1916

THE ALGOMA STEEL CORPORATION LIMITED (DEFENDANTS). } APPELLANTS;

*May 30, 31.
*June 19.

AND

MARY DUBÉ (PLAINTIFF).....RESPONDENT.

MARY DUBÉ (PLAINTIFF).....APPELLANT;

AND

THE LAKE SUPERIOR PAPER COMPANY (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Hire of machinery—Negligence of hirer—Negligence of owner—Master and servant.

The Steel Company hired from the Paper Company a crane and crew of two men, D. to run it and a fireman. In doing the work for which it was hired, the crane fell and D. was killed. In an action by his widow for damages, the jury found that the crane was a dangerous machine and that the Steel Company was negligent in not having a rigger to superintend its operation.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 371), that the Steel Company owed to D. the duty of seeing that the crane was properly operated; that the evidence justified the finding of the jury that a rigger was necessary for that purpose; and that the judgment against that company should stand.

The jury also found that the crane was defective when delivered to the Steel Company, and that the Paper Company was guilty of negligence in not supplying proper equipment for it.

Held, reversing the judgment of the Appellate Division, Davies and Idington JJ. dissenting, that the relation of master and servant existed between the Paper Company and D. up to the time of the latter's death; that the company, in sending D. to run a dangerous machine not properly equipped, would be responsible

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

for any injury caused by its operation; and that it was not relieved from responsibility by the fact that the injury might have been avoided if the Steel Company had provided proper superintendence over its operation.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial in favour of the plaintiff against the Algoma Steel Corporation and dismissing her action against the Lake Superior Paper Company.

The appellant is the widow of the late Martin P. Dubé, and the action was brought by her, on behalf of herself and the children of the deceased, against the Algoma Steel Corporation, Limited (herein referred to as the Steel Company) and the Lake Superior Paper Company for damages resulting from the death of the said Martin P. Dubé.

Prior to the 28th day of May, 1914, the Steel Company hired from the Superior Company a derrick or crane, with its crew, consisting of the deceased, as the operator thereof, and a fireman, to perform certain work upon the premises of the Steel Company. The derrick was duly delivered to the Steel Company by the Superior Company and a considerable amount of work was done with it on the 28th day of May, 1914, all without any mishap.

On the 29th day of May, 1914, the deceased was advised by the foreman of the Steel Company that it would be necessary to move a large iron tank weighing something less than five tons from the trestle or stand upon which it was resting to a flat car which had been placed to receive the tank. The trestle or stand was approximately twelve feet high, and the tank to be moved therefrom was of the following dimensions—

(1) 35 Ont. L.R. 371.

twelve feet wide, sixteen feet long, and four and one-half feet high.

The tracks upon which the derrick or crane ran had been laid by the Steel Company and were unballasted. The deceased was ordered by the representatives of the Steel Company to move the derrick along the tracks to a position approximately thirty feet from the trestle or stand upon which the tank was resting, and, having placed the derrick in that position, the deceased was then ordered to shift the tank to the flat car situate some distance behind the derrick.

The tackle belonging to the derrick or crane was attached to the tank by the workmen employed by the Steel Company for that purpose, and the deceased was given the signal to hoist. The derrick had lifted the tank about a foot above the trestle, and the boom, with the tank attached, was swinging round towards the flat car behind the derrick, when the derrick fell over on its side, and the deceased, in endeavouring to avoid injury, slipped and was crushed between the corner of the derrick and the ground, and was instantly killed.

At the trial counsel for the Superior Company moved for a non-suit on the ground that the deceased was not at the time of the accident in its employ, and that there was no evidence of negligence on its part to submit to the jury. The learned trial judge reserved judgment on the motion, and submitted certain questions to the jury, who returned the answers set out below. Later the trial judge directed judgment in favour of the plaintiff against the Steel Company, but dismissed the action as against the Superior Company. He reached the conclusion that there was no evidence of negligence on which the Superior Company could be held liable. The Steel Company appealed to the

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Appellate Division, and their appeal was dismissed. The plaintiff appealed against the judgment in favour of the Superior Company, and her appeal was also dismissed.

The jury's findings are as follows:—

1. Q. Were the defendants, the Lake Superior Paper Company, guilty of any negligence which caused the death of Martin P. Dubé? A. Yes.

