THE BRITISH COLUMBIA SUGAR REFINING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

KATE GRANICK (PLAINTIFF) ..... RESPONDENT.

1910
*Oct. 12.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Employer and employee—Compensation for injury—Contributory negligence—Construction of statute—"Workmen's Compensation Act," 2 Edw. VII. c. 74, s. 2, s.-s. 2(c) and 4, sch. 2, art. 4—Remedial legislation—Refusal of damages—Right of appeal—Evidence.

In an action in the Supreme Court of British Columbia claiming damages under the "Employers' Liability Act" and, alternatively, under the "Workmen's Compensation Act," the plaintiff, at the trial, abandoned the claim under the former Act and, thereupon, the judge dealt with the case as a claim under the "Workmen's Compensation Act," found that the plaintiff's deceased husband came to his death solely in consequence of his own "wilful and serious misconduct," and, therefore, under sub-section 2(c) of section 2 of the Act, held that she was precluded from obtaining compensation in consequence of his death.

Per Davies, Duff and Anglin JJ.—The right of appeal from a decision in the course of proceedings to which article 4 of the second schedule of the "Workmen's Compensation Act" applies is available only for questioning the determination of the court or judge upon some question of law. Decisions upon questions of fact in adjudicating upon a claim brought before the Supreme Court under sub-section 4 of section 2 of that Act are not subject to appeal. Whether or not there is any reasonable evidence to support a finding of wilful and serious misconduct is an appealable question.

In the circumstances of the case the court held, Davies and Anglin JJ. dissenting, that there was not reasonable evidence to support the finding of wilful and serious misconduct.

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

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

The appeal from the judgment of the Court of Appeal for British Columbia (15 B.C. Rep. 198) was dismissed, Davies and Anglin JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Morrison J. at the trial(2), and referring the case back to the trial judge for the assessment of compensation to the plaintiff.

The circumstances of the case are stated in the head-note and are discussed in the judgments now reported.

Lafleur K.C. for the appellants.

Craig for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Appeal for British Columbia in an action for damages brought under the "Employer's Liability Act," but disposed of by the trial judge as a claim under the "Workmen's Compensation Act." The reasonable inference from all the evidence as found by the trial judge, is that the deceased lost his life when in the employment of the defendants through an accident arising out of that employment. This finding having been accepted by both parties, the question, and the only question, the provincial appeal court was called upon to decide was: In the materials he had before him was there sufficient to justify the learned trial judge, when fixing the compensation to be assessed under the "Workmen's Compensation Act" for British Columbia, in dismissing the respondent's claim on the ground that the deceased had been guilty

(1) 15 B.C. Rep. 198. (2) 14 B.C. Rep. 251.

of serious and wilful misconduct to which the accident was solely attributable? That court found no evidence from which this conclusion could reasonably be drawn. It is now for us to say whether the finding of the appeal court is so clearly erroneous that we should reverse. No one saw what occurred and the real cause of the accident is left to conjecture and the evidence shews it could have happened in a variety of ways. The deceased was a foreigner with an imperfect knowledge of the English language. He was hired as a temporary man in the appellants' factory and his work brought him in contact with a lift or elevator used for the hoisting of goods and the conveyance of employees from one floor to another. No one was in charge of the lift which appears to have been slow going, of simple construction and easily managed. It was in fact set in motion by each one of the employees as he required to use it. After he had been at work for the best portion of the first day, the body of the deceased was found caught between the elevator and the archway at the ceiling.

The plaintiff (now respondent) having proved that she was dependent on the deceased and that he came to his death during his employment, the defendants (now appellants) to escape liability were required to prove that the injury was attributable solely to the serious and wilful misconduct or serious negligence of the deceased.

How can the appellants be held to have discharged this burden so long as the cause of the accident is admitted to be unknown? The deceased is not here to explain; and with all their witnesses available the appellants are obliged to admit that they cannot say how the body reached the place where it was found.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

The Chief Justice.

The learned trial judge, it is quite true, drew this inference;

> that on his way to the lavatory, he worked the lift in the wrong way and upon finding it ascending instead of descending, the deceased attempted to get out and was caught.

