1964

*Mar. 11, 12
April 28

SALIM AYOUB (*Plaintiff*) ..... APPELLANT;

AND

EMILE BEAUPRE AND WALTER BENSE (*Defendants*) ..... RESPONDENTS.

RUSSELL McMURTRY, LORNA KNIGHT, AND HELEN NEELANDS (*Plaintiffs*) ..... APPELLANTS;

AND

EMILE BEAUPRE AND WALTER BENSE (*Defendants*) ..... RESPONDENTS.

*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

EMPIRE WALLPAPER AND PAINT LTD. (*Plaintiff*) ..... APPELLANT;

AND

EMILE BEAUPRE AND WALTER BENSE (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Damage resulting from fire commencing in defendant's garage and spreading to plaintiffs' premises—Defendant's failure to act with the care required in carrying out a dangerous operation—Liability—Non-applicability of The Accidental Fires Act, R.S.O. 1950, c. 3.

In three actions tried together, the owners and occupants of premises surrounding those occupied by the defendant Beaupré and in which the defendant Bense was employed by the defendant Beaupré claimed damages for destruction of the properties owned or occupied by them through a fire which commenced in the premises of the defendant Beaupré and spread to the premises which they owned or occupied. The fire which spread to the premises of the three plaintiffs was started when the defendant Bense, acting in the course of his employment as a mechanic of the defendant Beaupré and while draining a gasoline tank of an automobile preparatory to the removal of the tank, bumped into a light cord. This resulted in the bulb on the extension cord falling; combustion occurred and the fire commenced. The defendants pleaded the provisions of *The Accidental Fires Act*. The actions were dismissed by the trial judge and his judgment was affirmed by the Court of Appeal.

Held: The appeals should be allowed.

In the course of draining the gasoline, the defendant Bense failed to act with the very great care required from the dangerous operation in which he was engaged. The acts of negligence individually were of a very small degree, but that combination of acts resulted in the damage occurring to the plaintiffs' properties and resulted from the fact that the operation in which the defendant Bense was engaged was one where any small piece of negligence might have disastrous effects.

The defendant Beaupré was responsible in law for the acts of negligence of the defendant Bense, and the defence of *The Accidental Fires Act* did not apply. The provisions of that Act did not extend to fires which were the result of negligence.

Donoghue v. Stevenson, [1932] A.C. 562; *United Motors Service, Inc. v. Hutson et al.*, [1937] S.C.R. 294; *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156; *Dokuchia v. Domansch*, [1945] O.R. 141; *Canadian National Railway Co. v. Canada Steamship Lines Ltd.*, [1947] O.R. 585, affirmed [1948] O.R. 311 (Ont. C.A.), [1949] 2 D.L.R. 461 (S.C.C.), referred to.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Aylen J. Appeal allowed.

W. B. Williston, Q.C., O. F. Howe, Q.C., and *R. J. Rolls*, for the plaintiffs, appellants.

1964

AYOUB *et al.* v. BEAUPRÉ *et al.*

C. F. MacMillan, Q.C., and *Roydon A. Hughes, Q.C.*, for the defendants, respondents.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario dated January 14, 1963, whereby that Court affirmed the judgment of Aylen J. dated December 8, 1961. By the latter judgment, Aylen J. dismissed three actions which were tried together. In these actions the owners and occupants of premises surrounding those occupied by the defendant Beaupré and in which the defendant Bense was employed by the defendant Beaupré claimed damages for destruction of the properties owned or occupied by them through a fire which commenced in the premises of the defendant Beaupré and spread to the premises which they owned or occupied on Kent and Queen Streets, in Ottawa.

In this Court arguments were made on alternative bases of negligence, nuisance and liability under *Rylands v. Fletcher*[1]. In addition, in their factum, the appellants had advanced the principle of *res ipsa loquitur*, although in argument counsel for the appellants agreed it was not necessary to rely upon that principle since all of the facts had been demonstrated accurately at the trial.

I have come to the conclusion that the judgment of this Court may be based upon the ground of negligence only and it is, therefore, not necessary to consider the alternative grounds of liability under the rule in *Rylands v. Fletcher*, and of nuisance. Indeed, when one makes a detailed analysis of the proceedings at trial, it is apparent that the basis of negligence alone was there considered.

