1962
*May 24
June 25

HOBBS MANUFACTURING COMPANY (*Defendant*) ..... APPELLANT;

AND

MARGARET SHIELDS, Administratrix of the Estate of John Shields, Deceased (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Sale by manufacturer of electrical machine containing defective wiring—Failure of purchaser's employee to ground equipment before turning on current—Accidental death of employee by electrocution—Whether manufacturer liable.

L Co. representing the defendant company sold a machine manufactured by the latter to M. Co., where the plaintiff's husband S was employed as plant electrician. In the course of his duties S undertook to connect the machine with an electrical current and in so doing he neglected to ground the equipment. The result of introducing the current through an exposed wire in the switch box was that the ungrounded part of the equipment became highly charged and S was killed when he came in contact with it. The plaintiff, as executrix of her husband's estate, brought an action for damages under *The Fatal Accidents Act*, R.S.O. 1950, c. 132. The trial judge decided that the negligence on the part of S in failing to ground the equipment before turning on the current and of the defendant in wiring the switch box as it did contributed to the accident, and holding that it was not practicable to determine the respective degrees of fault, he gave judgment in favour of the plaintiff for one-half of the agreed amount of damages. The judgment of the trial judge was approved by the Court of Appeal, and the defendant then appealed to this Court.

Held (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Martland and Judson JJ.: S was one to whom the defendant owed a duty to take care. *Donoghue v. Stevenson*, [1932] A.C. 562, *Dominion Natural Gas Co. Ltd. v. Collins & Perkins*, [1909] A.C. 640, referred to. There was no apparent reason for any person from the time the machine left the manufacturer to the time of the accident to open and examine the switch box and there was no duty upon S to examine every part of the machine to find possible defects

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

in the manufacture of it. Nor was the deceased's negligence severable from the fault of the defendant. *Great Eastern Oil and Import Co. Ltd. & Oakley v. Frederick E. Best Motor Accessories Co. Ltd.*, [1962] S.C.R. 118, distinguished. Accordingly, the conclusion arrived at by both Courts below was correct.

Per Cartwright and Ritchie JJ., *dissenting:* It is the absence of a reasonable probability that any defects or concealed dangers in his products will be discovered before use by such examination as ought reasonably to be anticipated which gives rise to the duty owed by a manufacturer to the ultimate user who suffers damage as the result of neglect in the manufacture or preparation of such products or as the result of dangerous qualities inherent in them, but where such reasonable probability exists, the subsequent negligence of the ultimate user cannot be coupled with the initial neglect of the manufacturer so as to permit the application of the doctrine of contributory negligence. Here there was a reasonable probability that any defect in the wiring of the machine would be discovered before use by a form of examination (the test afforded by "grounding"), which ought reasonably to have been anticipated by the defendant. The circumstances were not such as to bring the manufacturer into direct relationship with S, and there was, therefore, no duty owed by the defendant to him. *Donoghue v. Stevenson, supra; Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85; *Paine v. Colne Valley Electricity Supply Co., Ltd. et al.*, [1938] 4 All E.R. 803; *London Graving Dock Co. Ltd. v. Horton*, [1951] A.C. 737; *Woods v. Duncan et al.*, [1946] A.C. 401, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Smily J. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

D. A. Keith, Q.C., and *C. A. Keith*, for the defendant, appellant.

J. D. Arnup, Q.C., and *J. J. Carthy*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Martland and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the defendant, Hobbs Manufacturing Company, from a judgment of the Court of Appeal for Ontario[1] affirming the judgment of Smily J., after a trial without a jury. The respondent as administratrix of the estate of her husband, John Shields, brought action pursuant to *The Fatal Accidents Act*, R.S.O. 1950, c. 132, for damages for the death of her husband, on May 6, 1959, by electrocution while installing a turret winder used for the winding of plastic. The winder had been sold to Shields' employer, Monsanto Oakville Limited,

[1] [1962] O.R. 355, 32 D.L.R. (2d) 273, *sub nom. Shields v. E. V. Larson Co. Ltd. and Hobbs Manufacturing Co.*

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by the appellant's representative, E. V. Larson Company Limited, f.o.b. the appellant's factory at Worcester, Massachusetts, U.S.A. The Larson Company was a co-defendant but the present respondent did not object to the trial judge dismissing the action as against it without costs. It was agreed that the total amount of damages should be assessed at $30,000.

