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THE LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

LA COMPAGNIE F. X. DROLET (DEFENDANT) ..... RESPONDENT.

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

Negligence—Elevator—Sudden fall from upper floor—Injury to passengers—Damages paid by insurer of owner—Claim by insurer, under subrogation, against contractor who installed elevator—Liability resulting from offence or quasi-offence—Probable failure of safety blocks—Blocks made of cast iron—Expert evidence such material used at time of construction—Whether forged steel should have been employed—Quaere as to liability of owner of building—Certificate of inspection—Statement therein that elevator was in good order—Duties of inspector—Failure to mention kind of material of safety blocks—Whether in certain cases certificate should mention improvements since date of construction.

On February 24, 1938, one of the elevators in use in the Hôpital du St-Sacrement, at Quebec, fell from the second floor of the building to the bottom of the elevator pit, causing injuries to a number of passengers. Under the terms of its insurance policy with the hospital, the appellant company made a settlement of the claims filed by the injured persons, and disbursed a total sum of $7,453.48 which included the costs of repairs to the elevator, for which sum the appellant took subrogation from its assured and the injured persons. The appellant company then brought an action to recover that amount against both the general contractor for the building of the hospital and the present company respondent, which under a sub-contract had built and installed in 1926 the elevator; but the appellant company proceeded only against the latter. As there could not be any contractual fault of the respondent, the action had to proceed on the basis of its delictual or quasi-delictual responsibility, and the burden of proof was on the appellant. The precise cause of the failure of the elevator, the cause of its fall, has not been clearly demonstrated; but the injuries to its passengers were probably brought about by the failure of the brake appliance consisting of safety blocks, with which the elevator was equipped, to arrest the descent of the elevator and their rupture in the emergency which arose at the time of its fall. The main ground raised by the appellant was that the respondent furnished safety blocks made of cast iron, alleged to be a defective material and too weak to stand a violent shock, while such appliances should, in accordance with good practice, have been fabricated of cast or forged steel, thus effecting more security. The other ground of appeal was that, for many years, periodical inspections of the equipment were made by the respondent company, and, on the very day of the accident, an inspection had been made by an employee of the respondent and, as in previous occasions, a certificate was given to the

*PRESENT:—Rinfret, Davis, Kerwin, Taschereau and Rand JJ.

appellant company attesting that the elevator was in good order. The trial judge maintained the appellants' action, but the appellate court reversed that judgment, holding that the evidence of the expert witnesses, as to the propriety or impropriety of using cast iron at the time the elevator was constructed from the point of view of safety, was contradictory and conflicting and permitted of no definite conclusion upon the point.

Held, affirming the judgment appealed from (Q.R. [1943] K.B. 511), that, under the circumstances of this case, the respondent company was not liable. The result from the evidence of the expert witnesses, although somewhat contradictory, is to the effect that, at the time the elevator was built and installed, safety blocks of either cast iron or forged steel were used by experienced and competent contractors and were both giving entire satisfaction. So, at that time, the respondent company was at liberty to choose between two methods of construction then usually employed by leading men of art, more so for an elevator as the one in this case, and there has been neither imprudence nor negligence on the part of the respondent company to have adopted one of these methods rather than the other, i.e. to have given preference to cast iron safety blocks.

Quaere whether, if the action for damages had been brought against the hospital, owner of the building, the same conclusion would have been arrived at when determining the liability of the hospital, i.e. whether the hospital, as owner of the elevator, may be held to be bound to modify its construction along with the modern improvements made from time to time for the safety of the users of the elevator.

Held, further, that the respondent company was not liable on the ground that the certificate of inspection ought to have contained a statement that the safety blocks were of cast iron or did not mention improvements made since the construction of the elevator. The duties of the inspector were to verify, as a prudent man would do, the condition of the elevator and to report any defects which may imperil the safety of the passengers. Under the circumstances of this case, to ask more from the inspector and to exact from him more than a reasonable competency and the care of a prudent man, would be tantamount to constitute him a warrantor or a re-insurer of the appellant company. Rand J. *dubitante.*

Per Rand J.: The inspection and certification may, under certain circumstances, extend to features of construction, and the inspection is not necessarily that of the machine or thing as it is merely. The scope of the duty of an inspector is one which, in the absence of express terms, is to be gathered from the circumstances of its being undertaken; but *quaere,* whether, in the ordinary case, an inspection should not require disclosure of a defect in design or material which was or should have been apparent to the inspector and which, since construction, experience has shown to be hazardous, and general and approved practice has condemned.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Verret J., and dismissing the appellant company's action.

