Supreme Court of Canada
Waugh-Milburn Construction Co. v. Slater, (1913) 48 S.C.R. 609
Date: 1913-11-03

The Waugh-Milburn Construction Company *(Defendants) Appellants;*

and

Maud Slater *(Plaintiff) Respondent.*

1913: October 28; 1913: November 3.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Common employment—Dangerous works—Safety of workmen—Defective system—Employer's liability—Jury's findings—Sufficiency of answers—Practice—Discontinuance against co-defendant—Release of joint tortfeasor.

The plaintiff's husband was a linesman employed, on piece-work, by the defendants with a gang of men setting posts in holes previously dug by the company with which they had contracted to erect the posts and prepare them to carry electric wires. A post set in one of these holes was insufficiently sunk or set in position without proper packing to hold it rigidly in the light soil of an embankment. Deceased was sent up the post to attach crossbars which were being hoisted to him by fellow-workmen by means of a block and tackle when, owing to the strain, the post fell causing injuries which resulted in his death. The postholes, as dug by the company, had been accepted by the defendants for the purposes of their contract, but they made no inspection as to their sufficiency, nor did they give instructions in regard to necessary precautions to ensure the safety of their employees engaged in setting up the posts and preparing them for wiring.

Held, affirming the judgment appealed from (4 West. W.R. 1311; 13 D.L.R. 143; 25 West. L.R. 66) that the failure to sink the postholes to sufficient depth and obtain proper filling to pack the post, and ensure the safety of the employee required to climb it, was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow-servant.

[Page 610]

Per Duff J.—In the circumstances of the case the answers by the jury that the defendants had failed to set the posts at sufficient depth and pack them with sufficiently rigid material involved a finding that there was negligence in these respects imputable to the defendants for which they were personally responsible in an action for damages.

APPEAL from the judgment of the Court of Appeal for British Columbia[1], by which, on equal division of opinion among the judges, the judgment of Morrison J., entered upon the verdict of the jury at the trial, stood affirmed.

The circumstances of the case are stated in the head-note.

[1] 4 West W.T. 1311; 13 D.L.R. 143; 25 West. L.R. 66.

W. B. A. Ritchie K.C. for the appellants. The motion for nonsuit should have prevailed. The point is shortly stated by Irving J. as follows: "The learned judge should have withdrawn the case from the jury. The accident took place by reason of the negligence of the fellow-workmen not filling in the hole with proper holding material and not excavating to a sufficient depth." The defendants themselves were not shewn to be guilty of any negligence. See *Gallagher* v. *Pipe*[2]; *Cribb* v. *Kynoch*[3]; *Young* v. *Hoffman Manufacturing Co.*[4]; *McFarlane* v. *Gilmour*[5].

The plaintiff's evidence shewed, as the jury subsequently found, that deceased was a servant in the employ of appellants and, as expressed in the words of Martin J., "the defendant contracting company agreed with the defendant power company, the owner of the electric line, to set up the poles on the power company's right-of-way in the holes that the power

[Page 611]

company had dug for them." The evidence shews that some of these holes had caved in, and that the fellow-workmen of the deceased were employed on piece-work as he was, they to clear out these holes when necessary and fill in around the poles, when in place. There was no suggestion in plaintiff's case of personal negligence by the appellants, and it was not alleged or attempted to be proved that there was any defect of system in regard to the work, or any failure on their part to provide suitable workmen and materials. The fault, according to plaintiff's case, was in the foreman not seeing that the poles were put deeper in the ground, or as the jury put it, filled with sufficiently rigid material to ensure safety.

There was also a further point in support of the motion for nonsuit, viz., that it plainly appears that deceased not only voluntarily incurred the risk of going up a pole which he knew to be insecure, but, in the words of Lord Cairns in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*[6] at page 1166, "that he caused his death by his own folly and recklessness." See *Wakelin* v. *London and South Western Railway Co.*[7], *per* Lord Halsbury, at page 45; *Dominion Iron and Steel Co.* v. *Day*[8]; *Quebec and Levis Ferry Co.* v. *Jess*[9]; *Canada Foundry Co.* v. *Mitchell*[10], *per* Killam J., at page 459.

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[2] 16 C.B.N.S. 669.
[3] (1907) 2 K.B. 548.
[4] (1907) 2 K.B. 646.
[5] 5 O.R. 302.
[6] 3 App. Cas. 1155.
[7] 12 App. Cas. 41.
[8] 34 Can. S.C.R. 387.