While evidence was given that the appellant had made a special examination and test inspection of the winder at its plant and had issued a special inspection report certifying as to the proper functioning of the machine, the trial judge found: (1) that there was defective wiring in the winder, because one of the wire "leads" in the switch box, known as a stop and start switch, showed bare copper (instead of being insulated) at the point where it was connected with the switch; (2) that this defect existed at the time the winder was delivered to the Monsanto Company; (3) that it was a defect which would not reasonably be expected to be ascertained or known by that company or by Shields. He also found that Shields, who was a qualified and experienced electrician, should have grounded the machine before proceeding to connect it with Monsanto's electric power supply, that he should have known the importance of this and that he was negligent in not so doing. He decided that the negligence on the part of Shields and of the appellant contributed to the accident, and, holding that it was not practicable to determine the respective degrees of fault, gave judgment in favour of the respondent for one-half of the agreed amount of damages. The Court of Appeal agreed with the findings of the trial judge.

Counsel for the appellant contended that the Court of Appeal was in error in deciding that any duty such as is mentioned in *Donoghue v. Stevenson*[1] rested upon the appellant with respect to Shields. It is well known that the headnote in *Donoghue v. Stevenson* is not quite correct, and, in any event, in an earlier case, *Dominion Natural Gas Co. Ltd. v. Collins and Perkins*[2], the liability of the gas company to third parties was upheld by the Privy Council. It is clear that Shields was one to whom the appellant owed a duty to take care.

[1] [1932] A.C. 562.

[2] [1909] A.C. 640.

Counsel for the appellant also contended that even assuming negligence on its part the real cause of the accident was the failure of Shields to ground the machine. He relied upon Regulation No. 428(1) made by the Hydro-Electric Power Commission under *The Power Commission Act*, R.S.O. 1950, c. 281:

> 428 (1) The exposed non-current-carrying metal parts of fixed electrical equipment shall be grounded where the equipment
>
> * * *
>
> (*g*) operates with any terminal at more than 150 volts to ground.

He also argued that as an experienced electrician Shields knew or ought to have known the danger of putting a temporary connection from the machine to the 550-volt power outlet in the Monsanto plant and referred to the type of footwear worn by Shields. The evidence as to the footwear is unsatisfactory but taking it most favourably to the appellant, Shields' shoes, as described, constituted merely a contributory cause of the accident.

Counsel for the appellant pointed out that this machine contained what he called a "built-in" system of inspection. By this he meant that if the electrician had properly grounded the machine before turning on the power, the fusebox would have shown that there was a defect in the wiring. The respondent's answer is that when Shields began to connect this machine to the source of power, he was justified in assuming that it was properly wired and that no inspection to check this fact was necessary; that admitting that Shields was negligent when he connected the machine without first grounding it, that negligence would not have injured him if Shields had not justifiably assumed that he was working on a properly wired machine; that both causes were operating at the time of death—the negligence of the manufacturer and the negligence of the electrician; and that in these circumstances, the trial judge and the Court of Appeal were right in dividing responsibility.

I agree with the statement of Chief Justice Porter speaking on behalf of the Court of Appeal, that there was no apparent reason for any person from the time that the machine left the manufacturer to the time of the accident to open and examine the box and that there was no duty upon Shields to examine every part of the machine to find possible defects in the manufacture of it. The matter may be put as a paraphrase of what is stated in the 13th edition

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of Salmond on Torts, p. 569: Whether the appellant should reasonably have expected Shields to use the opportunity for inspection in such a way as to give him warning of the risk.