(1) Q.R. [1943] K.B. 511.

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THE LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA v. LA CIE F. X. DROLET.

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

J. P. A. Gravel K.C. and *Wilfrid Desjardins K.C.* for the appellant.

J. A. Gagné K.C. and *André Taschereau K.C.* for the respondent.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

TASCHEREAU J.—Il s'agit dans la présente cause d'une réclamation de l'appelante contre l'intimée au montant de $7,453.48.

Le 24 février 1938, à l'Hôpital du St-Sacrement, dans la cité de Québec, un ascenseur est tombé, blessant plus ou moins gravement les onze personnes qui y avaient pris place. L'appelante, assureur de l'hôpital, paya aux victimes les dommages soufferts, obtint des reçus avec subrogation contre les personnes qu'elle croyait responsables de l'accident, et institua la présente action contre C. Emile Morissette Ltée et F. X. Drolet Ltée.

La première de ces deux compagnies avait obtenu le contrat pour la construction de l'hôpital, en 1925, mais confia à l'intimée le soin d'installer les ascenseurs, et en particulier celui qui fait l'objet de ce litige. L'appelante procéda seulement contre l'intimée, et la Cour Supérieure a accueilli son action, mais la cour d'appel l'a unanimement rejetée.

Les causes qui ont déterminé cet accident ne sont pas clairement expliquées. La preuve révèle que cet ascenseur était retenu à la partie supérieure du puits par un câble qui s'enroulait sur un cylindre, où étaient pratiquées des cavitées destinées à prévenir tout glissement. Une hypothèse est à l'effet que, par suite de l'usure de ces cavités, le câble a glissé, permettant ainsi la chute de l'ascenseur.

Mais ce n'est pas pour cette raison que l'appelante prétend que la responsabilité de l'intimée est engagée. De chaque côté de l'ascenseur, se trouvaient des freins, appelés "blocs ds sécurité" destinés à l'immobiliser dans le puits, au cas de bris ou de défaut de mécanisme. Or, ce sont ces appareils qui dans l'occurrence se sont cassés parce qu'ils auraient été d'un matériel défectueux, trop faible pour supporter un choc de cette violence. C'était de la fonte

qu'on avait employée; on prétend que l'acier eût offert plus de sécurité. C'est la position prise par l'appelante dans son plaidoyer.

Cette action, dirigée contre le constructeur, repose en premier lieu sur l'article 1053 C.C. (Nous verrons plus tard le second motif invoqué par l'appelante.)

Il n'y a aucune relation contractuelle entre les parties qui sont devant cette Cour, et pour que la responsabilité de la défenderesse soit engagée, il est done nécessaire qu'elle se soit rendue coupable d'un délit ou d'un quasi-délit. Il faut trouver dans sa conduite l'élément générateur de la responsabilité, la faute, que l'appelante a indiscutablement le fardeau de prouver. Le simple fait dommageable du bris ne peut engendrer la faute; il faut aussi un fait fautif, et ce fait n'aura ce caractère que s'il est le résultat de l'imprudence, de la négligence, ou de l'inhabileté de l'intimée.

L'appelante l'a bien compris. Aussi, a-t-elle tenté d'établir cette faute, et de démontrer par des gens du métier que la fonte est un métal cassant, moins apte que l'acier à résister à la violence d'un choc.

Comme dans la plupart des causes de cette nature, la preuve est contradictoire, mais il ressort cependant des témoignages que si certains manufacturiers ont employé l'acier dans la fabrication de ces blocs, d'autres non moins expérimentés, étaient satisfaits de la fonte, qui d'après eux, donnait entière satisfaction. C'est ce que nous disent plusieurs témoins dont Arthur Langevin, qui a une expérience de 33 ans dans l'installation des ascenseurs, et qui sur ce point est corroboré par Frédérick Nöel Jodry, Louis Leclerc, etc. D'autres témoins émettent l'opinion que malgré que la résistance de la fonte soit moindre que celle de l'acier, cette déficience est compensée par le fait que les blocs de fonte sont plus lourds et plus gros que les autres.

