

CANADA / JUDGMENT

Toronto Power Co. v. Raynor

(1915) 51 SCR 490

COURT

Supreme Court of Canada

DECIDED

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Toronto Power Co. v. Raynor Collection Supreme Court Judgments Date 1915-06-24 Report

(1915) 51 SCR 490 Judges Fitzpatrick, Charles; Davies, Louis Henry; Idington, John; Duff, Lyman Poore; Anglin, Francis Alexander On appeal from Ontario Subjects Torts Decision Content Supreme Court of Canada Toronto Power Co. v. Raynor, (1915) 51 S.C.R. 490 Date: 1915-06-24 The Toronto Power Company (Defendants) Appellants; and Arthur E. Raynor (Plaintiff) Respondent. 1915: June 10, 11, 24. Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ. ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO. Negligence—Power company—Accident to employee—Injury from supposed dead wire—Duty of employer—Proper system. A power company is not liable for injury to an employee from contact with an electric wire represented to be harmless, but which had, in some way become charged, when it is shewn that every reasonable precaution had been taken for the safety of employees and there is nothing which proves or from which it can be inferred that the accident was due to the negligence of some person for which the company was responsible. Per Idington J. dissenting.—The only reasonable inference from the evidence is that the accident was caused by negligence; therefore, as decided by *McArthur v. Dominion Cartridge Co.* ([1905] A.C. 72) and *Toronto Railway Co. v. Fleming* (47 Can. S.C.R. 612), it is not necessary to determine precisely how such negligence produced the injury complained of. There was also some evidence of a want of a proper system and of failure to employ competent persons to superintend the work. Judgment of the Appellate Division (32 Ont. L.R. 612) reversed, Fitzpatrick C.J. and Idington J. dissenting. 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. The appellant company generates electrical energy at Niagara Falls, Ont., and transmit it by high voltage wires to Hamilton and Toronto. The wires are divided into units consisting of three each, two of which are, for the purposes of this case, known as units A. and B. On Sept. 2nd, 1913, the respondent, Rayner, was engaged in painting a tower supporting a wire of unit A. As the trial judge found he had been assured that this unit contained no current and that he could safely work there. He had been working about fifteen minutes when he received an electric shock which resulted in severe injuries. The trial judge also found that the shock came from contact with a wire on unit A. At the trial,

without a jury, the learned judge held the appellant company liable and assessed the damages at \$1,200. This judgment was affirmed by the Appellate Division. D.L. McCarthy K.C. for the appellants. J.H. Campbell for the respondent. THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal. DAVIES J.—I concur in the opinion of Mr. Justice Anglin. IDINGTON J. (dissenting).—The respondent was engaged in the service of appellant in painting for it part of one of its towers beside the Welland Canal, at a point one hundred and thirty-five feet from the ground, when he received an electric current which burned his hand and possibly other parts of his body and caused him to fall some distance to a platform below him, thereby causing other bodily injuries. He sued appellant for damages for such injuries, claiming them to have been caused by its negligence. The tower in question and other like towers carry a number of wires used for conducting electric energy from the Niagara Falls where generated to the City of Toronto. There are two of these wires or sets of wires which for the purpose of this work and this case are designated respectively A. and B. The respondent and his fellow workmen had been assured by appellant's representative that they would be in perfect safety from the electric current whilst engaged in their work. I do not think, though that assurance was relied upon in argument, that it carries the respondent further than the common law or the "Workmen's Compensation Act" for the purpose of this case. The respondent, and a fellow workman named Hamilton, under the direction of one Maudsley, their foreman, had painted as required that part of the work carrying line "B" when they awaited the preparation in way of taking the electric current off line "A" and thereby so deadening it, as the expressive phrase used implies, that work could be safely done in close proximity thereto. That being supposed to be perfectly done they in response to the directions of one Creswick on the said tower, and one Smith on another tower some distance away, both engaged in said work of deadening the wire, began their work of painting where directed. They had only been engaged there some ten or fifteen minutes when respondent was so stricken by the current of electricity as to cause the injuries complained of. The learned Chief Justice of the Queen's Bench Division who tried the case finds as a fact that these injuries were caused by electric current on the supposed dead wire. I have read the entire evidence in the case and I have not the slightest doubt of the correctness of that finding. The respondent and other men called to testify to what happened seem probably to have been strangers to each other till a few days before the accident when Rayner was first engaged by Maudsley. At all events no attack seems to have been made on the trial on their credibility. The story told by Hamilton of a flash from the wire when he and respondent were engaged so closely together is such as to render it impossible to account for that flash by respondent having touched the live wire "B," five or six feet away from the point they were working at. Maudsley corroborates him. The respondent whose story seems told in a truthful manner denies emphatically touching the other wire or departing from his work. Indeed, the suggestion of his doing so seems most improbable. And curiously enough one Bull, also under Maudsley, working at another point, in proximity to same wire "A," says:—Q. What were you painting? A. I was painting iron. Q. You heard nothing more? A. I heard a sizzle on the wire and turned around immediately: and saw Rayner fall. Q. Can you tell

