IN THE MATTER of the Petition of Right

MATILDA SABOURIN.....SUPPLIANT; 1911 Jany. 10.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Soulanges Canal—Accident to workmen—Negligence—Electric lighting system—Failure of workman to obey instructions—Faute commune.

The electric lighting system of the Soulanges Canal at the time of its installation, some ten years before the accident in question, embraced all the means then known to the art for safe-guarding the workmen in charge of it from accident. The facts shewed that while this system was not defective, in installations made at the present time more protection may be afforded workmen in lowering and returning lamps to position. The safety of the men engaged in this work on the canal was absolutely ensured by their observance of certain instructions communicated to them by the proper officer of the Crown in that behalf, viz., to wear rubber gloves furnished for the purpose by the Crown, and to use the crank provided for the purpose of raising and lowering the lamp to position. On the occasion of the accident in question M., the suppliant's husband, while discharging his duties as carbon-man, was killed by a current of electicity entering his body from the wire cable used for lowering and raising the lamp. The facts shewed that this cable had become electrified owing to certain weather conditions, and that M. had taken hold of it without rubber gloves in order to shake the carbon into place without lowering the lamp for such purpose, which he had been expressly forbidden to do.

Held, affirming the finding of the Referee, that the facts did not establish a case for the application of the doctrine of *faute commune;* and that as the accident was solely the result of M's own negligence, the petition must be dismissed.

PETITION OF RIGHT by the widow of a workman, employed on the Soulanges Canal, who was killed by an accident while engaged in the sphere of his employment.

The facts are stated in the report of the Referee.

By consent of parties, the case was referred to the Registrar, as Referee, for enquiry and report.

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September 18th, 1909.

The Referee now filed the following report:—

The reference was proceeded with at Montreal, before the undersigned on the 23rd and 24th days of April, 1909, in presence of S. Letourneau, Esq., of counsel for the suppliant and of Jean Charbonneau, Esq., of counsel for the respondent, and after hearing the evidence adduced and what was alleged by counsel aforesaid, the undersigned submits as follows:—

The preparation of this finding was delayed by the production of the evidence.

The suppliant brings her petition of right to recover the sum of $10,000 for alleged damages resulting from the death of her husband, Aurèle Mercier, who was killed while discharging his duties as carbon-man on the Soulanges Canal, a public work of Canada.

The action is based upon sub-section (c) of section 20 of the *Exchequer Court Act* (R. S. 1906, c. 140) which gives the subject relief against the Crown for every claim arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The accident happened in the following manner:— On the evening of the 12th July, 1907, Mercier was found dead, hanging by the hand still grasping the metal cord or cable used to take the lamp up and down the post. The coroner's investigation was passed upon the body, and the medical man declared, after hearing all the circumstances, that he had been killed by an electric shock.

The several duties assigned to Mercier and to all carbon-men are told to us by Damien Lalonde, the Chief Electrician on the Soulanges Canal, from whom the carbon-men received their orders and directions.

He was their superior officer. In daytime there is no current on the wire, and it is at that time the carbon-men pass and change the carbon on the lamps. In the evening and at night, when the current is on,—and it is put on at the power house and not by the carbon-men, when the sun is down,—it is the duty of the carbon-man to go the round of the section and see that the lamps are lighting. If they do not light they should be taken down in the manner told and shown them by the Chief Electrician, who tells us further that when Mercier first came upon the works, he showed him how to carbon a lamp and all the work that was expected of him. He further gave him a man with experience to go over his works for a few days, who showed him what to do.

Damien Lalonde further gave him a pair of rubber gloves to use when he was doing anything to the lamps at night, when the current was on. If a lamp does not light at night, the duty of the carbon-man is to take it down in the regular manner, as mentioned hereafter and to repair it if he can. If the lamp does not light for a second night, he takes it down to the power house to have it repaired. He is not supposed to open the lamp on the grounds, but only at the power-house.

Under the system at the Soulanges Canal, there was, with very few exceptions, a transformer for each lamp, and the lamp in question had its own transformer.

The lamp is suspended at the end of an arm running out from the post. It is so suspended by a metal cord running upon blocks, which runs down the post and through cross-bars holding the transformer and finally reaches a reel at about three feet from the ground at the time of the accident. This reel is worked with a detachable crank, having a wooden handle. The voltage on the main was 2,400, conducted to the transformer by two secondary wires. There is on the lamp proper,

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under normal conditions, a voltage of 110 to 112, and this voltage cannot kill.