I admit that where the evidence is contradictory one must proceed very cautiously in considering the weight to be given to inferences drawn by a judge when assessing damages in a proceeding under the "Workmen's Compensation Act"; but here there is no dispute as to the facts. The only evidence of the occurrence is given by the employees of the defendants, and our duty is to decide whether the intermediate provincial court of appeal was absolutely in error when they held that the inference drawn by the trial judge from that evidence read and considered as a whole was wrong.

If the trial judge might fairly assume that the deceased met his death when using the elevator, this question remains: Was there any evidence to justify the further assumption that to have done so in the circumstances was such serious and wilful misconduct as to defeat the plaintiff's claim? The misconduct consisted, as the trial judge apparently found, in the deliberate breach of a rule and warning, in that the deceased used the elevator contrary to an order and that he was personally and specifically told not to use it. I agree with the Court of Appeal. There is no evidence to support these findings. Morgan, in his evidence, states that Woodworth, the head foreman, said:

> I told Granick and Morgan both standing there not to let Granick use the elevator until he was acquainted with it. * * * I told him to leave it alone until he learned how to run it.

The only evidence of the rule relied upon by the trial judge is to be found in Morgan's deposition where he states the rule with respect to new men. He says that

> new men were generally instructed not to use the elevator at all unless there was somebody running it.

In this case no such rule was ever made known to the deceased. He received, when entering upon his duties, the qualified instruction not to use the elevator until he knew how to run it, leaving it, therefore, by implication, to himself to decide when he could safely use it. Assuming, as inferred by the judge, that the deceased used the elevator when going to the lavatory, — what were the special instructions he received at that time ? Being asked to give all the conversation that took place, Morgan says:

> I was in quite a hurry and I explained to him as well as I could where it was, pointed to the stairway.

Does this hurried instruction to a foreigner imperfectly acquainted with the English language imply a prohibition against using the elevator on his way to the lavatory ? And, if he did use it, what evidence is there he had not learned to use it at that time ? He had been employed previously in electric works in Winnipeg and as a blacksmith for the Canadian Pacific Railway Co. The elevator was easily worked. Is there a necessary and inevitable presumption that he did not then know how to use it ? The previous warning given by Morgan, and so much relied on, was given some time in the forenoon. The accident was at No. 2 elevator, and the conversation with Morgan in the forenoon was at No. 1. To sum up my view I cannot agree that, because of the instructions given by Woodworth in the early morning before work began, or by

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

The Chief Justice.

Morgan sometime in the forenoon, or again immediately before the accident when Granick started for the lavatory, to use the elevator, if the deceased did use it, was wilful wrongdoing and not mere thoughtlessness. No categorical rule applicable to those who used the elevator is proved to have been observed in the factory, or ever brought to the notice of the deceased; and to support the trial judge we must infer from the vague instructions given as to the use of the elevator in the forenoon, from the hurried explanation of the way to the lavatory given immediately before the fatal accident, that the deceased, if he used the elevator, was in so doing guilty of serious and wilful misconduct.. I think the reasonable conclusion on all the evidence is that, the direct cause of the accident being admittedly unexplained, it must be classed among those known in the French law as *accidents anonymes* which apparently are almost inevitable in the operation of large industrial establishments and the burdens of which are made a charge directly upon the industry but indirectly on the public by the "Workmen's Compensation Act." Planiol, *Thèses sur la responsibilité civile,* vol. 34; Rev. Crit. de Lég., at p. 282.

The body was found between the elevator and the floor. How it got there, how the deceased was killed, is the secret of Providence. All, in so far as this record shews, is left to conjecture. I am fortified in my conclusion by the rule laid down in this court in *Demers* v. *Montreal Steam Laundry Co.*(1), where Taschereau J. said, at page 538, speaking for the court:

> For it is settled law upon which we have often acted here, that where a judgment upon facts has been rendered by a court of first

(1) 27 Can. S.C.R. 537.

instance, and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment on the first appeal only if clearly satisfied that it is erroneous.

I would dismiss with costs.