from what wire the sizzle was? A. From my estimation it came right from the wire alongside of what I was working, Rayner was in the position falling from that wire. And in cross-examination he tells that he turned round and jumped because he felt sure the wire was alive. The importance of this is that the appellant alleges that wire was dead, and rests its case chiefly upon that ground. Upon all that evidence it seems impossible to impugn the finding of fact, even if one felt inclined, as I do not, to doubt the correctness of the finding. I only dwell upon it because there is an attempt, indirectly it is true, to challenge it by asking us to accept theories put forward as opposed to it yet resting only upon the evidence of some witnesses for appellant. The appellant's case as presented by a number of witnesses convinces me that there was undoubtedly negligence on the part of appellant. The evidence as to the steps taken by Cole and others looking to the clearance of the wire preparatory to the work of painting, may be accepted. But he and others testify in such a way as to demonstrate that, under weather and other conditions then prevailing, it was quite impossible, if the "A" line of wire had all been properly grounded, there could have been any such accident. There seems a general concurrence of opinion that even when the power feeding the current is shut off any wire of the Niagara end, there may be in the wire so shut off what they term static and by induction from other wires an accumulation thereof may occur, which may become a source of danger. Hence the necessity, not only to have those at Niagara shut off the current from the wire to be deadened, but also the wire, when so relieved, protected by groundings at various places and specially so almost immediately at the point next where men are set to work in proximity to or upon the supposedly dead wire. Cole says in his examination in chief:— Q. If a line is properly grounded what is the possibility of having power in it? A. No chance at all if it is properly grounded; it would be impossible to get any juice off it. And in cross-examination:— Q. The static will give a shock? A. Yes. Q. And a man working at that wire at that point that I have described to you would possibly receive a shock from electricity if either one of these ground wires was not efficiently placed? A. I do not see how he could get it there because the other man did not get it; if he got it the others would too. Q. Answer the question; is that a correct proposition? A. Of course, the man told me they had it on good— Q. I am not asking you that at all; I am asking you to answer the question? A. If it was not on properly certainly he might get it. * * * * Q. What is the true and correct meaning of statics as applied to electricity? A. It is gathered off the other lines, the live lines. Q. In the first place these three wires are dead, that is, the power is shut off at Niagara Falls? A. Yes. Q. And there is supposed to be no electricity or current in any of those wires in unit A. at that time, that is correct, is it? A. Yes, just the static. Q. But notwithstanding the fact that the power has been turned off at Niagara Falls, there is a certain quantity of electricity still in the wire? A. Static, yes, from the other line. Q. That is electricity, is it not? A. Yes. Q. And in order to protect men who are working at any particular point from that static it is necessary to ground the wires on either side? A. That is the idea. Q. So the proper grounding is essential? A. Yes. Seiler, foreman of the transformer at Niagara, says:— Q. The only power that can get on to that line is from your end of the system? A. No, you can make that line alive from some other source, at my end of it it is the only place you can make the

