1957

*Oct. 31, Nov. 1 Dec. 19

J. & R. WEIR, LIMITED (*Defendant*) ....APPELLANT;

AND

LUNHAM & MOORE SHIPPING LIMITED (*Plaintiff*) ..... } RESPONDENT.

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

Negligence—Sufficiency of evidence—Outbreak of fire in ship undergoing repairs—Knowledge of presence of inflammable cleaning fluid.

The defendant company was engaged by the plaintiff company to effect general repairs to a ship. While the repairs were under way, a fire broke out, caused by the use of an acetylene torch by the defendant's employees in close proximity to a highly inflammable cleansing fluid. This cleansing fluid had been bought by the plaintiff and left lying on the top of a tank near which the defendant's employees were working, and the defendant's officers and employees had been specially engaged to pump out this fluid but had left a quantity of it lying on the top of the tank.

Held: The defendant alone was responsible for the fire and the consequent damage. The evidence revealed that it was negligent in not taking the elementary precautions that a prudent man would have taken in similar circumstances. Having a wide experience in the repairing and cleansing of ships, the defendant knew or should have known that this particular fluid was inflammable. It was not the plaintiff which undertook to flush out the fluid and the ordering of this fluid for use on the ship did not constitute fault or a direct cause of the fire, particularly in view of the fact that it was to be handled and used by people who represented themselves as experts. *Grobstein v. Leonard,* [1943] Que. K.B. 731 at 735; *Gibson & Co. et al. v. Grangemouth Dockyard Company, Ltd.* (1927), 27 Lloyd, L.R. 338 at 340, 344, quoted with approval.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1] on appeal from a judgment of Smith J. Appeals dismissed.

The action was for damages resulting from a fire that originated in a manner described in the reasons for judgment. The trial judge found both parties equally at fault and awarded the plaintiff one-half of the damages assessed. Both parties appealed and the Court of Queen's Bench, holding the defendant entirely at fault, allowed the plaintiff's appeal, awarding it the full amount of the damages, and dismissed the defendant's appeal. The defendant appealed from both judgments.

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

[1] [1957] Que. Q.B. *514*.

A. M. Watt, Q.C., and *Lucien Tremblay, Q.C.,* for the defendant, appellant.

R. C. Holden, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—The respondent company, as assignee of Melan Shipping Company Limited, claims from the defendant-appellant a sum of $10,516.37. It is alleged in the declaration that on June 2, 1952, a fire occurred in the engine-room of the ship "Anguslake", on which the appellant company was effecting general repairs. As a result of the damages caused by the fire, the ship was detained and unable to operate for a period of 16½ days, and the loss sustained was established at $10,516.37. This amount is not challenged. It is the contention of the plaintiff that the damage was caused by the fault, negligence, imprudence and want of care and of skill of the defendant company and its employees, in the performance of the work for which they were employed.

Mr. Justice Smith of the Superior Court, sitting at Montreal, reached the conclusion that the responsibility must be shared equally by both parties, and gave judgment in plaintiff's favour for $5,158.93. Both parties appealed, and the Court of Queen's Bench allowed the appeal of the present respondent, awarded the full amount claimed and dismissed the cross-appeal of J. & R. Weir, Limited. We have to deal here with the two appeals.

Before this Court, two points were raised. It was first argued that the ship belonged to an English firm, the Melan Shipping Company Limited, a parent company, having its head office in London, England, and that there was no relationship giving rise to an action between the two parties. But it has been shown that the English firm has been paid in full by the present respondent, which is now the assignee of all the rights of the owner of the ship. (*Civil Code,* arts. 1570-1582). During the argument, the Court disposed of this contention and informed Mr. Holden, counsel for respondent, that it was not necessary to hear him on this point.

It was also argued that the respondent did not discharge the burden of proving the negligence alleged in the declaration, that the cause of the fire was due to an inflammable degreasing fluid, purchased by the respondent, and dumped on to the tank tops by its own officers, who should have

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known that it was inflammable and who did know that appellant's employees would be burning there the next day. And it was further argued that the appellant in the circumstances took all reasonable precautions for the safe performance of its work.

