ROBERT COWANS, AND OTHERS (DEFENDANTS).. ..... } APPELLANTS;

AND

JOHN MARSHALL (PLAINTIFF) .....RESPONDENT.

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*Oct. 14, 15.

*Dec. 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Negligence—Master and servant—Common fault—Jury trial—Assignment of facts—Arts. 353 & 414 C. C. P.—Art. 427 C. P. Q.—Inconsistent findings—Misdirection—New trial—Pleading.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to show the breach of a duty owed him by, and inconsistent with due diligence on the part of, the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1) affirming the judgment of the Superior Court sitting in Review (2) at Montreal, which granted the plaintiff's motion for judgment in his favour for four thousand dollars damages with interest and costs, and rejected the defendants' motion for a new trial.

A statement of the case appears in the judgment now reported.

Lajoie for the appellants. The declaration charges the defendant with negligence under three specific heads, and that an explosion was thereby occasioned whereby the plaintiff lost the sight of both his eyes

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) Q. R. 6 Q. B. 534.

(2) Q. R. 10 S. C. 316.

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for life. The pleas were that the risk was voluntarily undertaken by the plaintiff in the nature of the work for which he had engaged and which he was accustomed to perform in the course of his trade as a mechanic, that he met with the accident through his own imprudence and direct disobedience of orders, and denial of any fault by defendants. The jury rendered a general verdict of negligence and special verdicts of no negligence on the facts in issue, except on the principal fact of the case, whether certain oakum had become wet through the negligence of appellants, to which they did not answer either affirmatively or negatively. See Thompson on Trials, ss. 2670, 2681; *Faulknor* v. *Clifford* (1); *McQuay* v. *Eastwood* (2).

The appellants ask for a new trial on grounds of misdirection by the trial judge in his address to the jury, and that the verdict is contrary to evidence, defective and incomplete. Art. 413 C. C. P.; Co. Litt. 227*a*. The trial judge's charge was in such terms as to lead the jury away from a proper appreciation of the special facts and direct their attention only to the general question of negligence, and his advice to the jury was erroneous as to facts and as to law. The verdict is exorbitant and unjust.

Trenholme Q. C. and *Ryan* for the respondent. Two courts and a jury have found the prime fact of this case in the same sense, and this court should decline to re-open questions of fact so settled by both courts below: *Bellechasse Election Case* (3); *Warner* v. *Murray* (4); *Black* v. *Walker* (5); *Allen* v. *Quebec Warehouse Co* (6). In a matter of procedure like this, the judgment of the lower courts are not properly reviewable by this court. *Gladwin* v. *Cummings* (7); *Grant* v. *Ætna Ins. Co.* (8);

(1) 17 Ont. P. R. 363.
(2) 12 O. R. 402.
(3) 5 Can. S. C. R. 91.
(4) 16 Can. S. C. R. 720.
(5) Cass. Dig. 2 ed. 769.
(6) 12 App. Cas. 101.
(7) Cass. Dig. 2 ed. 427.
(8) 15 Moo. P. C. 516.

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Dawson v. *Union Bank* (1); *The Quebec Bank* v. *Maxham* (2). Appellate courts will not interfere unless the verdict is unreasonable and unsupported by evidence. Art. 501 C. P. Q.; *Metropolitan Railway Co.* v. *Wright* (3); *Paterson* v. *Wallace* (4). This case depends on the question of negligence or no negligence. All other questions are of a minor or subsidiary nature. *Brossard* v. *The Canada Life Insurance Co.* (5); *Cannon* v. *Huot* (6).