line alive, and it might happen that is the only place I could make it alive. * * * * Q. Is it possible for him to receive a shock if the wires are not properly grounded? A. Yes, static shock. Q. I do not care so long as it is a shock; and if Rayner did get a shock either while putting his paint brush in or taking it out of the paint pot which was hanging on this wire or one of these wires he must have received it by reason of improper grounding of the wires? A. I could not say on that; I would make no statement there. * * * * Q. Can you give any explanation as to how Rayner sustained this injury? A. Why, the only way that I can see that he received that shock was that in some way he made contact with line B. * * * * Q. That is your inference? A. It was as near as I can say; that is truthfully in every way I know; I came to that firm conclusion that he must have got up against the live wire in some way which was carrying the load. And Alexander Strangways says:— Q. Do you know as a matter of fact whether it would be safe for a person to work on what is called a dead line in the event of a ground wire not being properly secured? A. In which way? Q. Would it be safe for you to work at any certain point on a dead line and that point being between two ground wires, providing those ground wires were not properly attached to the tower? A. It would if they were not very far apart; one set of ground wires to a distance of about four or five towers would be perfectly safe to work either side of the ground. Q. That is one wire? A. One set of ground wires. Q. That would be one wire attached to the tower and the other end of it being attached to three wires? A. Yes. Q. Can you say whether it is sufficient simply to attach the wire to the tower or whether there should be some other grounding? A. With a proper set of grounds, the kind I was using, it was perfectly safe. Q. What I mean is this, was it necessary and proper that the tower itself should be grounded? A. I could not say. Q. Your experience does not warrant you in answering that question? A. No, sir. Q. Do you know anything about these towers, the kind of foundation for them? A. There are footings in the ground, I do not know how far they go down in the ground. Q. You cannot tell anything about that, whether they are grounded or not? A. I could not say. This witness evidently used a patent appliance and something else not in use by others for grounding wires. Connery appellant's superintendent says:— Q. Do you mean to say there would not be any mark left on him? A. No, sir. I have seen a man killed right in front of my eyes with static shock and there was not a mark on him. Q. Then it is possible for a person who gets a static shock to get a severe injury? A. Yes, because he fell on his head or fell 40 feet off a tower on his head. And departing for a moment from this line of evidence this witness, who ought to have known, but does not seem to have, says as to the grounding:— Q. You have had these twelve years' experience; can you tell me the system which is used in the grounding of wires in this company? A. Certainly I can. Q. Kindly do it; are the towers grounded? A. Every tower is grounded, and that particular tower— Q. Do you know that as a matter of fact? A. I think as a matter of fact I saw those towers built, and there is a copper ribbon in a box of gravel that has a bag over it, and a coil of wire made of copper brought up and riveted to the tower legs right down on the bottom. Q. You saw those towers built? A. Yes. I was right there when they were built. Ackerman says he was engaged in an advisory capacity by appellant:— Q. I asked you what voltage on the static, which is induced by the friction, how much voltage would you get on the wire? A. The voltage could

theoretically reach, accumulate up to this point where this air gap would break down theoretically, but practically it depends very much on the country, and the fact is due to some conditions probably of the air; having leakage from some of the insulators, it would very seldom reach this voltage where this air gap goes; it happens sometimes, we have some records in very dry summer days where we do not have any lightning reported, we get so called discharge all over our lightning arresters, which we keep records from, which would indicate we have an accumulation of voltage up to this point of breakdown. Q. I am speaking of the static? A. About the static on a dead wire, where we would not have any ground whatever, just the insulated wire we could reach the same voltage. Q. What voltage would you reach? A. We could come up to possibly 60,000 volts or higher. * * * * Q. You said the static that would get on the line by way of inducement would be 120 volts? A. Approximately 120 volts. Q. What is the voltage on the ordinary wires where they burn 20 or 30 lights? A. That is 110 or 120 volts. * * * * Q. I want to get a little further information upon this first kind of static, the static which is due to the wind and swinging wires? A. Yes. Q. I understood you correctly then; I also understood you to say that static would extend to the adjoining wire, the voltage of the adjoining wire could be given to a dead wire? A. Yes. * * * * Q. Could you get any static in the way you first mentioned in fifteen minutes on a wire? A. I could hardly think so; it takes some time to build up. Now, assuming respondent's story true, can any one say on this evidence that there is any doubt but that somebody in appellant's service blundered? There is no mystery about the matter. If the appellant's story be true some neglect of a gross character I fear led to the incident. Creswick, already referred to as one of those who invited respondent to the work, I assume imagined he had grounded his part, for he says he sat on one wire. I doubt if he sat still, as he says, I doubt if his dealing with the wire did not disturb his imperfect work. It is also a very curious circumstance in his connection with the case that he started the rumor, without hearing anything about its truth (as he admits by failing to prove it) that respondent had touched "B" line and hence this accident. Why did he do that? That story flashed down to Niagara twenty minutes later coming from this man has a disagreeable aspect. And unless protected by some non-conductor his story of sitting upon the wire seems highly improbable. Upon such a case as the evidence presents there could be no doubt if respondent sued as a stranger, entitled to do so, and not as a servant of the appellant, of his right to recover damages. The decision in the case of McArthur v. Dominion Cartridge Co.[2], followed by this court in Toronto Street Railway Co. v. Fleming[3], shews that it is not necessary where the only reasonable inference to be drawn from the evidence is that there was negligence which caused the accident, to reach a finding of exactly how the result of such negligence produced the injuries complained of. In considering the case then as one by a servant against his master it does not, in view of the moderate damages assessed, seem to matter whether the case can be rested upon the common law or not if maintainable upon the "Workmen's Compensation Act" Let us consider, however, the liability of appellant at common law:— The defence of common employment is not pleaded as some authorities seem to suggest must be done, and hence possibly not open to the appellant unless it can be implied under the fifth paragraph of the