2. Q. If so, what was that negligence? A. In not furnishing proper equipment, clamps and ballast in deck of crane.

3. Q. Was the crane, as it was when used by the defendants, the Algoma Steel Corporation, a safe or a dangerous machine at the time when used and as used by the defendants, the Algoma Steel Corporation? A. Yes.

4. Q. If dangerous, in what respect was it dangerous? A. In not being properly clamped to track or blocked under decking and deck of crane not being properly ballasted.

5. Q. Were the defendants, the Algoma Steel Company, guilty of negligence which caused the death of Martin P. Dubé? A. Yes.

6. Q. If so, what is the negligence which you find? A. In not having a proper rigger to superintend work that wanted to be done.

7. Q. Could the deceased, Martin P. Dubé, in the exercise of reasonable care, have avoided the accident? A. No.

8. Q. If so, what could the deceased have done? A. Nothing more than he did.

Damages, $3,000.00—if both companies are liable, each company shall pay $1,500.00. If only one company is found liable, that company to pay the full sum of $3,000.00.

Anglin K.C. and *J. E. Irving* for the appellants, the Algoma Steel Corporation. The Steel Company cannot be responsible for injury to an employee of the Paper Company in consequence of the latter's negligence. *Child* v. *Hearn*(1); *Membery* v. *Great Western Railway Co.*(2); *Waldock* v. *Winfield*(3).

The Steel Company was not obliged to examine the crane for defects before using it. *White* v. *Steadman*(4), *Bates* v. *Batey & Co.*(5).

The legal effect of the hiring was a warranty that the crane could perform the work safely. Plaintiff representing the owners undertook to work with it, and the Steel Company cannot be liable for the consequences. See *Mowbray* v. *Merryweather*(6); *O'Doherty* v. *Postal Telegraph-Cable Co.*(7).

T. P. Galt and *McFadden* for the plaintiff appellant and respondent. The Steel Company cannot deny that plaintiff was in their employ within the meaning of the "Workmen's Compensation Act," not having given the notice required by section 14. *Wilson* v. *Owen Sound Portland Cement Co.*(8); *Cavanagh* v. *Park*(9).

But, apart from the Act, they are liable, having undertaken a hazardous work without a competent person to direct it. *Canadian Northern Railway Co.* v. *Anderson*(10); *Heaven* v. *Pender*(11).

If the Paper Company is not held liable, the Steel Company should be ordered to pay the costs incurred

(1) L.R. 9 Ex. 176.
(2) 14 App. Cas. 179.
(3) [1901] 2 K.B. 596.
(4) [1913] 3 K.B. 340, at p. 347.
(5) [1913] 3 K.B. 351, at pp. 354-5.
(6) [1895] 2 Q.B. 640.
(7) 118 N.Y. Supp. 871.
(8) 27 Ont. App. R. 328.
(9) 23 Ont. App. R.715.
(10) 45 Can. S.C.R. 355.
(11) 11 Q.B.D. 503.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

by joining the former as a defendant. See *Besterman* v. *British Motor Cab Co.*(1).

Tilley K.C. and *Atkin* for the Paper Company, respondents, referred to *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*(2); *McCartan* v. *Belfast Harbour Commissioners*(3).

THE CHIEF JUSTICE.—I am of opinion that the appeal of the Algoma Steel Company should be dismissed with costs and the cross-appeal of Mrs. Dubé allowed as against the Paper Company with costs, for the reasons given by McLellan and Garrow JJ. in the court below and adopted here by my brother Anglin.

There is evidence to support the finding that the derrick or crane was dangerous as supplied by the Paper Company, and, because of its defective equipment, the crane toppled over and killed Dubé. There was also negligence in the management of the crane by the Steel Company, and both companies, by their joint negligence, contributed to the accident.

If the crane had been properly equipped, it would not have toppled over, and if proper care had been taken in its management, the consequences of the defective equipment might have been overcome. Therefore, I have come to the conclusion that, on the evidence, the verdict of the jury should be supported.

Moreover, the relation of master and servant between Dubé and the paper company continued to exist up to the time of his death. That company was responsible to him for his wages. It alone could dismiss him and he was subject to its exclusive orders. (Vide Walton Compensation, 38 and 89, Halsbury, vol. 20,

(1) [1914] 3 K.B. 181. (2) [1893] 1 Q.B. 629.
(3) [1911] 2 I.R. 143.

p. 191, No. 421; Dalloz, Répertoire Pratique, Accidents de Travail, No. 44; (1916) Q.O.R.S.C. p. 219).

