GEORGE E. McPHEE (PLAINTIFF) ....APPELLANT; 1913

AND *Oct. 29, 30. *Nov. 24.

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Employer's liability—Negligence—Answers by jury—"Volenti non fit injuria"—Issue undecided—Practice—B.C. Sup. Ct. Rules, O. 58, r. 4—New trial.

On the defence of *"volens,"* in an action for damages by an employee on account of injuries sustained in the course of his employment, the question which has to be considered is whether the plaintiff agreed that, if injury should befall him, the risk was to be his and not his master's. *Smith* v. *Baker & Sons* ([1891] A.C. 325) referred to.

In an action to recover damages for injuries sustained by the engineman in charge of the company's steam-shovel in use on the construction of their works, questions were submitted to the jury to which they gave answers negativing contributory negligence by the plaintiff and finding the company negligent in failing to provide a guard on part of the gearing and in leaving it uncovered, but they did not answer one of the questions submitted to them, viz.: "Did the plaintiff know and appreciate the risk and danger and did he voluntarily encounter them?" The defence resting upon this issue was duly presented at the trial and evidence submitted to support it.

Held, that, although the Court of Appeal for British Columbia, under Order 58, rule 4, of the "Supreme Court Rules, 1906," has power to draw inferences of fact and to give any judgment and make any order which ought to have been made in the trial court, and to make such further or other order as the case in appeal may require, nevertheless, it should not undertake the functions of a jury where it may be reasonably open to them to come to more than one conclusion on the evidence. Therefore, in the circumstances of the present case, there should be an order for a new trial to have the issue of *volens* decided. *Paquin* v. *Beauclerk* ([1906] A.C. 148) and *Skeate* v. *Slaters* (30 Times L.R. 290), referred to.

Judgment appealed from reversed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment entered by Morrison J., at the trial, on the findings of the jury, in favour of the plaintiff, and dismissing the action with costs.

The plaintiff was engineman in charge of a steam-shovel in use by the company on works of construction on their line of railway, which was being removed under its own power from one part of the line to another. While the machinery was in motion, he attempted to lubricate a portion of the gearing which was uncovered and not protected by guard-rails. In doing this he entered a narrow passage in a stooping posture and, in backing out from the lubricator, he was caught in the gearing and severely injured.

On the trial evidence was adduced to shew that the plaintiff had been employed on the machine for a long time, that he was fully aware of the danger to be incurred in approaching the lubricator while the machinery was in motion, that he had made no request to have it protected and that he had carelessly gone into the dangerous position and assumed the risk at a time when it was not necessary to do the work in which he was engaged at the time of the accident. The jury made answers to some of the questions, as stated, in the head-note, but did not give any answer to the question on the issue of *volens,* which had been the principal defence of the defendants. Upon the answers returned by the jury, the trial judge entered judgment in favour of the plaintiff for $5,000, the amount of the damages assessed by the jury. The Court of Appeal for British Columbia, by the judgment now appealed from, set aside the trial judgment and dismissed the action with costs. In the court

below, the present respondents contended that the plaintiff had been guilty of contributory negligence, and that he knew and appreciated and voluntarily accepted the risk of performing the work in close proximity to the unguarded gear in which, in consequence of his own carelessness, he was injured.

S. S. Taylor K.C. for the appellant.
Hellmuth K.C. for the respondents.

THE CHIEF JUSTICE.—It is admitted that the proximate cause of the accident out of which the plaintiff's claim arises was the defective gear of the steam-shovel on which he was put to work. That defect consisted in the failure of the defendants to provide a proper guard for the gear, and, in consequence, there was a *primâ facie* liability on their part. Among other defences it was urged that the plaintiff assumed the risk incident to the use of the defective machinery.

The maxim *volenti non fit injuria* has its origin in the Roman Law. (*Nulla est injuria quæ in volentem fiat,*" Dig. 47, 10, 1, 5.) In the restricted sense in which it is sought to apply it here, that maxim has disappeared from the civil law on the very sound principle that it is contrary to public order to permit a master to relieve himself by express or implied contract of the legal duty to provide adequate appliances, to maintain them in a proper condition and, generally, to conduct his business in such a way as not to subject those employed by him to unnecessary risk. *"La Sécurité des personnes est d'ordre public."* Arts. 13, 1057, 1080, Civil Code of Quebec; Planiol, Revue Critique, 1888, Exam. Doctr., at page 286; Huc., 8, page 571, No. 431, and references.

