

faith. At his marriage he went over to the Roman Catholic Church to please his wife. Some years after the marriage he returned to the Protestant Church. The children continued during their mother's lifetime and, as I understand after her death, to attend the Roman Catholic Church, but this was because they were living with their mother's relatives, who were Roman Catholics. We know on unimpeachable testimony that the father of the children attended the Established Church; called on the minister desiring him to make an effort to convert his wife to Protestantism; and that a few days before his death he expressed his willingness to have his children sent to a Protestant "Home." I think it must be taken that according to the latest expression of the father's wishes it would not be an objection that his children were to be brought up as Protestants.

In the Guardianship of Infants Act the points on which stress is laid are the welfare of the child, the character and conduct of the parties, and the wishes of the mother as well as of the father. Here the father was the surviving parent. In the whole circumstances I think that the custody of these children should be entrusted to the petitioner.

LORD KINNEAR—The main consideration is the interest of these children. On the Sheriff's report I do not think it doubtful that the petitioner will be able to provide for the children a more comfortable and also a more wholesome home, and to give them a better start in life, than the respondent with all his goodwill can provide. Other things being equal I should attach some importance to the position of the petitioner as the nearest agnate of the children. As such he has a legal right to the office of tutor-at-law. Mr Campbell says that the tutor-at-law has not the custody of the pupil's person. I do not think the presumption on which that doctrine of our older law was founded has any kind of application to such a case as the present. But it is common ground between the parties that the main question in dispute is whether the children are to be brought up as Protestants or as Roman Catholics; and by the law to which Mr Campbell refers the tutor-at-law has the absolute direction of the child's education. I do not doubt, however, that if it were clear that the father of the children was a convinced Roman Catholic, and had desired his children to be brought up in the Roman Catholic Church, the Court would give due consideration to his wishes. But I see no evidence in this case that the father had any intention to bring up his children as Roman Catholics. The evidence is all the other way. We are informed that the father, although he had joined the Roman Catholic Church at his marriage, had returned to his own Communion, had attended the parish church, and desired the parish minister to speak to his wife with a view to her conversion to Protestantism. It appears also that only two days before his death the father consulted the minister of the Established

Church with a view to providing a more suitable home for his children, and that he made no objection to the minister's suggestion that they should be sent to a Protestant Home. Now, all this shows no intention to bring up his children as Roman Catholics. On that evidence I should come to the conclusion that the father would prefer, or at all events would have no objection to, his children being brought up in the Protestant faith. I therefore come to the conclusion that it would be for the children's advantage to put them under the care of their grandfather, and that there is no sufficient reason for refusing to do so to be found in the evidence as to the father's religious faith.

As regards the proposal that a specific obligation should be put on the petitioner and secured by caution, I think that, as we are informed by the Sheriff that the petitioner and his niece are respectable persons and anxious to do their best for the children, it is unnecessary for the Court to take that unusual course.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Crabb Watt—Morton. Agent—W. A. Farquharson, S.S.C.

Counsel for the Respondent—Campbell, K.C.—Graham Stewart. Agent—Charles George, S.S.C.

Saturday, March 7.

SECOND DIVISION.

[Sheriff Court of Lanarkshire, at Glasgow.]

MULHOLLAND v. GLASGOW HARBOUR TUNNEL COMPANY.

Reparation—Negligence—Duty to Public—Public Hoist—Averments of Defective Apparatus and Failure to Provide Skilled Management—Specification of Cause of Accident.

In an action of damages for personal injury against the owners of a public hoist, the pursuer averred that there was a space between the foot of the door of the cage and the floor of it which was not fenced or protected otherwise than by a loose piece of flexible and worn-out canvas cloth, that while he was ascending in the hoist it gave a violent jerk upwards, causing him to lose his balance, and flinging him through the said canvas cloth against the framework in which the cage moved, and that the accident was caused through the fault of the defenders in "not providing necessary and sufficiently strong sides and doors to the said hoist or cage, in allowing said lowering and raising apparatus to remain in a defective and unsafe condition, causing it to rise in irregular and unexpected jerks instead of ascending in a regular and graduated manner,

and in not providing a skilled and experienced man to attend to the management and manipulation of said hoist or cage." *Held (diss. Lord Trayner)* that the pursuer's averments were sufficiently specific, and that the action was relevant.

