THE ROYAL PAPER MILLS COMPANY (DEFENDANTS) ..... } APPELLANTS; 1907

*Oct. 1, 2.
*Nov. 5.

AND

MARION L. CAMERON (PLAINTIFF) .. RESPONDENT.

APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Negligence—Employer and employee—Dangerous machinery—Want of proper protection—Voluntary exposure—Findings of jury—Charge of judge—Assignment of facts—Practice—Assessment of damages.

An experienced master mechanic, who was familiar with the machinery in his charge and had instructions to take the necessary precautions for the protection of dangerous places, in attempting to perform some necessary work, lost his balance and fell upon an unprotected gearing which crushed him to death. In an action by his widow for damages, questions were submitted to the jury without objection by the parties and no objection was raised to the judge's charge, at the trial. The jury were not asked to specify the particular negligence which caused the injury and, by their answers, found that deceased was acting under the instruction and guidance of the company's officers, who were his superiors at the time of the accident; that he had control of the work to be done but had not full charge, control and management of the machinery generally; that there was fault on the part of the company, and that he had not unnecessarily or negligently asumed any risk.

Held, affirming the judgment appealed from, Davies J. dissenting, that as there was evidence from which the jury could reasonably draw inferences and come to these conclusions, as to the facts, and, as no objection was made to the questions put to them and to the charge of the judge, at the trial, their findings ought not to be interfered with on appeal.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal (Taschereau J. dissenting), by which the judgment in favour of

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

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the plaintiff entered by Hutchinson J., on the findings of the jury, at the trial, was affirmed with costs.

The plaintiff brought the action, in her own name and as tutrix to her two minor children, to recover damages from the company, appellants, in consequence of the death of her husband which was alleged to have been caused by their negligent omission to protect dangerous machinery in their paper mill, at East Angus, Que.

The material circumstances of the case are stated and the questions at issue on this appeal are discussed in the judgments now reported.

J. E. Martin K.C. and *Fraser K.C.* (*Howard* with them) for the appellants.

Lafleur K.C. and *Cate K.C.* for the respondent.

THE CHIEF JUSTICE.—The deceased Cameron, husband of the respondent, was employed by the appellants in their mill at East Angus, Que., as master mechanic continuously for over fifteen years previous to the happenings complained of.

On the 10th of January, 1905, Cameron was ordered, owing to a shortage of water, to disconnect one of the water-wheels and remove it from the wheel-pit, a work of some danger when carried out while the mill was in operation. This work had been done by Cameron many times during his long period of service and he had the choice of his assistants, etc., and was perfectly familiar with all the risks which he assumed. It was apparently his invariable practice to do some preliminary work such as to prepare ropes, blocks and other tackle required to lift the wheel

before shutting down the mill and thus save time. On the occasion in question he followed his usual custom, and after the preliminary work was almost completed, Cameron, in attempting to reach a rope being let down from the ceiling by one of his assistants, lost his balance, fell over on the shaft and thence was thrown on the rapidly revolving crown-gear and crushed to death.

The negligence complained of is that the crown-gear was improperly left uncovered and it is charged that if the defendants had done their duty in this respect the accident would not have happened. On the other hand the appellants allege that the deceased was an experienced, highly paid mechanic, who had complete control of all the machinery in the mill; that it was his duty to take such precautions as in his judgment might have been necessary to protect the machinery at this place; that he was familiar with the work in the doing of which he had the choice of his assistants; that it was within his power to stop the mill at any time, and that he negligently and unnecessarily assumed a risk which resulted in the accident.

The issues of fact were found by a jury on questions which were not objected to or complained of so far as the record shews, and no objection appears to have been made to the summing up, and in answer to these questions the jury found:

1st. That the deceased was acting under the instructions and guidance of officers of the company who were superior to him at the time of the accident;

2ndly. That while he had control as to the manner in which the work was to be done he had not full charge, control and management of the gearings, shafts and machinery generally;

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3rdly. That the death was due to the fault and negligence of the company (appellants) and that Cameron had not unnecessarily or negligently assumed any risk.