Quoi qu'il en soit, il semble, maintenant que les ascenseurs modernes dans les grands édifices atteignent une vitesse de près de 1,000 pieds à la minute, que l'acier plus résistant est préférable à la fonte, et qu'il a des propriétés que l'autre n'a pas. Mais il est également vrai qu'en 1925, époque de l'installation, la fonte était employée par des constructeurs réputés, dans une substantielle proportion des cas. L'ascenseur qui est tombé, a été construit il y a au-delà de 15 ans, et sa vitesse maxima ne devait être que

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120 pieds à la minute. A cette date, l'intimée avait donc à choisir entre deux méthodes habituellement employées par les hommes de l'art, particulièrement pour les ascenseurs de ce genre. Est-ce une imprudence ou une négligence d'avoir adopté l'une de ces méthodes plutôt que l'autre, d'avoir préféré la fonte à l'acier? Je ne le crois pas.

La règle sur ce point est bien connue. Elle a été affirmée maintes fois par les tribunaux de la province de Québec et résumée récemment par la cour d'appel, dans la cause de *Bouillon* v. *Poiré* (1). C'est que le praticien ou le manufacturier n'est pas tenu d'employer exclusivement le moyen ou l'instrument qui est réputé le meilleur, mais qu'il peut employer le moyen, le matériel ou l'instrument couramment employé dans des conditions identiques. Et, ajoute M. le juge Dorion:

> Dans ces matières où le progrès de la science est constant, et produit des changements qui ne triomphent définitivement qu'après de longues années d'expérimentation, il n'y a rien d'absolu, et tout se réduit aux règles de la prudence ordinaire.

Le Conseil Privé a aussi posé la même règle dans une cause où se présentait également une question de responsabilité, et où l'on voit, dans le cas qui nous occupe, la similitude des principes du droit commun et du code civil. (*Vancouver General Hospital* v. *McDaniel et al.* (2).) Parlant pour le comité judiciaire, Lord Alness s'exprime ainsi:

> A defendant charged with negligence can clear his feet, if he shows that he has acted in accord with general and approved practice.

(Voir aussi *Higgins* v. *Comox Logging and Railway Co.* (3).)

Il est certain que ce qui n'était pas une faute autrefois peut le devenir aujourd'hui, maintenant que l'homme découvre des moyens nouveaux qu'il met à la disposition de ses semblables. Certaines méthodes employées dans le passé par nos devanciers nous paraissent désuètes, et les découvertes à venir, en nous dévoilant de nouvelles notions scientifiques, modifieront forcément plusieurs de nos conceptions actuelles. Ainsi, nous pouvons maintenant au moyen d'appareils précis soumettre les métaux à de hautes pressions pour éprouver leur résistibilité, et il nous est même permis, à l'aide des rayons-X, de scruter l'intérieur

(1) (1937) Q.R. 63 K.B. 1, at 12. (2) (1934) 162 Law Times R. 56.
(3) [1927] S.C.R. 359.

de la matière pour en déceler les faiblesses et prévenir les catastrophes. Autrefois, on ignorait ces méthodes modernes, et en se servant des moyens et matériaux connus et employés dans le temps, on ne commettait certes pas une négligence.

Cette conclusion à laquelle j'arrive pourrait peut-être être modifiée s'il s'agissait de déterminer la responsabilité de l'hôpital. Nous pourrions nous demander alors jusqu'à quel point le propriétaire est tenu de munir son ascenseur des perfectionnements modernes de nature à assurer la sécurité de ceux qui l'emploient. Mais nous n'avons pas à juger ici la cause de l'hôpital. C'est contre le constructeur que l'action est dirigée par des tiers, à qui il incombe de prouver la faute, et celle-ci ne peut être établie que par la preuve de négligence au moment de la construction et de l'installation. Je crois que cette négligence n'a pas été établie, que l'intimée a agi avec prudence, comme tout homme raisonnable aurait agi en employant dans le temps, un matériel habituellement employé dans des cas identiques, et qu'il ne pouvait pas raisonnablement prévoir ce qui est arrivé.

