

20,1915

In the Privy Council

No. 85 of 1914.

Appeal from the Judgment of the Appellate Division
of the Supreme Court of Ontario

BETWEEN :

KATE PASKWAN,

(Plaintiff) RESPONDENT.

AND

THE TORONTO POWER COMPANY, LIMITED.

(Defendants) APPELLANTS.

Factum of Respondent

KING & KING,

Solicitors for Respondent.

MCCARTHY, OSLER, HOSKIN & HARCOURT,

Solicitors for Appellants.

PRINTED BY SATURDAY NIGHT PRESS,
Corner Richmond and Sheppard Streets, Toronto.

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10 THE TORONTO POWER COMPANY, LIMITED,

(Defendants) APPELLANTS.

FACTUM OF RESPONDENT.

PART ONE.

1. This action was brought by the respondent, the widow of John Paskwan, against the appellants, his employers, to recover damages for injuries causing the death of the said John Paskwan by reason of the negligence of the appellants. The respondent claimed damages at common law and in the alternative under the Workmen's Compensation for Injuries Act.

20 2. The trial took place before the Honourable Mr. Justice Kelly, with a jury, at St. Catharines, on the 14th day of October, A.D. 1913. Upon the answers of the jury to certain questions submitted to them judgment was reserved, and on the 27th day of October, A.D. 1913, was directed to be entered on behalf of the respondent for damages at common law in the sum of \$6,000.00 and costs.

3. The appellant 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 was reserved. On the

5th day of February, 1914, judgment was given unanimously dismissing the appeal, and from this judgment the appellant now appeals to this court.

4. The material facts are as follows:

John Paskwan was killed on the first day of his employment with the appellants. He was employed as a rigger in their electric power plant at Niagara Falls, and was engaged in a section of the building known as the forebay. This section was about 300 feet long and about forty feet wide. An electrically operated crane is there erected. The crane travels from end to end of the forebay at a height of about thirty-five feet above the floor of the building. The carriage of the crane travels across the forebay at right angles. From the crane was suspended two blocks, the larger of which is capable of lifting fifty tons and moves comparatively slowly. The smaller was capable of raising ten tons, and travels with greater rapidity. The crane is operated by a man in a cage suspended below. 10

Paskwan was working on some stop logs placed at the entrance to the penstocks in the forebay. He and other men had placed cables around the stop logs, when on the signal of the foreman rigger the crane came from the other end of the forebay for the purpose of hoisting the stop logs. The foreman then signalled for the larger block to be lowered, and at the same time the smaller one to be hoisted so as to get it out of the way. 20

Owing to the absence of a safety device which would have stopped the rotation of the hoisting drum the smaller block was carried up to the drum and being unable to pass through, such strain was placed upon the cable that it broke, and the block fell, striking Paskwan and killing him.

The allegations of negligence were:

(a) That at common law the appellants had failed to discharge their duty of providing in the first instance proper safety appliances and in failing to employ a competent signalman.

(b) That in the alternative under the Workmen's Compensation for Injuries Act the appellants' foreman was negligent in directing the operation of raising one block and the lowering of the other to be performed at the same time, and in failing to give proper attention to the smaller one, and the operator of the crane was negligent in failing to stop the smaller block in its proper place. 30

The questions submitted to the jury and their answers are as follows: (Case, page 129—ll. 16-40.) "(1) Was the death of the deceased, John Paskwan, caused by negligence, or was it a mere accident?"

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? 40

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 larger 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 do you assess the damages?

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

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PART TWO.

The respondent submits that the judgment directed to be entered for her by the learned trial judge, and unanimously confirmed by the Appellate Division of the Supreme Court of Ontario is right, and that this appeal should be dismissed with costs for the reasons hereinafter stated:

(a) The appellants had a fair trial of the action.

(b) The findings of the jury are warranted by the evidence, and could not properly have been disturbed.

(c) Upon these findings the appellants have not discharged their common law duty of providing proper safety appliances and a competent signalman, and they are therefore liable at common law to the respondent.

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(d) The damages are reasonable.

PART THREE.

It is submitted that the duty of the master at common law is:

(A) To provide in the first instance safe and sufficient machinery and appliances and a safe arrangement so as to carry on his operations without unnecessary risks to his employees.

(B) To employ competent servants sufficient in number for the work in hand.

As to "A":

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The respondent contends a safety device could have been readily installed which would have stopped the rotation of the hoisting drum before the block reached a position likely to cause danger.

The drum operates by electric current, and the device suggested was a cut out mechanism by which the current was broken as soon as the cable was wound upon the drum to the extent necessary to bring the block to a safe distance from contact with the drum.

Case:—

Page 25—ll. 23-40.

Page 43—ll. 18-46.

Page 44—ll. 1-10.

Page 35—ll. 4-28.

Page 58—ll. 10-20.

The absence of such device was the cause of the accident.

Case:—

Page 25—ll. 23-40.

10 Page 44—ll. 25-28.

It was shown, and not contradicted, that devices of this kind have been successfully installed and are in use in precisely similar operations.

Case:—

Page 44—ll. 11-15.

Page 44—ll. 27-30.

Page 53—ll. 28-44.

Page 54—ll. 5-21.

Page 55—ll. 29-32.

20 The appellants' objection that such device would not bring the drum to rest, but that the drum by its own momentum after the circuit was broken might bring about the disaster attempted to be guarded against was met by showing that this drum was equipped with brakes which were automatically applied, and the momentum checked the moment the circuit was broken.

Case:—

Page 113—ll. 10-35.

Page 114—ll. 1-35.

30 The appellants contend that previous to this accident their engineer was instructed to look into the advisability of this safety device and reported against it.

It is submitted there is nothing more in this contention than is stated by Mr. Justice Riddell in the judgment of the Appellant Division: (Case: page 137—ll. 15) "A defective piece of machinery which certain witnesses swore may be perfected and rendered safe by a simple and easily understood device and the defendants' witnesses disputing the efficiency of such device. There is nothing that a jury should not be allowed to pass upon."

40 And it is further submitted that the appellants cannot, as they contend, get rid of this duty to supply proper appliances by delegating the duty to some one in their service.

As to "B":

The evidence shows that under a proper system the appellants should provide a competent signalman whose sole duty would be to supervise the raising and lowering of the blocks.

In the appellants' service the foreman rigger attempted to discharge the duties of signalman in addition to his many other duties, and was unable to give this duty his proper attention.

Case:—

Page 20—ll. 29-30.

Page 41—ll. 44.

Page 42—ll. 1-10.

Page 45—ll. 27-40.

Page 55—ll. 33-45.

In other similar undertakings it was the practice to employ such signalman. 10

Case:—

Page 23—ll. 11-45.

Page 44—ll. 31-45.

The appellants' failure to employ such signalman was the cause of the accident.

Case:—

Page 24—ll. 1-20.

Page 46—ll. 10-18.

In the alternative the respondent submits that she is entitled to succeed upon the findings of the jury under the Workmen's Compensation for Injuries Act, and that appellants' appeal against their liability under this Act should be dismissed. 20

R.S.O., 1914, chapter 156, section 3, sub-sections (b), (c) and (e).

THOMAS N. PHELAN,
Of Counsel.

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