The jury should, in my opinion, in such a case as this have been asked specifically what the negligence of the plaintiffs was which caused the injury. But this was not apparently suggested by either party. On the facts as proved the jury came to the conclusion that negligence ought to be inferred and that all reasonable precautions had not been taken; *Metropolitan Railway. Co.* v. *Jackson*(1); *Mader* v. *Halifax Electric Tramway Co.*(2); and I am not prepared to say that the verdict is one which the jury viewing the whole of the evidence could not reasonably find. There was some evidence to justify it. In my opinion the law applicable is well expressed in Dal. Jur. Gén. 1884, 2, 89:

> Ainsi, il a été admis jusqu'à ce jour que le patron n'est pas responsable de l'accident survenu à son ouvrier quand celui-ci, *laissé maître de ses déterminations*, a entrepris, imprudemment et sans y être obligé, un travail dangereux, dans des conditions ou avec des moyens qui n'offrent pas de suffisantes garanties pour sa sécurité, ou lorsque le travail présentant des risques inévitables que l'ouvrier a dû prévoir, celui-ci vient à être blessé dans l'exécution par suite d'un cas fortuit ou de sa propre négligence. Les risques qu'il court en ces divers cas ne peuvent être couverts que par un contrat d'assurance; la responsabilité du patron ne saurait alors être invoquée, parce qu'il n'a commis aucune faute. (V. Jur. Gén., vo. "Ouvriers," nos. 93 et suiv.; 103 et suiv.; Aubry et Rau, Droit civil français, 4 édit. t. 4, par. 446, p. 755; Req. 15 nov., 1881, D.P. 83, l. 159; Req. 13 févr., 1882, D.P. 82, l. 419).

In view of the finding of the jury that there was no negligence on the part of Cameron, and that the gearings and shafts at the place where the accident occur-

(1) 3 App. Cas. 193.

(2) 37 Can. S.C.R. 94.

red were negligently left unguarded and in a dangerous condition by the company, we must conclude that possibly the employers did not do all their duty towards the deceased.

Dal. Jur. Gén. 1870, 3, 63. Under this *arrêt* there is the following note:

> Toutefois, cette règle ne doit pas être poussée à l'extrême; et dans l'arrêt précité, la cour de Metz ajoute avec raison: "A la vérité, la responsabilité du chef de l'usine est toujours engagée pour le cas où l'accident aurait été causé par sa faute, c'est-à-dire, s'il était prouvé qu'au danger inséparable de l'œuvre il eut ajouté une autre cause de danger résultant de son propre fait." Il faut aller plus loin, croyons-nous, et *imposer au patron, avec le présent jugement, l'obligation de recourir, pour atténuer ce danger, à toutes les précautions conseillées par la pratique et par la science.* A cet égard, le patron ne doit pas s'en rapporter à l'usage, ni attendre que ces précautions soient déclarées obligatoires par des règlements. C'est ce qu'ont décidé un arrêt de la cour de Paris du 12 mai, 1866, et un jugement du tribunal de Mulhouse du 18 janv., 1867, reproduits l'un et l'autre Jur. gén., *v.* "Ouvriers," no. 96.

Some reference was made to insurance received by respondent. I would adopt the rule laid down in *Grand Trunk Railway Co.* v. *Jennings*(1), at page 803.

There is authority for the opinion expressed by Mr. Justice Mathieu in the Court of Review, that the amount of the insurance should not have been deducted from the amount of the damages. *Grand Trunk Railway Co.* v. *Beckett*(2); Laurent, vol. 20, No. 580. But that question is not before us in this appeal.

GIROUARD J. agreed that the appeal should be dismissed with costs.

(1) 13 App. Cas. 800.

(2) 16 Can. S.C.R. 713.

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DAVIES J. (dissenting).—If the decision of this case rested solely upon the question as to whether or not the deceased, who was the master mechanic of the appellants' paper mills, was the "author of his own wrong," and whether his death was occasioned by his own fault, negligence and unnecessary assumption of risk, in reaching out as he did to catch the rope depending from the floor above, I should have felt great diffidence in dissenting from the view which prevailed with the majority of the court, supported as it is by the finding of the jury and the judgment of the majority of the court below.

In the view I take of the case, however, it is not necessary for me to argue the point at length because I am of the opinion that the deceased came to his death by his own fault and negligence in failing to carry out the explicit instructions given to him by the general manager of the defendants' mills. These instructions were given to Cameron by the general manager at a time when the former was the master mechanic of the paper mill in which he afterwards met his death. They were given to him after an accident had happened to one of the workmen employed in one of the appellants' mills adjoining that of which Cameron was the master mechanic. They were given to him personally by the general manager of the company's mills in the presence of the company's secretary and were to the effect

> that he was to go over all the machinery in the mill and make everything safe.