L'appelante base également sa réclamation sur le fait que depuis de nombreuses années, l'intimée, pour la somme de $1.50, lui fournissait périodiquement un certificat d'inspection attestant que l'ascenseur était en bonne condition. Le jour même de l'accident, l'inspection avait été faite par Arthur Tardif, employé de l'intimée, et comme précédemment, il avait donné un certificat à l'effet que ledit ascenseur n'avait rien de défectueux. Il est vrai que ce certificat n'a été délivré qu'après l'accident, mais il était semblable aux autres donnés antérieurement, et il y a lieu de présumer qu'ils sont légalement devant la cour.

Dans sa déclaration, l'appelante allègue que la cause de l'accident est l'usure des cavités qui a déterminé le glissement des câbles. Tardif explique qu'il a vérifié si oui ou non il y avait un tel glissement, et il indique même la méthode employée pour faire cette constatation. La preuve révèle qu'au moment de l'inspection, le câble ne glissait pas sur le cylindre; et d'ailleurs, il n'est nullement prouvé que ce soit là la cause première de cet accident qui demeure dans le domaine des conjectures.

Cependant, dans son factum, l'appelante prétend que Tardif aurait dû lui signaler dans ses certificats que les "blocs de sécurité" étaient en fonte au lieu d'être en acier.

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Je ne puis partager cette prétention. L'inspecteur Tardif n'avait pas d'autre obligation que de vérifier, en homme prudent, l'état de l'ascenseur, son mécanisme, son fonctionnement et de rapporter les défectuosités qu'il pourrait y rencontrer et de nature à mettre en péril la sécurité des passagers. Dans les circonstances de cette cause, demander davantage à cet inspecteur, et exiger de lui plus qu'une habileté raisonnable et l'attention d'un homme prudent dans l'exercise de ses devoirs, serait faire de lui un garant ou un ré-assureur de l'appelante. Je ne crois pas que le défaut de signaler les améliorations ou les découvertes des hommes de l'art, incorporées aux ascenseurs plus modernes, soit de nature à engager sa responsabilité ou celle de son employeur. C'est l'ascenseur tel que construit que Tardif devait inspecter.

Je crois donc que ce second motif invoqué par l'appelante n'est pas fondé, et qu'en conséquence le présent appel doit être rejeté avec dépens.

DAVIS J.—On February 24th, 1938, at about 9.30 p.m., one of the elevators in use in the hospital called "Hôpital du St. Sacrement" in the city of Quebec, while carrying eleven passengers therein, fell from the second floor of the building to the bottom of the elevator pit, causing injuries to the passengers. The appellant, an insurance company, seeks to recover from the respondent, a manufacturer, the amount of damages sustained as a result of the accident. Without delaying to refer to the appellant's status as plaintiff and the somewhat unusual form of the action and several difficult subsidiary questions of law raised in the action and argued before us, one question is fundamental to the whole action, as will appear from a short recital of the facts.

The accident occurred, as stated, in 1938. The hospital had been built in 1924 and 1925 under a contract signed in August, 1924. There were to be four elevators in the hospital and the general contractor gave a sub-contract for the elevators to the respondent, the Drolet company, which company as sub-contractor built and installed the four elevators during the year 1925. There was no direct contract between the hospital and the sub-contractor. The elevators were examined and tested by the hospital authorities at the time of their installation and were in operation

for about a year before they were finally accepted. These elevators were operated without interruption and satisfactorily from about the time of their installation until the day of the accident—a period of some twelve or thirteen years.

This action seeks to hold the sub-contractor, the Drolet Company, responsible financially for the personal injuries suffered and expenses incurred by the passengers who were injured and for the expenses of the hospital itself for repairs to the elevator. The total sum sued for is $7,453.48. Judgment was awarded the appellant for this sum by the Superior Court of Quebec but was unanimously reversed on appeal and the action dismissed by the Court of King's Bench (Appeal Side).

No proof is given of the cause of the sudden collapse of the elevator. All that appears to be known is that visitors in the hospital who were about to leave at the hour of the accident on the evening in question, had entered the elevator to descend from the second to the first floor when, all of a sudden, the cage fell to the bottom of the pit. The elevator was what is known as a two-system operating elevator. It could be operated, as it appears to have been, in the daytime by an employee of the hospital, and in the evenings and at off hours the passengers themselves could operate it automatically by pressing a button, a self-serving device.