The learned trial judge should have given effect to appellants' contention that they were entitled to judgment upon the finding of the jury that the proximate cause of the accident was the failure to set the pole

[Page 612]

sufficiently deep and to fill the hole with sufficiently rigid material to ensure safety. They have not made findings as to whether this arose from defective system or any personal negligence of these defendants, or whether the same arose from negligence of the workmen engaged in setting the pole and filling the hole. There is no finding upon which judgment could be entered for the plaintiff. Where a jury does not give a general verdict but answers questions such answers, to support a verdict for plaintiff, must clearly shew a cause of action. See *Mader* v. *Halifax Electric Railway Co.*[11]. The answers of the jury are in the nature of a special case, and they must disclose what the negligence was. A finding which does not disclose whether the negligence found is personal negligence, or is the negligence of the foreman or workmen, will not answer when the action is brought by the representatives of a workman in common employment with those who did the work, and with the foreman, who is equally a fellow-servant with the other workmen. In the judgment of Martin J. dealing with the matter upon the evidence, instead of upon the findings of the jury, the learned judge's reasoning upon the facts is not sufficient to establish that the jury should have found that the appellants had put the deceased to work in a defective place, and that there was neglect of the primary duty cast upon employers in relation to the safety of their servants. The jury, being the constituted tribunal to determine the facts, a judgment cannot be entered in favour of the plaintiff until they have either found a general verdict in her favour or found facts which clearly shew liability in accordance with legal principles.

[Page 613]

The respondent cannot recover damages for negligence against appellants in an action brought and continued down to the end against the appellants and an independent incorporated company, the statement of claim alleging that the injuries were sustained in consequence of the joint negligence of the respective defendants, one of whom plaintiff expressly releases from liability. *Cocke* v. *Jennor*[12]; *Duck* v. *Mayeu*[13], at page 513. It is

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[9] 35 Can. S.C.R. 693.
[10] 35 Can. S.C.R. 452.
[11] 37Can. S.C.R. at p. 98.
[12] Hobart 66.

submitted that respondent cannot in an action of tort against two defendants jointly recover, under a statement of claim alleging only joint liability, a verdict against only one of the defendants. The conduct of respondent's counsel at the trial amounted to a distinct refusal to ask for an amendment. The decision in *Longmore* v. *McArthur*[14] does not in any way make against appellant's contention. The statement of claim alleged the joint duty and responsibility and claimed damages against the Vancouver Power Co. and Waugh-Milburn Construction Co. jointly, and the judgment is against the Waugh-Milburn Construction Co. alone.

D. G. Macdonell for the respondent. The power company had the holes already dug. No inquiry was made as to how they had dug the holes. The appellants did not inspect the quality of the filling; the only instruction they gave their workmen was to put the poles in the holes. The appellants personally accepted the defective holes and the defective filling from the power company. One of them, three days before the accident, saw the pole that had been planted and the quality of the filling, but took no action to secure safety.

[Page 614]

The appellants, themselves, failed to provide a fit and proper place for deceased to work in. *Ainslie Mining and Railway Co.* v. *McDougall*[15], pages 424-428. The instrumentalities which the appellants personally provided were defective. The holes in which the poles were to be planted, and the filling which their workmen were to use in planting the poles were defective; the holes in not being dug deep enough, and the filling being of too light a material to hold the poles in position.

The course of counsel for plaintiff at the trial was mere discontinuance of the action against one of the defendants for want of evidence to shew liability. It was not a release of a joint tortfeasor.

THE CHIEF JUSTICE.—Lord Watson, in *Johnson* v. *Lindsay*[16], at page 382, states the rule with respect to fellow servants, in the following terms:—

> The immunity extended to masters in case of injuries caused to each other by his servants rests on an implied undertaking by the servants to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master.

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[13] (1892) 2 Q.B. 511.
[14] 19 Man. R. 641; 43 Can. S.C.R. 640.
[15] 42 Can. S.C.R. 420.
[16] [1891] A.C. 371.