The jury, unable to find all the facts in favour of either party, made an application of the French doctrine of "*faute commune*," or comparative negligence. The court should uphold the jury. See remarks by Hall, J. rending the judgment of the court below (7), and cases cited in 28 Am. & Eng. Enc., pp. 386 and 419. The verdict is consistent and sufficient in form. The sub-divisions of the questions were not material to the main issues in this case. In Quebec the courts accept answers which are not affirmative or negative, if the facts to which they refer are merely upon subordinate issues. *Lambkin* v. *The South Eastern Railway Co.* (8); *The Royal Canadian Insurance Co.* v. *Roberge* (9). Negligence is a question of fact and not of law, and should be disposed of by the jury. The assignment of the fourth question went upon that assumption, and appellants acquiesced in that position by going to trial. *Cannon* v. *Huot* (6); *Brossard* v. *The Canada Life Assurance Co.* (5); *Tobin* v. *Murison* (10); *The Canadian Pacific Railway Co.* v. *Robinson* (11).

The issue as to contributory negligence in a jury trial is covered by a general question as to the defend-

(1) Cass. Dig. 2 ed. 429.
(2) 11 L. C. R. 97.
(3) 11 App. Cas. 152.
(4) 1 Macq. H. L. 748.
(5) M. L. R. 3 S. C. 388.
(6) 1 Q. L. R. 139.
(7) Q. R. 6 Q. B. pp. 543-544.
(8) 5 App. Cas. 352.
(9) Q. R 2 Q. B. 117.
(10) 5 Moo. P. C. 110.
(11) 19 Can. S. C. R. 292.

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ant's negligence, without its being necessary to ask whether the plaintiff also was negligent. *The Grand Trunk Railway Co.* v. *Godbout* (1). Weight should be accorded to a finding of negligence in a case of accident to an employee. *The Canadian Colored Cotton Co.* v. *Talbot* (2). See also *Chicago and Northwestern Railway Co.* v. *Dunleavy* (3) at page 143.

Instructions by the trial judge as to burden of proof are not regarded as of law, but merely as questions of practice. *Painchaud* v. *Bell* (4) at page 381. When the general verdict is for the plaintiff with special findings not inconsistent therewith, the judge may set aside the special findings and allow the general verdict to stand. *Monies* v. *Lynn* (5); *Roche* v. *Ladd* (6); *Billings Slate & Marble Co.* v. *Hanger* (7).

The court should interpret the verdict as a whole, and when ambiguities seem to exist choose that interpretation which is most consistent with the rest of the verdict, and the circumstances of the case. *Sheen* v. *Rickie* (8); *France* v. *White* (9); *Emmons* v. *Elderton* (10); *Kempe* v. *Crews* (11); *Goodhue* v. *Grand Trunk Railway Co.* (12); *Wilson* v. *Grand Trunk Railway Co.* (13); *Schneider* v. *Boissot* (14); *The "Alice"* v. *The "Rossita"* (15).

The judgment of the court was delivered by:

GWYNNE J.—The respondent instituted this action against the appellants for injuries sustained by him when employed as a machinist in the service of the

(1) 6 Q. L. R. 63.
(2) 27 Can. S. C. R. 198.
(3) 129 Ill. 132.
(4) 21 R. L. p. 370.
(5) 119 Mass. 273.
(6) 1 Allen (Mass.) 436.
(7) 62 Vt. 160.
(8) 5 M. & W. 175.
(9) 1 Man. & G. 731.
(10) 4 H. L. Cas. 624.
(11) Ld. Raym. 167.
(12) M. L. R. 3 S. C. 114.
(13) 5 Legal News 88.
(14) S. V. 78, 1, 412.
(15) L. R. 2 P. C. 214.

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defendants, caused, as he alleges, by the negligence of the defendants. In such an action it was necessary for the plaintiff to allege in his declaration the act or acts, whether of omission or commission, relied upon by him as the cause of the injury sustained by him, and that such act or acts constituted negligence of the defendants or of their servants for whom they were responsible. Accordingly in his declaration, after certain prefatory allegations to the effect that he had been employed to carry out the junction of the casing of a tank which the defendants were constructing in connection with the Montreal waterworks, and that he proceeded with the work inside the tank by bolting the iron work together, and that when the work was sufficiently advanced to be ready for the lead to be poured into the strip between the tank and the casing he applied to the defendants for two pounds of lead and that they only gave him one pound, which as the plaintiff alleges was insufficient, and that the defendants told the plaintiff to work upon the bolting of the sides of the junction at the outside, he then proceeds to allege the acts relied upon by him as the cause of the injury which happened to him, and the nature of the injury, as follows:

7. In obedience to such orders the plaintiff immediately began work on the outside, and while he was so employed the defendants without in any way warning the plaintiff sent other workmen to finish the pouring of the boiling lead on the unfinished part inside, although they and their managers knew that the plaintiff was working in an exposed position on the outside.

