CANADIAN VICKERS, LIMITED, (DEFENDANT) ..... APPELLANT;

1922
*Nov. 10.
*Nov. 27.

AND

A. G. SMITH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Master and servant—Liability—Machine throwing off steel particles—Guard—Goggles—Arts. 1053, 1054 C.C.—Art. 1384 C.N.

The respondent, a skilled and experienced workman, employed by the appellant company, was in charge of a lathe for paring down steel rods. From the machine, when normally operated, particles of steel dangerous to the eyes flew in different directions. A steel shaving having struck respondent's right eye and ruptured the eye-ball, necessitating the extraction of the eye, the respondent brought action for $5,000 damages.

Held, Davies C.J. dissenting, that as the injury had been caused by a thing under the appellant's care without human agency intervening, the case fell within the purview of article 1054 C.C.; the consequent *prima facie* liability was defeasible only by the appellant "establishing that it was unable by reasonable means to prevent the act (le fait) which had caused the damage"; and, upon the evidence, the appellant had failed to do so. *Quebec R.L.H. & P. Co.* v. *Vandry* ([1920] A.C. 662) and *City of Montreal* v. *Watt & Scott* ([1922] 2 A.C. 555) followed.

Per Davies C.J. dissenting.—The respondent had the onus of affirmatively establishing that a guard upon the machine was feasible and practicable having in view the efficiency of the machine and therefore was a reasonable means of preventing the injury, which he failed to discharge.

Per Duff J.—Any physical object handled or directed can be a cause of damage within the meaning of article 1054 C.C.; an automobile, for example, containing within itself its own forces of propulsion causing harm by impact is a "thing" causing "damage" within the meaning of that article.

Per Duff J.—As between the appellant and the respondent, it cannot be assumed under article 1054 C.C., but must be proved, that the machine which the respondent was operating was a thing in the care of the appellant.

Per Brodeur J.—The appellant is also liable under article 1053 C.C.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 443) affirmed, Davies C.J. dissenting.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Martineau J. and maintaining the respondent's action for $5,000.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Cook K.C. and *Heney* for the appellant. The use of goggles by the appellant's workmen in connection with the operation in question was impracticable and unnecessary.

In any event, the appellant complied with its legal duty in regard to goggles by providing the same for the use of its skilled mechanics who thoroughly understood the character and dangers of the work in which they were engaged.

No legal duty was placed on the appellant to force its expert workmen to wear these goggles.

The use of a guard over the cutting tool of the lathe was impracticable, unnecessary and unknown, and the failure of the appellant to devise such a guard which nobody else had devised or used on a machine which had safely been operated for over three years would not in law constitute an act of negligence attaching legal responsibility for injury.

The determining cause of the accident was the fault and negligence of the respondent himself in placing his head too close to the machine while the same was in operation and in not properly attending to his duty.

Ogden K.C. and *Popliger* for the respondent. Under Art. 1054 C.C., as interpreted by the Privy Council in *Quebec Ry. L.H. & P. Co.* v. *Vandry* (2), it was incumbent upon the appellant to exculpate itself by affirmative proof that it could not have prevented the accident, which evidence had not been made.

THE CHIEF JUSTICE (dissenting).—After reading the evidence in this case, I am not prepared to hold that the suggested guard upon the machine which the plaintiff was operating when he was injured was practicable having

(1) [1922] Q.R. 32 K.B. 443.

(2) [1920] A.C. 662.

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regard to the working efficiency of the machine. There is no evidence which affirmatively establishes that proposition and it appears to me that the absence of such evidence is fatal to the plaintiff's claim.

The plaintiff, himself a skilled workman, aged about 28, admitted that it was not customary in factories for guards to be placed on machines of the kind he was operating when injured. No one else stated that such guards were customary or known. The machine manufacturers had never supplied them. The provincial inspectors had never suggested their use. Neither in Canada nor elsewhere were they shewn to have been used.

I think the duty of proving that such a guard was feasible and practicable, having in view the efficiency of the machine, lay upon the plaintiff, and that the defendants could not be held liable for such an accident as happened to the plaintiff unless such evidence was given.

In the late case of *City of Montreal* v. *Watt & Scott* (1), their Lordships of the Privy Council explained what was meant by them in the case of the *Quebec Railway Light, Heat & Power Co.* v. *Vandry* (2) as to the proper construction of article 1054 of the Quebec Civil Code, namely, that the words "unable to prevent the damage" meant

> unable by reasonable means to do so and did not denote an absolute inability.

It becomes then a vital question as to whether the suggested guard, having regard to the necessary efficiency of the machine being operated, was a reasonable means of preventing such damage as the plaintiff suffered here. In other words, was it practicable?

No evidence was given to shew that it was. And the universal absence of its use anywhere on similar machines would, it seems to me, lead to the conclusion that it was not.