The decision of this Court in *Great Eastern Oil and Import Company Limited and Angus Oakley v. Frederick E. Best Motor Accessories Company Limited*[1], relied upon by counsel for the appellant, is quite distinguishable as there it was held that the negligence of Oakley, who had been in charge on behalf of the appellant company in making a delivery of gasoline to the premises of the respondent, was clearly severable from any act or omission of the plaintiff, even if such act or omission could be considered a fault. Reference was there made to the discussions that had occurred in the Courts and elsewhere as to proximate cause, *causa causans* and the last clear chance.

Each case must be decided upon its own particular facts and in the present appeal I agree with the conclusion arrived at by both Courts below. The appeal must be dismissed with costs.

The judgment of Cartwright and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—In the month of March 1959, the appellant, a Massachusetts company engaged in the manufacture of heavy machinery, undertook to supply an electrically-operated heavy duty machine encased in metal for installation by Monsanto Oakville Limited at its plant at Oakville, Ontario, in which province there were then, as there are now, in force regulations made under *The Power Commission Act* requiring, *inter alia,* that the exposed non-current-carrying metal parts of fixed electrical equipment shall be grounded where the equipment operates with any terminal at more than 150 volts to ground. (Regulation 428.)

Before the machine left the appellant's plant it was subjected to extensive tests which indicated that it was in safe running order, but it is apparent that owing to the manner in which the appellant had introduced the "lead wires" into the "stop and start switch box" attached to the machine, the insulation on one of such wires had worn thin so that

[1] [1962] S.C.R. 118, 31 D.L.R. (2d) 153.

by the time of installation at the Monsanto Oakville Limited plant bare copper wire was exposed at the point where it was connected with the switch.

Pursuant to the regulations made under *The Power Commission Act*, it is provided that an annual permit may be issued to the owner of any manufacturing, mercantile or other building where electrical installation work in connection with the plant is required to be performed, provided that the owner or occupant employs his own electrician for that purpose, and it was for this, amongst other purposes, that Mr. Shields was employed by the Monsanto Company.

In the course of his duties Mr. Shields, who was an electrician of great experience, undertook to connect the machine in question which had then been bolted to the factory floor with an electrical current of 550 volts, and in so doing he neglected to ground the equipment although there was apparently ample opportunity to do so. The result of introducing this current through the exposed wire in the switch box was that the ungrounded exposed metal part of the equipment became highly charged and that the unfortunate engineer was killed when he came in contact with it some one-half to one hour after the current had been turned on.

This was a machine designed by the manufacturer as being required to be grounded as can be seen by the evidence of the president of Hobbs Manufacturing Company who stated in reference to these products of that company that "a machine must be grounded before it is started up".

It is plain also from the evidence of the plant superintendent of Monsanto Oakville Limited that provision had been made at that company's plant for the grounding of the machine, and that both he and the plant electrician knew the provisions of Reg. 428 and, therefore, knew that the machine was one which was required to be grounded before use. After agreeing that he was familiar with Reg. 428, the plant superintendent went on to say on cross-examination:

> Q. You are familiar with that regulation. That is regulation 428 . . . I take it that, as the plant electrician, Mr. Shields, even more than you, would be familiar with such regulation?
>
> A. Yes.

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The same witness had given the following evidence on direct examination:

Q. What type of permanent grounding was contemplated so far as this machine was concerned?
A. Well, it would have been grounded through conduits when it was put in, when it was finished.

and he later gave this evidence:

Q. Was the Hobbs machine actually running at the time of the accident?
A. No, not to my knowledge, the power was on.
Q. What would be the purpose of the machine having been on at all?
A. Well, it was not supposed to have been turned on.

The Courts below have found that the death was caused by a combination of the negligence of the appellant in wiring the switch box as it did and the negligence of Shields in failing to ground the equipment before turning on the current, and that as both causes were operating at the time when Shields was killed, and as it is not possible to assess the varying degrees of responsibility, the fault should be equally divided. The respondent and the persons on whose behalf this action was brought were accordingly adjudged entitled to recover $15,000 against the appellant, being one-half of the agreed amount of the damage sustained as a result of the death.

The question raised by this appeal is whether, under the circumstances outlined above, the appellant manufacturer owed any duty to Shields giving rise to liability at law.