DAVIES J.—I am of opinion that the appeal of the Algoma Steel Corporation must be dismissed with costs, and the cross-appeal of Mary Dubé against both companies, seeking to hold them both liable, should also be dismissed with costs. The result would be that Mary Dubé would be entitled to retain her judgment against the Steel Corporation for the full amount of $3,000 awarded as damages by the jury.

The accident which happened and which caused the death of Dubé was not found by the jury to have happened because of any inherent defects in the crane or its equipment. The proximate and determining cause of the accident was found by them to have been the negligent use by the Steel Company of the crane and its equipment without having any one in charge who was, in fact, competent to direct it. In answer to the question put to them as to the use of the crane by the Steel Company, the jury find that the crane, as it was when used by that company, was a "dangerous machine" in

not being properly clamped to the track or blocked under decking and deck of crane *not* being properly ballasted.

But these findings, in themselves, would not have been sufficient to make that company liable. The mere use by the company of a dangerous machine would not be enough unless it was found that such use, owing to the defects of the machine, caused the accident. The next questions asked the jury were:—

(5) Were the defendants, the Algoma Steel Company, guilty of negligence which caused the death of Martin P. Dubé? Ans. Yes. Q. If so, what is the negligence you find? Answer fully. Ans. In not having a proper rigger to superintend the work that wanted to be done.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Davies J.

The negligence, therefore, found by the jury, and the only negligence found by them, against the Steel Company was the neglect to provide a proper rigger or competent person to direct and control the working of the crane in the condition it was in and for the work required to be done.

That it was the duty of the Steel Company to have provided such a rigger or competent person is beyond question, and that they failed in that duty is equally clear. That the duty was one which they owed to the deceased engineer seems to me also under the facts as proved quite clear. I do not find it necessary to determine whether or not Dubé was, at the time when working the crane, the servant of the Steel Company. I am strongly inclined to think he was. In any event, they owed a duty towards him, as the engineer of the crane they were working, to provide a competent superintendent to direct his working of the engine with safety. Without such directions he could not work at all. At least, that is my conclusion from the evidence, and I think it was admitted on the argument that Dubé, in the caboose or cabin or small box in which he was, could not direct or control and did not attempt to direct or control the proper movements of the crane. The absence of proper superintendence by the company ensuring his safety in the discharge of his work was a negligent disregard of the duty they owed him, quite irrespective of whose servant he was. He moved the machinery just as he was ordered by the person in charge to do, and every act in connection with the working of the crane was done according to the orders of the rigger or controller who was directing its working. Under these circumstances, it became the duty of the company operating the crane to provide a proper system for its operation. That person or those persons,

for there appeared to be more than one, was, or were, admittedly inexperienced and incompetent, and the jury found that the negligence which caused Dubé's death was in the employment of such incompetent persons "to superintend the work that wanted to be done."

It seems to me, therefore, quite clear that the Steel Company failed to discharge the duty they owed to Dubé under the circumstances, and that, such failure having been found to be the proximate and determining cause of the accident, they are liable for the full amount of the damages.

The jury's findings against the Paper Company are not such as, under the circumstances, make them jointly liable with the Steel Company. It is true the jury find as against them that they were guilty of negligence "in not furnishing proper equipment clamps and ballast in deck of crane," and that the crane, in the condition in which they hired it to the Steel Company, and in which it was when the latter used it, was a "dangerous machine." But they do not find that this faulty equipment or that it being a "dangerous machine" was the immediate and determining cause of the accident. On the contrary, that cause was found to be the neglect of the Steel Company to have the crane used, directed and controlled by a competent manager or rigger.

In all respects, therefore, I am in agreement with the judgment of the Court of Appeal.

I have read the several cases on which the parties respectively rely. But I am fully satisfied that, as was so clearly stated by the Lord Chancellor and the other judges who delivered judgments in the case of *McCartan* v. *Belfast Harbour Commissioners*(1), that each case

(1) [1911] 2 I.R. 143.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Davies J.

depends upon its own special facts, and that, except where the decisions formulate some legal principle, the decided cases are only useful as illustrations.

It must be remembered that in the case at bar Dubé was exonerated by the jury from any contributory negligence, and the case was argued on that basis.