8. The person so sent to pour the lead on the inside began to do so, when some of the boiling lead so poured came into contact with part of the oakum filling which was in a wet condition owing to the negligence of the defendants, their managers and workmen, and also to the fact that the water had penetrated to it from the water gates constructed by the defendants at the head of the said tank, the said water gates being in a defective, improper and dangerous condition due to the unworkmanlike way in which they had been put in by the defendants.

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9. An explosion immediately occurred and the steam and lead therefrom in a moments time rushed through the apperture connecting the casing with the tank and struck the plaintiff's eyes before he could save himself.

10. After suffering excruciating pain and being confined to the hospital and to his house for a long time the plaintiff now finds himself blind in both eyes for life as a result of the said accident.

11. The said accident was in no way due to any act or omission on the part of the plaintiff, but was on the contrary due to the negligence of the defendants, their managers, and representatives.

12. The defendants were in particular negligent and blameable in three important respects, to wit:—

First, in not supplying the plaintiff with two pots of lead so as to finish the inside work, as he himself had requested them to do upon commencing that part of the work.

Secondly, in sending the plaintiff to work in an exposed place and in directing other persons to finish the work without informing him.

Thirdly, in allowing the oakum to be in a wet condition.

The plaintiff claimed fifteen thousand dollars.

The defendants in their pleas in substance denied that the explosion which was the cause of the injuries sustained by the plaintiff was occasioned by any negligence of theirs and averred that the plaintiff sustained the injuries of which he complains by reason of his own negligence and imprudence.

To this defence the plaintiff answered by denying that he sustained the injuries by any negligence of his own, and he re-asserted that, on the contrary, the said accident was wholly owing to the negligence of the defendants.

The trial took place upon questions submitted to the jury upon an assignment of facts under the provisions of arts. 353 and 414 C. C. P.

In consequence of the manner in which these questions were answered by the jury and for alleged misdirection in the charge of the learned judge before whom the case was tried, the defendants moved for a new trial which was refused by the Court of Review. They thereupon appealed to the Court of Queen's

Bench in Montreal, a majority of which court, the Chief Justice Sir Alexander Lacoste dissenting, dismissed the appeal. Hence the appeal to this court.

Concurring as we do in the dissentient judgment of the Chief Justice, which shows very clearly, as we think, that if the judgment of the majority of the Court of Appeal should prevail the statutory provisions contained in the Code of Civil Procedure of the province in relation to trial by jury would be wholly set aside, it might be quite sufficient for us to express our concurrence in that judgment, but the argument pressed very earnestly upon us by the learned counsel for the respondent calls for some few remarks The argument pressed upon us was that paragraph 11 of the declaration of the plaintiff above set out in full contained an averment of an independent cause of action which rendered all inquiry into the acts of negligence charged in the 8th paragraph and specially designated in the 12th paragraph wholly unnecessary and irrelevant, and that the effect of the plaintiff's answer pleaded to the defendants' pleas was that the plaintiff abandoned the particular acts alleged in the declaration as the acts of negligence complained of and rested wholly on the charge of negligence generally as contained in the 11th paragraph. This argument, if not based upon appears to be sanctioned by, the charge of the learned judge who tried the case to the jury, for he appears by it to have told the jury that the 4th question which is,

> was the said injury, loss of sight, pain and suffering caused by the negligence of the defendants, their managers or workmen ?

was the important question, and that if they should answer either affirmatively or negatively then that the 5th, 6th and 7th questions became absolutely unnecessary. However, as the questions were put, he submitted them to the jury, observing however that if he had