That is not this case. Here, as is pointed out by Mr. Justice Martin in his judgment, it is in substance admitted that the accident resulted from the fact that the hole in which the pole was planted was not of sufficient depth to enable it to be erected safely. The fellow servants of the deceased had no responsibility for that omission or defect. The appellants had taken a contract, as stated in the plea to the action, for the placing of the poles of the Vancouver Power Company in holes already dug by that company, and placing cross-arms and stringing wires upon such

[Page 615]

poles. In the same statement of defence, it is said that the dangerous or unfit condition of the pole in question was occasioned by the manner in which the hole in which the pole was planted had been dug by the defendants, the Vancouver Power Company. How can the appellants now be heard to lay the blame on the fellow-servants of the deceased ? The latter had no discretion to exercise with respect to the deepening of the holes nor had they authority to make the holes deeper in order that the posts might be more firmly set in them. The appellants had accepted the holes from the Vancouver Power Company as they had been dug by the latter and, in doing so, they impliedly guaranteed that they were sufficient for the purpose. The only direction given their servants was to use such holes so accepted for the purpose of erecting the poles, and not to exercise any discretion with respect to their depth. If by reason of the insufficiency of the holes an accident happened, the responsibility is with the employer who omitted to take the proper precautions in that respect to avoid the accident.

The contention that the questions and answers of the jury do not disclose personal negligence attributable to the appellants or to those for whom they were responsible is not made out. The failure on the part of the appellants to provide a hole of sufficient depth, as found by the jury, to plant the poles firmly and safely is negligence for the consequences of which the employers are as clearly responsible as if they had supplied their servants with defective posts or defective apparatus of any kind.

The verdict of the jury negatives the defence of

[Page 616]

contributory negligence and it is not referred to in the judgment below.

I would dismiss this appeal with costs.

DAVIES J.—The defendant company had a contract to erect electric posts in certain holes which had been dug for the purpose by another contractor and to prepare for the stringing of the electric wires along those posts.

The deceased was one of the men employed in placing cross-bars on one of the posts to carry the electric wires, and, while doing so, was fatally injured by the falling of the post. The jury found that the hole for the post was either not sufficiently deep or the packing was insufficient. It was not part of the defendants' contract to sink those holes. Their contract was to erect the posts in the holes sunk by the contractor who had the contract for that work.

The post erected would, doubtless, have been found sufficiently safe for the purposes for which it was required after it had the support of the wires strung upon it.

The question was, whether the defendants owed a duty to the workmen they employed in the setting up of these posts to see that they were sufficiently supported and strengthened either by providing suitable filling material to put around them in the holes or otherwise, so that the men should not be obliged to incur unduly dangerous risks in climbing the poles and putting the cross-bars for the wires upon them.

I think the defendants owed such a duty and neglected to fulfil it and that the doctrine of common employment was, under the circumstances, no defence.

It is no answer to say that the poles were deeply

[Page 617]

enough sunk and would be safe enough after the wires were strung and they were strengthened thereby.

The question is, were they safe when the unfortunate man was sent aloft to put on the cross-bars? The event shewed they were not, and, in my opinion, it was the employers' duty to provide suitable filling material to ensure safety, or, failing such material, to see that equivalent safe-guards were supplied. Failing in this, the employer cannot invoke the doctrine of common employment to relieve him from liability. Under the facts proved, there was no obligation on the labourers or the foreman either to deepen the hole or to provide other packing or filling than the excavated material lying to their hand.

The defendant Waugh, himself, was present a day or two before the accident and saw the conditions and gave his men no special instructions. Ignorance of the actual facts by the defendants is displaced. The accident was the result, as the jury found, of the neglect of duty by the employer and not of the negligence of a fellow workman.

I would dismiss the appeal with costs.

IDINGTON J.—The undertaking of a dangerous work without adequate means of averting the consequences of such dangers as attendant upon its execution, and protecting therefrom those engaged therein, is negligence.

That is what the appellant is found by the jury to have been guilty of, and there is, *primâ facie,* evidence to support it.

They undertook to set posts in holes which ought to have been, in the view of some men giving evidence, twice as deep as they were to ensure safety.

[Page 618]

It seems idle to talk of superintendents and foremen, engaged to execute such an inherently dangerous project, being negligent in not so digging new holes and incurring the extra expense of so doing something they were not retained to do as to ensure safety.

The same is true of the expense of filling in or setting of the posts though the evidence of what transpired is not so direct but rather affords ground for the mere inference that the foreman and superintendent did exactly what they were expected to do; namely, use such filling-in as nearest to hand, and not expend money on hauling better material from a distance.

