In the Privy Council.

No. 85 of 1914.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN

THE TORONTO POWER COMPANY, LIMITED (Defendants) *Appellants*,

AND

KATE PASKWAN ... ... (Plaintiff) *Respondent*.

CASE FOR THE APPELLANTS.

CASE FOR THE RESPONDENT.

RECORD OF PROCEEDINGS.

CHARLES RUSSELL & CO.,
37 NORFOLK STREET, STRAND, W.C.,
Solicitors for (Defendants) Appellants.

BLAKE & REDDEN,
17, VICTORIA STREET, S.W.,
Solicitors for (Plaintiff) Respondent.

20, 1915

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On Appeal from the Appellate Division of the Supreme Court of Ontario.

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THE TORONTO POWER COMPANY, LIMITED.
(Defendants) APPELLANTS,

AND

KATE PASKWAN,
(Plaintiff) RESPONDENT.

Appellants' Case

CHARLES RUSSELL & Co.,
37 Norfolk Street, Strand, London, W.C.,
For Appellants.

PRINTED BY SATURDAY NIGHT PRESS,
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(Plaintiff) RESPONDENT.

APPELLANTS' CASE.

1. This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario, dated the 5th day of February, 1914, confirming the judgment of the Honourable Mr. Justice Kelly, whereby he directed judgment to be entered in favor of the respondent at common law for the sum of $6,000.00 (six thousand dollars). Rec., p. 135 Rec., p. 13

2. The question involved in this appeal is the right of the respondent to recover damages at common law against the appellants for the death of her husband, John Paskwan, who was killed while in the employment of the appellant company, on the 8th day of February, 1913, while in the discharge of his duty as a rigger.

3. The appellant company was incorporated by Letters Patent of the Province of Ontario, dated the 20th day of March, 1908, and on the 16th day of April, 1908, they acquired a ninety-nine year lease of the property of the Electrical Development Company of Ontario, a company generating electrical energy by water power on the banks of the Niagara River, in the Province of Ontario, and were operating the said property as lessees at the time of the happening of the accident hereinafter referred to. Rec., p. 59, l. 5.

4. The works and appliances, apparatus and machinery of the Electrical Development Company of Ontario were designed by and erected under the supervision of F. S. Pearson, of the Pearson Engineering Corporation of New York, United States of America. Mr. Pearson having an international reputation as an electrical engineer. The Toronto Power Company Rec., p. 59, l. 14. Rec., p. 59, l. 21.

in taking possession of the property of the Electrical Development Company made no changes in the appliances from that time up till the happening of the accident.

Rec., p. 59, l. 28.

5. The general manager and directors of the Toronto Power Company are not themselves practical men, and at the time of the accident they had placed in charge of the works at Niagara Falls Mr. F. S. Clark as chief engineer, Mr. Burrows electrical engineer, and Mr. Morris F. McCarthy as master mechanic, and these three men carried on the mechanical operations of the plant, and the general manager and Board of Directors were at all times governed by their advice and recommendation, subject always to the right to obtain advice from Mr. F. S. Pearson, the consulting engineer for the company.

Rec., p. 59, l. 37.
Rec., p. 60, l. 9.
Rec., p. 60, l. 28.
Rec., p. 60, l. 38.

6. On the 8th of February, 1913, one John Paskwan was employed by the master mechanic as a rigger, and while in the discharge of his duties was killed by the falling of a block from the crane operating over the forebay at the appellant company's plant.

ec., p. 13, l. 23.
ec., p. 42, l. 25.

7. On the 5th of May, 1913, his widow, Kate Paskwan, the respondent herein, commenced an action against the appellant company on behalf of herself and two infant step-daughters to recover damages against the appellant company, alleging negligence against the boss rigger, Sheppard, in relation to certain directions which he gave in regard to the raising and lowering of the block and tackle on the crane; alleging negligence against the appellant company in failing to provide a signalman to direct the operations of the crane and in failing to equip the crane with certain automatic devices for stopping the drum before the block of the pulley came in contact with the drum. Also alleging that the crane man was negligent, that the master mechanic was negligent, and that the system was defective.

ec., p. 6,

8. The action came on for trial before Honourable Mr. Justice Kelly and a jury at the town of St. Catharines, Ontario, on the 14th day of October, 1913, when at the conclusion of the evidence, and after charging the jury, his Lordship submitted certain questions to them which the jury answered as follows:

ec., p. 11, l. 4.

