THE SAULT STE. MARIE PULP AND PAPER COMPANY (DEFENDANTS) ..... APPELLANTS;

1902

*Nov. 24,25.

*Dec. 12.

AND

HARRY MYERS AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS BY JOHN WILLIAM MYERS HIS FATHER AND NEXT FRIEND AND THE SAID JOHN WILLIAM MYERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Injury to workmen—Proximate cause—Ontario Factories Act.

A workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step ladder to get on a plank in front of the drier. The step ladder was movable and placed close to a revolving cog wheel. On returning from the drier on one occasion another workman, accidentally or intentionally, removed the ladder as he was about to step on it and before he could recover his balance his leg was caught in the cog wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded and the ladder fastened to the floor; and that the non-guarding and fastening constituted negligence on the part of the defendants.

Held, affirming the judgment of the Court of Appeal (3 Ont. L. R. 600), that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor for which the defandants were liable.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the verdict at the trial for the plaintiffs but reducing the damages.

* PRESENT :—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Mills JJ.

(1) 3 Ont. L. R. 600.

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The material facts sufficiently appear from the above head-note and are fully stated in the judgment of the Court on this Appeal.

Riddell K.C. and *Colville* for the appellants. The Factories Act does not require all machinery to be guarded, and at all events the step ladder was a sufficient guard to the wheel.

The fact that the ladder was movable was not negligence. *Willetts* v. *Watt & Co.* (1).

The direct cause of the accident was the active intervention of the truckman in removing the ladder. *Groves* v. *Lord Wimborne* (2).

The defendants not being guilty of the first act of negligence are not liable. *Daniels* v. *Potter* (3); *Bartlett* v. *Baker* (4); *Mangan* v. *Atterton* (5); and see *Mann* v. *Ward* (6).

Douglas K.C. for the respondents. This second Court of Appeal will not disturb the verdict which is justified by the evidence. *George Matthews Co.* v. *Bouchard* (7); *Grand Trunk Railway Co.* v. *Rainville* (8).

The removal of the ladder was not the direct cause of the accident. If the wheel had been properly guarded it would not have happened anyway. *Baddeley* v. *Earl Granville* (9); *Clark* v. *Chambers* (10), and cases there cited.

The judgment of the court was delivered by;

THE CHIEF JUSTICE.—This case originated in an action on behalf of the respondents, father and son, to recover damages for an injury sustained by the son

(1) [1892] 2 Q. B. 92.
(2) [1898] 2 Q. B. 402.
(3) 4 C. & P. 262.
(4) 3 H. & C. 153.
(5) 4 H. & C. 388.
(6) 8 Times L. R. 699.
(7) 28 Can. S. C. R. 580.
(8) 29 Can, S. C. R. 201.
(9) 19 Q. B. D. 423.
(10) 3 Q. B. D. 327.

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Harry, an infant under the age of twenty-one, owing, as they alleged in their statement of claim, to the negligence of the appellants and to their non-performance of a duty imposed upon them by the Ontario Factories Act. The facts may be summed up as follows:

The respondent, Harry Myers, was employed by the appellants in their pulp mill at the town of Sault Ste. Marie, and his duty under such employment was to attend to and take away the pulp from a machine in the said mill known as a press and drier, and in order to do this it was necessary for him to go up a step ladder from which he stepped on to a narrow plank in front of a large roller from which the pulp was to be taken away. The step ladder was placed by the appellants close to a large revolving cog wheel, part of the rim of which revolved between the top of the ladder and the plank, and it was necessary for the said workman to step over this revolving portion of the cog wheel in going to and returning from the plank. In descending from the platform it was necessary to hold on to one of the upright screws. In coming down from the press rolls the young man took hold of the upright screw (which was the one always used for the purpose by the employees) with his left hand, and was stepping from the end of the plank to the top of the step ladder with his right foot, but before his foot reached the top of the step ladder a truckman, also in the employment of the appellants, moved the step ladder away either accidentally or otherwise, and the respondent being unable to recover himself, the result was that his right leg was thrown between the spokes of the cog wheel and was broken, and subsequently had to be amputated.

The step ladder was the only means of access provided by the appellants for the workmen to get on and off the plank, and was used by the workmen in

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the position in which it was placed by the appellants and no other or better mode or means of access was provided, and the respondent, Harry Myers, was instructed to use the ladder, and to ascend and descend in the manner he adopted at the time of the accident.

The cog wheel was in no way guarded except by the ladder, which was light and frail and was not fastened to the floor or otherwise.

It is in evidence that the machine in question was dangerous, and could have been guarded as other machines of the same character in the same mill were guarded at the time of the accident, and if the machine in question had been so guarded the accident would clearly not have happened.

The case was tried before the Chief Justice of the Court of King's Bench and a jury.

The following are the questions which were submitted to the jury and their answers thereto:

1. Was the injury to the plaintiff, Harry Myers, caused by any negligence of the defendants? Yes. Or,

2. Was it caused by his own negligence and want of proper care and caution? No.

3. Was it caused by the negligence or improper conduct of a fellow-servant? Only to a certain extent, but if this wheel had been properly guarded and the ladder properly fastened to the floor the accident would not have happened.