The facts may be summarized as follows. While the "Anguslake" was laid up for general overhaul and repairs, it was decided by the respondent that the condenser and some other equipment in the engine-room should be degreased and cleaned. For that purpose, J. S. Porteous, respondent's engineer superintendent, requested the services of Magnus Chemicals Limited, which used a special degreaser called "magnusol". One week before the fire, Magnus Chemicals started the work, using one part of magnusol mixed with six parts of kerosene, which is an inflammable liquid. Three hundred gallons of the mixture were put into the condenser, where it was circulated for some days, and then pumped over into the feed filter tank, or hot well, where water was added by hose. The mixture was then pumped and circulated between the hot well and the feed filter, and on Sunday, June 1, it was drained out onto the tank top.

The defendant-appellant specially pleads that on or about Saturday, May 31, it was engaged by the plaintiff-respondent "to drain the cleaning fluid out of the condenser and hot well into the sump in the tank top forming the bottom of the ship, *whence the said fluid was to be pumped overside*". (The italics are mine.) The appellant also adds in its plea that this work was carried out on Sunday, June 1, by some of its own employees under the supervision of engineer superintendent Mr. Porteous. One of appellant's employees, Buchan, who was in charge, under Benson, of the work appellants were doing on the "Anguslake", said that they were there *on Sunday specially to circulate the mixture and get rid of it.*

It is in evidence that the mixture was not all pumped out on Sunday, and Benson, one of the vice-presidents of the appellant and in charge of the repairs, testified as follows:

Q. How much did you leave in? A. *Lying on the tank top would be 3 or 4 inches covering the full area down to nothing just astern of the boilers.*

(The italics are mine.)

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Saturday before the fire, one of the appellant's employees, Jourdain, had been burning out bolts near the tank top with an acetylene torch in the engine room, in order to remove a light steel screen bulkhead. He returned on Monday morning to continue his work. He was lying on the floor-plates which had been pushed back, leaving a space of about 8 to 10 inches between the engine-room floor and the bulk-head, and he was operating from there, his torch burning down near the tank top.

There can be no doubt, and it is the conclusion of the lower Courts, that it is while in the process of this operation, that the torch ignited the residue of the magnusol which was on the tank top, and which had not been completely removed the previous day.

I do not think that appellant can escape liability. The evidence reveals that it was negligent in not taking the elementary necessary precautions that a prudent man should have taken in similar circumstances. It was indeed negligence, entailing liability, for the appellant *which had been specially engaged to remove the magnusol and to pump it overside,* to leave, Sunday night, lying on the tank top over the whole area, a substantial quantity of this inflammable liquid, and to allow its employee, Jourdain, Monday morning, to burn bolts with his acetylene torch in the very near vicinity. Knowing through its employees, of the presence of the fluid, the appellant should have seen that this liquid was completely removed before the burning operations were resumed.

Having a wide experience in the repairing and cleaning of ships, the appellant knew, or should have known, that magnusol mixed with kerosene is an inflammable liquid, exhaling an odour which Benson, the appellant's employee, detected and which naturally would arouse one's suspicions as to the dangerous nature of the material employed.

The learned trial judge reached the conclusion that both parties were at fault and apportioned the damages that resulted from the fire. He reached the conclusion that the defendant-appellant knew or should have known of the presence and nature of this inflammable mixture, and should not have operated the acetylene torch where it was operated without first having taken all reasonable precautions to avoid the possibility of fire. He thought, however, that the

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plaintiff, which selected the said degreasing compound, "was also guilty of negligence for having failed to diligently and thoroughly clean the said tank top of the mixture, or at least warn the defendant of its presence there".

