

LIN, J., and directing judgment for defendants as of nonsuit. Plaintiff was a boilermaker in the employ of defendants, and while engaged at the boiler house of the Toronto Railway Company he assisted in erecting a scaffold, through which, some six weeks later, he fell, receiving serious injuries, for which the jury assessed damages at \$1,500.

G. F. Shepley, K.C., for plaintiff.

E. E. A. DuVernet and R. H. Greer, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., CLUTE, J.), was delivered by

OSLER, J.A.:—There was, in my opinion, no evidence at the trial which would support a verdict for plaintiff either at common law or under the Workmen's Compensation Act.

As regards the first, the jury found that the negligence consisted in not sending competent men to erect the scaffold. It appeared that the men usually employed for that purpose were for some reason not available, and that plaintiff was told by the foreman of the shop to do the best he could, and that on applying to the president of the defendant company he was told to take the lumber for the scaffold from a pile in the yard, which contained an abundant quantity of good sound material proper and sufficient for the purpose. Plaintiff undertook the job without demur. It seems to have been a simple one, and the scaffold was made by the person whom plaintiff instructed to do it properly and securely in all respects but one, viz., that one of the planks of the flooring was weak and defective by reason of a large knot in the middle and the grain of the wood running cross to the edges of the plank. This plank, with others, had been taken by plaintiff from the pile in the yard, apparently without the least attempt to examine it, his only excuse being that there was ice and snow on the planks, which would make examination difficult, and anyway he was no judge of lumber. There is, however, neither evidence nor finding that either the foreman or the president knew that plaintiff was not competent to build such a scaffold either as regards its construction or the selection of the materials, and that, I think, is a conclusive answer to the contention that there was negligence on the part of the employers as at common law: *Gallagher v. Piper*, 16 C. B. N. S. 669, 688.