Such inference, I think, was open to the jury and if, as I think, the correct one, then it is, I respectfully submit, surely absurd to talk of the foreman or superintendent having been negligent, and that negligence the cause of the accident.

On such condition of facts and circumstances, it devolved, on the appellant to shew, if it could, that the superintendent or foreman was otherwise instructed and duly furnished with adequate material or means of getting same.

The appeal should be dismissed with costs.

DUFF J.—The first ground upon which Mr. Ritchie contends, on behalf of the defendants, who are appealing, that the judgment should be reversed and the action dismissed is that there is no evidence of any breach of duty on the part of the defendants personally. The deceased, Benjamin Slater, was an employee of the appellants who, at the time Slater received the injury that resulted in his death, were engaged in the execution of a contract they had entered

[Page 619]

into with the Vancouver Power Company for setting and wiring a line of poles on the power company's railway line between Vedder River and New Westminster. Slater was occupied in pursuance of his duty in fastening the cross-arms on the top of one of the poles which had already been set by the employees of the appellants, when the embankment, in which the pole was set, gave way and Slater was carried to the ground by the uprooted pole and fatally injured. The embankment in which the pole was set was a deep fill which at this place consisted of light soil described by some of the witnesses as "peaty" and by others as simply "a bed of ashes." The poles had a height of 60 feet. They were set in the steep slope of the embankment. One of the witnesses says that in order to obtain a secure setting it would be necessary in such soil to excavate to a depth of at least 9 feet. The defendant Waugh himself admits that the minimum depth necessary for securing safety would be 7 feet. There is ample evidence that in this fill the poles were placed on holes that had been excavated to a depth of less than 6 feet. The evidence shews also that Slater, being engaged in placing the cross-arms on this pole some time after it had been set, would not be able from such inspection as could be made by him in such circumstances to ascertain whether the pole had been set securely or not. In these circumstances there was, of course, enough to entitle the jury to find that there had been negligence in not excavating to a greater depth before setting up the pole. The question is whether negligence has been brought home to the appellants.

I think the evidence justifies the conclusion that the defendant, Waugh, was personally implicated in

[Page 620]

this negligence. The poles were being set, as I have already mentioned, under a contract between the appellants and the Vancouver Power Company. The contract was an oral one. Waugh says that in making the arrangement with the power company he was assured that the holes had already been excavated and that it was understood that these holes were to be

accepted, and that his price was fixed upon that basis. He says that if they had found a hole only four feet deep they would doubtless have deepened it before setting the pole. But, he admits that if they found a hole excavated to what he calls a "reasonable depth," six feet, they would not have excavated it further. It was shewn that a contract had been let to a man named Hare, who was one of the witnesses at the trial, to dig a line of post holes for posts of the same character on the other side of the track through this same fill and that although the specification of the contract required holes of 7 feet in depth they were, in fact, excavated only to a depth of 6 feet, and that in that condition they were accepted and the poles were placed in them by the appellants. Waugh, moreover, admits that a few days before the accident took place he walked over this fill. There was a superintendent, Bailey, who was in charge of the execution of the contract for the appellants and there was a foreman named Haines who was in charge of the gang of men who set up the pole in question. No evidence was offered on behalf of the appellants to shew that any instructions had been given to Bailey with regard to the depth to which the poles were to be sunk or with regard to the inspection of the post-holes that had been dug by the power company, or as to any precautions to be taken to secure the stability of the

[Page 621]

poles with a view to the safety of the men engaged in placing the wires upon them.

I do not think it would be an unreasonable inference from the evidence I have mentioned, coupled with the lack of evidence as to instructions given by the appellants to Bailey, that the appellants did not consider it to be their duty in the execution of their contract to deepen a hole such as that which occasioned this accident; and that Bailey, the superintendent, was aware that this was the appellants' view. I think, moreover, that the jury might not unreasonably infer that Bailey had no express instructions to do such work for the purpose of securing the safety of workmen engaged in wiring the poles after they had been set up. Whether, moreover, it would be a part of his duty as between him and his employers, in the circumstances, in the absence of instructions would, I am inclined to think, be a question for the jury. However that may be, in all these circumstances the jury were, as it appears to me, entitled to find that a man of Waugh's knowledge and experience, knowing the character of the fill in which the posts were being set, ought to have realized, and if he had exercised any sort of forethought whatever for the safety of his employees, would have realized that exceptional measures would be required for securing the stability of the poles set up in this

fill; and that his failure to observe that or his failure to act upon it in giving appropriate instructions was such a want of care as properly casts upon him responsibility for the failure to take such precautions.