1. Was the death of deceased, John Paskwan, caused by negligence, or was it a mere accident?

ec., p. 129, l. 18.

Answer—Negligence.

2. Was the casualty (or accident) caused by the negligence of defendants, or of any person or persons in the employ of the defendants?

Answer—Yes.

3. If so, state fully and clearly whose negligence it was, and what were the act or acts, or omission or omissions, which caused or brought about the accident?

Answer—The defendant company were negligent through their authorized employees, namely: Through their master mechanic for failing to instal proper safety appliances and to employ a competent

signalman. Through their foreman rigger for failing to give proper attention to the descent of the large hook, and so leave the craneman free to watch the small block. Through the craneman for neglecting to stop the small hook in its proper place.

4. At what amount do you assess the damages?

Answer—(a) Under the Workmen's Compensation Act $3,000. (b) At common law $6,000.

9. On the 27th day of October, 1913, Honourable Mr. Justice Kelly gave judgment in favor of the plaintiff at common law for the sum of $6,000. The appellant company appealed from this judgment to the Appellate Division of the Supreme Court of Ontario, and the appeal came on for hearing on the 21st day of January, 1914, judgment being delivered on the 5th day of February, 1914, dismissing the appellant company's appeal with costs. Rec., p. 132. Rec., p. 133. Rec., p. 134

10. In order to understand the contention of the appellant company it is necessary to give a short description of the premises on which the accident happened. The accident happened on what is known as the forebay, being a long building on the river side of the company's plant. The building is about 500 feet long, and 40 or 50 feet high and about 40 feet wide. It is separated from the main building by a heavy brick wall, and along this brick wall is a cement floor about 12 feet wide, and beyond that is the mill race, or canal. Along the wall are gates protected by gratings, through which the water runs down into the turbines, by which means the electric energy is generated. Over the forebay is a travelling crane which operates from one end of the house to the other. The hoisting apparatus travels across the house at right angles. From the crane are suspended two hooks. Rec., p. 14, l. 32. Rec., p. 14, l. 40. Rec., p. 15, l. 1. Rec., p. 15, l. 18. Rec., p. 15, l. 2.

The larger one is capable of lifting 50 tons, and moves comparatively slowly. The smaller is capable of raising 10 tons, and moves with greater rapidity. These hooks are hoisted by steel cables wound upon drums. On the day of the accident Paskwan was working at some stop logs placed across the entrance to the penstocks in the forebay. He and other men had placed some cables around these stop logs, when the crane, which was at the far end of the building from where Paskwan was working, was signalled by the boss rigger to come to where the stop logs were for the purpose of hoisting them. The foreman, or boss rigger, in charge of the gang who were working on the stop logs, signalled to the man in the cage operating the electric crane his desire to use the larger hook, and in accordance with the signal the man in the cage proceeded to lower the larger hook, and at the same time to raise the smaller hook, which he had been using a few minutes before. The man in the cage had a clear and untrammelled view, not only of the crane itself, but of the operations being carried on, the hoisting apparatus being only some 35 feet from the floor of the building, but owing to the negligence of the man in charge of the crane in failing to stop the smaller hook he allowed it to come in contact with the drum, with the result Rec., p. 31, l. 43. Rec., p. 32, l. 6. Rec., p. 33, l. 4. Rec., p. 33, l. 39. Rec., p. 53, l. 22. Rec., p. 35, l. 2.

that the strain on the cable was too great, and it broke. The hook falling struck Paskwan on the head, killing him.

