MEREDITH, J.A.:—The trial Judge, upon evidence abundant to support the finding, has found that the accident was caused by an insufficient foundation; that parts of it were built upon "made ground" and of defective material; and, if so, there can be no doubt of the defendants' liability. It is impossible, upon the whole evidence, to say that that finding was erroneous; on the contrary, one can very easily agree in it, and, perhaps, as easily have reached the same conclusion if there had been no such finding. The judgment cannot be disturbed on that ground.

The trial Judge, also very properly I think, found against that which was called "the defence of contributory negligence." If the watchman is to be judged as if he had, at the moment, all the knowledge we now have, two years after the event, and after a most protracted trial, it would be difficult to avoid condemning him for not having sooner turned off the water, or taken steps to do so, and so have, no doubt, stayed some of the injury; but the circumstances at the moment must be looked at; a very serious accident, a great flood of water from the fallen tank, a wall of the building broken into, and the place covered with the wreckage, as well as water; and, when so looked at, it is not very difficult to arrive at agreement with the trial Judge . . . .

So too in regard to the defence that the water was prematurely turned into the tank. The tank was, in all substantial things, finished, and the water was turned on, to the knowledge of the defendants, and, at the very least, with their tacit assent, after they had declared the work finished.

Lastly, the contention that the contract of the plaintiffs with the foreign corporation was illegal, and that the taint of its illegality vitiates the claim in this action, has, in my opinion, no force. The action is based upon the quite valid contract, between the parties to this action, for the construction of the tower and tank which fell; the foreign corporation is not in any sense a party to it, nor could properly be; and its contract with the plaintiffs is entirely separate and apart from that upon which this action is brought. It can make no difference that the plaintiffs have agreed, or intend, to give the foreign corporation the fruits of this litigation; they may change their minds; and, if they do so, what business is it of the defendants?

Appeal dismissed with costs.

OSLER, J.A., agreed in the result, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.