The fire which spread to the premises of the three plaintiffs was started when the defendant Bense, acting in the course of his employment as a mechanic of the defendant Beaupré and while draining a gasoline tank of an automobile preparatory to the removal of the tank, bumped into a light cord. This resulted in the bulb on the extension cord falling; combustion occurred and the fire commenced. With respect, I have come to the conclusion that the trial judge dismissed the action and the Court of Appeal affirmed that dismissal by the application to the circumstances, which shall be detailed hereafter, of the wrong standard of care.

[1] (1868), L.R. 3 H.L. 330.

The operation of draining gasoline from the tank of an automobile was stated throughout the trial to be a dangerous one and the appeal in this Court was argued upon the basis common to both appellant and respondent, that the operation was dangerous and that care was required. This may best be illustrated by quoting the evidence of Hugh Edward Thompson, the expert witness called for the defendants, who said:

> I would say, Mr. Rowe, it is dangerous to handle gasoline under any circumstances. The very nature of the material is inherently dangerous. The precaution and protection depends on the care of the operator.

The standard of care under such circumstances has been put in a dictum of Lord MacMillan in *Donoghue v. Stevenson*[1].

> I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence *where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.* (The italics are mine.)

This dictum has been cited on many occasions as giving the standard of care required of one when handling a dangerous thing or carrying out a dangerous operation. In *Hutson et al. v. United Motor Service Ltd.*[2], Middleton J.A. said at p. 230:

> Gasoline is a dangerous substance. Gasoline vapour is far more dangerous, and when it is exposed to contact with a flame or spark an explosion is inevitable. The care necessary in such cases is "consummate care" and as Pollock on Tort, 13th ed., p. 518, says: "It is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him."

Both of the other members of the Court agreed with the standard of care outlined by Middleton J.A. in the quotation above. The judgment of the Court of Appeal for Ontario in that case was affirmed in this Court[3]. At p. 301, Kerwin J., (as he then was) said:

> It is true that these witnesses testified that, where it was required to clean oil and grease from such floors, it was customary to use gasoline and scrapers and brushes followed by an application of some cleaning substance, the whole washed off with water. But the evidence falls short of proving that it was the usual practice to clean such an area in the elapsed time under the conditions that existed that day.

[1] [1932] A.C. 562 at 611. [2] [1936] O.R. 225.
[3] [1937] S.C.R. 294.

1964

AYOUB *et al.* *v.* BEAUPRÉ *et al.*

Spence J.

In *Read v. J. Lyons & Co. Ltd.*[1], Lord MacMillan said at p. 171:

> In the first place, the expression "strict liability", though borrowed from authority, is ambiguous. If it means the absolute liability of an insurer irrespective of negligence then the answer in my opinion must be in the negative. If it means that an exacting standard of care is incumbent on manufacturers of explosive shells to prevent the occurrence of accidents causing personal injury I should answer the question in the affirmative, but this will not avail the appellant.

And at p. 172, the learned law Lord continued:

> I think that he succeeded in showing that in the case of dangerous things and operations the law has recognized that a special responsibility exists to take care. But I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of such things or the conduct of such operations. In truth it is a matter of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. *The more dangerous the act the greater is the care that must be taken in performing it.* This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. (The italics are mine.)

And at p. 173:

> Strict liability, if you will, is imposed upon him in the sense that he must exercise a high degree of care, but that is all.

In *Dokuchia v. Domansch*[2], Laidlaw J.A. said, at p. 145:

> The undertaking of putting gasoline from a can into the carburetor of a defective engine was proposed by the defendant, and the law subjects him to strict responsibility for all mischief resulting therefrom.

Therefore, to determine these actions, it is the duty of the Court to apply to the facts which were found in the trial Court the very high standard of care to which I referred above.

The defendant Walter Bense, who had been employed by the defendant Beaupré for only about two months, was, on February 16, 1958, instructed by his foreman to remove a gas tank from a 1951 Oldsmobile automobile. He drove this automobile over top of a pit, then taking two five-gallon gasoline cans, he carried the same to the edge of the pit, left one sitting on the edge of the pit, and descended into the pit bringing with him the other gasoline can. In order to

[1] [1947] A.C. 156.