Mr. Tilley, for the Paper Company, relied strongly upon the case of *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*(1). That was a case where a person directing the operations of a crane, corresponding with the person who is called throughout this appeal a "rigger," was injured by the negligence of the man in charge of the crane, corresponding to the man Dubé in this case. It was the exact reverse of this case, where the man in charge of the crane (Dubé) was killed through the incompetence of the rigger employed by the Steel Company.

Under the special facts of that case, the court held that, as the owner of the crane, when he hired it to another, had parted with the power of controlling the cranesman with regard to the matter on which he was engaged, though the latter still remained his general servant, he was not liable for his negligence.

If in this case the negligence of the cranesman, Dubé, had been a factor, I could see the relevancy of this decision in the *Donovan Case*(1). Under the facts as they exist I do not. The Paper Company are sought to be held liable because of defects in the crane and its equipment. As these have not been found the immediate and determining cause of the accident, I have held that company not liable The Steel Company I have held liable because they failed in their duty to provide a proper system under which the crane

(1) [1893] 1 Q.B. 629.

was worked and a proper controller to direct its working, and that the jury found such failure on their part to be the negligence which caused the accident.

I am also of the opinion that, although under the findings of the jury the Paper Company cannot be held liable, yet that the case as regards the costs of that company comes within the principle of *Besterman* v. *British Motor Cab Co.*(1), where it was held that the upholding of an order on an unsuccessful defendant to pay a successful company defendant's costs depends, in all cases, on whether it was a reasonable and proper course for the plaintiff to have joined both defendants in the action.

In this case I think it was a reasonable and proper course to join both defendants, and that the Steel Company, which I hold liable, should pay to the plaintiff all such costs against the Paper Company which, under the judgment to be delivered, she may have to pay or have incurred by reason of the joinder in the action of the Paper Company.

IDINGTON J.—I think in the circumstances in question herein that the appellant owed to the deceased a legal duty to take care which it failed to discharge, and thereby caused his death.

I so find quite independently of whether or not there was a legal relationship of master and servant within the meaning of the "Workmen's Compensation Act."

In accepting control of, and operating what has been found to have been a dangerous machine, at the time of its so doing, the appellant became bound in law to take due care, in carrying on such operation, that,

(1) [1914] 3 K.B. 181.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Idington J.

all such persons as might be lawfully in or about said machine were not endangered thereby or should not suffer from its use.

Instead of taking such due care, it handed over the direction and management of the operations therewith to those who were not competent, and hence it should abide the consequence.

The deceased and another who went with the machine formed, as it were, but parts thereof, and could not have been considered by either of the companies as a fully equipped crew intended to operate the machine.

I am, therefore, unable to attach that importance to the conversation had between the respective representatives of each company as to the sending clamps along with the machine which appellant's counsel does and presses so far as to suggest must, when coupled with the fact of and legal effect of a contract of hiring, be held a warranty of the efficiency of the outfit.

Anything that transpired between the companies cannot, as I view the principles of law applicable, as between the deceased and the appellant, absolve the latter so long as it was the party dominant in controlling the operations of the machine.

Moreover, when one tries to render it possible to hold these companies jointly liable, we find the very foundation of their relations, which were reduced to writing, is not produced, and at this stage it is impossible to form any very definite conclusion in regard to such relations. All we know is that there was a sort of letting or hiring of something which was not kept by the owners for general public use, but let with such parts, including in that part of a crew, as the parties agreed upon, for which some compensation was to be made.

Their agreement to dispense with clamps cannot affect respondents' rights.

And whether or not she might have had an action against the company in whose service her late husband was engaged can form no concern of the appellant; short of that being an action against the companies jointly and founded on a joint liability which I cannot find in the facts.

The common sense of the jury in reaching the verdict first returned of $1,500 against each, if it had been maintained, I suspect might, if the case had been fought out on the lines it indicates as possible, have found some support in law.

As the case stands, it is all or nothing so far as appellant is concerned. Its negligence was the last fatal slip of those concerned and the proximate cause of the death of deceased.

I, therefore, think the appeal must be dismissed with costs, including the costs of all parties and of the cross-appeal against the Lake Superior Company, which, of course, fails.

The necessity of keeping the latter company before the court, even by circuitous and cumbrous methods, was fully justified, if we have due regard to the division of opinion in the court below.