11. As already set forth, the plaintiff contended in the first place that the foreman, Sheppard, was negligent in the carrying on of the work; that the craneman, William Hartary, was negligent in his operation of the crane; that the company was negligent in failing to provide a safety device which might have prevented the accident, and that the company was negligent in failing to have a signalman, in addition to the foreman, to warn the man in the crane in regard to the position of the hooks while the same were being raised or lowered. The jury found that the company, through their master mechanic, was negligent in failing to install the proper safety appliances, through their foreman rigger for failing to give proper attention to the descent of the large hook, through their craneman for neglecting to stop the small hook. And upon those findings the learned trial judge directed judgment to be entered for the plaintiff at common law. The appellant company admits that the accident was due to the failure of the craneman to properly operate the two hooks, and they concur in the jury's findings in that respect, but they submit with great respect that there is no evidence to justify the jury's findings in regard to the alleged negligence of the foreman rigger, because the craneman was in a much better position to see what was going on than he was, and it would be manifestly absurd for two men to attempt to regulate the running of the hooks when both were in the clear view of the one man whose sole duty it was to control them. The appellants also contend that there is no evidence to justify the jury's findings that there was negligence on the part of the master mechanic in failing to install protective devices, and even if this were so there would be no negligence on the part of the company itself, because there has been no finding of imcompetence by the jury on the part of the master mechanic, or any of the other employees, although the learned trial judge was specifically asked to submit the question to the jury as to whether the company did employ competent men to carry on the undertaking, which question he declined to put, and upon the evidence there is no contradiction, and there can be no doubt that the men employed were competent and capable of performing the duties entrusted to them.

Rec., p. 7, l. 5.
Rec., p. 7, l. 1.
Rec., p. 6, l. 31.
Rec., p. 129.
Rec., p. 132.
Rec., p. 53, l. 24.
Rec., p. 128, l. 15.

12. The situation, therefore, as far as the appellant company are concerned is this: They leased premises which were modern and up-to-date in every respect. Not being practical men themselves, they placed the mechanical part of the business in charge of two engineers and a master mechanic, giving them full authority to carry on the business in the most approved and up-to-date fashion. The competency of the men selected to perform these duties is not questioned. These men engaged the foreman, who had charge of the gang of riggers where Paskwan was employed. His competency is not questioned. The man in charge of operating the crane was spoken of most highly, and his competency is not questioned. And the only suggested act of negligence on the part of the company is the failure to install the protective appliances on the crane. The engineers and master me-

chanic had authority to do this if they deemed it advisable, but after due consideration they came to the conclusion that these devices not being always reliable and satisfactory, that they preferred to rely on the man operating the crane. And if this can be considered negligence, then it is respectfully submitted it is not the negligence of the company, but the negligence of a fellow-employee, and Paskwan having chosen to serve a company whose operations are directed by the master mechanic and engineers employed by the company, must accept the risks which are incident to mistakes which may be made by them in the carrying on of the business. And there can be no liability at common law, so far as the company themselves are concerned. Rec., p. 60, l. 32. Rec., p. 73, l. 14.

13. The plaintiff sought to prove her case by means of three so-called experts. The first expert called, George A. Dion, himself a rigger, and at the time he gave evidence in the position of a discharged employee of the appellant company, and also the plaintiff in an action against them, claiming damages for injuries which he alleged he had sustained while in their employ. His qualifications for dealing with the matters in dispute as an expert were that he had worked as a rigger, doing structural steel and iron work for an American company for two and one-half years when they were erecting new piers at the New York docks. He then worked at outdoor work for the Ontario Power Company for a year and two months erecting steel towers for carrying the transmission lines, and subsequently with the Hydraulic Power Company for a year and a half as a rigger inside their power-house. He had never run a crane, he knew nothing about their construction, he was not an expert mechanic, and his whole experience seems to have been that of a rigger or on general construction work. Rec., p. 28, l. 35. Rec., p. 30, l. 31.

14. Dion was present when the accident happened to Paskwan, and he describes the condition of affairs leading up to Paskwan's death, in regard to which there is no dispute. When giving his evidence as an expert he gave it as his opinion that the company should have employed a signalman, his idea being that if the crane operator had been sitting in his cage watching the signalman, who in turn would be watching the large hook coming down and the small hook going up, that the accident would not have happened, although he was forced to admit that the man in the crane had a very much better opportunity of observing the position of the two hooks than any man on the platform would have. The appellant company always use a signalman when either of the hooks are carrying a load, but when they give an order to the man in the cage to lower one hook and raise the other preparatory to putting a load on one hook or the other they always leave it to the man in the cage to carry this out without interference from anyone down below. Rec., p. 26, l. 22. Rec., p. 70, l. 23.

15. The witness Dion suggested the use of a limit switch, which he describes as a worm screw on the shafting, which only allows the hook to come within a certain number of feet of the drum, a device in the nature of a safety appliance which, in his opinion, might have prevented the accident in this case, but he himself had no experience as to how these appliances Rec., p. 31, l. 1.