The instructions are sworn to specifically by the general manager and by the secretary. They stand uncontradicted and the only possible doubt which

could be raised regarding them was suggested by Mr. Lafleur as arising out of a single answer, said to be of doubtful meaning, given by the general manager to a question put to him in cross-examination. I think the answer referred to, when read in connection with the witness's other answers, means that while the witness could not swear to every identical word he used in giving the instructions, he did instruct him clearly and definitely to go over the machinery and see that everything was made safe. But Mr. Palmer's evidence, the general secretary, unattacked and uncontradicted, makes everything relating to those instructions plain and clear. The attention of the jury does not seem to have been specifically directed, as it ought to have been, to this point, nor was any question asked them concerning it.

I think the case comes within the principle of the decision of this court in the case of *Davidson* v. *Stuart* (1), where it was held, as I think properly, that there was no breach of duty on the part of defendant towards deceased, who had undertaken to remedy the very defects which caused his death and the failure to discover them or provide against them must be attributed to him.

At the worst there should be a new trial in order that this crucial point might be submitted to and passed upon by the jury.

I would, therefore, allow the appeal.

IDINGTON J.—The appellants have been condemned by the Superior Court in Quebec to pay damages caused by their neglect to safeguard their machinery

(1) 34 Can. S.C.R. 215.

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whereby the husband of the plaintiff, now respondent, met his death, whilst in the employment of the appellants as a master mechanic.

The Court of Review confirmed this judgment, and hence this appeal.

The case was tried with a jury and all their findings of fact are against the appellants.

It is not, I think, seriously contended at this stage, that the machinery was properly safeguarded as required by "The Quebec Factories Act" (1) which contains the following general provision:

> 3021. The industrial establishments mentioned in the preceding article must be built and kept in such manner as to secure the safety of all employed in them; and, in those which contain mechanical apparatus, the machinery, mechanism, gearing, tools and engines shall be so placed and kept as to afford every possible security for the employees.

As has been pointed out by my brother Girouard, in more than one case, section 3053(*a*) of the same Act which is as follows:

> 3053(*a*). The provisions of the civil laws of this province, concerning the responsibility of the employer towards his employees, are in no manner considered as being modified or changed by the provisions of this Act,

may reduce this section 3021 to being part of a police regulation.

Nevertheless, this section 3021 may yet, as Mr. Lafleur argued, be an embodiment of the law which bound appellants in their relations with the deceased in the absence of an express contracting out of the law.

Without deciding that or going quite as far as the

(1) As amended by 57 Vict. ch. 30, sec. 1.

last words of section 3021, that is "to afford every possible security for the employees" and keeping well within what I gather from the decisions in Quebec to be the jurisprudence of that province on the subject, I think it was fairly open to the jury to find as they have done, in this case, that leaving the machinery in question without being safeguarded, either by hand-rail or by covering, as suggested by some of the witnesses, was a fault within the meaning of the article 1053 of the Civil Code.

It seems to me impossible to hold that the law in Quebec in this regard, as laid down in many cases, was complied with by the appellants. It seems equally impossible to me, to hold, in this case, that if the safeguarding required—I do not say by the statute just cited, but within the comprehensive language of the Code—had been observed, that the accident in question could have happened.

It is said, however, that the deceased, by virtue of his employment as a master mechanic, had cast upon him the duty of providing that safeguarding required.

It seems to me that this contention is quite unfounded. There is not implied in the words "master mechanic" any such duty. Nor is there in the evidence of those witnesses attempting to define his duties or to give a history of his conduct in such employment anything to permit us to infer that such duty was cast upon him.

The design of the proprietors in the whole planning and construction of their mills evidently was to have the machinery in question exposed.

When the deceased was employed as master mechanic, it was to run and superintend the running of the machinery thus intentionally designed, and not to

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re-construct, as was evidently needed—at least in part—or to add to the structural arrangements he thus found completed.

It cannot be said that the word "repairs," even if he had much wider authority in that behalf than I think he had, could be extended to cover such additional expense in a mill that was new when he came to it to discharge the duties assigned him.

It is said, however, that at one time, just after an accident, six or seven years before the one now in question, the deceased was told to see that all steps needed to safeguard the machinery should be taken.

The evidence of this is, to my mind, most unsatisfactory.