If the appellant had ever been found, in the course of this litigation, putting forward and acting upon the principles of law I have proceeded upon and discarding and helping the courts to discard the application of the "Workmen's Compensation Act," I could sympathize with its suffering costs.

By the other course it has possibly got off with a very much more moderate verdict than it might have had returned against it from a common law point of view.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Anglin J.

ANGLIN J.—That the death of the plaintiff's husband, Dubé, was caused either by lack of proper equipment of a derrick supplied by the defendant, the Lake Superior Paper Company (hereinafter called the Paper Company), to its co-defendant, the Algoma Steel Corporation (hereinafter called the Steel Corporation), or by the unskilful management, or by a combination of both these causes, scarcely admits of doubt, and was not seriously contested. Nor, contributory negligence on the part of Dubé having been negatived by the jury and there being no appeal from that finding, is there much room for doubt as to the liability of one or other, if not of both, of the defendants for the damages assessed at $3,000.

The jury has found that the derrick or crane as supplied and used was dangerous, and that its danger consisted

in (its) not being properly clamped to the track or blocked under decking; deck of crane not being properly ballasted.

It would appear that, if properly equipped, the unskilful use of the crane might not have resulted in its collapse; and it would also seem more than probable that, if it had been skilfully used, the lack of proper equipment might have proved harmless. The failure of the Paper Company to furnish proper equipment, the jury finds to have been negligence on its part which caused the death of Dubé; in failing to provide a competent person to direct the use of the crane the Steel Corporation is found to have been likewise at fault.

The Paper Company's omission to supply clamps, etc., could be chargeable against it as negligence—*i.e.*, breach of duty owing to Dubé under the circumstances—only if it should have reasonably anticipated that the derrick would have been put to a use for which

this equipment would be required. A finding to that effect is involved in the jury's answers to the first and second questions; and there is evidence to support such a finding. The controverted issues on this branch of the case are the existence of the duty to Dubé by the Paper Company which it is charged with having neglected, and whether its breach was a proximate cause of his death.

On the other hand, there is abundant evidence to warrant a finding that a competent supervisor was necessary, and that the omission to provide one (a fact not in dispute) amounted to negligence. Whose negligence is here the vital question.

In order to have a true conception of the duty owing by each of the defendants to Dubé, it is essential to ascertain the relation in which he stood to each of them. There is no suggestion that the Paper Company had undertaken the removal of the Steel Corporation's disused alkali plant as independent contractors. They supplied the Steel Corporation, for a consideration, with the means to effect such removal. They were bailors, and the Steel Corporation bailees, of the derrick. But, upon a consideration of the authorities, I concur in the view of the four judges of the Appellate Division, who held that under the circumstances in evidence Dubé was throughout the servant of the Paper Company. The case, in my opinion, falls within the principle of the decisions in *Quarman* v. *Burnett*(1); *Jones* v. *Corporation of Liverpool*(2); *Moore* v. *Palmer*(3); *Union S.S. Co.* v. *Claridge*(4); *McCartan* v. *Belfast Harbour Commissioners*(5); *Consolidated Plate Glass*

(1) 6 M. & W. 499.
(2) 14 Q.B.D. 890.
(3) 2 Times L.R. 781.
(4) [1894] A.C. 185.
(5) [1910] 2 I.R. 470; [1911] 2 I.R. 143.

1916

ALGOMA STEEL CORPORATION. v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Anglin J.

Co. v. *Caston*(1); and *Waldock* v. *Winfield*(2). The absence of control of Dubé by the Steel Corporation, while performing his duties as "runner" of the crane, and of the right to dismiss him and substitute someone else for him, distinguishes this case from *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*(3), *Rourke* v. *White Moss Colliery Co.*(4), and other cases relied on by the Paper Company. The Steel Corporation's right of interference and the control exercised by it was no greater than that of the shipowner in *McCartan* v. *Belfast Harbour Commissioners*(5).