4. If you find that the injury was caused by the negligence of the defendants wherein did such negligence consist? By in no way guarding the gear wheel and not fastening the ladder properly to the floor.

5. Was the machinery at which the plaintiff, Harry Myers, received his injury a dangerous part of mill gearing or machinery so that it ought to have been as far as practicable securely guarded? It was.

6. If so, was it as far as practicable securely guarded? It was not.

7. If you answer no to the last question, and if you also find that the injury to the plaintiff, Harry Myers, was in any way the result of negligence or improper conduct of a fellow servant, would the plaintiff, Harry Myers have received the particular injury which he complains of if the machinery had been as far as practicable securely

guarded, notwithstanding such negligence or improper conduct of the fellow servant? He would not.

8. At what sum do you assess the damages to the plaintiffs? Harry Myers, $4,000. To the father, $500.

Upon these findings judgment was entered for the said amounts. Upon appeal by the company the court upheld the said judgment, with the exception that the damages were reduced from $4,000 to $2,000 and from $500 to $100.

The company now appeal and the respondents cross-appeal from the reduction of the amount of the damages that the jury had awarded to them. As to this cross-appeal, we did not at the hearing call upon the company's counsel to answer his adversary's argument. As we then intimated, there is nothing in the case that would justify us in interfering with the judgment of the Court of Appeal which reduced the amount of the damages. The cross-appeal is therefore dismissed with costs.

As to the principal appeal, it should also be dismissed, in my opinion. The appellants base their principal defence to the action upon the ground that it was not the absence of a guard that caused the accident, or was the proximate cause of it, but that it was the act of the truckman, who by suddenly snatching away the steps had caused the plaintiff, Harry, to fall. They contend that where an independent cause, of a nature which could not have been anticipated, and without which the injury would not have occurred, has intervened between the defendant's negligence and the plaintiff's injuries, the defendant's negligence will be held too remote to warrant a recovery against him citing *Mangan* v. *Attertson* (1); *Hill* v. *New River Co.* (2); *Bartlett* v. *Baker* (3); *Daniels* v. *Potter* (4). That contention cannot prevail in this case. If a defendant

(1) 4 H. & C. 388.
(2) 9 B. & S. 303.
(3) 3 H. & C. 153.
(4) 4 C. & P. 262.

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is a wrong-doer without whose wrongdoing the plaintiff would not have been damaged, he cannot be heard to say that there is some other wrong-doer who contributed to the damage. Per Lord Bramwell in *Mills* v. *Armstrong*, (1). There is, it is true, no doubt that the accident in question would not have happened but for the act of the truckman taking away the steps, but it is as evident that, as found by the jury, it would not have happened had this cog wheel been securely guarded and the ladder properly fastened. Now it is expressly enacted by the *Ontario Factories Act* (2), that ;—

> In every factory (*a*) all dangerous parts of mill gearing, machinery, vats, pans, cauldrons, reservoirs, wheel-races, flumes, water channels, doors, openings in the floors or walls, bridges and all other like dangerous structures or places shall be as far as practicable securely guarded.

So that the appellants are proved to have committed a breach of a statutory duty by leaving this machinery not securely guarded and are therefore precluded from relying upon the doctrine of common employment raised by the fifth paragraph of their defence. The case of *Groves* v. *Lord Wimborne* (3) is in point. That was an action for damages for injury sustained by unguarded machinery. The plaintiff was a boy employed in the service of the defendant, working at a steam winch with revolving cog wheels. These cog wheels were dangerous to a person working the winch unless fenced, and they were not fenced. The plaintiff's right arm was caught by the cog wheels and injured. It was held that an action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing or guards to dangerous machinery imposed upon him by the Factory and Workshop Act,

(1) 12 P. D. 58 ; 13 App. Cas. 1. (2) R. S. O. [1897] ch. 256.
(3) [1898] 2 Q. B. 402.

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and that the defence of common employment is not applicable in a case where an injury has been caused to a servant by a breach of an absolute duty imposed by statute upon his master for his protection.

Smith L. J. said:

In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant nor any one else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence and therefore that he was not liable? The defendant cannot shift his responsibility for the non-performance of the statutory duty on to the shoulders of another person.

And Rigby L. J. said:

Where absolute duty is imposed upon a person by statute it is not necessary in order to make him liable for breach of that duty to show negligence. Whether there be negligence or not he is responsible *quacunque viâ* for non-performance of the duty. As authority for that the case of *Gray* v. *Pullen* (1) may be referred to, where it was held in the Exchequer Chamber by the whole court that breach of a statutory duty such as that now in question of itself gives a right of action to a person thereby injured, unless the case may be brought within some known exception of that rule.

And further:

There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of anyone in order to make out his cause of action; that being so the doctrine of common employment is out of the question (2).

It is unreasonable to contend that if any one, by an illegal act, causes damage to another, he is not liable for the consequences of his illegality. Offenders against the law are not entitled to claim such immunity.