As to the conclusion that it was the duty of the defendants to have compelled the workmen to wear goggles, the learned judge found that their use was impracticable and

(1) [1922] 2 A.C. 555.

(2) [1920] A.C. 662.

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that no fault could be imputed to the defendants in that regard. I can only say that I agree with him and the learned dissentient judges of the Court of King's Bench on that point.

For these reasons, I would allow the appeal and dismiss the action.

IDINGTON J.—For the reasons assigned by the learned trial judge, and those in appeal agreeing therewith, I would dismiss this appeal with costs.

DUFF J.—As regards the merits of the appeal as a whole I do not dissent from the conclusion at which the court has arrived. There are points, however, of great importance raised in the course of the discussion and to some extent considered in the judgments of the Court of King's Bench which cannot, I think, properly be passed over without an observation or two.

And first, I am unable to agree with the suggestions which have been advanced as to the limited scope of Art. 1054. By that article there are three conditions of responsibility. One is that the plaintiff shall have suffered damage, another is that the damage shall have been caused by a "thing" and the third is that the "thing" causing the damage shall have been under the care of the defendant or of some person for whose conduct he is responsible *vis à vis* the plaintiff. The responsibility is the legal result of the concurrence of these factors unless the defendant brings himself within the exculpatory clause by shewing that the damage could not have been avoided by him through the use of means which he might reasonably have been expected to employ.

I confess I am unable to understand the contention that a physical object handled or directed (as an automobile, for example), cannot be a cause of damage within the meaning of Art. 1054. This view seems to me to involve the assumption that the more complete the control the defendant has over the physical object which is the cause of the harm the less cogent is the presumption against him of responsibility. I cannot understand why, for example, an

automobile containing within itself its own forces of propulsion causing harm by impact may not be a "thing" causing "damage" within the meaning of Art. 1054.

It is quite true that until recently the courts in France seem to have been committed to the doctrine which limits the application of Art. 1384 to cases of damage caused by the "fait autonome" of the thing. That doctrine appears, however, to have been discarded and it is worth while I think to quote in full the note of M. René Demogue in 20 Rev. Trim. at p. 734 in the following words:

La Cour de Cassation (ch. civ. 6 nov. 1920, D. 1921. 1. 169) a rendu un arrêt qui marque une étape dans la théorie de la responsabilité du fait des choses. Un incendie éclatant dans une gare est alimenté per des résines qui s'y trouvaient et il gagne des installations voisines. La cour a déclaré "qu'il n'est pas nécessaire que la chose ait un vice inhérent à sa nature susceptible de causer le dommage, l'art. 1384 rattachant la responsabilité à la garde de la chose, non à la chose elle-même." Aussi a-t-elle cassé l'arrêt qui, pour refuser d'appliquer l'article 1384, déclarait que la cause du dommage doit résider dans la chose et que la résine n'avait pu s'enflammer spontanément. Cette solution est en opposition avec la jurisprudence antérieure des cours d'appel (v. Bordeaux, 26 oct. 1909, S. 1914, 2. 214 en note; Paris, 23 mars, 1911, S. 1913, 2. 302), La portée de l'arrêt actuel est considérable. On pourra l'invoquer pour obtenir indemnité si un incendie se communique du mobilier d'une maison à la maison voisine, si un objet manié ou dirigé cause un dommage. Ce sera donc la consécration de cette idée sociale: quiconque a le profit d'une chose mobilière doit supporter le dommage qu'elle occasionne. Cette base donne à cette innovation une chance très sérieuse de se consolider.

L'arrêt précise un autre point. La responsabilité de l'article 1384 ne peut être détruit que par la preuve d'un cas fortuit ou d'une force majeure non imputable au défendeur. Il ne suffit pas de prouver que l'on n'a commis aucune faute ou que la cause du dommage est inconnue. Ainsi se trouve condamnée l'opinion d'un arrêt antérieur qui se contentait de l'impossibilité de déterminer la cause de l'accident (Req. 30 mars, 1897, S. 98, 1. 65) Il faut prouver un fait déterminé: ainsi le terme de présomption de faute paraît insuffisante. Il y a une responsabilité légale ne comportant que des causes précises d'exonération. Par là encore la responsabilité se trouve étendue.

This note by the eminent commentator may well serve as a warning against the risk of adopting too readily as a guide for the application of Art. 1054 C.C. the decisions of the French courts on the subject of *responsabilité*.

The note also brings into relief the fact that the development of *la jurisprudence* on this subject in France has gradually come under the influence of a definite doctrine of social responsibility, a doctrine on its legal side known as *le risque créé*. It cannot be too rigorously insisted upon

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that the natural meaning of the language of Art. 1054 cannot properly be expanded in deference to any such doctrine. Art. 1054 lays down a rule of the law and the scope of the rule must be ascertained by the usual means of interpretation.