DAVIES J. (dissenting).—I agree that there is no general right of appeal from the decisions of a judge in assessing or refusing to assess damages under subsection 2 of section 4 of the "Workmen's Compensation Act" of British Columbia. The only right of appeal given by the statute to the full court from any such decision is upon any question of law in respect of such assessment of damages.

Such being the case, the only question for the appeal court to decide was whether there was any evidence from which a reasonable man could find that the accident which caused the death of the deceased was solely attributable to the serious and wilful misconduct of the workman.

I have reached the conclusion that there was such evidence and that the finding of the trial judge was right, but whether we agree or do not agree with his conclusions, we have no power to interfere if there is any evidence from which a reasonable man might find as he did.

Some remarks of Lord Loreburn, in the case of *Johnson* v. *Marshall Sons & Co.*(1), at page 412, were relied upon as shewing that in his opinion the use of a lift contrary to orders or rules was not so dangerous as in itself to amount to serious misconduct. But I venture to think no such general conclusion should be drawn from his language, which was intended to be

(1) [1906] A.C. 409.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Davies J.

applied to the facts with which he was dealing only. In that case the lift was for use by workmen in charge of a load, forbidden to workmen not in charge of a load; as His Lordship there says:

> the offence was not that the man used it, but that he used it *without a load.*

User by a workman entitled to use it when in charge of a load was not "serious misconduct" on the same workman's part if used by him at a time when there was no load, because, though a breach of the orders, it was not such a breach as necessarily involved himself or others in danger.

The language of Lord Loreburn in my judgment lends no countenance to the conclusion that a workman not understanding how to use or control a lift and forbidden to operate it until he does understand it, is not guilty of "serious and wilful misconduct" if he attempts to use it in violation of his orders.

In a later case, *George* v. *Glasgow Coal Co.*(1), at page 128, Lord Loreburn says:

> In my opinion it is not the province of a court to lay down that the breach of a rule is *primâ facie* evidence of serious and wilful misconduct. That is a question purely of fact to be determined by the arbitrator as such. The arbitrator must decide for himself and ought not to be fettered by artificial presumptions of fact prescribed by a court of law.

Now, in the case before us the judge, acting as arbitrator, found as a reasonable inference from all the facts that the deceased workman was guilty of serious and wilful misconduct in attempting, contrary to his explicit instructions, to use the elevator before he had learned how to use it, and we have no right as a

(1) [1909] A.C. 123.

court of appeal, to "fetter by artificial presumptions of fact" any such finding or to review it.

As to whether the use of an elevator contrary to express orders by a workman ignorant of how to use and control it is "serious misconduct," I think the judgment of Lord Robertson, concurred in by Lord Collins in the case of *George* v. *Glasgow Coal Co.*(1) conclusive that it is. He says, at page 130:

> You are to judge of the question of seriousness by reference to the subject-matter, if it touches life or limb.

I understand it is contended that as the deceased man's instructions were not to use the elevator until he had learned how to do so, he cannot be held guilty of wilful and serious misconduct in using it unless it is proved he had not at the moment of the accident learned how to do so. There is evidence, I think, beyond doubt, from which it may fairly be inferred that he did not know how to use the elevator when he was employed in the morning, and also that he had not learned how to use it at some time not fixed in the forenoon. It is obvious that such proof cannot be direct and positive and have relation to the man's knowledge at the very moment of the accident. From the very nature of the case the question whether he had learned to use the elevator or not must remain and be a question of fact to be found by the arbitrator by reasonable inference from all the proved facts.

The broad facts here are that the man was hired in the morning as a temporary hand during a rush of work. That the foreman instructed him to go to work with Morgan, one of the older hands, and told them both, Granick (the deceased) and Morgan, while

(1) [1909] A.C. 123.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Davies J.

standing together, that Granick was not to use the elevator until he was acquainted with it, and that Morgan was to send him up to open the trap doors and shut them again and come down the steps.

Here we have one thing prohibited and other work prescribed. The foreman saw the man afterwards doing the work of opening and shutting the trap doors specially assigned to him.