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The Chief Justice.

In the English common law, as I understand it, the maxim is gradually receiving a more limited application. In any event, it is quite permissible to say that it was more rigorously applied against the workman in *Thomas* v. *Quatermaine*(1), than in *Smith* v. *Baker & Sons*(2), and *Williams* v. *Birmingham Battery and Metal Co.*(3). In the first case the Court of Appeal took upon themselves to decide that the plaintiff was deprived of any cause of action because *volenti non fit injuria.* Since *Smith* v. *Baker & Sons* (2) it is a question of fact for the jury whether the workman by express or implied agreement undertook to suffer harm or run the risk of it.

In the case at bar there was a positive duty upon the defendants not to create or permit the continued existence of the particular source of danger and it was for them to prove affirmatively that the plaintiff had by express or implied agreement taken upon himself the risk of injury resulting from that breach of duty. That issue was squarely raised at the trial on the evidence and the appropriate question was put to the jury but remained unanswered because, presumably, of the very pardonable, if erroneous, assumption that the defence of *volens* was merged in that of contributory negligence which the jury negatived.

In these circumstances, having regard to the law of British Columbia, I would have been disposed to decide the issue of *volens* here, but I defer to the better opinion of Mr. Justice Duff, in whose conclusions I concur.

DAVIES J.—I will not dissent from the disposition

(1) 18 Q.B.D. 685. (2) [1891] A.C. 325.
(3) [1899] 2 Q.B.D. 338.

of this appeal proposed by my colleagues, though I acquiescence in it with difficulty and doubt.

I think it better, as there is to be a new trial on the question of *volens,* not to enter upon any discussion of the facts and circumstances out of which my doubts and difficulties arise as these facts will be submitted to a jury on the new trial.

It is not on the legal question that my difficulties arise, but on its application to the facts as proved, and the further fact that, while the jury did not pass upon the question of *volens,* it was open, under the law of British Columbia, as I understand it, for the appellate court to do so, and I find great difficulty in acceding to the reversal of the unanimous judgment of that court on the question.

IDINGTON J.—The case of the *Canada Foundry Co.* v. *Mitchell*(1), seems to have been overlooked by the Court of Appeal. It seems to me that this court in that case decided, though not in terms yet in principle, that a verdict of the jury must be had in order to exonerate the employer by reason of the employee having voluntarily assumed the risk incident to his employment.

The facts in that case seem to me quite as plain as in this calling upon the employee to determine for himself the risk he ran.

The case, as it appeared in this court, is imperfectly reported. But in the report in 3 Ont. W.R. 907, the answers of the jury to questions 12 and 13 are reported as follows:—

12. That deceased knew and fully appreciated the risk he ran in doing the work with the appliances which were used;

13. That he did not voluntarily incur the risk, but was working under protest.

(1) 35 Can. S.C.R. 452.

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Idington J.

I have looked at the appeal case on file in this court to see if there was anything in that to explain the grounds of this answer to question No. 13, and am unable to find any personal protest on the part of the injured man and assume, therefore, that the answer was founded merely upon the inference that he had, rather than quit his employment, submitted to the risk he ran. It seems to have been merely an inference of a mental protest overborne by his circumstances. This court there felt bound by the verdict of the jury.

I, therefore, conclude that it must be taken that the question is one for the jury in almost any conceivable case save the one of an express contract and one that must be submitted to the jury.

Indeed, it seems to me that they are in such cases much more fitted to draw the correct inference than any tribunal of lawyers, where training leaves them in a measure unable to realize to the full just what the ordinary workman's appreciation of his condition and will must have been in any such given case, short of express contract evidencing it.

I might distinguish this case from that which I cite by relying upon the length of time the workman had to ponder over and decide. I do not think such distinctions are productive of a sound administration of justice. And I think, moreover, that there is a gross fallacy in the argument founded on the length of time that the workman had served under the conditions in question.

Each day he escaped from the danger he was running, instead of tending to enable him to appreciate the true nature of the risk he ran, lessened his appreciation of it.