Was anything done in pursuance of such direction? It would seem not. Was any explanation ever asked, any report ever requested, any further regard had to it, by him who is alleged to have given such loose sort of directions as sworn to? It seems not. Surely, he could not have imagined his mill was perfect, and if he did not, he, in default of hearing anything or seeing anything done, would surely have reverted again to the subject. And yet, he never breathes another word, so far as I can see, on the subject, and cannot tell us what language he used so that we may judge the true import of it.

The new manager in charge, when the accident now in question occurred, had gone through the form of re-engaging each employee, including deceased, and I think it may well be that this new engagement put an end in law to all that had preceded it.

The jury, however, have, I think, rightly found against the contention and thus put an end to it as far as we are concerned, unless we meddle in a way this

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court has repeatedly refused to do as in the case of *The George Matthews Co.* v. *Bouchard*(1), and go far beyond what it did in the case of *Dominion Cartridge Co.* v. *McArthur*(2), when its interference with a jury's verdict was set aside by the Privy Council.

Mere knowledge by the employed of the conditions, unless coupled with something more, will not of itself relieve the employer.

The appellants claim, however, that because the deceased was engaged at the time of the accident in that which was, as the jury have found, wholly entrusted to him, he must be held to have assumed the risk or at all events, contributed to his own destruction in such a way as to deprive his widow of any right in law to complain.

The order was given him to disconnect a waterwheel.

There seems a confusion of ideas in the argument at this stage. The appellants' counsel allege he should have stopped the mill. No one pretends he was going to execute this order without stopping the mill. No one pretends in giving evidence, whatever counsel may argue, that he would have acted properly in stopping the mill whilst he was engaged in the mere preliminary work of getting things ready to execute this order. It would have been most improper for him to have stopped the mill at any time during these preparations up to the moment before the accident, when as he expressed it,

> we won't attempt to do any more before the wheel is stopped, before the wheel is closed.

Even if he should have stopped the mill whilst so engaged, the preparatory work was successfully ac-

(1) 28 Can. S.C.R. 580. (2) 31 Can. S.C.R. 392; [1905] A.C. 72.

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complished and no evil results flowed therefrom or from anything authorized by the deceased to be done in that regard.

One of the men, on a floor above deceased, for some reason, I cannot quite clearly understand, just at this juncture, let a rope drop down and it seemed in danger of going into the machinery. The man was not told by the deceased to do this and he, evidently fearing some one blundered, reached out to grasp the rope and save ill results. In his effort, he tried to do what a taller man could have done successfully, but proved beyond him and for want of a hand rail or cover protecting the place, he stepped to destruction.

The impulsive act was natural and in line of his duty which was, amongst other things, to avert injury to the machinery or those about it. It was not a wise thing to do. He erred in judgment. Was he negligent in doing it? Fidelity to his employers was the basis of his act. I am not surprised that the jury have concluded he was not negligent. I will not disturb their finding and help to impose upon men similarly situated a legal duty to sacrifice others and take care of themselves, without an effort to save.

Some question was raised as to the form of the question put to the jury, as to whether the death of the late John E. Cameron was due to the fault and negligence of the company defendant.

It was alleged that the question was a mixed one of law and of fact and improper for the jury to be called on to answer.

It is not a model to be followed, but as there was only one kind of negligence imputed to the defendants by the plaintiffs, and it is to be presumed, in the absence of any objection to the learned trial judge's

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charge, that, as to the element of law involved in the question, he properly directed the jury and they, thus guided, dealt with the facts only.

Moreover, no objection so far as can be seen, was taken by the defendants at the proper time to the form of question.

It would never do to have in such a state of things trials and verdicts set aside on such a ground alone.

We must remember that for centuries juries had, when confined to a general verdict properly directed as to the law, to deal with the law and the facts in much more complex cases and issues than the very simple one here.

At the trial everybody seems to have been satisfied with the charge, the verdict, and the judgment, and no one objected to the charge or objects now, nor did they to the verdict, until they appealed.

I think the appeal should be dismissed with costs.

MACLENNAN J. agreed to dismiss the appeal with costs.

DUFF J.—I agree that, as regards the form in which the issues of fact were submitted to the jury, no question is before us. The sole point, consequently, is whether the appellant company has successfully impugned the verdict as against the weight of evidence. On this point I agree with the reasoning of the learned Chief Justice and have nothing to add to it.

Appeal dismissed with costs.

Solicitors for the appellants: *Hurd, Fraser, Macdonald & Rugg.*

Solicitors for the respondent: *Cate, Wells & White.*