Dame Placide Veilleux *(Plaintiff) Appellant*;

and

Abitibi Paper Company Limited *(Defendant)*;

and

Workmen's Compensation Commission of Quebec *(Plaintiff) Respondents.*

Abitibi Paper Company Limited *(Defendant) Appellant*;

and

Workmen's Compensation Commission of Quebec *(Plaintiff) Respondent.*

1978: February 14; 1978: May 1.

Present: Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Negligence — Death — Victim at fault — Duty of the owner of dangerous equipment — Equal division of liability — Civil Code, art. 1056.

Workmen's compensation — Remedy against a third party — Victim at fault — Subrogation — Priority of the Workmen's Compensation Commission — Workmen's Compensation Act, R.S.Q. 1964, c. 159, ss. 7(3), 8 — Civil Code, art. 1157.

The husband of appellant Dame Veilleux met his death in an industrial accident. He was delivering wood chips for his employer to the mill of Abitibi Paper Company Limited ("Abitibi") when he was crushed by the conveyor of a bin belonging to the latter. The Workmen's Compensation Commission of Quebec awarded compensation in the amount of $30,835.73. Since actions had been brought against Abitibi by Dame Veilleux and by the Commission, the Superior Court judge found that the damages amounted to $60,650 and that the accident was due to the common fault of the victim and Abitibi. In view of his finding that both parties were at fault in equal proportion, he ruled that the Commission could recover from Abitibi but one half of the compensation payable by it, and that Dame Veilleux was entitled to recover the balance of the damages due to the fault of Abitibi, that is $15,164.64. The Court of Appeal affirmed the finding that liability was to be equally divided, but found that the compensa-

tion due by Abitibi ought to be used first to reimburse the Commission for all that it had to pay. Since the full amount of the compensation was consequently awarded to the Commission, the Court of Appeal concluded that Dame Veilleux was not entitled to any additional amount. Hence the appeals to this Court by Dame Veilleux and by Abitibi.

Held: The appeals should be dismissed.

As to the division of liability, there is no reason for setting aside the concurrent findings of the courts below. Although the victim was at fault for going into the bin, Abitibi had a duty to protect him from the danger of an accident such as occurred. Since Abitibi did not discharge this duty, its appeal is dismissed.

As to Dame Veilleux, her claim under art. 1056 of the *Civil Code* amounts, in the case at bar, to half the loss caused by the accident (50 per cent of $60,650). The Commission awarded her a little more than her claim, namely $30,835.73, for which sum the Commission is subrogated *pleno jure*. Dame Veilleux therefore cannot rely on s. 8 of the *Workmen's Compensation Act* in order to claim any "additional sum required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained". The legal situation is quite different from that in *Brink's Express v. Plaisance*, [1977] 1 S.C.R. 640, in which the victim was not at fault.

Hamel v. Chartré, [1976] 2 S.C.R. 680; *Brink's Express v. Plaisance*, [1977] 1 S.C.R. 640, distinguished; *Rainville Automobile Ltd. v. Primiano*, [1958] S.C.R. 416; *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*, [1978] 1 S.C.R. 605, (1977), 17 N.R. 593, referred to.

APPEALS from a decision of the Court of Appeal of Quebec[1] varying two judgments of the Superior Court. Appeals dismissed.

Jean Giroux, for the appellant, Dame Veilleux.

J. Borenstein, for Abitibi Paper Company Limited.

Jocelyn Fortier and *Jocelyn Barakatt*, for the respondent, the Workmen's Compensation Commission of Quebec.

[1] [1976] C.A. 426.

The judgment of the Court was delivered by

PIGEON J.—The husband of appellant Dame Placide Veilleux was a truck driver employed by one Edgar Boulet, a trucker. His job was to deliver loads of wood chips to the mill of Abitibi Paper Company Limited ("Abitibi"). On September 16, 1971, he met his death in an industrial accident. He was crushed by the conveyor at the bottom of the huge bin into which the chips were being unloaded.

As a result of this accident two actions were brought against Abitibi, one by Dame Veilleux personally and as tutrix to her minor children, the other by the Workmen's Compensation Commission of Quebec ("the Commission"). The two actions were heard at the same time and Paul Lesage J. of the Superior Court ruled by judgment of March 11, 1974, that the accident was due to the common fault of the victim and Abitibi. The damages resulting from the death were fixed at $60,650 and it was admitted that the compensation payable by the Commission amounted to $30,835.73. In view of his finding that both parties were at fault in equal proportion, the trial judge ruled that the Commission could recover from Abitibi but one half of the compensation payable by it, and that Dame Veilleux was entitled to recover the balance of the damages due to the fault of Abitibi, that is, a total amount of $15,164.64.

Four appeals were lodged against that judgment. One by Dame Veilleux against Abitibi claimed full compensation, another by the Commission claimed from Abitibi all that it had to pay, and two others by Abitibi asked that it be relieved from any condemnation. On April 24, 1976 the Court of Appeal held, [1976] C.A. 426, that the trial judge's finding that liability was to be equally divided should be affirmed, but it then found that the compensation due by Abitibi ought to be used first to reimburse the Commission for all that it had to pay. Since the full amount was consequently awarded to the Commission, the Court allowed Abitibi's appeal against Dame Veilleux, dismissed Dame Veilleux's and Abitibi's appeals against the Commission and allowed the latter's appeal.