It seems clear from Morgan's evidence that this division of work was maintained during the few hours between the hiring and the occurrence of the accident, Morgan operating the lift and Granick opening and closing the trap doors of the several floors, using the staircase while so doing. That once, during some part of the forenoon, the exact hour not being fixed, Granick went on the elevator ahead of Morgan and attempted to run it, but was promptly told "to leave it alone till he knew how to run it." That after dinner and just before the fatal accident, the same division of labour continued. The elevator was on the third floor; Morgan and Granick were there and the former sent the latter down the staircase, as usual, to close the traps while he himself took two trucks down the elevator; and when he descended to the shipping or first floor he there met Granick, who had come down the staircase and who said he wanted to go to the toilet, whereupon he explained where it was and pointed to the stairway for him to go to it.

Morgan further explained that he, Morgan, closed the doors of the elevator, left it standing at the first floor where he got out, and went to an adjoining shed for a few minutes to get something wanted; when returning, he found the elevator up against the bottom

of No. 2 floor, and the body of Granick jammed between the elevator and the floor.

The inference which the trial judge drew as an arbitrator from this evidence was that

> on his way to the lavatory he worked the lift in the wrong way and finding it ascending instead of descending, he attempted to get out and was killed.

I think this a justifiable finding of fact under the evidence. The evidence may not be as strong as one could wish, but there is some and enough to enable the reasonable inference to be drawn which the arbitrator has drawn.

Granick was forbidden when taken on as a temporary hand in the morning to use the elevator until he had learned how to do so. He was put with and under the charge of an experienced man who was to use the elevator and to employ Granick at other work, such as opening and closing the traps while the elevator was being used in carrying loads. At some time in the morning hours before dinner, he went into the elevator ahead of Morgan and made an attempt to use it, but was promptly stopped and forbidden to do so until he knew how. Neither at that time nor when the foreman gave him his instructions at the hiring did he suggest that he knew how to use it. Immediately before the accident, at 2 p.m., he came down from the third floor by way of the staircase, attending to his special duty of opening and closing the trap doors while Morgan descended by the elevator. He asked for the toilet and was told to go by the staircase and evidently must, as soon as Morgan turned and went to the adjoining shed, have wilfully opened the door of the elevator and attempted, with fatal results, to use it.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Idington J.

As I think there was evidence on which the arbitrator-judge could make his finding, and as in such case we have no right to review it, I would allow the appeal and dismiss the action.

IDINGTON J.—The respondent sued for damages arising from the death of her husband as result or an accident in appellants' factory claiming under the "Employers' Liability Act" and alternatively under the "Workmen's Compensation Act."

She failed under the former, but was entitled to have succeeded under the latter and have her damages assessed by the learned trial judge under and by virtue of sub-section 4 of section 2 of the said Act, unless her late husband's death had been the result of his own serious and wilful misconduct.

The learned trial judge held the husband had been so guilty and respondent had thereby become disentitled to recover at all.

The Court of Appeal for British Columbia reversed this finding and referred the matter back to the learned trial judge to assess the damages.

The sole question thus raised for our decision is whether or not the deceased had been guilty of such misconduct.

He was found crushed in an elevator used in appellants' warehouse, and which it is alleged he was forbidden to use.

It is not by any means clear how deceased came into the place where his body was found. Whether it had been the result of its use solely by himself or by some other of the employees whom he had been helping is left in doubt.

He was only a casual hand hired by the day at so

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Idington J.

much an hour, coming on for the first time at seven a.m., and he was found dead at two p.m., in the elevator, crushed between its cage and the ceiling of one of the five or six flats served by this elevator.

The evidence is very meagre and, I agree with the learned Chief Justice below, could have been made clearer on many points by the appellants on whom the burden of proof lay.

It is contended that deceased violated a positive command not to use the elevator at all.

But there is not any proper evidence to maintain such a contention, and in any event I doubt if anything short thereof could avail appellant.

The foreman says as follows:

17. Q. What conversation did you have with him then? A. I told Granick and Morgan, both standing there, to not let Granick use the elevator until he was acquainted with it, and send him up and open the trap doors and shut them again, and come down the steps.