It must be possible in such cases by an extreme

care beyond the ordinary care used, and bound to be used, to escape injury. That extreme care he is likely to apply at first, but may become unable to continue it on every occasion.

It is the difference between this necessity for extreme care, which the law does not impose on him, and the ordinary care that the ordinary man will use in his daily work and he is bound to use, which he must appreciate yet may not be able fully to do so together with the consequential results.

In the last analysis it is the long average chance he takes and must appreciate that is to be determined and willed by him if the rule of law is to be adhered to that is involved in the doctrine.

I think the jury must determine that as best they can according to the manifold circumstances arising in each case.

The jury's omission to answer the question was the fault of the respondent in not insisting upon an answer.

For the jury said they had answered the questions, yet counsel did not call attention to this omission.

I do not think the verdict rendered can be treated as a general verdict which might have covered the case.

I think, therefore, the appeal must be allowed and a new trial had, and costs as appear in the judgment of Mr. Justice Duff.

DUFF J.—On further reflection I have come to the conclusion that the view of the Court of Appeal, which was the view I was inclined to take at the close of the argument, cannot be supported. For reasons

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Duff J.

I shall presently mention, I think there ought to be a new trial and, as in duty bound, I shall, therefore, refer to the facts only in so far as it may be absolutely necessary to do so in order to explain my reasons for differing from the Court of Appeal.

The maxim *volenti non fit injuria* indicates a principle of wide and various application in the English law. In relation to questions between employer and the employed, Lord Watson said in *Smith* v. *Baker & Sons*(1), at page 355, the maxim as now used generally imports

> that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is *not whether he voluntarily and rashly exposed himself to injury*, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's.

An instance of the application of the principle would be the doctrine of common employment if the exposition of that doctrine in *Priestly* v. *Fowler*(2) contains the true account of it.

Where the principle is resorted to for affording a way of escape from liability by an employer, who has not performed his *primâ facie* duty to make reasonable provision for the safety of his employee, the question to be determined is a question of fact and the employer must shew, to use the language of Lindley L.J. in *Yarmouth* v. *France*(3), quoted with approval by Lord Halsbury in *Smith* v. *Baker & Sons*(1), at page 337,

> as a fact that the workman agreed to incur a particular danger or voluntarily exposed himself to it.

(1) [1891] A.C. 325. (2) 3 M. & W. 1.
(3) 19 Q.B.D. 647, at p. 661.

For the purpose of this appeal it may be taken as settled that there was negligent default for which the defendants would be responsible (unless the defences I am about to mention could be made good) in failing to provide a proper guard for the machinery in which the plaintiff received his injuries. The defence of common employment was pleaded, but not relied upon at the trial where it was not disputed that (in the event of the other defences specifically relied upon failing) appellants were answerable for the absence of such a guard. The defences to be considered are two. The first was that the operation of regulating the lubricator on the engine of which the plaintiff was in charge was one which could be efficiently performed at a time when the machinery in question was not in motion and, consequently, in perfect safety; and that, in performing this operation while the machinery was in motion, the plaintiff rashly and unnecessarily exposed himself to the danger of being injured as he was. This defence was really presented to the jury as contributory negligence and, doubtless, was dealt with by them as such. Without saying more, it seems to me to be quite indisputable that there was evidence upon which the jury might properly find for the plaintiff on this issue. The other substantial defence was that the plaintiff entered upon his employment and continued in it for two years with full knowledge of the danger arising from the absence of proper safeguards; and that his conduct in this respect was such as to preclude him from complaining of what otherwise might have been the actionable default of the defendants in not providing such safeguards.

It is to this defence that the Court of Appeal gave

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effect in dismissing the action. Before coming to the facts, first let me note again the exact legal ground upon which the defence rests.

> The jury ought to be able to affirm that he, the employee, consented to the particular thing being done which would involve the risk and that he consented to take the risk upon himself. Lord Halsbury in *Smith* v. *Baker*(1), at page 338.

The question to be considered is: "Whether he agreed that, if injury should befall him, the risk was to be his and not his master's?" (Lord Watson, in *Smith* v. *Baker & Sons*(1).)

In *Williams* v. *Birmingham Battery and Metal Co.* (2), Lord Justice A. L. Smith says, at page 344, that the defence summarized by the maxim *volenti non fit injuria* is that the employee has

> contracted or consented or undertaken to run the risk of the defect

from which the accident arose. In the same case Lord Justice Romer says that in order to escape liability the master must shew that the servant "has taken upon himself the risk without precautions."

