

EMPLOYERS' LIABILITY.

Before A. McArthur, Esq., S.M., at Wellington.

Master and Servant—Negligence of Master—Failure to provide Adequate Plant—Injury to Workman—Damages—Volenti non fit injuria.

A workman is entitled to presume that the materials provided for him to work upon are not inferior to the average, and that the employer will exercise towards him at least ordinary care and diligence. The failure to provide proper machinery or materials is a ground of liability.

The plaintiff sues the defendants, and says,—

1. That on the 8th day of February, 1909, the plaintiff was employed by the defendants upon certain works—to wit, construction of a ferro-concrete wharf at Clyde Quay.

2. That it was a term and condition of the plaintiff's employment that the defendants should furnish proper and adequate plant and materials for the execution of the said works.

3. That a winch that was being used in connection with the said works was faulty and defective by reason of the negligence of the defendants, in that it was impossible to remove the handle therefrom.

4. By reason of such defect the plaintiff while passing the said winch in performance of his duties on the date above mentioned was struck by the handle with great force, whereby his nose was broken and the sinew of his left foot crushed.

Wherefore the plaintiff claims to recover the sum of £50 as damages.

The plaintiff was engaged on a punt on which were four winches, and was in charge of one. On the day previous to the accident one of the winches had carried away, and on the morning of the accident its place was taken by the winch which was the cause of the accident. The handle would not come off, and to get it off after the accident it was necessary to cut the split pin. The foreman admitted that he did not examine the winch carefully, and that he did not know when it had been in active use before. He only gave, he said, a casual look over it, as he did not think there was any occasion to examine it carefully. The plaintiff had tried to remove the handle, but was unable to do so, and was called away to take a hammer to the second landing. On his return he had to go past the winch to get to the check-rope. At that time a pile was removed off a smaller punt, which then came in contact with the wire rope from the winch. This caused the handle of the winch to fly round, and strike the plaintiff in the face, and knock him down, and also crush the sinews of his foot, besides breaking his nose. Had the handle been off, the accident would not have taken place; but the defendants allege that, had the pawl been down, the winch would not have gone round.

It was contended for the defence that the plaintiff should have had the pawl of his winch in, and then the accident could not have happened, whereas for the plaintiff there was evidence that a more serious accident would have taken place had the pawl been in, as the winch might have carried away altogether. It was also contended for the defence that the instructions were that all pawls were to be in; but this is hardly borne out by the evidence, which goes to show that such instructions did not apply to the winch in charge of the plaintiff. Moreover, the foreman admitted that he had no recollection of definitely telling the defendant to have his pawl in.

It is certain that there was a defect in the winch, in so far as it was not possible to remove the handle, and in my opinion the plaintiff had not been instructed to have his pawl down. Did, then, the plaintiff, by continuing to work after he knew that the handle was tight, accept the risk? I do not think so, as he was attempting to remove the handle when called away to some other duty. I do not consider the maxim *Volenti non fit injuria* applies in this case. There are many important cases on the point arising here. A workman is entitled to presume that the materials provided for him to work upon are not inferior to the average, and that the employer will exercise towards him at least ordinary care and diligence. The failure to provide proper machinery or materials would furnish grounds of liability.

In *Weems v. Mathieson* (Macq. H.L. Reports, Vol. iv, 215) it was held that the master of dangerous works is bound to be careful to prevent accidents to those employed by him. If his machinery or apparatus be not staunch and appropriate, or if he permit it to be used without proper guards, and mischief consequently arises, he will be responsible.

Smith v. Baker (1891, A.C., 235) is, to my mind, the most important case on the subject. Certainly Lord Bramwell dissented. Lord Halsbury, L.C. said (p. 337), "In both *Thomas v. Quartermaine* (18 Q.B.D., 685) and in *Yarmouth v. France* (19 Q.B.D., 647) it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk." Bowen, L.J., carefully points out in the earlier case that the maxim is not *Scienti non fit injuria*, but *Volenti non fit injuria*. And Lindley, L.J., in quoting Bowen, L.J.'s, distinction with approval, adds, "The question in each case must be not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." Lord Halsbury goes on as follows (page 338): "I am of opinion myself that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."

Lord Watson, in *Smith v. Baker* (page 356) said, "At common law the master's ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect." Lord Herschell (page 362) said, "Where then a risk to the employed which may or may not result in injury has been created or enhanced by the negligence of the employer, does the mere continuance in service, with the knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim *Volenti non fit injuria* applies to such a case, and that the employer can invoke its aid to protect himself from liability for his wrong." Lord Morris (page 369) said, "The appellant may have voluntarily entered on a risky business, but he did not voluntarily undertake it