However, it appears that through unknown reasons, which are at least assigned to thunder, the primary or main wire came in contact with the box of the transformer, burning the insulation and loading the box of the transformer with the current of 2,400, which is the current on the primary. The thunder would have burnt the wire inside and brought it in contact with the box. As a result the secondary wire came in contact with the primary or main, the wire coming in contact with the main came in contact with the box of the transformer which is of wrought iron. Now, as was already said, the transformer rests on two wooden cross-bars through which passes the metal cord to take the lamp up and down, and it is contended by all the experts and those who know of electricity that as it had rained all day and the weather was still very damp on the night of the accident, the electricity was, following this disturbance, communicated to this metal cord by water on those cross bars. Water is a conductor. The induction, on account of this rainy, wet and damp weather prevailing all the time, electrified this metal rope. The metal cord was then practically loaded from the primary or main wire with a current of 2,400, more or less.

On the very first day that Mercier reports for work, Damien Lalonde teaches him his work as above mentioned, and furthermore gives him a pair of rubber gloves and instructs him and gives him orders to use them every time he has any work to do with the lamps when the current is on (pp. 136, 282, 284, 305, 307). Mercier had had two pairs of gloves, and he would have been given more, so the Chief Electrician tells us, for the asking. There was no reason for him to be

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without gloves, and he had gloves. He was, by his superior officer, from whom he took instructions, ordered not to shake the lamp and warned that an accident might happen if he did not use his rubber gloves. He was told several times to use his rubber gloves ; and if a lamp does not light it is a sign something has gone out of order, and that alone is a good reason to use the gloves.

Furthermore, he had been forbidden on several occasions, strict orders being given him never to shake the lamps by catching hold of the metal cord, because among other reasons, it had the effect on some occasions to shake the globe off the lamp and make it fall to the ground and break it. It was said in evidence that sometimes by so shaking this metal cord, it would give a jerk to the lamp and work down the carbon to its place and start a lamp which would be temporarily out. But this mode of starting the lamps was forbidden, strict orders being given never to do it. Sauvé, the superintendent, and Damien Lalonde, the Chief Electrician, under whom were the carbon-men, gave these orders.

On the night of the accident, Mercier first transgresses the order given him in not putting on his rubber gloves to attend to the lamp, and, secondly, he further disobeys in attempting to shake the lamp by holding the metal cord in his hand, because it is the necessary surmise we must, under the evidence, come to, when he is so found hanging by the hand to this metal cord.

By way of shifting the liability the suppliant has endeavoured to prove that the lamp in question was often out of order. Would not that fact, if it were satisfactorily proved, be an additional reason why Mercier should obey his orders and instructions and put on his rubber gloves when he has to do with such a lamp?

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Damien Lalonde says, that it was Mercier's duty on the night of the accident to use his gloves in connection with the lamp out of order, and especially so in rainy weather.

Jean Baptiste Juillet says he sometimes saw Mercier at work at night with rubber and kid gloves on his hands.

Under the present circumstances and the facts as above related, there cannot be any other conclusion to come to than that Mercier met with the fatal accident through his own fault. The man who is the author of his own wrong merits nobody's sympathy; he does not come into Court with clean hands. *Thrussell* v. *Handyside* (1).

So far, having relation to sub-section (c) of section 20 of the *Exchequer Court Act*, we have a public work and an officer of the Crown in charge of the works, *i.e.*, Damien Lalonde, the Chief Electrician. Can it be said that the latter was in any manner negligent? The question must obviously be answered in the negative.

Two experts, electrical engineers, were heard as witnesses on behalf of the suppliant. They were Messrs. J. de G. Beaubien and Louis Herdt, men of good standing and capacity. The latter especially is a gentleman of experience and profound knowledge and professor at McGill University.

Both of them, in answer to the undersigned, clearly and unhesitatingly declared that the electrical system or installation in force at the Soulanges Canal is not defective. Mr. Beaubien tells us clearly that if Mercier had used his rubber gloves the accident would not have happened.

Mr. Herdt tells us that the installation, made ten years ago, was so made in the best possible conditions

(1) [1838] 20 Q. B. D. 359; 57 L. J. Q. B. 347.

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but that now precautions might be taken ,and he concludes by saying:—

"Le développement dans l'installation électrique dans les dix dernières années a été tellement sensible que je me rappelle avoir visité cette installation avec l'ingénieur en chef de la compagnie et avoir exprimé mon admiration de la manière que ç'avait été installé mais d'ici là qu'une protection aurait du être faite sur ce point en question. Or je voudrais comme ingénieur être absolument indemné de blâme contre quelqu'un qui a fait une installation il y a dix ans."

Mr. Herdt, however, when stating he could not say that the installation was not defective, added that it was not complete, inasmuch as it had not sufficient protection to raise and take down the lamps. It is always easy to be wise after the event, and to suggest some way or manner how an accident might have been avoided. And, obviously, the criticism of Mr. Herdt could not, by hook or crook, be construed to be a condemnation of the installation. The installation was, in his judgment, the best that could be made and erected at the time, and it must now be worked with precaution. Mr. Damien Lalonde has shown that precaution by giving strict orders from the beginning to use rubber gloves when handling the lamps. What more could be expected? *Quebec & Lake St. John Ry.* v. *Lemay* (1).