Chief Justice Porter, speaking on behalf of the Court of Appeal in the present case, stated the crux of the problem in these words:

> Does then the duty defined in *Donoghue v. Stevenson* [[1932] A.C. 562] extend to the circumstances before us? Did the manufacturer bring itself into direct relationship with the skilled electrician who was killed as the result of the combined carelessness of the manufacturer and the electrician? If there were no duty, there would be no negligence. The Negligence Act adds nothing to the duty. It merely eliminates contributory negligence as a complete defence, and provides for apportionment of the damages.

Since the decision in *Grant v. Australian Knitting Mills, Ltd.*[1], it has been generally accepted that the principle of the decision in *Donoghue v. Stevenson, supra,* is summed up in the words of Lord Atkin at p. 599 where he said:

> . . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate

[1] [1936] A.C. 85.

examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

In commenting on this passage in the case of *Paine v. Colne Valley Electricity Supply Co., Ltd., et al.*[1], Lord Goddard observed at pp. 808-9:

It seems clear that, in speaking of the prevention, or of the reasonable possibility, of examination, LORD ATKIN meant prevention or no possibility in a business sense. A person who buys 100 cases of tinned salmon from the packers has a physical opportunity of examining each tin. Commercially speaking, it would be impossible for him to do so, nor would anyone expect it, as by opening the tins he would spoil the contents before they could be sold. Perhaps, therefore, without disrespect, the word "probability" may be substituted for "possibility". If there be such a probability, the relationship between manufacturer and ultimate user or consumer will not be proximate. Something is interposed which prevents the forging of a link between the two.

Although *London Graving Dock Co. Ltd. v. Horton*[2] was a case of an invitor, the following comment made by Lord Porter at p. 750 appears to me to have particular relevance to the present case:

Your Lordships' House held that . . . the manufacturer would have escaped if it was natural to expect that the intermediate vendor would take care to see that the contents were in order. The pursuer, however, could recover from the manufacturer because such an examination was not to be expected. The law required the latter to be careful not to run the risk of injuring a person whom he contemplates or ought to contemplate as likely to be injured by his negligence, but an examination by the retail vendor, if rightly expected, could be relied upon by the manufacturer and would have been a complete answer to the claim. Still more so would knowledge by the purchaser of the true position, whether such knowledge was actual or such as the circumstances would warrant the manufacturer to assume.

It is to be observed that in the case of *Woods v. Duncan et al.*[3], Lord Simonds made the following general comments:

But at this stage the question is whether the assumed negligent actor ought reasonably to have foreseen the intervening act and, having foreseen it, to have provided for it or ignored it at his peril. It is, I think, essentially the same question as that which your Lordships resolved in *Donoghue v. Stevenson,* [1932] A.C. 562. For to ask, who is the neighbour to whom I owe a duty in respect of my act, may be in part answered by saying that he at least is not my neighbour who cannot be affected by my act, unless there is some intervening event which I cannot reasonably foresee.

[1] [1938] 4 All E.R. 803.
[2] [1951] A.C. 737.
[3] [1946] A.C. 401 at 442.

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And later by the same judge at p. 443 where he says of the *Donoghue* case:

> There the manufacturer was held to owe a duty to the consumer just because the intervening act of examination was not reasonably contemplated as possible or probable—I do not pause to consider which. That, I suggest, is one aspect of a wider proposition, namely, that the nature of the duty (if any) owed by an actor to a third party depends upon the existence and nature of the acts which should in the actor's contemplation be regarded as reasonably likely to intervene.

It is the absence of a reasonable probability that any defects or concealed dangers in his products will be discovered before use by such examination as ought reasonably to be anticipated which gives rise to the duty owed by a manufacturer to the ultimate user who suffers damage as the result of neglect in the manufacture or preparation of such products or as the result of dangerous qualities inherent in them, but where such reasonable probability exists, the subsequent negligence of the ultimate user cannot be coupled with the initial neglect of the manufacturer so as to permit the application of the doctrine of contributory negligence. As Porter C.J.O. had so clearly stated, "The Negligence Act adds nothing to the duty."