With leave of this Court, two appeals were lodged against those Court of Appeal judgments, one by Dame Veilleux, the other by Abitibi.

As to the second appeal, Abitibi's, I fail to see any reason for setting aside the concurrent findings of the courts below on the fault imputed to Abitibi. Having found the victim at fault for going into the bin to push the chips into the conveyor, the trial judge said:

> [TRANSLATION] . . . it is the bounden duty of employers to ensure the safety of those working with their tools and machinery, as their own employees or otherwise . . . the duty of the owner of dangerous equipment, who uses it for his own business, is to protect the workmen working there, even against their own imprudence.

> . . . defendant's bin, as installed, presented probable dangers which it was its duty to foresee in order to ensure that persons who would be working there would be protected.

Kaufman J.A. added in appeal:

> To this I should add that proof was allowed of certain safety measures which were taken *after* the accident—there now is a grill which might well prevent similar mishaps—and while there might normally be an objection to such evidence, it was perfectly permissible in this case, because, no doubt by error, the company's Plea had mentioned the existence of such a grill. Therefore, as the trial judge pointed out, [TRANSLATION] "it is obvious that such evidence should be allowed because, without a doubt, it is important to know when the grill was installed".

The decision of this Court in *Hamel v. Chartré*[2], is of no assistance to Abitibi. That case was quite different. It dealt with a householder to whose home a workman, a handyman, went to repair a defect in an electric pump that had been mentioned to him. This Court approved the opinion of Brossard J.A. who, dissenting in the Court of Appeal, had said [TRANSLATION] "appellant had no duty . . . to protect him from the danger of an accident such as occurred". Here, on the contrary, it was held that Abitibi had such duty, which it had not discharged and this finding is based on adequate reasons.

[2] [1976] 2 S.C.R. 680.

As to Dame Veilleux's appeal, the provision to be applied is s. 8 of the *Workmen's Compensation Act* (R.S.Q. 1964, c. 159):

8. Notwithstanding any provision to the contrary and notwithstanding the fact that compensation may have been obtained under the option contemplated by subsection 3 of section 7, the injured workman, his dependants or his representatives may, before the prescription enacted in the Civil Code is acquired, claim, under common law, from any person other than the employer of such injured workman any additional sum required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained.

Dame Veilleux and her minor children are the dependants of the injured workman within the meaning of the Act. It is admitted that they obtained the compensation allowed to them, and consequently the Commission was subrogated in their rights pursuant to subs. 3 of s. 7, the material part of which reads as follows:

3. If the workman or his dependants elect to claim compensation under this act, the employer, if he is individually liable to pay it, or the Commission, if the compensation is payable out of the accident fund, as the case may be, shall be subrogated *pleno jure* in the rights of the workman or his dependants and may, personally or in the name and stead of the workman or his dependants, institute legal action against the person responsible, and any sum so recovered by the Commission shall form part of the accident fund. The subrogation takes place by the mere making of the election and may be exercised to the full extent of the amount which the employer or the Commission may be called upon to pay as a result of the accident. . . .

Dame Veilleux relies on art. 1157 of the *Civil Code*, which reads as follows:

Art. 1157. The subrogation declared in the preceding articles takes effect as well against sureties as against principal debtors. It cannot prejudice the rights of the creditor when he has been paid in part only; in such case he may enforce his rights for whatever remains due, in preference to him from whom he has received payment in part.

In my opinion, the Court of Appeal properly held, in accordance with the principles that it had previously stated in various cases, that Dame Veilleux cannot claim to have received from the Commission part payment only. As a result of the fault of the deceased, her claim against Abitibi under art. 1056 of the *Civil Code* amounted to only half the loss caused by the accident: *Rainville*

Automobile Ltd. v. Primiano[3], *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*[4]. What Dame Veilleux received from the Commission ($30,835.73) in fact represents a little more than her claim against Abitibi (50 per cent of $60,650). She cannot therefore claim an "additional sum required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained". The corollary of this conclusion is that the Court of Appeal was also correct in allowing the Commission to recover $30,325 from Abitibi.

As Kaufman J.A. noted in the Court of Appeal, the legal situation in the case at bar is quite different from that which was considered in *Brink's Express v. Plaisance*[5]. The essential difference is that the victim was not at fault in that case: the accident was due to the common fault of another City of Montreal employee and of the Brink's Express truck driver. As in the case at bar, the compensation payable under the *Workmen's Compensation Act* represented barely half the damages, but since the victim had committed no fault, he was entitled to claim the whole difference from the third party liable. Therefore it was the victim's employer, the City of Montreal, that had to bear the consequences of the fault of its other employee. It was thus prevented from availing itself of its subrogation against the victim, who in that case had actually received part payment only.

For these reasons I am of the opinion that both appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant, Dame Veilleux: Sabourin, Savard & Associates, Quebec.

Solicitors for the respondent, the Workmen's Compensation Commission of Quebec: Gauvin, Fortier & Associates, Quebec.

Solicitors for Abitibi Paper Company Ltd.: Robin, Cutler, Sheppard & Associates, Montreal.

[3] [1978] S.C.R. 416.
[4] [1978] 1 S.C.R. 605, (1977), 17 N.R. 593.
[5] [1977] 1 S.C.R. 640.