The appellants cannot find an excuse for their own negligence in the negligence or wilful act of a third party where the doctrine of fellow servant or com-

(1) 5 B. & S. 970.

(2) I refer also to *Baddely* v. *Earl of Granville*, 19 Q. B. D. 423, and to *The Town of Prescott* v. *Connell*, 22 Can. S. C. R. 147.

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mon employment has no application. Contributory negligence by a third party cannot be assimilated to contributory negligence by a claimant. Pollock on torts, 6th ed. p. 454. Then, what happened should have been foreseen and guarded against. Whatever caused the ladder to move is immaterial. It moved because it was not properly fastened, and this man's leg was caught in the machinery because that machinery was not securely guarded. That was the efficient cause of the injury complained of. The appellants gave the truckman the means of injuring the respondent. Without their negligence he could not have done it, and it is not the law that any one is relieved from liability for injuries resulting from his negligence simply because he is not the sole cause of those injuries. Wharton on Negligence, 144.

In *Illidge* v. *Goodwin* (1), the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. But Tindal C. J. ruled that, even if this were believed, it would not avail as a defence.

> If (he says) a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done.

Lynch v. *Nurdin* (2), is a still more striking case. There also the defendants' cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says:

(1) 5 C. & P. 190. (2) 1 Q. B. 29.

It is urged that the mischief was not produced by the mere negligence of the servant, as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a playground where school boys were at play, and one of the boys in play letting it off and wounding another.

think it will not be doubted, says Lord Denman, that the gamekeeper must answer in damages to the wounded party.

"This", he adds,

might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support, in *Illidge* v. *Goodwin* (1).

In *Dixon* v. *Bell* (2), the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming which the latter, as he thought, did, but as it turned out, did not do effectually. The girl brought it home and, thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable. "As by this want of care," says Lord Ellenborough, that is by leaving the gun without drawing the charge or seeing that the priming had been properly removed,

(1) 5. C. & P. 190. (2) 5 M. & S. 198.

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the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable.

In *Engelhart* v. *Farrant & Co.* (1), the defendant employed a man to drive a cart with instructions not to leave it, and a lad who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart in which the lad was and went into a house. Whilst the driver was absent the lad drove on and came into collision with the plaintiff's carriage. In the action to recover for the damage caused by the collision it was held that the negligence of the driver in so leaving the cart was the effective cause of the damage and that the defendant was liable.

In *Mills* v. *Armstrong* (2), Lord Esher said:

> If no fault can be attributed to the plaintiff and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all damages occasioned to him against either the defendant or the other wrong-doer.

And Lord Lindley said:

> A., without fault of his own is injured by negligence of B., then B. is liable to A. If, now, another person is introduced the same principles will be found applicable. Substitute in the foregoing case B. and C. for B., and unless C. is A.'s agent or servant there will be no difference in the result except A. will have two persons instead of one liable to him. A. may sue B. and C. in one action and recover damages against them both or he may sue them separately and recover the whole damages sustained against the one he sues; *Clark* v. *Chambers* (3), where all the previous authorities were carefully examined by the late Lord Chief Justice Cockburn.

In *Thorogood* v. *Bryan* (4), the deceased (whose administratrix the plaintiff was) had been killed by the concurrent negligence of the driver of an omnibus upon which he, the plaintiff, was riding, and of the driver of another omnibus coming in an opposite

(1) [1897] 1 Q. B. 240.
(2) *The Bernina Cass*, 12 P. D. 58, affirmed, 13 App. Cas. 1.
(3) 3 Q. B. D. 327.
(4) 8 C. B. 115.

direction. The action was taken against the owner of the latter. The court dismissed the action But that decision is expressly overruled in *Mills* v. *Armstrong, Bernina Case*, (1) by the House of Lords (affirming the Court of Appeal); and the settled law clearly resulting from that overruling is that a passenger who is injured by a collision between two omnibuses has a remedy against the proprietor of either, if the drivers of both were guilty of negligence, and he was not.

In the United States it is likewise held that

where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable.

Crandall v. *Goodrich Transportation Co.* (2). See *Grand Trunk Railway Company* v. *Cummings* (3). In *Wolff Manufacturing Co.* v. *Wilson* (4), the defendant's waggon negligently driven struck an iron post used by a barber as his sign that had been left near the sidewalk not securely braced or fastened. The post fell on the plaintiff, injuring his leg. He sued the owners of the waggon. It was held that though *he might have recovered against the barber*, yet that, as upon the evidence it was clear that he would not have been injured but for the additional negligence of the defendant, the negligence of the barber did not relieve the defendant from the liability for his own negligence. Where two persons are negligent, said the court, and the accident would not have happened but for the negligence of both, the person injured may proceed against both or either.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Hamilton, Elliot & Irving.*

Solicitors for the respondents: *Hearst & McKay.*

(1) 12 P. D. 58; 13 App. Cas. 1
(2) 16 Fed. Rep. 75.
(3) 106 U. S. R. 700.
(4) 46 Ill. App. 381.