Under the English law the legal doctrine would in a case like the present one deprive the suppliant from recovering.

Under the Admiralty law, the rule governing in cases of contributory negligence is founded upon the principle which from ancient times has been applied in Admiralty courts, that damages occasioned by a

(1) Q. R. 14 K. B. 35.

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common fault shall be considered as a common loss. *Williams' & Bruce's Admiralty Practice* (1).

However, the present case is to be decided under the law of the Province of Quebec where, when the employer and the employee injured are both at fault, damages are divided. *Price* v. *Roy* (2). The damages must then be reduced in the ratio of the relative fault. But this is not a case of common fault or of contributory negligence. There is no fault or negligence proved on behalf of the servants or officers of the Crown. Mercier suffered death through his own negligence, from his disobedience to the orders and instructions of his superior officers. *Volenti non fit injuria.* If an employer could be held liable in such a case, he could not protect himself against the concerted action of his employees to mulct him in damages. *Beven on Negligence* (3). says:—

"If the necessary advices are given to insure the safety of the workmen so far as is, in the circumstances, reasonably practicable, the master's duty is discharged; and a workman who has had the requisite orders given to him to safeguard his working and who disregards them is not to be heard to say that the master is liable for an injury sustained by him because the foreman did not see the orders were not disobeyed, or where the danger is intensified by his own insensate folly".

Among the numerous cases cited by Bevan, we find the two Canadian cases of *Davidson* v. *Stewart* (4); and *The Royal Electric Co.* v. *Paquette* (5) on this very point. See also *Canada Foundry Co.* v. *Mitchell* (6); *Lepitre* v. *Citizens Light etc. Co.* (7); *Montreal Park and Island Ry. Co.* v. *McDougall*;(8) *Allen* v. *New Gas Co.* (9).

(1) 3rd ed. p. 95.
(2) 29 S. C. R. 494.
(3) [1908] ed. 3, vol. 1, p. 618.
(4) 34 Can. S. C. R. 215.
(5) 35 Can. S. C. R. 202.
(6) 35 Can. S. C. R. 452.
(7) 29 Can. S. C. R. 1.
(8) 36 Can. S. C. R. 1.
(9) 1 Ex. D. 251.

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The person who sustains damages through his own fault is supposed not to suffer any. *Quod quis ex sua culpa damnum sentit, non intelligitur damnum sentire.* He has, indeed, but himself to blame for the prejudice suffered, and no one but himself is responsible for the damage he has suffered through his own fault. *Larombiere Oblig.* (1); *Sourdat, Responsabilité* (2); *Laurent* (3); *Dalloz* (4); *Cie. Navigation de Richelieu et Ontario* v. *St. Jean* (5); *Grand Tronc* v. *Bourassa* (6); *Bergeron* v. *Tooke*(7); *Currie* v. *Couture* (8); *Coallier* v. *Dominion Oil Cloth Co.* (9); *The Globe Woollen Mills Co.* v. *Poitras* (10).

I regret to say that the late Mercier had but himself to blame for the accident, and under the circumstances the suppliant cannot recover.

Therefore, the undersigned has the honour to report and finds that the suppliant is not entitled to the relief sought by her petition of right herein.

The suppliant appealed from the report of the Referee.

December 15th, 1910.

The appeal from the report of the Referee was now argued.

J. A. Beaulieu, for the suppliant, contended that the facts showed a case of contributory negligence on the part of the suppliant's husband. In such a case the principle of *faute commune* must be applied and the damages divided but not necessarily equally. The accident was the combined fault of the Crown's officers and of the deceased. The electric lighting system of the canal was admittedly defective. The

(1) Vol. 5, p. 708.
(2) Vol. 2, pp. 9, 10.
(3) Vol. 20, pp. 494, 495.
(4) [1874] Part 1, p. 230.
(5) 28 L. C. J. 91.
(6) 19 L. N. 132.
(7) 27 Can. S. C. R. 567.
(8) 19 R. L. 443.
(9) M. L. R. 6 Q. B. D. 268.
(10) Q. R. 4 K. B. 116.

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cable by which the lamp in question was lowered and raised into position became electrified owing to the negligence of the Crown's officer in charge of the electric lighting system. Mercier, the plaintiff's husband, was admittedly negligent in not using rubber gloves, but the accident would not have happened if the cable had not been permitted to become charged with electricity owing to the defective state of the lamp and the transformer.

Canadian Pacific Railway Co. v. *Tapp* (1); *Jacquemin* v. *Montreal Street Railway* (2); *Fleury* v. *Quebec District Railway Co.* (3); *Caron* v. *La Cité de St. Henri* (4).