I entirely agree with the statement of the learned trial judge when he says that the appellant is at fault because its servants failed to take all reasonable precautions against fire, by permitting its employee to operate the acetylene torch at a place and in the manner he did without having taken all reasonable precautions. However, with respect, I do not agree with his conclusion that the plaintiff-respondent also contributed to the accident. It was not the respondent which undertook to flush off the material from the tank top, but it was the employees of the appellant who performed that work, for which they were specially engaged on the Sunday previous to the fire. If Porteous, the respondent's representative who was present at the cleaning operation, knew that some material had been left on the tank top, it was unnecessary for him to tell Benson, who was in charge of the operation, and who said that on Sunday night he left on the tank top between 3 and 4 inches of this inflammable mixture.

In cases of contributory negligence, the existence of a fault attributable to the victim must be examined and determined according to the same principles applied in establishing the fault of the author of a delict or of a quasi-delict. One of the main elements to be considered is a link between the fault and the resulting damage. It is imperative that the damage sustained be the direct consequence of the fault which has been committed. I see this necessary link in the conduct of the appellant's employees, but I fail to see that the fact that the respondent had ordered the magnusol on board its ship, was a direct cause of the fire, particularly in view of the fact that this mixture was to be handled and used by people representing themselves as experts in the matter. As to the alleged negligence in that the appellant was not warned of the presence of this mixture, I do not see that it is founded in law. I know of no law that compels a person to tell a third party a fact of which he is already aware, and which holds him liable in case of damages, if he fails to do so.

I entirely concur in the views expressed by Mr. Justice E. M. McDougall in the case of *Grobstein v. Leonard*[1], where he says:

A skilled artisan who lights a fire in premises upon which he is working must be bound to know the conditions prevailing. He must assure himself of all the prerequisites to the successful and safe accomplishment of what he sets out to do. Here, admittedly, he took no precautions whatever, closed his eyes to obvious risks, and proceeded to do something to which he was not directly bound. Does it lie in his mouth to disclaim negligence merely on the statement that he did not know?

In *Gibson & Co. et al. v. Grangemouth Dockyard Company, Ltd.*[2], Lord Fleming, at pp. 340, 344, expresses identical views:

The first question to be considered is whether the pursuers have proved that the fire was caused by sparks or particles of molten metal from the oxy-acetylene machine . . .

In this case the machine was used for the purpose of removing metal and not for the purpose of welding. When used for the purpose of removing or cutting away material, there are two well-recognized stages in the process. The blow-pipe of the machine has a nozzle with two orifices, an annular one and a central one within the annular. Through the annular orifice a mixture of acetylene and oxygen at a comparatively low pressure passes, which, when lighted, gives a flame with a high temperature of about 2500 deg. Fahr. This flame is applied to the metal to be removed and gives it the necessary heat. When the operator judges that this stage has been reached, he then opens the central orifice through which a supply of pure oxygen at high pressure flows. The supply of pure oxygen raises the flame to a very high temperature and causes the metal to combust and blows it away in glowing sparks . . .

The defenders, however, contend that the pursuers, and in particular the shipowners, are debarred from recovering damages because they contributed by their own negligence to the happening of the fire. It was suggested that there was a duty on the shipowners to inform the defenders of the nature of the cargo that was being loaded in No. 2 hold and also to take precautions for the safety of the cargo.

I think, however, that on the contrary it was the duty of the defenders, before they used a machine which gave off sparks, to ascertain whether there was any cargo in the vicinity of their operations which was likely to be damaged by it and to take the necessary precautions to protect it. Further, in point of fact, the man in charge of the squad and the operator knew that jute was being loaded in No. 2 hold for at least an hour or so before the fire actually took place.

* * *

I shall accordingly pronounce a finding that the defenders are liable for the loss and damage sustained by the pursuers in consequence of the fire which took place on the steamship Grangemouth on Apr. 24, 1925.

[1] [1943] Que. K.B. 731 at 735. [2] (1927), 27 Lloyd, L.R. 338.

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I cannot escape the conclusion that the appellant is the only party responsible for this accident, and I would therefore dismiss both appeals with costs throughout.

Appeals dismissed with costs.

Attorneys for the defendant, appellant: Foster, Hannen, Watt, Leggat & Colby, Montreal.

Attorneys for the plaintiff, respondent: Heward, Holden, Hutchison, Cliff, McMaster & Meighen, Montreal.