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prepared the questions he would have omitted them altogether. Now, from this contention that the 11th paragraph of the declaration contains an independent cause of action and that the plaintiff's answer to the defendants' pleas had the effect claimed, we must dissent wholly. The 11th paragraph, as is very plain from its terms and context, contains simply an allegation that the "said" accident, namely, the accident caused by the explosion mentioned in the 9th paragraph, which explosion was caused by the acts mentioned in the 8th paragraph, was in no way due to any negligence of the plaintiff, but was on the contrary due to the negligence of the defendants, which had already been charged in the 8th paragraph. This 11th paragraph in fact contains nothing more than a redundant repetition of the allegations in previous paragraphs—that the explosion was caused by the acts of negligence already alleged; it did not in any respect render it unnecessary for the plaintiff to prove in order to succeed in his action the particular acts of negligence relied upon by him as those which caused the explosion. Then in the 12th paragraph the plaintiff alleges three particular acts which he avers to be important and which he charges to have been acts of negligence of the defendants, one of which is mentioned in the 8th paragraph namely—"in allowing the oakum to be in a wet condition." Then as to the plaintiff's answer to the defendants' pleas it is simply a denial of the negligence imputed by the defendants' pleas to the plaintiff as the cause of the injuries he had sustained and a repetition of the allegations in the declaration that they were due to the negligence of the defendants. This mode of pleading is, in effect, simply equivalent to a "joinder of issue" pleaded by a plaintiff to a defendant's plea of like nature according to the form of pleading in use in the other provinces of the

Dominion. But the *principles* of pleading in an action of this nature must not be lost sight of and it has not been suggested as regards them, that there is any difference between the jurisprudence of the Province of Quebec and that of the other Provinces of the Dominion and of England, although there is a difference between their forms of pleading and in procedure, and in the effect of what is called contributory negligence.

It is an established principle that a plaintiff can succeed in an action only *secundum allegata et probata*, and that in an action like the present for negligence causing an injury to the plaintiff he must allege and prove facts sufficient to shew a duty owed by the defendant to the plaintiff and a breach of such duty, and that such breach of duty occasioned the injury complained of; affirmative proof of the facts relied upon as constituting the negligence complained of must be given by the plaintiff, and such facts must be inconsistent with due diligence on the part of the defendant, and therefore if the evidence should be equally consistent with the existence or non-existence of negligence the plaintiff cannot succeed. Bullen and Leake on Pleading p. 9 and precedents of declarations *passim*. *Cotton* v. *Wood* (1); *Hammack* v. *White* (2); *Montreal Rolling Mills* v. *Corcoran* (3). In *Wakelin* v. *London and South Western Railway Co.* (4), an action by the representatives of a deceased person alleged to have been killed by the negligence of the defendants, Lord Halsbury, L. C., says at page 44:

> It is incumbent on the plaintiff to establish by proof that her husband's death has been caused by some negligence of the defendants, and negligent act or some negligent omission to which the injury com-

(1) 8 C. B. N. S. 568.
(2) 11 C. B. N. S. 588.
(3) 26 Can. C.S.R. 595.
(4) 12 App. Cas. 41.

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plained of * * is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff, as with the denial of the defendants, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition.

In the same case, at page 47, Lord Watson held that it lay on the plaintiff to prove affirmatively some negligent act or omission on the part of the defendants or their servants which materially contributed to the injury complained of; that the burden of proof lies on the plaintiff does not admit of dispute, and he adds:

*Mere allegation or proof that the company were guilty of negligence is altogether irrelevant, * * * the plaintiff must allege and prove not merely that they were negligent but that their negligence caused or materially contributed to the injury.*