18. Q. You say you told Granick that? A. Well, Morgan and Granick together; I says to Morgan, I say you take the things up the elevator and bring them down again and let Granick open up the trap doors and close them again.

19. Q. Do you know whether Granick understood you or not? A. He must have understood me, because he done as he was told, he shut the trap doors and opened them.

This foreman directing operations did not know whether the deceased could speak English or not, yet seeks to lead the court to infer from the man's doing things he had been directed to do that he must have understood English.

I surmise, from the fact that the foreman's remarks were addressed to Morgan, enjoining him not to let Granick use the elevator till he was "acquainted" with its use, that the foreman had a pretty shrewd idea Granick was not possessed of an English tongue.

Moreover, why was there any doubt left to exist on

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Idington J.

the point of this command being expressly and clearly understood if intended to insist upon its breach as misconduct of any kind ?

The first thing done by Morgan and Granick was to use this or another elevator. Morgan ran it then.

If the Swede, or German, had the ordinary intelligence of his race and calling that ride alone probably enabled him to see how it was run.

Even if he understood English only as imperfectly as appears, he might not so have grasped the purport of the words addressed to Morgan as to understand them in the sense that he was duly commanded to refrain from running the elevator.

But the man's command of English was most imperfect if we read the respondent's broken English in which she gave her evidence and believe her when she says:

Q. And did he speak or understand English ? A. He didn't speak very well, but he could understand enough if he got work any places.

Q. He couldn't speak as well as you ? A. No, not half so good.

Q. How do you account for that; as a matter of fact he was in the country longer than you, had he not been ? A. Yes, but he wasn't working with English people.

Q. In Winnipeg he was working ? A. He didn't work for English people.

Q. How do you come to speak as well as you do ? A. I come from the old country and went right straight working in one place two years.

Q. (By the court): With English-speaking people ? A. Yes.

No one questions her veracity.

Morgan, who took him to shew him his work, says:

Q. What did you say to him ? A. We were talking about several things.

Q. Did he understand English ? A. Yes, sir.

Q. Well, or fairly well, or how ? A. He understood it pretty good.

Q. You hadn't any difficulty in understanding him ? A. No.

Q. Did he have any difficulty in understanding you ? A. None.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Idington J.

I venture to submit with respect, that any person who can find from this evidence, giving all of it due credence, that the deceased had any accurate idea of what the word "acquainted" as used by the foreman meant or implied, must, I fear, have little idea of the embarrassments that such a man as deceased has to endure in his struggle to understand the English tongue.

It seems to me that to infer, even if we are to assume, what is not proven, that the user of this elevator on the fatal occasion was solely an act of the deceased undirected or unaided by any one else, was a disobedient, wilful violation of this alleged command would be cruel indeed.

To treat it as serious and wilful misconduct is something never intended by the Act.

But reliance is also placed by appellants on another circumstance stated by Morgan as follows:

> Q. Was there any other circumstance connected with the accident; that is, you used some other elevator ? A. Yes, sir.
>
> Q. Did you have any conversation with him about the elevator ? A. Yes, sir.
>
> Q. What was it; tell me ? A. He went on the elevator ahead of me there over in No. 1 shed, and he wanted to run it, and I told him to leave it alone until he knew how to run it.
>
> Q. How long was this before the accident ? A. That was some time in the forenoon.

What is there in this ? Or coupled with the foregoing, what do these suggestions amount to ? The elevator was of a slow-running type and the description given of all one had to learn shews its operation to have been of the simplest kind.

Any ordinary man who had been engaged as the deceased was in a Canadian Pacific Railway shop as blacksmith's helper, for nearly a year, must have been very stupid if he could not learn the running of such a

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Idington J.

machine by watching Morgan do it on the two occasions he was with him.

Besides we have, as the learned Chief Justice of the Court of Appeal points out, a half-day's work all over the place and what it implies, and no attempt to fix this latter incident later than it might have been, possibly the same hour as the first.

The very direction given by the foreman in regard to a man only hired for a day, implied the expectation that the man would learn through the day to use the elevator. His usefulness as a servant demanded that he should do so as soon as possible.