statement of defence. That raises the issue of whether or not there was a proper system furnished to protect those in the position of the respondent. In some features of the system as presented in evidence there certainly was all that possibly might be expected. But in many respects it was not by any means an ideal one. The methods of grounding seem to have been left to the men engaged in the work. It is frankly admitted there were no standard appliances. One man, I infer, adopted one appliance. Others adopted another just as suited their respective views of what would be effective. If we apply the oft-repeated test of Lord Cairns in *Wilson v. Merry*[4], at page 332, that the master is to select proper and competent persons to superintend the work and to furnish them with adequate materials and resources for the work, I cannot think that was done in this case. In the last analysis it comes to a question of the competence of Creswick and Smith, and the appliances put at their disposal which seem to have been of a very questionable character. Whether when used as they saw fit or not the possibility of the tower itself being such as to form a means of grounding which I infer was treated as the means of grounding seems most doubtful from the evidence of the superintendent quoted above. In this regard the onus rested upon the appellant to establish a defence and I think it failed. The evidence is meagre and most unsatisfactory. I cannot assent to the proposition that a mere certificate of character in the general terms given by these men for themselves and by the superintendent for them, can fulfil all that is to be expected of men guarding others in a most dangerous occupation requiring therefor a degree of knowledge and skill they evidently did not possess. Then under the "Workmen's Compensation Act," R.S.O. ch. 146, sec. 3, sub-secs, (a) and (c), I think the action can be maintained. The painters, including respondent and foreman, as well as others, evidently were expected to conform to the direction of the patrolmen of whom either or both must have failed in his duty. Of the other ground what I have said already presents my view of appellant's failure in many respects. Indeed, in argument there was not very much attention paid to this branch of the case, though the matter is dealt with in appellant's factum. The argument, however, was chiefly directed to the alleged improbabilities of the accident happening in the way or by reason of what respondent and his witnesses alleged and that failing, its cause was suggested to be an insoluble mystery which I have already dealt with. *Rylands v. Fletcher*[5], relied upon below does not seem to one, whatever it stands for, to involve any question of negligence, upon which alone respondent must rest his action. I think the appeal must be dismissed with costs. DUFF J.—This appeal should be allowed. There is nothing in the so-called invitation augmenting the duties which the law imposed on the company as incidental to the relation of master and servant; it cannot reasonably be construed as involving anything like a warranty against accidents. If it had that effect it was clearly ultra vires of the foreman. The respondent fails to make out a case and he fails in my opinion for this reason; when the evidence is looked at as a whole and I have carefully examined it all the proper conclusions are:—