There was no evidence of express consent or agreement on the part of the plaintiff, and the question for the jury, therefore, was whether in all the circumstances the conduct of the plaintiff amounted to such consent. It was argued by Mr. Taylor that this is a question upon which the jury alone is competent to pass; in other words, that where consent is to be inferred from a course of conduct the employer must, in order to make good this defence, obtain a verdict from a jury or other primary tribunal of fact affirming it. I am quite unable to agree with this contention. There are, undoubtedly, expressions in text-books

(1) [1891] A.C. 325. (2) (1899) 2 Q.B. 338.

and judgments which seem to give some countenance to it; but it appears to me to be entirely opposed to principle. By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

The power given by O. 58, r. 4,

> to draw inferences of fact * * * and to make such further or other order as the case may require,

enables the Court of Appeal to give judgment for one of the parties in circumstances in which the court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously; *Paquin* v. *Beauclerk*(1), at page 161; and *Skeate* v. *Slaters*(2).

The important thing to remember is that the question for the jury is whether there was, in fact, consent; while the question for the court is whether the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation. In passing upon this last mentioned ques-

(1) [1906] A.C. 148. (2) 30 Times L.R. 290.

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tion judicial opinions given in relation to particular states of fact may be valuable as illustrations, but the question whether a particular conclusion is the only reasonably possible inference from a given state of facts is a question of law in the sense only that it is a question for the court; it is a question for the solution of which (in the very nature of things) the law itself can afford no rule of universal application.

It was argued by Mr. Hellmuth, on the authority of *Clarke* v. *Holmes*(1), and *Woodley* v. *Metropolitan District Railway Co.*(2), that, since, according to the plaintiff's own admissions, he entered upon his employment with a full appreciation of the danger occasioned by the lack of a guard and of the risk of injury arising therefrom and, as was contended, according to his own admission, with notice that his employers would not correct the defect, the appellant must be taken to have consented to his assumption of the risk as a term of his employment. I do not think it is necessary to examine the cases referred to minutely. When those cases were decided the doctrine of *volenti non fit injuria* had not undergone the elaborate examination to which it was afterwards subjected by the Law Lords in *Smith* v. *Baker & Sons*(3), and I think that in so far as any argument founded upon the earlier cases is inconsistent with the doctrine laid down in *Smith* v. *Baker & Sons*(3), as explained in *Williams* v. *Birmingham Battery Metal Co.*(4), and in *Canada Foundry Co.* v. *Mitchell*(5), that argument ought to be rejected. In *Williams' Case* (4), it is expressly stated by Romer L.J., at page 345, that the circumstance that the servant has entered

(1) 7 H. & N. 937.
(2) 2 Ex. D. 384.
(3) [1891] A.C. 325.
(4) (1899) 2 Q.B. 338.
(5) 35 Can. S.C.R. 452.

into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him; and that statement of the law was adopted by this court in *Canada Foundry Co.* v. *Mitchell*(1).

Whether the circumstances in any particular case amount to consent must depend upon the facts of that particular case looked at as a whole; and, considering the facts of this case as a whole, I cannot agree that the construction of them adopted by the Court of Appeal is the only construction they will reasonably bear.

I think, however, the respondents are entitled to a new trial on the ground that their plea *volenti non fit injuria* was not passed upon by the jury.

As to costs the appellant should have the costs of the appeal to this court; and, with respect to the costs of the Court of Appeal for British Columbia, the respondents are entitled to the costs of a successful motion for a new trial on the ground just mentioned, while the appellant is entitled to the costs attributable solely to the controversy raised by the respondents' contention in the Court of Appeal that the action ought to be dismissed on the ground that the issue in question was conclusively determined in their favour by the evidence. The costs of the abortive trial should abide the event of the new trial.

ANGLIN J.—The plaintiff appeals from the judgment of the Court of Appeal for British Columbia reversing the judgment of the trial judge and dismissing this action on the ground that the plaintiff was *volens,* that is, that he had undertaken to assume

(1) 35 Can. S.C.R. 452.

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the risk of the defect in the defendants' machinery which was the cause of his being injured.