There is no evidence that he did not or from which it can be fairly inferred he did not.

In addition to all this I agree with the reasoning of the learned Chief Justice in the court below.

Moreover, if I had any doubt it necessarily should be resolved in favour of the judgment appealed from.

In my view of the evidence I find no occasion for struggling with the problem of whether or not the learned trial judge is to be held as taking the place of and being held as an arbitrator. There is, I respectfully submit, no such evidence as would entitle, within the law as laid down in *Johnson* v. *Marshall Sons & Co.*(1), the learned judge to draw such inference of serious and wilful misconduct as to exonerate appellant.

The appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed.

I am not able to agree with the opinion of the court below that there is a general right of appeal against a

(1) [1906] A.C. 409.

refusal by a judge of the Supreme Court to assess compensation under section 2 (4) of the "Workmen's Compensation Act, 1902." It seems to be clear that the right of appeal from a decision of the Supreme Court in the course of proceedings to which article 4 of the second schedule applies is available only for the purpose of questioning the determination of that court upon some point of law. If decisions upon questions of fact in adjudicating upon a claim brought before the Supreme Court under sub-section 4 of section 2 are to be treated as decisions falling within the provisions of the "Supreme Court Act" conferring a right of appeal from judgments and orders of the Supreme Court, then these provisions must also extend to decisions on points of law in any such adjudication; and if so what purpose is served by that part of article 4 which expressly gives a right of appeal from such last-mentioned decisions? That part of the enactment is upon the hypothesis suggested, entirely superfluous. The implication that the general right of appeal is excluded is palpable; and it is of much the same order as that which excludes the remedy by action for the infringement of a newly created statutory right where the enactment that constitutes the right at the same time provides another remedy for the violation of it. Here there is an authority vested for the first time in the Supreme Court to hear and determine claims under a new statutory provision and a right of appeal restricted to a special class of decisions given in the course of passing upon such claims. In the absence of something indicating a contrary intention the legislature must be taken to have intended that the claimant's statutory right should be vindicated in the manner prescribed as well in respect of appeals as of proceedings in the first instance.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Duff J.

This view finds in my judgment some confirmation when we consider that the frame of the statute indisputably shews that a most important feature of the scheme adopted was this limited character of the right of appeal given by article 4. The legislature intended obviously to provide a speedy and inexpensive means of dealing with claims under the Act. The importance of instituting some such procedure for determining the claims of the persons—usually of very limited resources—for whose benefit the scheme was designed, can hardly be exaggerated; and the last thing a legislature with such objects in view would be likely to sanction is a general right of appeal on facts as well as on law—with all that such a right of appeal implies in a controversy between litigants of large resources and adversaries with means inadequate to sustaining the burden of a protracted contest.

The questions which the learned trial judge had before him were: (1) Whether the deceased, Granick, lost his life through an accident arising out of and in the course of his employment: (2) Assuming the first question to be answered in the affirmative, whether the claim of the plaintiff must be rejected on the ground that the injury is attributable solely to the "serious and wilful misconduct or serious neglect" of Granick.

Both of these questions were decided by the learned trial judge in the affirmative and the claim was consequently rejected by him. The question before us is whether there was evidence before him on which such findings could reasonably be reached; and upon the admitted facts of this case I think the decision of the House of Lords in *Moore* v. *The Manchester Liners* (1)

(1) [1910] A.C. 498.

is conclusive in favour of the respondent upon the questions whether or not the learned trial judge had before him sufficient evidence to support his conclusion upon the first point.

The second question raises greater difficulties, but I have come to the conclusion, after careful examination of the evidence and the decision of the learned trial judge, that there was not before him evidence to support a finding against the plaintiff upon that point. In *Johnson* v. *Marshall Sons & Co.*(1), at page 412, Lord Loreburn, L.C., said:

> I cannot agree that a lift is an appliance so dangerous that the use of it, when believed to be in proper condition and intended for use, does in itself amount to serious misconduct. Certainly it is for the arbitrator under the Act to decide questions of fact; but when there is no evidence it is for the court to interpose.

