

have brought them into contact accidentally. Everything he said was consistent with the displacing of the risers while the rings were being placed on the messenger wire, and all other possible causes of the displacement had, he thought, been investigated without result.

I am, with great respect, of opinion that the finding of the learned Judge is not warranted by the evidence. Whitney, who was called as a witness by the respondent plaintiffs, testified that the displacement of the risers was not caused by him; that he noticed the condition of the risers, and realised that he could not come into contact with them without endangering his life, and that he carefully avoided doing so. There is no doubt, upon the evidence, that it was difficult—perhaps very difficult—to do the work in which Whitney was engaged—doing it in the way he said he did it—without his having come into contact with the risers; but it is not shewn that it was impossible.

It was suggested in the course of the examination of some of the witnesses that, owing to the swaying of the messenger wire to which Whitney was suspended, or to muscular contraction, his legs, or one of them, may have displaced the risers without his being aware of what had happened. I do not know whether that was the view of my learned brother; but, if it was, I cannot agree with it. The evidence of the expert witnesses—I refer particularly to the testimony of Mudge, p. 375—is, that it would require considerable physical force to have caused such a displacement of the risers as existed on the day the deceased was killed; and it is improbable, I think, that the movement of Whitney's legs in the way suggested would have brought sufficient force to bear on the risers to have caused that displacement. Any other act of Whitney's which could have caused the displacement must have been a conscious act, and of such an act Whitney is acquitted by the learned Judge.

I am unable to discover any finding, at all events a finding in terms, that the act which the learned Judge thought caused the displacement of the risers was a negligent act, though, no doubt, the learned Judge, when dealing with the legal aspect of the case, speaks of the deceased's death as having been the result of two independent acts of negligence on the part of the respective defendants; and I do not find anything in the evidence that, assuming the finding that the displacement was unconsciously caused by Whitney, warrants a finding that his act was a negligent act; indeed, the finding that it was an unconscious act rather implies that it was not. . . .