THE DOMINION IRON AND STEEL COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES DAY (PLAINTIFF)..... RESPONDENT.

1903
*Dec. 9, 10.

1904
*Feb. 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence — Employers Liability Act — Injury to servant — Proximate cause—R. S. N. S. (1900) *c.* 79.

D. was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher and had to be taken past an unused chute about 200 feet away supported by a post placed 7½ inches from the track. D. having loaded a car found that it failed to move as usual after unbraking and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started and he climbed up the steps at the side to get to the brake on top but was crushed between the car and the post. He could have got on the rear of the car instead of using the steps or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post but had done nothing to obviate it.

Held, reversing the judgment appealed from (36 N. S. Rep. 113) Davies and Killam JJ. dissenting, that D.'s own negligence was the cause of his injury and the company were not liable.

Held per Davies and Killam JJ. that the position of the post was a defect in the company's works under the Employers Liability Act which was evidence of negligence.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the verdict at the trial in favour of the plaintiff

The facts of the case are set out in the judgment of Mr. Justice Weatherbe, at the trial, as follows:

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 113.

1903

DOMINION IRON AND STEEL CO. v. DAY.

"Plaintiff was injured by being squeezed between a car on which he was brakesman and a post, alleged to be too near the track by reason of negligent construction.

"It was plaintiff's duty to move the car from the chute when it was filled, and when in motion to jump quickly on the rear end of the car and walk along to put down the brake, and while doing so he was struck by a post supporting an unused chute of the company.

"Plaintiff had climbed up and took the brake off, and, owing to some defect, the car would not start. Then he shook the car, which still could not be moved. He then came down to the foot-board and shoved back the rod connected with the brake. On going up the car started and, being unable to jump clear, he was crushed between the post and the side of the car.

"On warning the foreman of this post he said 'we will not bring any cars that way,' but owing to neglect in shunting cars on another track the mischief occurred.

"Plaintiff's entire body was squeezed in a 7½ inch space, and was injured, he says, 'right across the system.' The injury, he says, is so great that he may never get over it. He was unable to walk for 13 days after the injury. After, he was obliged to get an easier job. For 10 weeks he could only average four days a week. After a month and a half's rest he commenced to work again, but does not seem to be much better. He was going to meet two doctors for consultation when called to attend the court.

"He averaged a dollar and a half a day as wages when well, sometimes he got $1.75 a day.

"He applied to the official in charge of the quarry for damages, and two letters of Mr. Jennison are in evidence, in one of which he says the matter has been

referred to the head office at Sydney, where no doubt the matter will be considered.

"The defence pleaded, denying any negligence whatever on defendant's part and setting up contributory negligence. Defendants denied that plaintiff was injured and put him to the proof of everything;—though plaintiff had been for some time employed by the company, he had been but a short time at the work at which he was injured.

"Plaintiff called the 'walking boss' Stamper. He admits that the post was too close to the car and if he had built the chute, he would have given three feet of room instead of 7 or 8 inches.

"George Lawrence, under whom plaintiff worked, was called by the defence and I regard his evidence as corroborative of the manner in which the accident occurred. He also corroborated plaintiff as to his inability to do his usual work.

"Another brakesman was called Jesso who, on cross-examination, admitted that the steps on the side of the car which plaintiff used were generally used for the same purpose and are placed there to get up and down.

"Jennison, who was in charge of the quarry for defendant company, was also called for the defence. He started the construction of the plant but did not complete it. He says very suggestively that 'this particular part I did not construct, fortunately.' He does not know the width of the cars and whether they are wider than ordinary cars."

On the facts so found the learned judge gave judgment for the plaintiff and assessed the damages at $850 with costs. The company appealed to the court *in banco* which affirmed the judgment of the trial judge but reduced the damages to $600. From this judg-

1903

DOMINION IRON AND STEEL CO. v. DAY.

ment a further appeal was taken by the company to the Supreme Court of Canada.

Lovett for the appellants.

Harris K.C. for the respondents.

THE CHIEF JUSTICE.—I would allow this appeal and dismiss the respondent's action on the ground that, even if the company were negligent in allowing the post to remain so close to the track, yet the respondent by reasonable care and ordinary prudence could have avoided this accident.

As I read the evidence, if he had stepped off to the ground immediately on the car starting, he would not have been hurt. He is not merely guilty of contributory negligence but is the victim of his own carelessness. It is a case where it was perfectly in the power of the servant, by keeping his eyes open, to guard himself against a possible danger of which he was fully aware. If, by not doing so, he suffers injuries he must take the consequences of his own neglect. Without the respondent's negligence or stupidity this accident would never have happened.