Rec., p. 47, l. 37. worked, but had only seen them, and knew that such devices were in use by certain people.

16. The next expert called by the plaintiff was a man named Cattley. Rec., p. 47, l. 30. He also was a discharged employee of the appellant company, having worked for them as a rigger. His qualifications as an expert witness were that he had served an apprenticeship as an electrical worker of two and one-Rec., p. 47, l. 20. half years, and had served five and one-half years as a soldier in the American army, being an electrician in a signal corps. He had also occupied a position for three months with the Edison Company and with a chemical Rec., p. 47, l. 8. company in Niagara Falls, and subsequently came to the appellant company as a rigger.

17. He also speaks of the use of a signalman in crane operations, but Rec., p. 52, l. 45. he admits that the duty of a foreman is to instruct the signalman, and the signalman in turn instructs the crane operator, and he, like the witness Rec., p. 53, l. 22. Dion, admits that the crane operator was in a better position to watch the position of the hooks than anybody else about the place.

Rec., p. 53, l. 28. 18. This witness also speaks of safety devices on cranes and electric hoists, but frankly admits that he has only seen the devices, and is not sufficiently expert to know how they work.

19. The third witness called by the plaintiff was A. C. Biernstible. He was a crane operator with about eight years' experience. He only knows Rec., p. 55, l. 9. of one safety device for placing on the cranes, which is called a limit switch. It consists of a gear wheel on the drum; the shaft runs out of that, and the screw on the drum turns around, and when it gets on the end of the shaft it strikes the carbon and breaks the circuit; that will stop the motor. He Rec., p. 55, l. 27. had heard of another device called a circuit breaker, but he did not understand it, and had never worked it. There were no such devices on the Rec., p. 57, l. 30. cranes which he had operated, but he had seen them on other cranes, and in his experience the operator was always made responsible when he got instructions from the foreman or boss rigger to raise or lower the hooks. He admits that the order which was given in this case was a perfectly pro-Rec., p. 57, l. 16. per one, and also admits that the man who was responsible for the carrying out of that order was the operator himself, and that a signalman would have been of very little use.

20. The result of the evidence offered on behalf of the plaintiff was this: They attempted to prove that the use of a signalman or the use of a safety appliance on the crane of the appellant company would have prevented the accident. They have attempted to prove these points by witnesses who were practically in the same grade of employment as the deceased Paskwan, two of whom were admittedly prejudiced against the company. As far as the use of a signalman is concerned the only suggestion they had to offer was that a signalman might have stood on the platform of the forebay and kept his eyes on the hooks which were being lowered and raised, and the operator in the crane would keep his eyes on the signalman, but they were all forced to admit that the operator himself was in a

much better position to see the position of the hooks and to know when to shut off his power to prevent the hooks going higher or lower than they were intended to go.

21. Their evidence on the question of the use of a safety device is very meagre. None of them knew as to its method of operation; none of them knew as to whether they were reliable or not; none of them had ever actually used them, but they said that they had known of their being used at different places. But the only crane operator that was called, although he had operated a crane for eight years, had never used one at all. The competency of the crane operator was not in any way attacked. In fact he was spoken of as being an extremely competent man with an excellent reputation. The only charge against the boss rigger was that after having given the order for the lowering and raising of the hooks, he turned his back and went on with the work that he was doing, chopping ice off the stop blocks. No other suggestion of negligence is mentioned in the evidence in the plaintiff's case.

22. The appellant company answered this evidence in this way: The secretary of the company was called to prove that the company had leased the premises from the Electrical Development Company; that the premises and appliances had not been altered since the appellant company took them over; that they were originally designed by F. S. Pearson, a man with an international reputation as an engineer; that neither the general manager nor the directors were practical men; and that they had put a chief engineer, a master mechanic and a chief electrician in charge of the operation of the plant, and neither the ability nor the competency of these three officials is in any way challenged. Rec., p. 58, l. 30. Rec., p. 59, l. 21.