[2] [1945] O.R. 141.

provide himself with illumination, Bense had attached an extension cord to a plug some six to eight yards away and brought with him into the pit an electric lamp at the end of this extension cord. The electric lamp was set in a fixture which had a rubber handle some one foot long and the bulb was protected by a guard which appears to have been solid on its back face but which had wire mesh, the wires being about one inch apart, on the front face. At the top of this housing or guard was an ordinary hook and Bense hung that hook over a wire cable at the rear of the automobile which would appear, from the rather indefinite evidence, to be the wire running to the tail light of the automobile and which wire, at the place where Bense hung the hook, was said by him, after some hesitation, to run horizontally. It should be noted that Bense had not tested the automobile or looked at the gauge to determine the amount of gasoline in the tank. As it happened, the amount in the tank was less than five gallons and this failure to check is not relevant to any thing which actually occurred in the disaster but does indicate the standard of care which Bense exercised throughout the operation. Bense removed the cap, placed a large funnel in the mouth of the gasoline can, and then held the gasoline tank with the funnel protruding from its top against his stomach beneath a one-quarter inch opening in the bottom of the gasoline tank on the automobile. He unplugged that one-quarter inch opening so that the gasoline ran from the tank into the funnel and then into the gasoline can. There was much discussion during the trial as to the exact distance between the opening in the bottom of the gasoline tank and the top of the funnel sitting in the can, and it was finally determined that that distance was about one foot. In my view of what occurred, the evidence is not important at any rate because there seems to have been little indication of any large amount of vapour lying in the bottom of this repair pit. It must, of course, be understood that gasoline vapour is much heavier than air and one would expect it to have dropped to the bottom of the pit but, of course, in a considerable building and with the doors being on some occasions opened, there may easily have been sufficient draught to have carried the gasoline vapour away. In my opinion, it was not vapour caused by evaporation as the gasoline flowed from the tank into the funnel which caused the catastrophe. When the gasoline can had been about

1964

AYOUB *et al.* v. BEAUPRÉ *et al.*

Spence J.

three-quarters filled, it was apparent that the gasoline tank was well-nigh empty and only a few drips remained. This occurred at what Bense swore was, according to his watch, two minutes to twelve. The gasoline can was, of course, heavy by this time—a five gallon can three-quarters filled would be heavy—and therefore he lowered it from the position in which he held it up opposite his chest or stomach to the floor of the pit, leaving the funnel in it and leaving a few drops falling from the tank. Those drops would have had to fall about six feet and in my opinion it is the combustion of those drops or the vapour from them which caused the conflagration. They were only a few, but there can be no surety that the drops coming down that far would even hit the funnel, and, in fact, it would seem that some must have been on the top of the tank or even on its sides. At any rate, those drops of gasoline falling about that six-feet distance would result in a considerably more rapid evaporation than the gasoline which had been drained from the tank in a steady flow and fell only about one foot to sixteen inches before striking the funnel and running into the can. Moreover, such evaporation would occur below the level of the pit wall so the vapour could not be dissipated. When this dripping had ceased, which was evidently after only moments and after only a few drops had fallen, Bense inserted a plug in the bottom of the tank and turned it tight and then removed the funnel from the top of the gas can as it stood on the floor of the repair pit and put that funnel into an orifice at the side of the pit, then put the cap on the gasoline can. It is probable again, as the trial judge pointed out, that a few drops from the funnel ran onto the top of the gasoline can during this operation. It should be noted that it would have taken only a second to have swabbed the top of that gasoline tank as Bense capped it and every mechanic has in his coveralls someplace a cloth which he could use for such purpose.

Throughout this operation, the lamp hung by its hook from the wire cable beneath the automobile. It is true that counsel for the defendant asked Bense in the examination-in-chief this question:

> Q. And that light would be where, if it was three or four feet back from the tank? A. Yes.

