

1961

*May 16, 17
Oct. 3DAME IRENE JALBERT (*Plaintiff*) APPELLANT;

AND

LA CITE DE SHERBROOKE (*Defendant*) RESPONDENT.ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC

Damages—Liability—Gas from distribution system owned by city escaping into basement of house—Use of cigarette lighter to trace source of odour—Explosion—Liability of city—Whether plaintiff also at fault—Civil Code, art. 1054.

While inspecting their house to try and discover the source of a peculiar odour, the appellant's husband and their two sons went down into the basement where they spent some fifteen minutes seeking for a possible source of the odour. One of the sons used a cigarette lighter in the process. The father and one of the sons started back upstairs leaving the other son (who died prior to the trial) still investigating, when an explosion of gas occurred. In the action for damages to the house, the father and the surviving son both testified that at no time did they suspect the presence of gas, and their evidence was accepted by the trial judge. It was conceded during the trial that gas had penetrated into the building from a break in a gas pipe outside the building, which was part of a propane gas distribution system owned and operated by the City and under its control. The action was maintained by the trial judge. This judgment was unanimously affirmed both as to the amount and the liability of the City, but a majority found that the father had also been at fault. The father having died, his wife, as universal legatee, appealed to this Court.

Held: The appeal should be allowed and the trial judgment restored.

The only fault which could be attributed to the appellant's husband would be a fault of omission in failing to prevent his son from using or continuing to use a lighter when he knew or should have known that such use was dangerous. The explosion was due primarily to the

*PRESENT: Taschereau, Locke, Fauteux, Abbott, Martland JJ.

presence of explosive gas for which the City was clearly responsible under art. 1054 of the *Civil Code*. A reasonably prudent layman could not be expected to know that propane gas is heavier than air and apparently would lie along the floor of the basement.

1961
JALBERT
v.
CITÉ DE
SHERBROOKE

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec¹, reversing in part a judgment of Desmarais J. Appeal allowed.

Maurice Delorme, Q.C., for the plaintiff, appellant.

Albert Rivard, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Queen's Bench¹ which allowed, in part, an appeal from a judgment of the Superior Court condemning respondent to pay to appellant's late husband, Rodolphe L. Vallée, a sum of \$5,890.36 as the amount of damage caused by fire to a house owned and occupied by the said Rodolphe L. Vallée.

The fire in question resulted from a gas explosion which took place in the basement of the said premises, and at the trial it was conceded that gas had penetrated into the building from a break in a gas pipe outside the said building which was part of a propane gas distribution system then owned and operated by respondent and under its control. The cause of the break was not established.

The Court of Queen's Bench unanimously confirmed the judgment of the Superior Court as to the amount of the damage caused to the premises and as to the liability of respondent under art. 1054 of the *Civil Code*. The majority held however, that appellant's late husband was also at fault and reduced by one-half the damages fixed by the learned trial judge. Bissonnette and Hyde JJ. dissenting, would have dismissed the appeal.

From that judgment, appellant as the universal legatee of her late husband (who died pending the appeal to the Court below) has appealed to this Court.

The facts are fully set out in the judgments below and are not now really in dispute. On the evening of the accident, the late Rodolphe Vallée, his wife and their two sons, with some friends, were celebrating a family anniversary in the premises. Appellant had complained to her husband

¹ [1960] Que. Q.B. 934, *sub nom. Cité de Sherbrooke v. Vallée*.

1961
JALBERT
v.
CITÉ DE
SHERBROOKE
Abbott J.

for some time previously of a peculiar odor in the house, which he said he himself could not detect. On the evening in question, the guests also noticed the odor which they were unable to identify, and Vallée and his two sons (one of whom was a professional engineer) set out to inspect the house and see if they could discover it. Finding nothing in the kitchen, Vallée and the sons went down to the cellar where they spent some fifteen minutes seeking for a possible source of the odor. One of the sons used his cigarette lighter in the process. They tried the gas meter without incident and then began to suspect the sewer. One of the sons started back upstairs followed by the father, leaving the other son (who died prior to the trial) still carrying on the investigation, when an explosion occurred—presumably from the ignition by the flame of the cigarette lighter—of gas which had seeped into the cellar from outside. Vallée and the surviving son both testified that at no time did they suspect the presence of gas. Their evidence on this point was not shaken on cross-examination and it was accepted by the learned trial judge.

As Bissonnette J. pointed out in the Court below the fault, if any, of appellant's late husband could only have been a fault of omission, in that he failed to prevent his son from using or continuing to use a cigarette lighter when he knew or was bound to know that such use was dangerous.

The search in the basement for the source of the objectionable odor was carried on without mishap for some fifteen minutes in the immediate vicinity of the pipes and gas meter with the aid of a cigarette lighter, but precisely what happened after this inspection as the father and one son were leaving the basement, is not established.

The explosion was due primarily to the presence of explosive gas for which respondent was clearly responsible under art. 1054 of the *Civil Code*. This propane gas is heavier than air and apparently lay along the floor of the basement. In the circumstances this was not a condition which, in my opinion, a reasonably prudent layman could be expected to know about.

With great respect, I am unable to agree with the conclusion reached by the majority in the Court below that appellant's late husband was at fault, and in part responsible for the accident.

1961
JALBERT
v.
CITÉ DE
SHERBROOKE

I would allow the appeal and restore the judgment of the learned trial judge, with costs here and in the Court below.

Abbott J.
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Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Leblanc, Delorme, Barnard & Leblanc, Sherbrooke.

Attorney for the defendant, respondent: A. Rivard, Sherbrooke.
