1910
*Oct. 24.
*Nov. 2.

JOHN LONGMORE (PLAINTIFF) ..... APPELLANT;

AND

THE J. D. McARTHUR COMPANY AND J. D. McARTHUR (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Negligence—Dangerous works—Joint tortfeasors—Judgment against one of several persons responsible for damages—Bar to action.*

A proprietor or principal contractor undertaking works in the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected.

Failure to discharge such duty makes the proprietor and his contractor, or the contractor and his sub-contractor, as the case may be, equally liable as joint tortfeasors for resultant injury.

A judgment for damages sustained in consequence of any such injury against one of such joint tortfeasors is a bar to a subsequent action therefor against another.

Judgment appealed from (19 Man. R. 641) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J., at the trial, by which the plaintiff's action was dismissed with costs.

The defendants sublet a portion of their contract for the construction of a line of railway. In the execution of the work the sub-contractors made use of dynamite for the purpose of blasting rock excavations and,

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

(1) 19 Man. R. 641.

1910

LONGMORE v. J. D. MCARTHUR CO.

in this process the plaintiff sustained personal injury for which, in an action against them for damages, he recovered judgment, issued execution and, on the levy, the sheriff returned a writ of execution *nulla bona,* the result being that the judgment against the sub-contractors remained unsatisfied. Subsequently the plaintiff brought action against the present defendants to recover damages for the same injuries and, at the trial, his action was dismissed. This decision was affirmed by the judgment from which the appeal is now asserted.

The question at issue on the appeal sufficiently appear from the judgments now reported.

*A. C. Galt K.C.* for the appellant.

*Ewart K.C.* for the respondents.

THE CHIEF JUSTICE.—This appeal involves the simple point as to whether or not a judgment against one of several joint tortfeasors is a bar to an action against the others, it being admitted that the injury complained of in both actions and the cause of such injury are identical. The facts are fully set forth in the judgment of the trial judge, Chief Justice Mathers, which judgment was affirmed by the Court of Appeal for Manitoba, and I would dismiss this appeal for the reasons given in that judgment.

GIROUARD J.—I agree that this appeal should be dismissed with costs.

DAVIES J.—For the reasons given by Chief Justice Mathers in delivering judgment in the Court of King's Bench dismissing the action, and which judg-

1910

LONGMORE v. J. D. MCARTHUR CO.

Idington J.

ment was concurred in by the Court of Appeal, I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—This is an action brought by appellant against contractors for injuries caused to him by the negligence of a sub-contractor in the execution of a work requiring the use of explosives of a highly dangerous character in a place and under such circumstances that the subletting could not in law be held to have the effect of discharging the obligation to others from the observance of a duty to see that the said work was done with due care.

The appellant claims that the contractors and sub-contractors cannot be held, by reason of the negligence complained of, to have been joint tort-feasors.

He claims each to have been severally liable. So is each tort-feasor in any case where a joint tort has been committed.

The negligent execution of the work is the basis of the right of action and all implicated therein are jointly liable.

It is admitted in the stated case that "the injury complained of in both actions and the cause of such injury are identical."

It is clear also that the legal duty out of which springs the obligation to use that due care which would have avoided the cause of such injury is one and only one and not necessarily to be accomplished by the hands of either contractor or sub-contractor. It seems clear error to say that a declaration could not be properly framed alleging the duty as joint and the responsibility joint and ending with a prayer for relief against them jointly.

It is idle to allege that because the evidence relative to the part each had taken of necessity must be different can make any difference in the legal substance of the cause of action or legal consequences thereof.

In every case of joint tort the identity of and relative parts taken by each defendant and the connective evidence shewing how each of them is to be held jointly liable with the other, clearly needs different statements or pieces of evidence much of which may be given as to one without naming the other.

I assume as admitted each was liable, and pass no opinion upon the question of whether the contractor in fact fell within the class of cases wherein he cannot free himself from liability by means of a sub-contract.

I assume that to have been so as common ground between the parties.

I think the appeal must be dismissed with costs.

ANGLIN J.—The plaintiff appeals from the judgment of the Court of Appeal for Manitoba affirming the judgment of Mathers C.J., dismissing this action on the ground that the defendants, principal contractors, were joint tort-feasors with their sub-contractors against whom the plaintiff recovered judgment in a former action.

In support of his contention that the cause of action against the sub-contractors differs from that against the principal contractors, Mr. Galt ingeniously urged that while in the former action it was not, in the present action it is, necessary for the plaintiff to aver that the work, which the sub-contractors were engaged to perform, was necessarily attended with risk.

The negligence in respect of which the plaintiff re-

1910

LONGMORE v. J. D. MCARTHUR CO.

Anglin J.

covered in his action against the sub-contractors admittedly gave him a cause of action against the defendants as well. That is the case only because that negligence consisted in failure to take the care called for by what was in the circumstances the inherently dangerous nature of the work. The moment this fact is stated the identity of the plaintiff's cause of action against both the principal contractors and their sub-contractors seems to me to be established.

In order to prove his charge of negligence against either he must establish breach of a duty owing to him to take care; that duty *ex hypothesi* in each case alike arises out of and depends upon the fact that the very work which the sub-contractors were engaged to do was necessarily attended with risk; therefore in both cases an allegation of actionable negligence implies and involves the averment that the work was inherently dangerous and that it for that reason cast upon the defendants, whether contractors or sub-contractors, the duty to take precautions which they omitted and which, if taken, would have prevented injury to the plaintiff. It is apparent that although a formal and explicit statement of the inherently dangerous character of the work may have been unnecessary in the action against the sub-contractors it was so only because this averment was implied in the charge that they were negligent or in the allegation that it was their duty to take the omitted precautions.

Another ingenious suggestion is that the duty of the sub-contractors was themselves to take due care, whereas that of the principal contractors was to see that the sub-contractors took such care and therefore that the cause of action against the former differs from that against the latter. It is only necessary to point out that the same distinction exists in fact, if

not in theory, between the responsibility of the master and that of the servant — between the duty of the principal and that of the agent. Yet where such a tort as is here complained of has been committed by a servant or agent, that the master or the principal respectively is jointly liable, and in fact a joint tort-feasor with his servant or agent admits of no doubt. While a sub-contractor is not, even in carrying out work necessarily attended with risk, the *alter ego* of his principal contractor so as to make the latter liable for collateral negligence of the former, as he would be if the relation between them were that of master and servant, on the other hand where the work undertaken by a sub-contractor involves a duty on the part of the contractor from responsibility for the performance of which he cannot escape by delegation, the sub-contractor is in regard to that duty so identified with the principal contractor that his failure to perform it is the failure of the principal contractor himself. *Quoad* that duty he is in fact the *alter ego* of the principal contractor.

In my opinion the present defendants and their sub-contractors were joint tort-feasors against whom the plaintiff has an identical cause of action and his judgment recovered against the sub-contractors is a complete answer to this action.

The appeal therefore fails and should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Tupper, Galt, Tupper, Minty & McTavish.*

Solicitors for the respondents: *Fisher, Wilson, Battram & Hamilton.*