In that case the workman had used the lift in disobedience to orders and it was held that that circumstance alone was not sufficient to support a finding bringing him within the "misconduct" clause. In this case the learned trial judge has found that Granick was forbidden to use the lift until he should learn how to use it. This direction was given at 7 o'clock in the morning when Granick was first taken on by the appellants as a temporary hand. There is no evidence that between 7 o'clock in the morning and 2 o'clock in the afternoon, when the accident occurred, Granick was not taught to use the lift. The learned Judge has found that Granick was inexperienced as regards lifts, but that is an observation, with great respect, which is not based on anything in the record. It is admitted that the lift was of the very simplest kind, and it seems to me to be too palpable for discussion that

(1) [1906] A.C. 409.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Duff J.

there is nothing in the evidence whatever to shew or upon which to base an interference that complete mastery of it could not be acquired by any man of ordinary intelligence within a very short time. There are suggestions in the evidence to the effect that there was a rule forbidding the employees to use the lift except for the purpose of carrying freight. That, however, has no bearing upon the issue the learned judge was called upon to decide because there is nothing whatever to shew that any such rule or practice was ever brought to Granick's attention.

ANGLIN J. (dissenting).—The defendants appeal from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Morrison J., who held that the plaintiff was not entitled to damages for the death of her husband under the "Workmen's Compensation Act" of British Columbia, chapter 74 of the statutes of 1902.

The plaintiff brought her action under the "Employers' Liability Act"; but, at the trial she was obliged to abandon her allegations of negligence against the defendants and the trial judge thereupon dealt with the case as a claim under the "Workmen's Compensation Act." He found that the death of the plaintiff's husband was due to his own "wilful and serious misconduct," which precluded her claim for compensation. It was practically conceded at bar — and the authorities fully support the view — that there can be no appeal upon any question of pure fact from the decision of an arbitrator in proceedings under the "Workmen's Compensation Act." *Hod-*

dinott v. *Newton, Chambers & Co.*(1), at page 68; *George* v. *Glasgow Coal Co.*(2); *Clover, Clayton & Co.* v. *Hughes*(3). Where, instead of proceeding under that Act, a plaintiff brings an action to recover damages independently of it and the court in which the action is tried finds him not entitled to recover in such action, but, nevertheless, entitled to compensation under the provisions of the statute, although it dismisses the action, the court, if the plaintiff so elects, may proceed to assess such compensation and its certificate of the compensation awarded "shall have the force and effect of an award under this Act." (Section 2, sub-section 4.) If the trial judge had found the plaintiff entitled to compensation under the statute and had assessed such compensation his findings of fact would, in my opinion, be non-appealable, as are similar findings of an arbitrator made in a proceeding taken under the other provisions of the statute. Otherwise a plaintiff obtaining an award of compensation in this manner, although his recovery is absolutely the same, would be subject to an appeal essentially different from that given to the defendant where the plaintiff has proceeded and recovered compensation under the other provisions of the statute. I think the legislature did not intend that there should be such different rights of appeal under the same Act where the recoveries are substantially the same.

I am, therefore, of the opinion that the full effect intended by the legislature can be given to the provision that a certificate under sub-section 4, of section 2, "shall have the force and effect of an award under

(1) [1901] A.C. 49. (2) [1909] A.C. 123.
(3) [1910] A.C. 242.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Anglin J.

this Act," only by holding that where a plaintiff has obtained such a certificate the defendant's right of appeal is precisely the same as he would have had if there had been an award in his favour under the other provisions of the statute and questions of law had been dealt with by the judge on a submission by the arbitrator. This limited right of appeal appears to be given by section 4 of the second schedule "in any case where (the judge) himself settles the matter." The right to compensation being purely statutory, the limited right of appeal specially conferred excludes any right of appeal, which might otherwise exist under legislation of general application.

