Privy Council Appeal No. 85 of 1914.

The Toronto Power Company, Limited - *Appellants,*

v.

Kate Paskwan - - - - - - *Respondent.*

FROM

THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL 1915.

Present at the Hearing:

LORD ATKINSON. SIR GEORGE FARWELL.
LORD PARMOOR. SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario confirming the judgment of Mr. Justice Kelly whereby he directed judgment to be entered, after a trial before a jury, in favour of the respondent for the sum of six thousand dollars.

The respondent is the widow of one John Paskwan, who was killed on the 8th February 1913 by an accident on the works of the appellant company, in whose service he then was, having entered their employment on that day. The respondent brought the action on behalf of herself, and two children of hers, stepchildren of the deceased, who were alleged to be dependent upon him, and she alleged that the appellants were liable both at common law and under the Workmen's Compensation

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Act, which corresponds to the English Employers Liability Acts. The jury at the trial answered certain questions put to them by the learned judge and found 3,000 dollars as the damages if the liability was the restricted liability of the Workmen's Compensation Act, and 6,000 dollars if the defendants were liable at common law, and the learned judge afterwards entered judgment for the 6,000 dollars.

The deceased man was working as a rigger and had been preparing some logs for hoisting by a travelling crane, and was waiting to hitch on the logs when he was killed by the falling of a block from the crane. The cause of the block falling was the overwinding of the drum which hoisted the chain on which the block was. It was not contended in the Supreme Court of Ontario or before this Board that there was not a clear case proved of negligence by fellow workmen giving a cause of action under the Workmen's Compensation Act, and the only question on the appeal is as to the liability of the appellants at common law. The suggested grounds for holding them liable are that they ought to have provided some kind of safety device which would have prevented the overwinding, or that in default of such a device they ought to have employed a signalman to give warning to the crane operator when he ought to stop winding. The respondent called several witnesses who spoke to two different kinds of safety apparatus which they had seen in use at other works, and it could hardly be said that at the end of the plaintiff's case, there had not been made a case which must have been left to the jury. Indeed no submission on this point seems to have been made at that stage. The defendants' answer to this case was that the directors of the company

did not take any personal part in the superintendence of the mechanical work of the company but employed a competent man as mechanical superintendent. It appeared from the defendants' evidence that on an occasion some two years before the accident to Paskwan the hook had fallen from overwinding in the seme way, and that the defendants' superintendent had then visited other works, including those mentioned by the plaintiff's witnesses, to see the safety devices there in use, and that he came to the conclusion that they were not satisfactory, and accordingly no safety appliance was installed ; as to the signalman, the defendants' case was that the operator had a clear view and could see as well as any signalman could have done. The learned judge left three questions to the jury in addition to the question of the amount of damages.

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

To which the jury answered "Negligence."

(2) Was the casualty or accident caused by the negligence of the 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 authorised 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 to leave the craneman to watch the small block.

Through the craneman for neglecting to stop the small hook at its proper place.

On these findings the learned judge entered judgment for the larger of the two sums found by the jury as on a common law liability.

The summing up of the learned judge is not now complained of nor is it contended that if there was evidence which ought to have been left to the jury their finding ought to be set aside as perverse or one which the jury could not reasonably find. The contention of the defendants is that they performed their duty by leaving the selection and care of the plant to a competent man, and they rely mainly on a well-known passage in the judgment of Lord Cairns in Wilson *v.* Merry, L.R. 1. H. of L. (Scotch), at page 332. Reliance was also placed on Cribb *v.* Kynoch, Ltd., 1907, 2 K.B. 548, and Young *v.* Hoffmann Manufacturing Co., 1907, 2 K.B. 646. It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant as distinguished from its subsequent care is especially within the province of the master rather than of his servants.

In Cribb *v.* Kynoch and Young *v.* Hoffmann the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper

plant stands on rather a different footing. It is true that the master does not warrant the plant and if there is a latent defect which could not be detected by reasonable examination, or if in the course of working, plant becomes defective and the defect is not brought to the master's knowledge and could not by reasonable diligence have been discovered by him, the master is not liable, and, further, a master is not bound at once to adopt all the latest improvements and appliances. It is a question of fact in each case, was it in the circumstances a want of reasonable care not to have adopted them, *see* per Willes J. in Hanson *v.* Lancashire and Yorkshire Railway Co., 20 W.R. 297. Here the nature of the accident must be borne in mind. Accidents from overwinding are by no means uncommon with all kinds of hoisting machinery. They arise from negligence of the operator, but it is a kind of negligence so likely to occur that a jury may well consider that safety appliances should be provided. In mine shafts it is in this country compulsory to do so. In the present case the jury may well have thought that even if the particular appliances spoken of by the plaintiff's witnesses, and inspected by the defendants' manager after the former accident, were not entirely satisfactory, still there could have been no real difficulty in installing a safety device, and that ought to have been done. Then, is it an answer that a master whose attention has been called by a previous occurrence to the danger from overwinding should take the advice either of his manager or any other person whom he presumes to be more skilled than himself, and on such advice do nothing? The jury might perhaps under such circumstances have found that there was no want of reasonable care and only an error of judgment,

but this jury have not done so. It is enough to say, as both the Judge who tried the case and the Judges on Appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned judge could not have ruled that as a matter of law the answer of the defendants was necessarily conclusive in their favour. It is unnecessary to go so far as Mr. Justice Middleton did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable. Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

THE TORONTO POWER COMPANY, LIMITED,

v.

KATE PASKWAN.

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