But shortly thereafter, the trial judge put to the witness these questions and received these answers:

His Lordship: Q. Witness, that lamp has a handle at the bottom of it? A. Yes.

Q. You see? Now, how far was that handle from your left shoulder? A. I think maybe one and a half feet.

Q. Pardon? A. One and a half feet. Maybe two feet. I have place to walk. I cannot hit the light.

It would seem, however, that is exactly what Bense did, for he picked up the five-gallon gasoline can three-quarters full with his right hand and then turned to his left in order to climb the wooden ladder which stood in the rear corner of the pit. That lamp fell, and on examination-in-chief, the defendant Bense gave this evidence thereon:

Mr. Hughes: Q. Now, would you come back here, please? Thank you, Mr. Bense. Do you know what caused the extension lamp which was hooked on the cable to fall? What caused it to fall? A. I feel nothing, sir, but I think it was my shoulder.

Q. You think it was your shoulder? Your left shoulder? A. Yes, sir.

Q. And your left shoulder coming in contact with what? A. I think with the underside from the light here.

Q. With the underside of the light which— A. Was hanging.

Q. "the underside" he means by that below the handle. A. By that place.

Q. Below the rubber handle on the light? A. Yes.

Q. You think your shoulder must have touched that? A. Yes.

It must be remembered that the extension lamp from the end of its heavy rubber handle to the top of the hook was a solid and inflexible unit. It would seem, therefore, that it must have occurred when the defendant Bense's shoulder touched the end of the handle. Upon examination for discovery, the defendant Bense described the hanging of that light on the cable and said: "and I tried it to see if it was steady enough". It would appear from what occurred that in fact the light was not hung in a place where it would be secure, as the small movement of the defendant Bense's shoulder striking one end of the lamp handle must have dislodged the hook from the wire cable, a cable which was said to be about half-an-inch in diameter. The lamp fell and a metallic sound occurred followed by a sound which the defendant Bense described as a "poof", which would, of course indicate a very minor explosion or combustion of the gasoline vapour which was around the can. The actual extension lamp with all the other exhibits seemed to have

1964

AYOUB *et al.* v. BEAUPRÉ *et al.*

Spence J.

disappeared during the course of a reconstruction at the Carleton County Courthouse and we are not able to inspect it. It would appear, however, to have been a standard type of an approved extension cord used in such occasions as the repair of automobiles. It was, in addition to the guard, furnished with a heavy duty electric light bulb, and the evidence given by various witnesses was that that bulb did not ordinarily break when the lamp fell. However, the witnesses added that such bulbs being glass do break and have broken on other occasions. The opinion that the bulb broke when the spout of the gasoline can, a spout of about three inches in length, pierced the space between two of the wire guards so that it came into direct contact with the glass bulb, would seem to be an accurate opinion. I am of the view that nothing particularly hinges on the type of equipment and that it was quite a proper type of equipment to use under the circumstances if it had been properly used.

I have come to the conclusion, however, that the use of the equipment by the defendant Bense failed to attain the very high standard of care required by his dangerous operations. In the first place, Bense, in my opinion, hung that lamp in a rather insecure fashion. Hyman Hershorn was called for the defendants and gave evidence that in his automobile repair shop they removed about fifteen or twenty gasoline tanks from automobiles each week. He was asked what was liable to make such an extension lamp fall and his answer was "an insecure place". He was then asked the following question:

> Q. There is some reference to a cable underneath this motor car. I don't know yet what the cable was doing there. Perhaps that will appear in the evidence but there are lots of places underneath a car to hook a lamp to? A. There is what they call cross-bars across. There is a cross member in the car and there is also there a brake cable usually for the emergency brake.

It would seem such a cross-member or a much heavier cable than the one used, as for instance a brake cable, would have been a much more secure place to hang the extension lamp. I find that to hang it as insecurely as it must have been hung under these circumstances was an act of negligence.

Secondly, to lower the gasoline can to the floor of the pit and permit the drops to fall some six feet from the bottom of the car to the funnel as it sat on the top of the can or

perhaps to the top of the can apart from the funnel, was an act of negligence, in view of the rapid vaporization of the small drops of gasoline.

