in different parts, in order to give ample notice of their provisions. The plaintiff had read these rules. Among the rules are a set of signals by ringing of bells to the engineer when any man was going down into the mine or coming up. It would appear as if these rules had not received, during the time that the work was being carried on by the contractor, that attention that should have been given to them, and that with respect to the lowering of the men in the shaft they had not been in the habit of

giving the signals required, their custom having been to intimate to the engineer that they were about to descend, thereupon immediately going down.

On the day of the accident the plaintiff came up from the shaft in the performance of his duties, to get powder and fuse. Having supplied himself with the material that he needed he started to go down and on passing through the engine room he gave notice to the engineer, not by ringing the bells as the rules required, but telling him, "I am going down now, Frank."

Having passed through the engine room and given this notice to the engineer that he was about to go down, he walked to the pit-head, and with his back to the engineer put his foot in the bucket, and the engineer not being at his post, his attention being momentarily diverted, the bucket with the man in it went down the shaft. The engineer heard the humming of the machinery and was quick enough to stop the bucket, either immediately that it touched the platform at the bottom of the shaft or shortly before, and possibly saved the man's life, or at least from having any bones broken. The only injury sustained by the plaintiff was from the shock occasioned by the fall.

The following questions were put to and answered by the jury:

1. Were McCready, Viles and Prendergast, or any of them, competent persons to fill the positions which they respectively occupied?—A. Yes.

2. Was the defendant Palmer personally aware of the condition of the engine, hoisting engine and apparatus?—A. Not sufficient evidence to show that he was.

3. Was the system adopted for lowering the men and the machinery used for that purpose fit and proper?—A. System faulty. (See clause 6.)

1902

WARMINGTON v. PALMER.

4. Was Prendergast negligent in the exercise of his superintendence as topman?—A. Yes.

5. Was Viles negligent in the exercise of his superintendence as engineer?—A. Yes.

6. Was the hoisting engine defective in not having the catches (or at least one of them) which were put on after the accident?—A. Yes.

7. Is the plaintiff's statement that he said to the engineer, "Frank, I am now going down," correct?—A. Yes.

8. Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident?—A. No.

9. Was it usual for the miners, when descending from the surface, to signal the engineer by means of the bells?—A. No.

10. If the defendants were guilty of negligence, did the accident result therefrom?—A. Yes.

11. The amount of damages, if any?—A. $4,000.

12. Was the engine and brake then, as a whole, reasonably fit for the purpose for which it was applied?—A. No.

13. Would the accident have been avoided if the plaintiff had exercised ordinary care?—A. No, we believe he did exercise ordinary care.

14. Did the plaintiff voluntarily undertake the employment with the knowledge of its risks?—A. He undertook the employment with the knowledge of an ordinary miner's risk.

15. Was the plaintiff acquainted with the printed rules of the mine including the bell signals?—A. Yes, in a general way.

16. Did he fully comply with the said printed rules on the occasion of the accident?—A. No.

On these findings a verdict was entered for plaintiff, with $4,000 damages. This amount was larger than the sum ($3,000) claimed by the plaintiff in his statement of claim and an amendment was ordered to make the statement conform to the verdict.

The full court set aside the verdict and ordered a new trial. The plaintiff appealed to this court.

Davis K.C. and *Macdonald K.C.* for the appellant.

Clute K.C. for the respondents.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—This appeal must be allowed.

I think that there is ample evidence of negligence. The only doubt I have is whether or not there was negligence at common law. This is of importance, for if the case is to be regarded as one of negligence at common law, that is, a case in which the negligence was that of the employers themselves, there is no limit to the amount of the damages. But the view seems to prevail that it was the negligence of the persons having control of those going down the mine. The effect of this is to limit the damages to three thousand dollars.

As to contributory negligence, I do not agree with the court below. I think there was none whatever. It was shewn that there was a course of conduct which indicated that the rules had been abrogated. With the consent of the persons having control of the men, and with the consent of the employers, they had been disregarded.

Therefore, non-observance of the rules was not contributory negligence. On the whole I agree with Mr.

1902

WARMINGTON v. PALMER.

The Chief Justice.

Justice Martin that there was no proof of contributory negligence.

As to the damages, we are all of opinion that they must be treated as damages recovered under the statute and should therefore be reduced to three thousand dollars.

As to costs, as the plaintiff has succeeded on all points raised, except the amount of the damages, we think plaintiff should have his costs as well here as below.

Appeal allowed with costs.

Solicitors for the appellant: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Wilson, Senkler & Bloomfield.*