John Mulholland, carter, 33 Russell Street, West, Glasgow, raised an action against the Glasgow Harbour Tunnel Company, in the Sheriff Court at Glasgow, in which he sought to recover damages for personal injuries sustained by him on 15th November 1901 while crossing from one bank of the Clyde to another by means of a subway, of which the defenders were the owners, and which was used as a public thoroughfare for crossing the river.

The pursuer averred—" (Cond. 2) In order to effect said crossing the passengers and merchandise are first lowered from the street level in a wooden cage or hoist to a point beneath the bed of said river Clyde by means of apparatus or machinery moved by hydraulic or steam or other motive power. Said cage or hoist contains at each end a wooden folding door, the lower extremity of which stands about one yard from the floor of said hoist, the space between the said extremity and said floor having no protection or fencing whatever other than a flexible and worn out canvas cloth, the lower end and sides of which were not in any way fastened either to the floor of said cage or otherwise. (Cond. 3) Having crossed said river by means of said subway, the said passengers and merchandise are then raised to the level of the street by similar motive agency. Said subway, and all the apparatus and machinery connected with and used in the ascent and descent of passengers and goods traffic crossing the Clyde as aforesaid, are the property of the defenders, who are therefore responsible for the safe and efficient condition thereof. (Cond. 5) On said date the pursuer was crossing from the south to the north bank of the said river Clyde by means of said subway, in charge of a horse and lorry belonging to D. M'Kay & Sons. The pursuer had descended the southern cage or hoist, had crossed said subway to the north bank, and had begun to ascend the northern cage or hoist when suddenly, unexpectedly, and without any warning, the ascending cage gave a violent jerk upwards, causing pursuer to lose his balance, flinging him through the said canvas cloth against the framework in which the cage moves, and injuring him severely as after mentioned." [The record was amended at the hearing by substituting the words printed in italics for the words "walls of said cage."] "(Cond. 6) The said accident was caused through the fault and negligence of the defenders, or of those for whom they are responsible, in not providing necessary and sufficiently strong sides and doors to the said hoist or cage, in allowing said lowering and raising apparatus to remain in a defective and unsafe condition, causing it to rise in irregular and unexpected jerks instead of

ascending in a regular graduated manner, and in not providing a skilled and experienced man to attend to the management and manipulation of said hoist or cage. This defective and highly dangerous condition of said cage or hoist, both with respect to the absence of necessary doors and sides, as well as its liability to frequent jerking, and the absence of a skilful competent man in charge, were well known to the defenders or those for whom they are responsible, but were unknown to the pursuer. (Cond. 7) An examination or inspection of said hoist and apparatus by the defenders or their servants would have easily disclosed its defective and highly dangerous condition, both with regard to its spasmodic jerking and the absence of adequate sides and doors, but the defenders negligently failed to make any such examination or inspection, and their negligent failure in this respect caused, or materially contributed to, the accident."

The defenders pleaded—" (1) The action being irrelevant should be dismissed, with expenses."

On 28th November 1902 the Sheriff-Substitute (BALFOUR) allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial.

The respondents maintained that there was no relevant case, and argued—The averments were too vague. The pursuer was bound to specify what was wrong with the construction, wherein the apparatus was defective, and in what respect the man in charge lacked skill and experience. The case of *Macfarlane v. Thompson*, December 6, 1884, 12 R. 232, 22 S.L.R. 179, was entirely in the defenders' favour; in that case the law was corrected which had been laid down in *Fraser v. Fraser*, June 6, 1882, 9 R. 896, 19 S.L.R. 646; and *Walker v. Olsen*, June 15, 1882, 9 R. 946, 19 S.L.R. 708. The present was not such a case as to place on the defenders the onus of showing how the accident could have happened as in the case of *Oliphant v. Johnstone & Macleod*, February 3, 1894, 21 R. 531, 31 S.L.R. 422. It was not sufficient to aver that the machinery broke down in ordinary use. If any inquiry was to be allowed the case should be sent back to the Sheriff-Substitute for proof before answer.

Argued for the appellant—The averments were sufficiently specific—*Macfarlane v. Thompson*, and *Oliphant v. Johnstone & Macleod, cit. sup.* The case should be sent to a jury.

LORD JUSTICE-CLERK—Certainly this condescence is by no means a model, but that is not to say that the pursuer has not stated such a case as entitles him to inquiry. He avers that the cage was badly worked and that the machinery was defective. I do not think in all cases the pursuer is called upon to describe the defect of which he complains, if he complains of something which could not have happened if all had been in proper order. I think the pursuer has stated a case which entitles him to inquiry.