All elevators appear to have some brake appliance to catch and hold the cage if it should fall beyond the control of the person at the time in charge. The common form of brake appliance appears to be safety blocks such as were installed with this elevator. These safety blocks, however, never come into play, are not called upon to perform their function, unless and until the elevator in some way gets out of control. It is suggested that one thing that may happen at times is that the cables which pass over wheels at the roof of the building or at the top of the elevator machinery get out of position and throw the cage of the elevator out of alignment. One may be a little surprised to learn that for the twelve or thirteen years this elevator was continually used, and at times by strangers attempting to work it themselves without the presence of an elevator man, nothing should have happened until the evening of the accident in question. As I have already said, there is really no explanation of what caused the elevator to drop that evening; but it did.

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The dropping of the elevator brought into play, then, what are known as the safety blocks as a brake appliance. They appear to work automatically if and when the elevator gets out of control. On this occasion they failed to work effectively because they broke and did not operate to catch and hold the falling cage.

I should have thought that eleven passengers in the elevator at the time might have put an unnecessary strain upon its equipment, but that point, like several others which appeared to me to be of some importance, was not advanced. It seems to be admitted that the estimated weight of the eleven passengers was within the capacity of the elevator. At any rate the safety blocks broke and undoubtedly the injuries to the passengers were directly attributable to the fall of the elevator due to the failure of the brake appliance to work. I should have mentioned that wherever the safety blocks are located there are two of them opposite each other. I presume that if one broke, the strain on the other would break that other also; in this case at any rate both of them broke. In the very nature of things it does not appear to be known how often, if at all, the elevator had momentarily got out of control and been held by these safety blocks. It has been assumed that it never happened before.

It seems to me to be a far cry to call upon the sub-contractor who manufactured and installed this elevator in 1925 to make good all the damages sustained by the passengers as well as by the hospital itself. It is admitted by counsel for the appellant that the action lies solely within article 1053 of the civil code. That means that fault must be established against the defendant—a fault that caused the accident and to which the damages are directly attributable.

What then is the fault set up against the defendant? Based on the theory that if the safety blocks had been made out of cast steel instead of out of cast iron they would have stood the strain and the accident would not have happened, it is contended that the defendant was at fault in 1925 when it manufactured and installed this elevator with safety blocks made out of cast iron instead of out of cast steel. It is said that because cast iron is more brittle and breaks more easily than cast steel which has greater strength and elasticity, cast steel is the proper

material for use in the safety blocks. That theory, until recently at any rate, has not become an established practice. In the development of the art of the manufacture of elevators the evidence shows, I think, that by 1938 it had become pretty fairly agreed in the Canadian trade by engineers and experts in the business that cast steel should be used rather than cast iron in at least high-speed elevators, which have a speed of from 600 to 900 feet per minute; this elevator was low speed, not exceeding 120 feet per minute. But that does not establish fault back in 1925. In fact the evidence shows that some manufacturers are still using cast iron instead of cast steel and that at the time of the manufacture and installation of this particular elevator it was quite common practice in Canada to make the safety blocks of cast iron. Apart from other difficulties which arise in seeking to hold the manufacturer liable for an alleged imperfection in an article it manufactured and installed twelve or thirteen years ago and which meantime has been out of his control and has been in daily and continuous use by all sorts of people, the fundamental fact on the evidence is, as I see it, that proof of actionable fault on the part of the respondent has not been made out in this case. The safety blocks had been made according to the rules of the art and with material which at the time was generally accepted in Canada as sufficient. If that is the correct view, then all the other matters which were debated and argued before us at considerable length and which raised many difficult questions of law, such as assignment of claims, subrogation, prescription, sufficiency of proof of damages, etc., fail to arise for consideration.

The Court of King's Bench (Appeal Side) dismissed the action with costs and I should dismiss with costs this appeal from that judgment.

RAND J.—With some doubt, I concur in dismissing the appeal.

I desire to reserve my opinion, however, upon the view that the inspection and certification could, under no circumstances, extend to features of construction. I am not satisfied that the inspection is necessarily that of the machine or thing as it is merely. The scope of the duty is one which, in the absence of express terms, is to be

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gathered from the circumstances of its being undertaken but that, in the ordinary case, it could not require disclosure of a defect in design or material which is or should be apparent to the inspector and which, since construction, experience has shown to be hazardous, and general and approved practice has condemned, is a proposition from which I must withhold assent.

Appeal dismissed with costs.

Solicitors for the appellant: *Demers & Desjardins.*

Solicitors for the respondent: *St-Laurent, Gagné & Taschereau.*