

ALTA.

S.C.

1912

SMOLAK

v.

JOHN
WALTERS,
LIMITED.

Beck, J.

come to the conclusion that the defendant did provide reasonably safe machinery. It seems, however, that in coming to this hesitating conclusion the learned Judge took a view with regard to the duty of operators of dangerous machinery which, with due respect, is in my opinion incorrect. The guard which the learned Judge refers to was attached to the machinery after the accident. He was not satisfied that such a guard as that would have prevented the accident. It is, however, particularly to his view, expressed as follows, that I take exception. He adds:—

Indeed, so far as the evidence goes it was not shewn that in this country, at any rate, it was ever the custom to have guards on such machinery as that. There was some reference to guards being used in Montana, but the evidence in regard to the custom in Ontario and Alberta is that it is not common upon such a machine—is not used.

The evidence is that a shield similar to the one now attached to the machine, but higher, and covering also the greater portion of the feed wheel next to the operator, has been in use for 15 years or so in Montana and is insisted upon. The learned Judge in referring to this evidence in no way suggests that he does not believe it. He takes it as correct and says the evidence is that such a guard is not used in Ontario or Alberta. This evidence is to my mind of the vaguest character as to Ontario, and covers one or two miles in remote parts only. But it seems to me that the machine, being obviously a dangerous one, and known devices being in use for the protection of workmen for a sufficient length of time to become generally heard of, it is the duty of an employer of ordinary prudence to make use of them, and the fact of his not investigating and keeping up to date in his knowledge of such things should not excuse him, nor the fact that in some localities such improvements are not yet adopted. Feeling that the learned trial Judge gave too much force to the evidence—which, to my mind, was very vague and unsatisfactory—of the alleged custom in Ontario and Alberta against the use of shields on such machines as that in question here, and seeing that even so his conclusion was arrived at with hesitation, I venture to differ from him in his finding that the defendant did provide reasonably safe machinery. He goes on to say that he has the gravest doubt whether a guard would have prevented the accident. In the first place it seems he was referring only to such a guard as was afterwards put on, and not to such a guard as the witness who spoke of what was common in Montana described.

I would hold the defendant responsible on this ground: the machine was obviously dangerous; the workman (the plaintiff) was inexperienced; a means for protecting the operator had long been known and in use; the employer ought to have known of it and used it; it would in all probability have prevented the acci-

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