23. They also called the master mechanic and the boss rigger to explain why they had not used a signalman in a case of this kind, their explanation being that a signalman was only used where the hooks were carrying a load. If either of the hooks had a load on which had to be placed in a certain position in any part of the company's works and owing to the position of the crane operator he could not see exactly where anything should be placed, then he would be guided by the movement of the hand of the signalman, who usually was the boss rigger, and would tell him when to stop and when to turn on his electric current. But where it was simply a question of adjusting the position of his hooks for the purpose of using one rather than the other, that was a matter which was left entirely in his own discretion. Rec., p. 70, l. 23. Rec., p. 70, l. 31.

24. Then in regard to the question of an electrical device. The master mechanic explained that some years ago they had a similar accident to the one in question in this case, fortunately without any evil results, and they then considered the advisability of putting some safety appliance on the drums which would prevent such an accident as this happening, and in order to make himself familiar with the use of these safety appliances he visited all the large concerns operating at Niagara Falls, both on the Cana- Rec., p. 82, l. 31.

dian and the American side, to see if any of these devices were in use, and what value the different operators attached to same. The result of his enquiries was that while these appliances were in use in some plants, they had not proved satisfactory, and they found that the crane operator was too prone to rely on the device, which did not always work, rather than on himself, to carry out the operations with his crane, so that in some of the large works these devices which had been installed had been subsequently removed. After consultation with the chief engineer and the electrical engineer it was decided that these devices should not be put in.

Rec., p. 82, l. 12.

25. Two experts were also called: John Schwartz, the mechanical superintendent of the Niagara Falls Power Company, and A. H. Fagan, a foreman of the Canada Foundry Company, the largest manufacturing concern of electrical hoists and cranes in Canada. These men gave it as their opinion that so far no electrical or mechanical device had been invented which was absolutely sure to act, and further stated that in their opinion it would be unwise to divide the responsibility between the employee and a faulty appliance, and that the best practice was to throw the responsibility upon the cage operator in adjusting his hooks.

Rec., p. 86, l. 41.

Rec., p. 129.

26. Notwithstanding this evidence the jury found that the company were negligent in failing to instal a proper safety appliance and to employ a signalman, and the failure of their foreman rigger to give attention to the descent of the large hook, leaving the craneman free to watch the small hook, which, of course, means that the craneman would have had to watch both the small hook and the foreman rigger, and in the craneman neglecting to stop the small hook at its proper place.

27. The contention of the appellant company is that in the first place the findings of the jury are not justified by the evidence, and in the second place that even on the jury's findings there can be no liability at common law.

28. In the first place, it is contended that even though the jury's findings of negligence against the crane operator Hartary are justified by the evidence, Hartary and the deceased Paskwan were fellow-workmen, and the company would not be responsible in common law for the negligent acts of Hartary, provided he was a competent operator, as it was proved beyond all question that he was. It is further contended that the doctrine of common employment would also extend to the master mechanic McCarthy, and to the boss rigger Sheppard. Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. The gang of riggers who were working under the direction of the boss rigger, and whose instructions they were bound to follow, were all fellow-laborers under a common master. McCarthy was responsible for the mechanism of the crane; the crane had to be employed in doing the work. That McCarthy was competent is not questioned. There was no duty upon the directors or the general manager personally to supervise the mechanism of the crane. They discharged their duties to the employees when they procured the ser-

vices of a competent master mechanic, and from the time that Paskwan began to work he was a fellow-workman of McCarthy's.

29. In what respect then had the appellant company failed in their duties to their employee at common law? It is not disputed that the appellant company exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish it. In the event of their not carrying on the work themselves they thereby fulfilled their full duty to their employees. It would have been criminal for the directors or the general manager themselves to have attempted to interfere in the carrying on of the mechanical or electrical part of the company's business, and if the findings of the jury are justified by the evidence that the accident was due to the negligence of either the master mechanic McCarthy or the boss rigger Sheppard, or the crane operator Hartary, then the clear answer is that notwithstanding the difference in the grade of employment they were all fellow-workmen under a common master, and the doctrine of common employment is a bar to the plaintiff's right to recover at common law.

31. The appellants respectfully submit that the judgment in review is erroneous, and ought to be reversed, for the following among other reasons:

1. That the findings of the jury are perverse and are not warranted by the evidence.

2. That upon the jury's findings there can be no liability at common law.

3. That upon the evidence the appellant company had done everything that was required of them at common law, and that even if the jury's findings are justified by the evidence, the judgment pronounced against them is erroneous.

D. L. McCarthy,
Of Counsel for Appellants.

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