- (1) That the appellant company, neglected no duty which the common law cast upon it in relation to the safety of the respondent; that is to say, the appellant company neglected no precaution suggested by science or practical experience which could reasonably be required of them for the diminution of the risk of accident. Further assuming that the accident was the result of negligence of some servant of the company there is no ground whatever for saying that it was the negligence of anybody of whom the appellant company would be at common law responsible vis à vis the respondent.
- (2) There is nothing in the evidence to bring the respondent's case within any of the classes of the cases in which by the terms of the "Workmen's Compensation Act" he would be entitled to recover. I asked Mr. Campbell during the argument more than once to refer to the clause of the "Workmen's Compensation Act" upon which his right to recover could be based, but the question, of course, does not admit of an answer from the record. The judgment of Mr. Justice Clute in the Court of Appeal proceeds, as far as I can gather, on the application of the doctrine of *Rylands v. Fletcher*[6]. This doctrine has never been applied and could not, without bringing the direst confusion into the law on the subject, be applied in cases of this description between master and servant, where apart from statute the question must always be (the master being charged with responsibility for harm coming to the servant in the course of his employment): Was the harm caused by the failure of the master in any duty to the servant arising out of the relation subsisting between them? The duty of protecting or compensating the servant for harm arising from the perils incidental to the service which cannot be avoided by any reasonable degree of care on the part of the master, is not one of the duties which the law casts upon the master. Even where the peril can be avoided the master performs his duty if he provides adequate means and appliances and competent servants, and provides a proper system of working with a view to securing safety. The doctrine of *Rylands v. Fletcher*⁶ imposes a responsibility which in the first place is, speaking generally, absolute for the consequences of the escape of the noxious agent (excepting where the escape is due to the act of God or the mischievous intervention of a third party) and in the second place cannot be discharged by employing independent contractors or servants never so competent and never so well equipped as to skill and means. Such a principle could only become part of the law of master and servant by the instrumentality of legislation and, one must add, revolutionary legislation. ANGLIN J.—With very great respect for the learned trial judge and the majority of the judges of the Appellate Division, I am of the opinion that the judgment in favour of the plaintiff cannot be sustained. The learned trial judge found as a fact that the electric current which the plaintiff received came from the supposedly dead wire on which he was working, and, while he did not accept that finding, Mr. McCarthy conceded that he could not attack it with any hope of success. But the learned judge did not suggest how the wire had become charged; nor did he indicate any negligence, which would be imputable to the defendant company, as the cause of this having occurred—and it is only, if there was such negligence, that the plaintiff can recover. It may not improperly be assumed in favour of the plaintiff that the happening of the accident under the circumstances in which it occurred cast upon the defendants the burden of

proving that they had taken every reasonable precaution to ensure the plaintiff's safety while at his work. That burden the defendants assumed and counsel for the plaintiff was unable to point to any particular in which they had failed to discharge it. Improbable—almost impossible—as it may seem in view of the precautions taken and the surrounding circumstances, if the wire upon which the plaintiff was working became charged with electricity, upon the evidence it is quite as likely that this was due to some inexplicable electric phenomenon against which no precaution known to science would be effective as that it occurred through the negligence of any person. If it was the result of negligence it must be the purest conjecture that such negligence was in matter which would entail liability at common law, or was that of a person for whose fault the company would be responsible under the “Workmen's Compensation Act” (R.S.O. 1914, ch. 146), and was not the negligence of some workman against which the defence of common employment would prevail alike at common law and under the statute. The case does not fall within the maxim *res ipsa loquitur*. Indeed, upon the evidence accepted as veracious, negligence of any kind is, I think, completely disproved. I am, with respect, unable to understand the application of the doctrine of *Rylands v. Fletcher*^[7], invoked in the Appellate Division to the case of a claim against his master by a servant injured in the course of his employment. It may be that this case affords a striking illustration of an evil which the new “Ontario Workmen's Compensation Act” is designed to remedy. But under the law as it stood when the plaintiff was injured he had, in my opinion, no recourse against his employers. The appeal must be allowed and the defendants are entitled to their costs of the litigation throughout, if they should see fit to exact them. Appeal allowed with costs. Solicitors for the appellants: McCarthy, Osler, Hoskin & Harcourt. Solicitors for the respondent: Lancaster, Campbell & Lancaster.

[1] 32 Ont. L.R. 612.

[2] [1905] A.C. 72.

[3] 47 Can. S.C.R. 612.

[4] L.R. 1 H.L. (Sc.) 326.

[5] L.R. 3 H.L. 330.

[6] L.R. 3 H.L. 330.

[7] L.R. 3 H.L. 330.

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