That brings me to a point raised by this appeal in respect of which there has been no discussion but which I think it is my duty to mention. And that is the question, whether or not, as between the appellant company and Smith, the machine which Smith was operating was a thing in the care of the appellant company. In France it has been assumed that in such circumstances the machine was in the care of the employer, but the assumption rests upon an application of the doctrine above referred to—the doctrine that the person who derives the profit from the operation of a movable thing must incur the loss incidental to the operation of it. That is not an admissible ground upon which a similar view as to the effect of Art. 1054 can be based.

Whether or not in the particular circumstances of this case the conclusion that the machine was in the company's care within the meaning of this article is a point upon which I express no opinion. We have had no argument upon it.

ANGLIN J.—In my opinion this case falls within the purview of Art. 1054 C.C. It is a case of damage caused by a thing under the defendant's care. Not only is all contributory fault on the part of the plaintiff negatived, but human intervention, either by him or by any other person, was not a factor in the causation of the injury. *Montreal Tramways Co.* v. *Frontenac Breweries* (1). The plaintiff was operating the defendant's lathe in the normal way necessary for the work on which he was engaged: the flying off of the metal chips was an inevitable consequence of such operation. As put by Mr. Justice Dorion:—

> Si l'action de l'ouvrier n'a été pour rien dans l'accident, c'est donc le fait de la machine qui l'a causé, et il incombe au gardien de la chose de se disculper.

(1) [1921] Q.R. 33 K.B. 160.

That he can do, as held by their Lordships of the Judicial Committee in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1) only by

establishing that he was unable to prevent the act (le fait) which has caused the damage

—which, as their Lordships' later judgment in *City of Montreal* v. *Watt & Scott* (2), explains, implies "unable by reasonable means."

The burden of establishing this exculpation falls on the defendant. The learned trial judge found that the plaintiff had affirmatively established that the absence of a guard on the machine constituted fault sufficient to entail responsibility under Art. 1053 C.C. The majority of the learned judges of the Court of King's Bench approved of that finding and also held that failure of the defendant to insist on the workman operating the machine in question using goggles amounted to actionable fault. There is evidence in the record to support both findings. The efficiency of the precautions which were found to have been wrongfully omitted is probably established; their practicability seems to be much more open to question. I am by no means satisfied that I should have found that it had been affirmatively established. On the other hand, giving to the findings made below the weight to which they are entitled, I am not prepared to say that it is so clearly proven that the defendant was unable by the use of one or other of these means—both certainly reasonable in themselves if efficient and practicable—to prevent the act (*le fait*) that caused the damage for which the plaintiff seeks to recover that the judgment in his favour, affirmed on appeal, should be set aside here.

BRODEUR J.—Que cette cause soit décidée sous l'autorité de l'article 1053 ou de l'article 1054 du code civil, je suis d'opinion que la défenderesse, la compagnie Vickers, a engagé sa responsabilité.

Y a-t-il eu faute de la part de la compagnie? Je n'hésite pas à dire que oui.

(1) [1920] A.C. 662.

(2) [1922] 2 A.C. 555.

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Cette machine à laquelle travaillait Smith était incontestablement dangereuse. La preuve a été contradictoire sur ce point, mais le juge qui présidait au procès a ordonné une expertise; et l'expert, dont la compétence ne saurait être mise en doute, vu qu'il est à la tête de l'école technique, a fait fonctionner cette machine et a rapporté que dans sa marche normale elle pouvait causer l'accident dont le demandeur Smith a été le victime.

Le patron d'un établissement industriel est obligé de protéger ses ouvriers contre les dangers qui peuvent être la conséquence de leur travail; il doit prévoir non-seulement les causes habituelles mais même possibles des accidents, et il doit prendre les mesures propres à les écarter. Sirey, 1878. 1. 412.

Dans le cas actuel, il est en preuve que cette machine dont se servait Smith a projeté de menues parcelles ou brindilles d'acier qui lui ont atteint l'œil et qui en ont nécessité l'ablation.

La compagnie aurait dû installer un écran ou un appareil qui aurait pu protéger l'ouvrier contre ce danger. Elle ne l'a pas fait.

Elle a prétendu que l'installation de cet appareil n'aurait pas permis une production aussi considérable. Cette prétention ne saurait la relever de sa responsabilité. Est-ce que la vie ou la santé de l'ouvrier ne demande pas une protection constante de la part de son patron; et ce dernier a-t-il le droit de sacrifier son ouvrier pour avoir une production plus considérable? C'est là faire parade d'un égoisme qui ne saurait avoir grâce devant les tribunaux. Le patron doit veiller à la sûreté de son employé.