Mr. Ritchie's next contention is that the verdict of the jury is insufficient. I am unable to agree with this contention. The jury found the defendants guilty

[Page 622]

of negligence in two respects:—in failing to set the poles sufficiently deep and in failing to fill the post-holes with sufficiently rigid material. I think this involves a finding that there was negligence in these respects and that that negligence is imputable to the defendants personally.

There was a further point made by Mr. Ritchie which, if I understood him correctly, was this. The appellants and the Vancouver Power Company, he said, were charged in the respondent's statement of claim as joint tortfeasors; and he said, the respondents' counsel at the trial having released the Vancouver Power Company, the cause of action against the appellants must be taken to have disappeared on the principle that the release of one joint tortfeasor effects the release of all, because the cause of action is an entirety. This contention cannot be given effect to, in my opinion, because it is perfectly clear that what the respondent's counsel at the trial did was to discontinue the action as against the Vancouver Power Company because the evidence failed to implicate them in the negligence proved and to proceed against the appellants as the persons solely responsible for the injury complained of. It was entirely a question for the trial judge whether that course should or should not be permitted and the appellants' contention fails upon the simple grounds, in my opinion, that on the facts proved the Vancouver Power Company could not be held to be joint tortfeasors with the appellants and, if they could, the respondents at the trial ought not to be taken as releasing the Vancouver Power Company from liability, but simply as discontinuing the action against them.

[Page 623]

ANGLIN J.—The plaintiff is the widow of a deceased employee of the defendant company, suing on behalf of herself and his children to recover damages for his death, caused, she avers, by the negligence of the defendants, an incorporated partnership.

The facts are not seriously in controversy. A pole erected by the defendants fell while the plaintiff's husband was upon it, engaged in placing cross-bars to carry electric wires, and he sustained fatal injuries. The jury found upon sufficient evidence that the fall of the pole was due to the negligence of the defendants in that

> they failed to set the pole sufficiently deep and to fill the hole with sufficiently rigid material to ensure safety.

The recovery was at common law and the main defence relied upon at bar was "common employment."

I think that defence is not available under the circumstances of this case. The hole in which the pole was placed was not made by the defendants, but by a contractor who preceded them. It was no part of the work of the defendant company to deepen that hole. They accepted the holes as they had been dug. The evidence does not establish that the inadequacy of the hole in question was due to the fault of a fellow-workman of the deceased. The defendants' contract was to erect the poles in the holes as dug and this appears to have been the instruction which they gave to their men. There is nothing to shew that it was the duty of their foreman to deepen the hole in question or to see that other filling was procured and used if that adjacent to it was unsuitable. The defendants owed to the plaintiff's husband the duty of furnishing him with a reasonably safe place in which to work — of seeing that the pole which he was required to ascend was securely placed. Notwithstanding the shallow—

[Page 624]

ness of the hole, it is claimed that the pole would not have fallen if sufficiently rigid filling had been used. The jury has found that the defendants were at fault in regard to the filling. The circumstances disclose a case of dangerous employment imposing upon the defendants, as masters, the duty to see that proper precautions were taken to ensure their employee's safety. The defendant, Waugh, admits that no inquiry or inspection was made or directed as to the depth of the hole or the quality of the filling. The filling adjacent to the hole in question, having regard to its shallowness, was unsuitable. No instructions were given to procure or use any other filling. The defendants had erected poles on the opposite side of the railway. They knew the character of the soil. The defendant, Waugh, himself passed the place of the accident only three or four days before it occurred. He had an opportunity then of seeing the nature of the ground in which the particular pole in question was placed and of knowing that special care was necessary there as to the depth of the hole and the character of the filling.

Yet there were no inquiries; no instructions were given; no inspection was made or directed. Under such circumstances the jury were, I think, justified in finding the defendants liable at common law.

I would dismiss this appeal.

BRODEUR J. agreed with Anglin J.

Appeal dismissed with costs.

Solicitors for the appellants: Bowser, Reid & Wallbridge.

Solicitors for the respondent: Senkler, Sparks & Van Horne.