The case of *Montreal Rolling Mills* v. *Corcoran* (1), was decided upon the same principles recently in this court. Now in the case before us the plaintiff in his declaration alleges that the cause of the injury complained of was the explosion mentioned in the 9th paragraph. That this is an undoubted fact is not disputed. He also alleges that this explosion took place from the facts alleged in the 8th paragraph. These allegations and that charged in the 7th paragraph constituted the whole of the negligence complained of in the declaration and to the acts so charged as constituting the negligence complained of the plaintiff's action and his proof therein are confined. See the observations of Lord O'Hagan in *Metropolitan Railway Co.* v. *Jackson* (2), at page 202. It is to these matters that the question No. 5 in the assignment of facts was applied. That question is divided into four parts, as follows:

5th. Were the defendants negligent,
1st, In not furnishing plaintiff with two pots of lead?

(1) 26 Can. S. C. R. 595. (2) 3 App. Cas. 193.

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To which the jury answer that there was no evidence. As to this question it must be admitted that it was on an immaterial point for it could not be held that such neglect if it had been established in evidence is what the law regards an act which was a *cause* of the explosion. However, the jury have by their answer substantially found that this alleged act of omission was not established.

2ndly. In sending the plaintiff to work in an exposed place?

to which the jury answer that the place was "not considered exposed." Thus substantially also finding that the alleged act of negligence was not established.

3rdly. In directing others to finish the work of pouring lead into the joint inside unawares to the plaintiff?

to which the jury answer "No." They thus negative the negligence charged in that respect.

4thly. In allowing the hemp or oakum in filling the joint to be in a wet condition?

to which the jury answer "not wet when put in." Now the evidence showed that the immediate cause of the explosion was the wet condition in which the oakum was when the lead was poured in, and the answer of the jury to this question certainly wholly fails to find that such wet condition was attributable to any act of omission or of commission of the defendants or for which they are responsible, and that they were so responsible was the most material fact in the case for the plaintiff to establish; indeed, in view of the other answers of the jury to the 5th question, the sole point upon which the question of the liability of the defendants rested. The 6th, 7th and 8th questions related to that part of the defence which charged the accident to the plaintiff to be attributable to the plaintiff's own negligence and imprudence, and as to this the jury have by their answers to the questions

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submitted to them found that "to a certain extent" the accident was attributable to the plaintiff's own imprudence and want of care, and for this reason they have deducted from the total sum of $7,500 as the amount of plaintiff's damages the sum of $3,500. The result of all this appears to be that the jury have attributed to the plaintiff himself nearly half of the injury which he has suffered and they have failed to find that the defendants are guilty of the only act of negligence charged against them in the declaration and of which any evidence was offered *as constituting the cause of the explosion* which was the very gist of the matter in issue as affecting the defendants' liability; for these reasons we are of opinion that the judgment for the plaintiff cannot be sustained, and that the defendants' application for a new trial should have been granted. The appeal must therefore be allowed with costs in this court and also in the Court of Queen's Bench, and we order a new trial and without costs, as we are of opinion that the contention of the appellants that the learned judge's observations to the jury in relation to the 4th question and the matters upon which the learned judges directed them that that question turned, is well founded.

As the new Code of Civil Procedure, Art. 427 enables the judge presiding at a trial to add to strike out or amend any of the facts assigned to be submitted to the jury if he considers that by so doing a more perfect trial *of the issues* will be secured, it will no doubt be a subject of special consideration that the questions submitted to the jury shall be so framed as to avoid confusion and contradiction in the answers of the jury and to arrive at the truth of the cause of action which the plaintiff has affirmed and which the defendants have denied, namely, that the defendants are responsible for the explosion which is alleged

by the plaintiff to have caused him the injury of which he complains.

While juries naturally feel deep sympathy with the plaintiff, as indeed every one must do, for the very serious injury he has suffered, the defendants have a right to insist that they shall not be made responsible therefor unless their responsibility shall be established in accordance with the principles of law applicable to the case with which they are charged by the plaintiff in his declaration.

Appeal allowed with costs. New Trial granted without costs.

Solicitors for the appellants: *Bisaillon, Brouseau & Lajoie.*

Solicitors for the respondent: *Ryan & Jacobs.*