In my opinion, as its servant engaged in doing work for its profit which his contract with it obliged him to perform, Dubé was entitled to expect that his employer, the Paper Company, would not send him out with a machine so defectively equipped that its use in the work which was contemplated when it was hired would be dangerous unless that danger should be overcome or obviated by the exercise of care and skill by a person not supplied by the Paper Company. Assuming that, as between the defendants, it was the contractual duty of the Steel Corporation to have provided a competent "rigger" as between itself and its employee, I think the Paper Company cannot invoke the failure of its co-defendants to provide such a rigger, whose skill and vigilance, if exercised, might have saved the employee from the consequences of his employers' own negligence in sending him out to perform work for which the crane supplied by it was so inadequately equipped that its use was dangerous. Whatever rights (if any) the Paper Company may have against the Steel Corporation because of the absence of a competent rigger, that

(1) 29 Can. S.C.R. 624.
(2) [1901] 2 K.B. 596, at pp. 603-4.
(3) [1893] 1 Q.B. 629.
(4) 2 C.P.D. 205.
(5) [1910] 2 I.R. 470; [1911] 2 I.R. 143.

fact, in my opinion, does not afford a defence to it as against the plaintiff. I also agree with Garrow and Maclaren JJ.A. that there is evidence to support the finding that the negligence of the Paper Company was a proximate cause of the collapse of the crane, and I incline to think that the plaintiff is entitled to recover against this defendant under the "Workmen's Compensation Act" as well as at common law, although, but for the existence of the relation of master and servant, unless the Paper Company was under contractual obligation to its co-defendant to furnish a "rigger," it would probably not be liable at all under the doctrine enunciated in such cases as *O'Neil* v. *Everest*(1), in 1892. Dubé was killed in the course of his employment, while, and in consequence of, acting in obedience to a negligent order of a person in the employment of the Paper Company, to whose orders he was bound to conform. He was killed owing to defects in machinery negligently supplied to him by his employer for the work he was sent to do. The fact that, although the collapse of the derrick was a natural consequence of the Paper Company's negligence, that negligence became operative because its effect was not counteracted by competent supervision (though the duty to provide that supervision rested on its co-defendant) does not suffice to prevent the Paper Company's negligence being truly a cause and not merely a condition of that collapse happening. *Paterson* v. *The Mayor of Blackburn*(2); *Reg.* v. *Haines*(3); *Engelhart* v. *Farrant & Co.*(4), at pp. 246-7, *per* Rigby L.J.; *Burrows* v. *March Gas and Coke Co.*(5).

(1) 61 L.J.Q.B. 453, at p. 455.
(2) 9 Times L.R. 55.
(3) 2 C. & K. 368.
(4) [1897] 1 Q.B. 240.
(5) L.R. 5 Ex. 67; 7 Ex. 96.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Anglin J.

The plaintiff's case against the Steel Corporation is perhaps not quite so clear. Dubé was not its servant. The highest degree of care that it owed him was that which is due to an invitee or licensee. It may be that, as between the Steel Corporation and the Paper Company, the latter is under an obligation arising out of warranty which may entitle the Steel Corporation to indemnification. That question is not before us, and I express no opinion upon it. The existence of such a warranty would afford no answer to a claim by the plaintiff for breach of a duty owing to her deceased husband. Nor does the fact that Dubé was the servant of the Paper Company affect the liability of the Steel Corporation if it was under a duty to supply a competent rigger as the jury has found. Upon the evidence there is some uncertainty as to whether the order of the Steel Company was for "a derrick and crew," by which might well be understood a body of men in number and qualification sufficient to control and operate the derrick, or was for "a locomotive crane with engineer and fireman," as its pleading avers. The written order is not in evidence. Counsel for the Paper Company at the trial made this statement:—

> The Paper Company owned the crane and employed Mr. Dubé as the engineer to run it and McLaughlin as the fireman to fire it. They then hired it with its crew to the Algoma Steel Corporation.

In his factum counsel for the Paper Company speaks of the Steel Corporation "having hired a derrick with its crew of two men only." The evidence makes it reasonably clear that, in addition to the "runner" and the fireman, the crew of a derrick such as that in question should include a competent man known as a "rigger" to supervise the "spotting" of it and the management of the work to be done. The failure to provide such a man was certainly negligence on the

part of one or other of the defendants. Inasmuch as the jury has attributed that negligence to the Steel Corporation and not to the Paper Company, it would seem probable that, in its opinion, the contract between these two companies required the Paper Company to furnish only the runner and fireman, leaving the obligation upon the Steel Corporation, which was to order the derrick to be put in operation, to furnish the necessary supervisor. If that be the correct view of the case, and I think it is a fair inference from the jury's findings, which cannot upon the evidence be held to be clearly erroneous, the liability of the Steel Corporation would also seem to be clear. It could not be heard to urge "identification" of Dubé with his employer, the Paper Company, as a defence (see *Child* v. *Hearn*(1); *Membery* v. *Great Western Railway Company*(2)); indeed, it would itself be liable to the Paper Company for any damages sustained by it in consequence of the breach of the implied undertaking to provide a rigger competent to handle the derrick with reasonable care and skill.