The electric light system was defective as a whole. It was incumbent upon the Crown to have adopted all the modern means of safeguarding the carbon-man from accident. The evidence shows that more precautions are taken now in protecting men in charge of the lights than was the case in this system installed some ten years ago. The Crown should have brought the system up to date. The evidence shows that if a porcelain tube had been provided through which the wire from the lamp would pass, the accident would have been averted. The cable was too close to the transformer, and the wire should have been grounded. Moreover, this particular lamp was in a defective condition to the knowledge of the Crown's officials, and that knowledge was not communicated to the suppliant's husband. Under these circumstances there is a clear case of negligence within the meaning of the *Exchequer Court Act*, sec. 20. The utmost care was upon the Crown to safeguard the workmen from accident where the work was necessarily dangerous as was the case here. (Cites *The Citizen's Light and*

(1) 18 Q. O. R. K. B. 552.
(2) Q. R. 11 S. C. 419.
(3) Q. R. 13 S. C. 268.
(4) Q. R. 9 S. C. 490.

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Power Co. v. *Lepitre* (1); *The Royal Electric Co.* v. *Hévé* (2); *City of Montreal* v. *Dame Mary Gosney* (3).

The Crown seeks to put the sole cause of the accident on the fact that the deceased did not wear gloves. But if the wire had not been charged with electricity the accident would not have happened. True the deceased took hold of the cable, but it is submitted that if he had used the crank instead of doing what he did he would have met with the same fate because the crank itself was charged with electricity. We admit there was fault on the part of the deceased, but it was partial and contributory only; and if everything had been normal in the system, gloves would not have been needed. This being so, the Crown was more at fault than the deceased. The deceased had no knowledge of the action of electricity. He should have been instructed by the Crown officials as to the dangerous nature of the work. It was not sufficient for the Crown to provide rubber gloves and to give instructions that they should be used; it was the duty of the Crown to see through its officials that the gloves were worn by its employees. (Cites *Chemical Co.* v. *Forster* (4).

The Crown officials knew that it was a common practice amongst the employees to neglect instructions with regard to wearing gloves. They should have seen that the instructions were carried out. (Cites *Fournier* v. *Lamoreux* (5); *Martell* v. *Ross* (6).

S. Letourneau contended that upon the facts the sole cause of the accident was first the breach by the suppliant's husband of the plain instructions that had been given to him not to attempt to regulate the carbon in the lamp by pulling the cable; and, secondly, by his

(1) 29 S. C. R. 1.
(2) 32 S. C. R. 462.
(3) Q. R. 13 K. B., 214.
(4) Q. R. 15 K. B. 411.
(5) Q. R. 21 S. C. 99.
(6) Q. R. 16 S. C. 118.

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not wearing rubber gloves as he was instructed to do. Under such circumstances the doctrine of *faute commune* could not be applied.

There is no negligence attributable to the Crown. The evidence shows that at the time of its installation the system of electric lighting on the canal was in every way perfect. The Crown, therefore, had done everything required of it with respect to the safety of its workmen. There was no contributory negligence on the part of the Crown, and Mercier the suppliant's husband was solely responsible for the accident which caused his death.

CASSELS, J., now (January 10th, 1911) delivered judgment.

This is an appeal from the report of the Registrar, acting as Referee herein, made on the 9th day of September, 1909, by which he found that the suppliant was not entitled to the relief sought by her petition of right.

I have read over the evidence taken before the Referee and have referred to the various authorities cited.

On the argument of the appeal Mr. *Beaulieu*, counsel for the suppliant, conceded that the deceased was in fault, but based his contention for partial relief on the doctrine of *faute commune*.

I think the Referee has arrived at a correct conclusion, both as to the facts and the law applicable thereto.

In addition to the authorities cited, *Tooke* v. *Bergeron* (1), and *George Matthews Co.* v. *Bouchard* (2), may be referred to.

(1) 27 S. C. R. 567.

(2) 28 S. C. R. 580.

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Walsh v. *Whitely* (1), and *Morgan* v. *Hutchins* (2) are instructive authorities relating to liability under the Workmen's Compensation Act.

It has to be borne in mind that the present case is an action against the Crown, and the relief can only be given under the provisions of the *Exchequer Court Act* if the suppliant makes out a proper case.

The appeal is dismissed with costs, and judgment may now be entered accordingly, if the parties waive making the motion for judgment provided by Rule No. 214.

Judgment accordingly.

Solicitors for the suppliant: *Pelletier & Letourneau.*

Solicitor for the respondent: *E. L. Newcombe.*

(1) 57 L. J. Q. B. 57, 586. (2) 59 L. J. Q. B. 197.