Should there be a broader right of appeal where, instead of awarding compensation, the judge has found the plaintiff disentitled to recover by reason of serious and wilful misconduct? Had proceedings been taken under the other provisions of the statute there could not have been an appeal upon any question of fact. Where the trial judge, having found that there is no liability independently of the "Workmen's Compensation Act," also holds that there is no liability under that Act, the proceeding is not expressly within the terms of sub-section 4, of section 2, of the statute and the concluding provision as to the force and effect of a certificate of compensation may not be strictly applicable. Nevertheless, in dealing with the plaintiff's claim under the "Workmen's Compensation Act" and determining the question of the defendants' liability, the functions of the trial judge, in my opinion, were much the same as if there had been no action and he had been acting as an arbitrator in proceedings instituted in the first instance under the "Workmen's Compensation Act,"

except that it was superfluous for him to formally state questions of law involved for submission to himself, and for purposes of appeal he must be deemed to have dealt with such questions as if they had been so submitted. To hold otherwise, would, I think, be contrary to the spirit and the scope of the entire statute. *Hoddinott* v. *Newton, Chambers & Co.* (1), at page 59, *per* Lord Shand. This is a "case where (the judge) himself settles the matter." (Section 4, Schedule 2.) The right of appeal under this provision is expressly confined to "any question of law" and is the same appeal which is given where the judge deals with a question of law submitted for his decision by an arbitrator acting under the statute. There is, in my opinion, no other right of appeal. I, therefore, think that the defendants' right of appeal from the judgment of Morrison J. was confined to questions of law, or of mixed law and fact, and that the British Columbia Court of Appeal erred in dealing with this case as if the appeal were from a trial judge whose findings and inferences of fact were open to review.

Upon a perusal of the record I am unable to say that there was not some evidence upon which an arbitrator might reasonably base a finding that the plaintiff's husband had been guilty of wilful misconduct to which his injury was solely attributable. He was engaged on the morning of the day on which he was killed. That he had then been forbidden to use the elevator is abundantly proved. Whether the prohibition was absolute, or only "until he was acquainted with it" may be open to question. There is evidence in support of either view. If the prohibition was un-

(1) [1901] A.C. 49.

1910

BRITISH COLUMBIA SUGAR REFINING CO. v. GRANICK.

Anglin J.

qualified, the finding that Granick deliberately disobeyed it can scarcely be challenged. If it was qualified, Granick's silent acquiescence in the direction given him affords some evidence of his inexperience. He was again told by his companion, Morgan, in the course of the morning "to leave the elevator alone." His work kept him off the elevator. His duty was "to open and shut trap doors." Only five minutes before the accident occurred he was directed by Morgan to use a stairway, although his destination would have been reached more directly by using the elevator. From these facts taken in conjunction with the circumstances of the accident itself, assuming that the burden rested on the defendants of shewing that Granick's unfitness to operate the elevator continued up to the moment of the accident, I think a jury might reasonably infer that, notwithstanding its simplicity, he was not yet "acquainted with" the elevator and was, therefore, still subject to the prohibition against its use. That he was injured while attempting to use it seems sufficiently clear. I, therefore, think there was some reasonable evidence upon which a finding that the death of Granick was due to his own wilful misconduct might be based. Upon the weight of that evidence it is not within the province of an appellate tribunal to pass.

Neither am I prepared to hold that deliberate disobedience to a lawful instruction given by his employer involving danger to his life is not serious misconduct on the part of the workman. *George* v. *Glasgow Coal Co.*(1), at page 129 — if indeed this "question purely of fact" be open to review on appeal (*ibid.*, at page 128). This is not a case merely of

(1) [1909] A.C. 123.

disobedience to a regulation of an employer designed to promote economy in the use of motive power or some convenience of management. *Johnson* v. *Marshall Sons & Co., Ltd.*(1). It is a case of the breach of an express direction of which the subject-matter "touches life and limb." *George* v. *Glasgow Coal Co.*(2), at page 130.

I am, therefore, with great respect, of the opinion that this appeal should be allowed with costs, the judgment of the Court of Appeal vacated with costs and that of Morrison J. restored.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Tiffin.*
Solicitors for the respondent: *Burns & Walkem.*

(1) [1906] A.C. 409.
(2) [1909] A.C. 123.