But, whatever may have been the duty in this respect of the two companies *inter se*, I rather incline to think that the necessity for having a competent rigger in charge was so clear that, as to any person likely to be injured through just such an accident as that which happened, whether one of its own employees, a mere stranger lawfully on the premises, or an employee of the bailor, the Steel Corporation, before directing that the derrick should be put into operation, was under an obligation to see that it was in charge of such a rigger. Attempting the removal of such a heavy article as a tank weighing 8,700 pounds without a competent rigger verges very close upon, if

(1) L.R. 9 Ex. 176, at p. 182. (2) 14 App. Cas. 179, at p. 191.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Anglin J.

it does not amount to, recklessness, such as would entail liability to a mere licensee or invitee.

When the derrick was placed or "spotted" in order to remove the tank, in the carrying of which it collapsed, it was found that, as then adjusted, the arm of the crane would not reach it. Instead of moving the derrick closer, as the evidence shews might easily have been done, one Jeffrey, an employee of the Steel Corporation, directed Dubé to lower the arm of the crane. This had the effect of increasing the distance between the derrick and the end of the arm, thus augmenting the leverage, which proved to be too great when the load was swung out. This was the immediate cause of the collapse. A competent rigger would, in all probability, have either insisted upon the derrick being placed nearer or being secured by clamps or by blocking up the platform before attempting to move this heavy tank with the arm extended practically to its extreme length. It may be that, as against the Paper Company, the Steel Corporation was warranted in assuming that the operation could be fully performed just as it was attempted. But I gravely doubt that it would have been justified in making such an assumption as against any person—even a servant of the Paper Company—whose personal safety was thus jeopardized. In view of the jury's findings, however, it seems to be unnecessary to determine this question.

I am, for these reasons, of the opinion that the verdict against the Steel Corporation must stand. The negligence of both defendants having materially contributed to causing the unfortunate Dubé's death, each is liable for the total result of their joint wrong, and, whatever may be their rights of indemnity *inter se*, neither can ask to have the damages apportioned as against the plaintiff The main appeal should be dis-

missed and the cross-appeal allowed, and the plaintiff should have judgment for $3,000 against both defendants, with costs throughout.

BRODEUR J.—In hiring their crane to the Algoma Steel Company, the Lake Superior Paper Company should have furnished a proper equipment, clamps and ballast, to raise the five or six tons of weight that were mentioned. But they have not done so, and, as a result of that defective equipment, the accident in question has happened to their servant Dubé.

The jury has found that they were negligent. There was evidence to justify such a verdict, but the courts below have not, however, accepted it.

That is not a question of law that was being raised on that issue between the Paper Company and the relatives of the victim, but it was a question of fact of which the jury was the judge. (*McCartan* v. *Belfast Harbour Commissioners*(1)).

Of course, if there had been no evidence to justify the verdict, the latter should be set aside. But there was sufficient evidence to justify it, and it should be maintained.

The appeal of Mary Dubé against the Lake Superior Paper Company should then be allowed.

As far as the Algoma Steel Company is concerned, the jury found also that the latter company was guilty of negligence in not having a competent foreman to superintend the work that had to be done.

That verdict was approved by the courts below and should be maintained.

The judgment should be that the defendant companies are condemned to pay, jointly and severally, the

(1) [1911] 2 I.R. 143.

1916

ALGOMA STEEL CORPORATION v. DUBÉ.

DUBÉ v. LAKE SUPERIOR PAPER CO.

Brodeur J.

sum of $3,000, of which $1,250 to the plaintiff, Mary Dubé, and the balance distributed in equal shares to the six children of the victim. The defendant companies should pay the costs throughout.

Appeal by the Algoma Steel Corporation dismissed with costs.

Appeal by Dubé allowed with costs.

Solicitor for the appellants, the Algoma Steel Corporation: *J. Ewart Irving.*

Solicitors for the respondent, Mary Dubé: *McFadden & McMillan.*

Solicitors for the respondents, the Lake Superior Paper Company: *Hearst, Rowland & Atkin.*