

D. W. Dumble, Peterborough, for plaintiff.

A. B. Aylesworth, K.C., and D. O'Connell, Peterborough, for defendants.

Judgment was delivered on January 13th, 1902.

FALCONBRIDGE, C.J.—There was not sufficient evidence of defendants' negligence to justify a submission to the jury. The accident was due to a very common cause of injury to workmen,—the breaking or falling of something, which breaking is not necessarily attributable to negligence of defendants: *Moffat v. Bateman*, L. R. 3 P. C. 115, explaining or distinguishing *Scott v. London Dock Co.*, 3 H. & C. 596.

STREET, J.—In my opinion the nonsuit was right and should not be disturbed, because no negligence on the part of defendants was shewn. It is not a case in which the doctrine of *res ipsa loquitur* should be applied, because evidence of proper and careful construction was given by defendants: *Scott v. London Dock Co.*, 3 H. & C. 596; *Moffatt v. Bateman*, L. R. 3 P. C. 115; *Black v. Ontario Wheel Co.*, 19 O. R. 578. . . . The case is one, therefore, in which the jury are asked to say that the derrick was negligently constructed, when no witness on either side has said so, and where the only opinion expressed by any witness is that it was properly and not negligently constructed. The case is within the doctrine laid down in *Walsh v. Whitely*, 21 Q. B. D. at p. 378.

BRITTON, J.—The case is not distinguishable in principle from *Cripps v. Judge*, 13 Q. B. D. 583, in which *Heske v. Samuelson*, 12 Q. B. D. 30, was affirmed. At the close of plaintiff's case, if the defendants had not put in any evidence, the jury should have been asked this question:—"Was the derrick fit to be used for the purpose it was being used at the time of the accident?" I do not think the evidence given by defendants warranted the withdrawing of the case from the jury. Even if the evidence on the part of the defence was not contradicted by witnesses called by plaintiff, still the jury, and not the Judge, should have pronounced upon it. Again, the iron strap, shewn in figure 2 and figure 3, slipped over the top of the bolt because it had no head. Omitting to put a head on the bolt may have been a specific act of negligence on defendants' part, and the jury should have been asked to say whether or not that omission was the cause of the accident, and, if so, was it negligence, and, if so, were defendants liable.

Motion dismissed with costs, BRITTON, J., dissenting.

D. W. Dumble, Peterborough, solicitor for plaintiffs.

Stratton & Hall, Peterborough, solicitors for defendants.