The appeal is allowed with costs in this court and in the court *in banco*, and the action is dismissed with costs.

SEDGEWICK J. concurred with the Chief Justice.

DAVIES J. (dissenting).—For the reasons given by Mr. Justice Graham in delivering the unanimous judgment of the Supreme Court of Nova Scotia, to which I have not much to add, I am of the opinion that this appeal should be dismissed. The action was brought under The Employers Liability Act of Nova Scotia which is similar to that of Ontario. In his able

presentation of the case for the appellants, Mr. Lovett contended that there was no evidence of any negligence on the part of the defendants (appellants) "arising out of any defect in the condition or arrangement of the ways, works, machinery, buildings or premises connected with, intended for or used in the business of the employer." His argument was that the statutory negligence must be negligence *per se* in the condition or arrangement of the ways, etc. But I think the decided cases clearly show that the defects to which the statute refers are defects having regard to the use to which the ways or premises are to be applied or the mode or manner in which they are to be used. The use of the railway with the presence of the post complained of where it was might not be negligence under some circumstances and might be under others. *Walsh* v. *Whitely* (1); *Heske* v. *Samuelson* (2), the head note of which says:

The Employer's Liability Act, 1880—which gives a workman a right of action against his employer for personal injury by reason of a defect in the condition of the machinery used in the business of the employer—applies to the case where a machine, though not defective in its construction, was, *under the circumstances in which it was used, calculated to cause injury to those using it.*

As Lord Coleridge C.J. says:

If it was not in a proper condition for the purposes for which it was applied there was a defect in its condition within the meaning of the Act.

This decision was affirmed and followed by the Court of Appeal in *Cripps* v. *Judge* (3), and also in *Walsh* v. *Whiteley*, cited above, and has not so far as I have found been questioned. I am of opinion that in the circumstances of this case the user of the railway to load the cars with stone from the crusher with the post complained of and which caused the injury to

(1) 21 Q. B. D. 371. (2) 12 Q. B. D. 30.
(3) 13 Q. B. D. 583.

1904

DOMINION IRON AND STEEL CO. v. DAY.

Davies J.

the plaintiff, fixed where it was, brings the case within the meaning of the section.

The appellant further contended that the maxim *volenti non fit injuria* applied and that its application ousted the plaintiff's claim. But I think the evidence given as to the complaint made by the plaintiff to the manager or superintendent of the danger which the continued maintenance of the post in question would probably cause, and the assurances given to the plaintiff respecting it, constitute, apart from other considerations, a complete answer to that contention.

Mr. Beven in his work on Negligence, vol. 1, page 383, lays down the following as one of the three propositions which may be accepted as the result of the decided cases so far as they relate to the application of this maxim:

> When the master is under a statutory liability to take precautions in any particular work the presumption of law is, that as between the master and the workman the fact of the workman working in the absence of the statutory safeguards does not discharge the master from his liability to compensate the workman for injuries sustained through the master's neglect to provide the statutory safeguards; and this presumption can only be rebutted by clear proof of an undertaking of the employment by the workman with a knowledge of the risk involved and of the master's duty in respect thereof.

Adopting this as I do as a fair though possibly not exhaustive definition of the liability of the master under the conditions assumed, I fail to see where the evidence of any such understanding on the part of the plaintiff can be found.

The statutory safeguard in this case is of course the proper condition of the ways and premises of the defendants' railway for the purposes and under the circumstances in which they were being used at the time the plaintiff sustained his injuries. As I have already held this was defective, and the defect had

been brought expressly to the knowledge of the defendants and assurances given that it would be remedied.

The only other contention advanced by the defendants was that the plaintiff contributed by his own negligence to the injury he received. The case of *Ryan* v. *The Canada Southern Railway C.* (1) was cited in support of this contention. But that case was decided on the ground that the injury could not have happened if the deceased had not placed himself in the position to be injured by the switch stand and that he had not satisfactorily explained why he was there. The facts of the case are stated on page 746 of the report as follows:

> His position as brakesman should have been on top of the car, but for some reason or other, *of which there is no evidence*, he was on the side of the car holding on to the steps of the ladder, etc.

In the case at Bar there was, in my opinion, ample evidence giving satisfactory reasons why the plaintiff was on the side of the car when injured and the case relied upon has not, therefore, in my opinion, any relevance.

NESBITT J. concurred with the Chief Justice.

KILLAM J. (dissenting), agreed with Davies J.

Appeal allowed with costs.

Solicitor for the appellants: *W. H. Covert.*

Solicitor for the respondent: *John A. Macdonald.*

(1) 10 O. R. 745.