I do not think that the word "inspection" as used by Lord Atkin in the *Donoghue* case necessarily connotes "physical inspection" but rather that it embraces all means by which the defects or dangers might reasonably be expected to be detected before use. In this regard it is to be observed that in *Grant v. Australian Knitting Mills, Ltd., supra,* when Lord Wright was describing the opaque ginger-beer bottle which gave rise to the litigation in *Donoghue's* case, he referred to it as an

> . . . article issued to the world, and . . . used . . . in the state in which it was prepared and issued without it being changed in any way and without there being any warning of or *means of detecting the hidden danger.* (The italics are mine.)

No manufacturer of heavy electrically-operated machinery can, in my opinion, be expected to contemplate the probability that the ultimate user will dismantle a machine and examine every part of it for possible dangers or defects, but if there is a known procedure which will disclose such dangers and defects without physical inspection it becomes a question of whether the manufacturer was justified in assuming it to be reasonably probable that such procedure would be followed in the particular case, or to put it another

way, whether the manufacturer ought reasonably to anticipate that the procedure would not be followed. The fact that such a procedure is required to be followed by the law of the place where the machine is to be installed is, in my opinion, a factor to be considered in determining this issue.

The regulations made under *The Power Commission Act* of Ontario, include the following:

> 428 (1) The exposed non-current-carrying metal parts of fixed electrical equipment shall be grounded where the equipment
>
> * * *
>
> (*g*) operates with any terminal at more than 150 volts to ground.

After his attention had been called to this regulation, one of the electrical inspectors for the Ontario Hydro who gave evidence on behalf of the plaintiff at this trial gave the following answers on cross-examination:

> Q. And you agree with me that where a machine such as the one in question is connected up to a voltage in excess of 150 volts, it must be grounded?
>
> A. Yes.
>
> Q. That is a Hydro requirement, a regulation, is it not?
>
> A. Right.
>
> Q. Now, what is the object of grounding?
>
> A. Well, to make the machine safe in case of a breakdown or a defect.
>
> Q. To make the machine safe in case of a breakdown or a defect. Now, would that kind of defect include a short circuit induced by a conductor coming in touch with another part of the metal?
>
> A. I would say yes.
>
> Q. Such as what you suspect happened in this case?
>
> A. Yes.
>
> Q. And the grounding is for the express purpose of making the machine safe in the event of such a defect?
>
> A. Yes.

The same witness later said:

> Q. As you have explained it, so that there can be no doubt about it, the purpose of grounding is to prevent just the thing that happened in this case?
>
> A. Right.
>
> Q. Will you go this far with me, that in your best opinion, had this machine been grounded this accident would not have happened.
>
> A. Yes, I would have to say yes to that.

The general application of Reg. 428 to all fixed electrical equipment with exposed non-current-carrying metal parts operating with a terminal at more than 150 volts indicates that the potential danger lurking in all such equipment is

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recognized by the Hydro-Electric Power Commission of Ontario and it does not seem to me to have been unreasonable to assume that both the potential danger and the regulation itself were known to the very competent electrician who had been working for just under 4 years as assistant plant electrician and subsequently plant electrician in a plant where other such electrical equipment was installed and who was effecting the installation under a permit issued under the authority of the same regulations.

Counsel for the appellant suggested that the machine was so constructed that when properly grounded it contained its own "built-in" system of inspection, and while this is perhaps something of an exaggeration, it is nevertheless apparent that the effect of such grounding on the machine in the condition in which it was at the time of installation would have been to cause a fuse to blow when the power was turned on, thus eliminating the danger and indicating the defect in the wiring of the machine. This, in my opinion, is the equivalent of an "inspection" as that word is employed in *Donoghue v. Stevenson, supra.*

The president of the appellant company described the matter thus:

Q. Mr. Oakes, assuming that the power supply is correctly connected to the machine by the electrician and the machine grounded through some part of its exterior casing by means of the wire illustrated in Exhibit 18F, and there is a short circuit in the machine, for instance, as is suggested in this case that a bare wire is touching the exterior of the switch box: are you in a position to say what happens when the power is turned on to that machine in that condition?