Mais le patron dit: Nous n'avons jamais eu d'accidents sur cette machine, et l'écran qu'on me demande d'installer n'est en usage dans aucune usine. Sur ce point, il y a conflit dans la preuve. Le demandeur a prouvé que pour des machines semblables offrant le même danger, on se servait d'une couverture ou d'un écran. De plus, il a demandé de rouvrir son enquête pour prouver que des machines absolument semblables étaient munies de cet appareil protecteur. Le juge n'a pas cru nécessaire d'accorder cette demande, étant convaincu évidemment que la preuve était déjà assez forte pour donner gain de cause au demandeur.

Si cette cause doit être décidée sous l'autorité de l'article 1054, si le dommage a été causé " par une chose qui était sous la garde " de la compagnie Vickers, il incombait à cette dernière de prouver qu'elle n'a pu empêcher le fait qui a causé le dommage. La présomption de faute édictée dans ce cas ne peut être détruite que par la preuve d'un cas fortuit ou de force majeure ou d'une cause étrangère qui ne lui soit pas imputable. Dalloz, 1920.1.169.

La défenderesse n'a pas été en position de détruire cette présomption de faute qui était édictée contre elle. Elle a, je crois, mis au dossier tous les faits qu'il lui était possible d'invoquer. Et cependant, non-seulement elle n'a pas été capable de repousser cette présomption, mais le poids de la preuve est plutôt en faveur du demandeur et est à l'effet qu'il y a eu négligence de la part de la défenderesse.

Pour ces raisons, son appel doit être renvoyé avec dépens.

MIGNAULT J.—The case established here clearly falls within Article 1054 of the civil code as construed by the Judicial Committee in *Quebec Railway, Light, Heat & Power Co.* v. *Vandry* (1), and *City of Montreal* v. *Watt & Scott* (2), being a damage caused by a thing under the care of the defendant. The lathe which caused the injury was in perfect order and was operated as it should have been, the plaintiff being a skilled and experienced workman. In the proper and normal use of the lathe, particles of steel, the evidence shews, would fly in all directions from the eccentric rod which was being pared down, and one of these particles struck the plaintiff's right eye and it had to be removed. The damage here was therefore caused by the thing, to wit the lathe, which the defendant had under its care, and not by any human agency negligently setting the thing in motion. See the distinction made by my brother Anglin in *Curley* v. *Latreille* (3), in which I fully concur.

In the *Watt & Scott Case* (2), their Lordships explained the meaning of their decision in the *Vandry Case* (1), and these two decisions should be read together. It is there-

(1) 1920 A.C. 662. (2) [1922] 2 A.C. 555.
(3) [1920] 60 Can. S.C.R 131 at p. 140.

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fore authoritatively determined that article 1054 establishes, for damages caused by a thing which a person has under his care, a liability which is defeasible only by proof of inability to prevent the damage. Further, in the *Watt & Scott Case* (1), in addition to the views they had expressed in the *Vandry Case* (2), their Lordships stated that

"unable to prevent the damage complained of" means "unable by reasonable means." It does not denote an absolute inability.

It will be interesting to compare the construction placed by the Judicial Committee on article 1054 of the Quebec code with probably the latest pronouncement of the Cour de Cassation in France as to the effect of article 1384 of the French code. See Cass. civ., 16th November, 1920, Dallox, 1920.1.169. with annotation by Mr. R. Savatier. The first paragraph of article 1384 is construed as establishing a presumption of fault which the defendant can only rebut

par la preuve d'un cas fortuit ou de force majeure ou d'une cause étrangère qui ne lui soit pas imputable. Il ne suffit pas au gardien de prouver qu'il n'a commis aucune faute, ni que la cause du dommage est demeurée inconnue.

The exculpatory paragraph of article 1384 C.N. is by its terms restricted to the specific cases therein mentioned, In Quebec, in a matter coming within the first paragraph of article 1054, it suffices for the defendant to prove that he was unable, by reasonable means, to prevent the damage complained of.

Was this defendant unable by reasonable means to prevent the damage complained of? The learned trial judge thought that the defendant should have placed a guard over the lathe to prevent the chips from flying in the operator's face. It is urged that to do so would have been impracticable, that it would have interfered with the proper working of the lathe. I would be very slow to hold that the person having machinery under his care should resort to impracticable or unreasonable means to prevent injury occurring by reason of the normal working of the machinery. But having carefully read the evidence, I think it stops short of clearly shewing that it would have been impracticable to place a guard over this lathe to stop the

(1) [1922] 2 A.C. 555. (2) [1920] A.C. 662.

flow of clippings. The non-use of goggles was not considered as a fault by the learned trial judge, and it is unnecessary to say whether it would have afforded a reasonable means of preventing the injury. In my opinion, the defendant has not succeeded in placing itself within the protection of the exculpatory paragraph of article 1054.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cook & Magee.*

Solicitor for the respondent: *G. Popliger.*