Thirdly, to so remove the funnel from the top of the gasoline can as it sat on the floor of the pit as to permit the droplets which remained in the funnel to fall upon the top of the can is, in my opinion, an act of negligence.

Fourthly, having permitted the drops to fall the six feet from the opening in the gasoline tank to the top of the can and also to fall from the funnel to the can when the funnel was removed, to fail to wipe off the can immediately was again an act of negligence.

Fifthly, Bense's failure to move the lamp back from its insecure hanging place to a safe position on the border of the pit before he attempted to move around in the confined space and carrying the heavy can was, in view of the grave danger of fire, an act of negligence.

Finally, having failed to remove the lamp from its insecure hanging place the defendant Bense was negligent in that he permitted himself to bump into the vulnerable, hanging lamp and cause the lamp to fall, the cord pulling the lamp so that it struck the top of the gasoline can.

In all of these circumstances, I find that the defendant Bense failed to act with the very great care required from the dangerous operation in which he was engaged. It is true the acts individually are of a very small degree, but that combination of acts resulted in the damage occurring to the plaintiffs' properties and resulted from the fact that the operation in which the defendant Bense was engaged was one where any small piece of negligence might have disastrous effects.

I am further of the opinion that the above acts of negligence are covered by subparas. (*a*) and (*b*) of para. 4 of the statement of claim common to the three actions in which the plaintiffs set out the acts of negligence. Those paragraphs appear as follows:

> 4. The Plaintiff says that the Defendants were negligent in that:
>
> *a*) they failed to take adequate precautions to secure the said light and prevent it from falling and breaking and thereby causing a dangerous condition to arise.

1964

AYOUB *et al.* v. BEAUPRÉ *et al.*

Spence J.

b) the Defendant Bense did not exercise care in moving about the area where the light was suspended.

The defendants plead the provisions of *The Accidental Fires Act*, R.S.O. 1950, c. 3. Section 1 of that Act reads as follows:

1. No action shall be brought against any person in whose house or building or on whose land any fire accidentally begins, nor shall any recompense be made by him for any damage suffered thereby; but no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

In *United Motors Service Inc. v. Hutson et al., supra*, Kerwin J., as he then was, said at p. 302:

Many years ago it was decided that this expression did not include a fire caused by negligence, *Filliter v. Phippard* (1847), 11 Q.B. 347, and this decision has been followed ever since. For two examples in this Court see *Canada Southern Ry. Co. v. Phelps* (1884), 14 Can. S.C.R. 132, and *Port Coquitlam v. Wilson*, [1923] S.C.R. 235.

In *Canadian National Railway Co. v. Canada Steamship Lines Ltd.*[1], Schroeder J. said at p. 603:

Counsel for the defendant argues that the fire might have been due to pure accident, and that under the provisions of The Accidental Fires Act, R.S.O. 1937, c. 161, there would be no liability on the defendant. That contention is entirely devoid of merit, in my opinion, since it is abundantly clear upon the evidence that the fire did not "accidentally begin" within the meaning of that Act as explained by numerous authorities. It would be quite superfluous to quote authorities upon the point, now so well established, that a fire cannot be said to begin accidentally if it is the result of negligence, or that "accidental" in the statute means "by mere chance", or "incapable of being traced to any cause", as opposed to the negligence of either servants or masters, rather than accidental in contradistinction to wilful.

An appeal from that judgment was dismissed both in the Court of Appeal for Ontario and in this Court.

Having found that the defendant Bense was guilty of acts of negligence for which the defendant Beaupré is responsible in law, I therefore must find that the defence of *The Accidental Fires Act* does not apply.

For these reasons, I would allow the three appeals with costs throughout, and give judgment in favour of the appellants in each of the three actions with a reference in each to the Master of the Supreme Court of Ontario at Ottawa to assess the damages. The costs of such reference

[1] [1947] O.R. 585.

should be determined by the Supreme Court of Ontario upon application by either party.

Appeals allowed with costs throughout.

Solicitors for the plaintiffs, appellants: Howe, Howe & Rowe, Ottawa.

Solicitors for the defendants, respondents: Hughes, Laishley & Mullen, Ottawa.