A. Well, provided the grounding is a good ground, I would say the fuses would blow in the disconnecting switch or somewhere on the machine.

Q. That is, a fuse would blow and what does that result in?

A. Eliminating the power from the machine.

Q. So that with the blowing of a fuse there is no power, no current in the machine?

A. That is correct.

Q. Is there current in any part of the machine?

A. No, if the—

Q. Of course, if the fuse which is at the disconnect box blows, there will be no power at any part of the machine?

A. That is correct.

Q. And if the fuse happened to be in the type "E" box that blew, what circuit goes out?

A. The circuit to the switches and to the motor.

It is to be remembered that although the manufacturer had adapted the switch box attached to this machine for use in a manner for which it was not originally intended and although that method of adaptation resulted in the insulation wearing off one of the wires in the box after it had been tested at the manufacturer's plant, the defect was nevertheless one of a character against which the Ontario Hydro Commission had provided protective regulations applicable to all such machines indicating, in my view, a recognition by that Board of the reasonable possibility of such a defect existing in any such machine no matter how carefully it may have been manufactured and tested at the factory.

It appears to me that the interpretation placed on Lord Atkin's decision in *Donoghue's* case by the learned editor of the Law Quarterly Review (Dr. A. L. Goodhart) in (1938), 54 L.Q.R. at p. 63 is particularly apposite to the circumstances here disclosed. He there says:

> Lord Atkin twice stated that the manufacturer will be liable if the goods sold are to be "used at once before a reasonable opportunity of inspection". He explained this on the ground that "this is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed". What is meant by the two phrases "reasonable opportunity of inspection" and inspection which "may reasonably be interposed"? By what test are we to judge whether the purchaser's inspection "may reasonably be interposed"? It is submitted that such an inspection is *reasonably interposed* when the purchaser, *instead of being entitled to rely on the manufacturer's skill, ought to make an inspection of his own.* An opportunity is reasonable not merely because a sufficient length of time has been afforded to the purchaser: *it is reasonable because under the circumstances the purchaser ought to make an inspection.* (The italics are mine.)

The fact that the machine was designed to be grounded, that the plant superintendent and plant electrician knew that it should be grounded, that the regulations required it to be grounded and that grounding before use would have had the effect of isolating the danger and disclosing the defect all indicate to me that it was recognized by all concerned (the manufacturer, the purchaser, the electrician and the Commission) that it was not safe "to rely on the manufacturer's skill" without "grounding" this type of machine before using it as it was used in this case.

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In the same article in 54 L.Q.R. at pp. 66-67, the learned author adopts the test of whether the defect was discoverable by "such a reasonable examination as ought to be anticipated" as expressing the principle for which he is contending. I agree with this reasoning and consider that the answer to this question is decisive of the present case. In my view, for the reasons which I have stated, the "test" afforded by "grounding" constituted "reasonable examination" in the present case, and it seems to me that for the reasons hereinbefore set forth the appellant was amply justified in anticipating that it would be carried out as the regulation required and ordinary caution dictated.

I am, accordingly, of opinion that there was a reasonable probability in this case that any defect in the wiring of the machine would be discovered before use by a form of examination which ought reasonably to have been anticipated by the appellant, or to put the matter in another way, that it was not unreasonable for the appellant to anticipate that the electrician installing this machine would take advantage of the recognized means of protection from and detection of any concealed and undisclosed dangers or defects which such grounding would afford.

In view of all the above, I have reached the conclusion that the circumstances here disclosed are not such as to bring the manufacturer into direct relationship with the skilled electrician who was killed, and that there was, therefore, no duty owed by the appellant to the late Mr. Shields.

I would allow this appeal and direct that judgment be entered dismissing the action with costs throughout.

Appeal dismissed with costs, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitors for the defendant, appellant: Keith, Ganong, Du Vernet & Carruthers, Toronto.

Solicitors for the plaintiff, respondent: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.