

to answer in damages to his employee (unless the employee himself knew of the defect) for any injury happening to him owing to a defect in the condition of the machinery which, by reasonable examination from time to time, might have been discovered.

The purpose of sub-sec. 1 of sec. 3 and sub-sec. 1 of sec. 6 was, in my opinion, to take from the employer this immunity from liability for the neglect of the person to whom he has intrusted the duty of providing and maintaining in proper condition the appliances for the work in which his employees are engaged, but it was not intended otherwise to affect the common law liability of the employer, and it does not do so.

If, therefore, defendants in this case did not provide for a proper examination from time to time of the locomotive upon which the deceased was working, and the defect in it which caused the injury to him would have been discovered had such an examination been made, they are, in my opinion, answerable for a breach of the duty which they owed to deceased of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and if, on the other hand, they did provide for such an examination, if the defect could have been discovered they are answerable for the negligence of the person or persons whom they intrusted with the performance of that duty.

Defendants are also, in my opinion, answerable for the negligence of any person whom they had intrusted with the duty of seeing that the locomotive was repaired so as to make it fit to be safely used, for such a person would be, I think, a person intrusted by them with the duty of seeing that the machinery was proper, within the meaning of sub-sec. 1 of sec. 6: *Markle v. Donaldson*, 7 O. L. R. 376, 3 O. W. R. 147, affirmed in appeal, 4 O. W. R. 377.

The evidence adduced at the trial as to the means adopted or in use by defendants to ensure the proper discharge of the duty which they owed to deceased was very meagre, but there was enough, in my opinion, to entitle plaintiff to have her case passed upon by the jury.

There was, I think, evidence which, if believed, would support a finding by the jury of negligence in the discharge of the duty which defendants owed to deceased, and that deceased came to his death owing to that negligence.

Appeal allowed and new trial ordered; costs of appeal and of last trial to be costs in the cause; upon the new trial it is not to be open to plaintiff to rely upon the 1st and 2nd grounds of complaint, and as to these the action remains dismissed.