DAME M. J. LACOMBE (PLAINTIFF).....APPELLANT; 1928

*May 10.

AND

W. P. POWER AND OTHERS (DEFENDANTS).RESPONDENTS.

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

Negligence—Automobile—Injury to mechanic working on upper floor, when car fell down an elevator shaft—Cause of the accident—Liability of owner of the garage—Presumption of fault—Arts. 1053, 1054 C.C.

The appellant's son, a mechanic and an electrician, was working for the respondents on the third floor of their garage, repairing an automobile, when suddenly the automobile started in the direction of the open shaft of an elevator. The car fell to the bottom of the shaft and the appellant's son received bodily injuries which caused his death the same day.

Held, affirming the judgment of the Court of King's Bench (Q.R. 43 K.B. 198), that the respondents were not liable.

Held also that, upon the evidence, it could be found that the appellant's son was "the author of his own injury." As a skilled workman he should have realized the risk to which he was exposed in working upon the unbraked car while in gear, situated as it was and he must have known that the means of avoiding such risk were entirely in his own hands. But, at least, it must be *held* that the appellant had

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

1928

LACOMBE v. POWER.

failed to prove that her son's death was caused by actionable fault of the respondents necessary to entail their liability under article 1053 C.C.

Held, further, that before a plaintiff can invoke a presumption of fault against a defendant under art. 1054 C.C., he is obliged to establish (*a*) that the damage was in fact caused by the thing in question within the meaning of that article, and (*b*) that that thing was at the time under the care of the defendant. The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it and it became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of art. 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely involuntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of art. 1054 C.C., invoked by the appellant, does not apply: either the case was one of pure accident, entailing no liability; or, if there be liability, it must rest on fault to be proven and not presumed. Upon the evidence, the most likely cause of the movement of the automobile was the act of the deceased workman in pressing down the self-starter, probably inadvertently, as the car was in gear and unbraked in a place where it was dangerous to start it, and the workman must have known that fact unless he were utterly careless or indifferent as to his own safety.

Quaere whether, upon the facts in this case, the automobile was not, for the purposes of art. 1054 C.C., at the time of the accident under the care of the deceased who was an expert workman, rather than under the care of the respondents.

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

The appellant brought action to recover damages occasioned by the death of Lionel Tremblay, her son, who was killed on the 11th of May, 1925, while in the employ of the respondents. The respondents, at the time of the accident, were carrying on business as vendors of motor cars, and they maintained a garage or work shop for repairs and service. It was a rented building of four stories (counting the ground floor), and in that garage was a platform elevator or hoist at the back which was used to bring cars and materials to the various floors. On the day of the accident,

(1) (1927) Q.R. 43 K.B. 198.

Lionel Tremblay was working on the third floor. About one o'clock in the afternoon he brought up on the elevator from the main floor an automobile sent in for repair. The hoist stopped at the third floor and the deceased ran it off and stopped it opposite to, a few feet from and facing the elevator. The elevator continued to the fourth floor, where another employee got off and the operator lowered the hoist to the main floor where it was usually kept. The deceased then worked for over an hour upon the car; at the time of the accident he was standing with one knee on the running-board and his body inside the car, and, while he was so employed the car suddenly started, crashed through the wooden barrier, and fell down the elevator shaft to the bottom, carrying with it the appellant's son, who was so injured in falling that he died the same day. The appellant brought an action for $4,999.99, alleging fault on the part of the respondents in the following particulars:

(*a*) In allowing the deceased to work on the car near the elevator; (*b*) In lowering the elevator to the ground floor without warning the deceased; (*c*) In failing to provide any barrier (garde-corps) around the elevator shaft.

J. E. Cadotte for the appellant.

F. J. Laverty K.C. for the respondents.

After hearing argument for the appellant, and after hearing for a short time counsel for the respondent, the court gave judgment dismissing the appeal with costs. The judgment of the court was orally delivered by

ANGLIN C.J.C.—In her declaration the appellant undoubtedly confined her claim to a cause of action based on art. 1053 C.C., alleging fault in three respects attributable to the respondents. Here her counsel sought also to invoke the provision of art. 1054 C.C., which renders every person responsible for all damage caused "by things which he has under his care." It is not clear whether this position was taken in the Court of King's Bench, but two of the learned judges in that court base their dissent largely upon an application of art. 1054 C.C.

Before the plaintiff can invoke a presumption of fault against the defendants under art. 1054, she is obliged to establish (*a*) that the damage was in fact caused by the

1928

LACOMBE v. POWER.

Anglin C.J.C.

thing in question within the meaning of that article, and (*b*) that that thing was at the time under the care of the defendant. The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it on the third floor of the defendants' garage. It became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of art. 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely involuntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of art. 1054 C.C., invoked by the appellant, does not apply: either the case was one of pure accident, entailing no liability; or, if there be liability, it must rest on fault to be proven and not presumed.

On the evidence before us, the most likely cause of the movement of the automobile was the act of the deceased workman in pressing down the self-starter—probably inadvertently, as the car was in gear and unbraked in a place where it was dangerous to start it, and the workman must have known that fact unless he were utterly careless or indifferent as to his own safety. That the car was started in any other way would seem highly improbable and may not be assumed in the absence of any evidence of facts which would warrant such an inference.

Moreover, as was pointed out during the argument, we should have to consider very carefully whether, upon the facts before us, the automobile was not, for the purposes of art. 1054 C.C., at the time of the accident under the care of the deceased, Tremblay himself, who was an expert workman, rather than under the care of the defendants. The action cannot, in our opinion, be maintained under that article.

Nor has the plaintiff established fault of the defendant which was the cause of the death of Tremblay so as to render them liable therefor under art. 1053 C.C. Assuming that the deceased was obliged to work upon the car where

it was, he might have averted any danger by turning the front wheels sideways or by throwing the transmission out of gear and setting the brakes. As a skilled workman he should have realized the risk to which he was exposed in working upon the unbraked car while in gear, situated as it was, and he must have known that the means of avoiding such risk were entirely in his own hands. Under such circumstances the maxim *volenti non fit injuria* would seem to be much in point. The place was in fact dangerous only because the deceased neglected obvious precautions which would have made it quite safe.

Tremblay probably actually knew, at all events he should have seen, that the elevator was not stationed at the third floor, and that the elevator shaft was open, save for the light railing which served as a guard to prevent persons passing accidentally falling into it. There was no duty incumbent on the defendants to guard against such an occurrence as that which actually happened. We are not prepared to impose on the proprietor of every garage such as that operated by the defendants, the duty of maintaining at each opening of an elevator shaft a barrier of sufficient strength to withstand the impact of any automobile which may be allowed to run against it. There may be circumstances under which such a duty would arise, but there is no evidence of their existence in the present case. The defendants owed no such duty to the deceased Tremblay. Had he taken the precaution either of turning the front wheels of the car away from the direction of the elevator shaft or of throwing the transmission out of gear and setting the brakes before attempting to do work upon the automobile which involved danger of his accidentally pressing the self-starter, the unfortunate occurrence which cost him his life would not have happened. If he was not "the author of his own injury," at least the plaintiff has failed to prove that his death was caused by actionable fault of the defendants necessary to entail their liability under art. 1053 C.C.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Godin, Dussault & Cadotte.*
Solicitors for the respondents: *Laverty, Hale & Dixon.*