At the trial the jury found the defendants guilty of negligence in not having had a guard placed on the gear of the steam-shovel on which the plaintiff worked, and that such negligence was the proximate cause of the injury; and they assessed the damages at $5,000.

To the fourth question, put at the instance of counsel for the defendants,

> Did the plaintiff know and appreciate the risk and danger and did he voluntarily encounter them ?

the jury did not give an answer.

The plaintiff had been working for five years and four months on the steam-shovel on which he was injured, for the first three years in a subordinate capacity, and for the last two years and four months as engineer in charge. He says the machine was always in the same condition, and that his predecessor had asked that the gear be guarded, but that nothing was done. The following questions and answers are taken from the plaintiff's evidence.

> Q. You always understood the importance of avoiding that gear ?
> A. Yes.
> Q. Well, what happened this time that you did not avoid it ?
> A. Well, I was avoiding the clearance, I thought I was avoiding it; I am sure I was avoiding it. I knew how dangerous it was.

Contributory negligence on the part of the plaintiff was negatived by the jury, and their finding on that issue cannot be successfully attacked.

For the plaintiff it is urged that upon the findings as we have them he is entitled to judgment, notwithstanding the failure of the jury to answer the fourth question. For the defendants it is contended that

upon the plaintiff's admission that he knew and appreciated the risk from the absence of the gear, the only reasonable inference is that he was *volens* and that the action should, therefore, be dismissed.

Had the defence of *volens* not been fought out at the trial — had the issue upon it not been clearly presented to the jury, I think the plaintiff's contention should have prevailed and the judgment in his favour should have been restored. But that issue was clearly presented at the trial and formed the subject of a specific question. It is impossible to say that the jury intended to deal with it either when they negatived contributory negligence or when they found negligence on the part of the defendants. Neither is it possible to maintain that the verdict should be taken to be a "general verdict" for the plaintiff. There is no finding upon the issue of *volens*. Without undertaking the functions of the jury we cannot make such a finding. I am, therefore, of opinion that, notwithstanding the power conferred on the Court of Appeal for British Columbia to supplement the findings of a jury, which we may exercise, judgment should not be entered for the plaintiff.

On the other hand, although it is clear that the plaintiff knew of the defect and, perhaps, also sufficiently clear that he fully appreciated the danger to which it exposed him, mere knowledge and appreciation of the danger does not conclusively establish that he contracted or consented or undertook to run the risk and to exonerate his employer from liability for any injury it might cause. As Lord Watson said, in *Smith* v. *Baker & Sons*(1) :—

(1) [1891] A.C. 325.

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When, as is most commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But, assuming he did so, I am unable to accede to the suggestion that the mere fact of his continuing in his work with such knowledge and appreciation will in every case imply his acceptance.

As put by Lord Halsbury:—

In order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to take the risk upon himself.

The same view is expressed by Romer L.J. in *Williams* v. *The Birmingham Battery and Metal Co.*(1):

The circumstance that the servant has entered into or continued in his employment with knowledge of the risk and absence of precaution is important, but not necessarily conclusive against him;

and, as put by A. L. Smith L.J. in the same case:—

that the mere knowledge of the risk does not necessarily involve consent to undertake the risk has now, beyond question, been settled by the House of Lords.

These authorities make it clear that, assuming the plaintiff's knowledge and appreciation of the risk which he incurred to have been fully established, it was still open for a jury to consider whether, having regard to the "nature of the risk and the workman's connection with it" and the other circumstances of this case, it should be inferred that he "contracted or consented or undertook to run that risk" and to exonerate his employer from liability in connection with it.

The fourth question as propounded to the jury in the present case is open to some criticism as to its form. But, in the absence of an answer to it, the burden of obtaining which was upon the defendants, the

(1) (1899) 2 Q.B. 338.

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judgment dismissing the action cannot be maintained. The jury having failed to determine a vital issue, with which it was within their province to deal, the only course open is to order a new trial.

Inasmuch as the defendants have come here to sustain the judgment dismissing the action, the plaintiff's appeal should be allowed with costs. The costs in the Court of Appeal and of the abortive trial should be dealt with as indicated by my brother Duff.

BRODEUR J. agreed with Duff J.

Appeal allowed and new trial ordered.

Solicitors for the appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitor for the respondents: *J. E. McMullen.*