LORD YOUNG—I am of the same opinion. I cannot say I have any criticism to offer on the manner in which this record has been prepared.

The pursuer is a carter, and in the course of his business he was crossing from the south to the north bank of the Clyde by this subway, and the cage on the north bank had begun to ascend, and he avers that “suddenly, unexpectedly, and without any warning the ascending cage gave a violent jerk upwards,” causing him to lose his balance, and flinging him through the canvas which is described, and injuring him severely. Now it is stated in the next article of the condescendence that this accident, which was serious upon the statement of it, was caused through the fault and negligence of the defenders. [*His Lordship then quoted condescendence 6.*] Now, when a man is the victim of such an accident as is here said to have occurred I do not think it is incumbent upon him before raising an action to have skilful experts employed to examine the premises, machinery, and method of working, and report upon the condition of matters at the date of the accident, in order to enable him to state on record in what respects the machinery, &c., was defective. I know of no law that lays such an obligation upon him. I do not know that a carter, such as the pursuer, would be in a position to send experts to the works in order to make an examination of the kind. It is incumbent upon him, however, at the trial to satisfy the jury, or the judge if the case is tried without a jury, that what occurred would not have occurred if everything had been in proper order. He must prove to the satisfaction of the tribunal that what happened was attributable to defective machinery, or inexperienced or unskilled working.

In my opinion such a case as is here stated ought to be sent to trial; and it occurs to me that a case such as this, in which the public as well as the pursuer is interested, is a most suitable case to be tried by a jury.

LORD TRAYNER—The only question before us at present is whether the pursuer has averred a relevant case. I think the case is irrelevant, because of the want of specification. In condescendence 6 three grounds of fault are alleged, and all of them are to my mind much less specific than they should be. The first ground of complaint is, that the cage was of defective construction, that its sides and doors were not strong enough. Nothing could be more general. The pursuer should have specified what the cage should have been, either in view of the use to which it was being put or in view of what is usual in the construction of such cages. If the cage in question is of the construction and strength usual in such cages, then it is difficult to see how the defenders were in fault so far as this ground of action is concerned. The second fault averred is that the hoisting and lowering apparatus was defective and unsafe because it jerked. But the jerking on the occasion libelled might have been purely

accidental. The pursuer, in my opinion, should have stated what it was in the condition of the apparatus which caused the jerking. It is said he did not know this. Then how does he know that the jerking was the result of the defenders' fault? The third ground put forward by the pursuer is that the man in charge was not a skilful or experienced man. But that is the pursuer's deduction from the fact that the cage jerked—he has no other ground, or at all events he has averred none, for believing that the man in charge of the hoist was unskilful. The whole averments of fault are as vague and indefinite as they could be, and do not give the defenders fair notice of the case they have to meet. For these reasons I am for sustaining the objection to the relevancy.

LORD MONCREIFF—I agree with the majority of your Lordships. I think that the averments here are sufficiently specific to be relevant. We now understand that the accident is said to have happened in this way—While the cage in which the pursuer was being carried was ascending in the framework it unexpectedly stopped with a violent jerk, and as there was nothing strong enough at least to prevent a person in the cage from being thrown against the framework, the pursuer was in consequence of the jerk thrown against the framework and injured severely. If there had been sufficiently strong sides to the cage no accident, it is said, would have happened. Now turning to condescendence 6 we find that three grounds of fault on the defenders' part are set forth—namely, first, the absence of sufficiently strong sides and doors to the cage; secondly, defects in the raising apparatus, causing the cage to ascend with frequent and unexpected jerks; thirdly, the absence of a competent man in charge. In short, the pursuer's case is that either the defenders did not provide suitable apparatus for working this hoist, or if the apparatus was suitable that it was worked carelessly by the person in charge. I do not think that the pursuer is bound to say which of these causes led to the accident. I do not intend to impugn any of the cases that were referred to. But the case here averred is not a case of latent defect, in which some piece of machinery suddenly and without any previous warning goes out of order. According to the pursuer's statement the defenders were well aware of the liability of this cage to jerk. On the whole matter, I think that the pursuer is entitled to have his case sent to trial.

The Court appointed the cause to be tried by a jury upon the record as amended.

Counsel for the Pursuer and Appellant—Watt, K.C.—J. H. Henderson. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defenders and Respondents—Jameson, K.C.—M'Clure. Agents—W. & J. Burness, W.S.