

1928
 *May 10.

RAOUL PERUSSE (PLAINTIFF) APPELLANT;
 AND

DAME J. E. STAFFORD (DEFENDANT) . . . RESPONDENT.
 ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,
 PROVINCE OF QUEBEC

Negligence—Automobile accident—Injury to passenger—Presumption of fault—Motor Vehicles Act (R.S.Q. [1925] c. 35, s. 53 (2)—Liability of owner under Arts. 1053 and 1054 C.C.

The appellant claimed damages resulting from an automobile accident and alleged that, while at the invitation of respondent's chauffeur he was a passenger on respondent's truck, he was injured through fault of the chauffeur by being caught between the car and the pavement, when the truck struck the curb and broke a wheel.

Held, affirming the judgment of the Court of King's Bench (Q.R. 43 K.B. 251), that the respondent was not liable.

Held, also, that section 53 (2) (a) of the *Motor Vehicles Act* (R.S.Q. [1925] c. 35), which creates a presumption of fault against the owner of a motor vehicle which he must rebut, applies only in the case of a person injured while travelling upon a highway and does not apply in favour of a passenger in an automobile which is driven by the owner's servant.

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

(a) 53 (2) Quand un véhicule automobile cause une perte ou un dommage à quelque personne dans un chemin public, le fardeau de la preuve que cette perte ou ce dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou de la personne qui conduit ce véhicule automobile, incombe au propriétaire ou à la personne qui conduit le véhicule automobile.

(a) 53 (2) Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

Held, also, that a presumption of fault cannot be urged against the defendant under article 1054 C.C. on the ground that the injury was caused by a thing under her care. That provision has no application to a case where, as in this case, the real cause of the accident is the intervention of some human agency; the question whether such human agency—that of the driver in this case—is at fault being a question of fact. Damage is not caused by a thing which is in the care of the owner within the meaning of Art. 1054 C.C., where it is really due to some fault in the operation or handling of the thing by the person in control of it.

Held, further, that the defendant is not liable under Art. 1053 C.C. as in the circumstances of this case this court would not interfere with the concurrent findings of the courts below that fault of the driver, a person under the defendant's control, had not been proved.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Philippe Demers J., and dismissing the appellant's action in damages.

The respondent is a funeral director and occasionally employed the appellant. On the 26th of April, 1926, the appellant, after having completed the services for which he had been retained, was about to leave the respondent's premises, when the driver of a truck owned by the respondent asked the appellant to help him to carry some furniture to its destination. On the way back, the chauffeur drove the respondent's car onto the sidewalk, broke a front wheel, upsetting the car, and the appellant, being caught between the car and the pavement was seriously injured. The appellant claimed \$5,000 damages.

Ernest Lafontaine for the appellant.

H. J. Trihey K.C. for the respondent.

At the close of the argument for the appellant, and without calling on counsel for the respondent, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that this appeal must be dismissed.

Three distinct grounds of claim are presented.

First, it is said that, on the interpretation of section 53 (2) of the *Motor Vehicles Act* (R.S.Q., 1925, c. 35) there is a presumption of fault against the owner of the motor

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vehicle in which the plaintiff was injured, which he must rebut; that that presumption applies equally in favour of a passenger in the car and of a person travelling on the highway. We are entirely against that view of the construction of the article. In our opinion, the article applies only in the case of a person travelling upon the highway; it does not apply in favour of the plaintiff who was a passenger in the automobile which was owned by the defendant and driven by his servant. The French version of the statute removes any possible doubt on this point.

In the second place, it is contended that fault is presumed against the defendant under article 1054 of the Civil Code, because the injury was caused by a thing under her care. Our view is that that provision has no application to a case where, as here, the real cause of the accident is the intervention of some human agency—the question whether such human agency—that of the driver in this case—is at fault being a question of fact. Damage is not caused by a thing which is in the control of the defendant within the meaning of art. 1054 C.C. where it is really due to some fault in the operation or handling of the thing by the person in control of it.

The third ground is that there was fault of the driver, a person under the defendant's control. In that case such fault must be proved just as under art. 1053 C.C. fault of the defendant himself, where he is in personal control, must be established. There are concurrent findings against the appellant in this respect. These findings would be very difficult in any case to overcome. But they are particularly so, in this case, where there is only one witness who gives evidence relating the facts, and that witness is believed, such belief being expressed by the trial judge and by the Court of Appeal. In these circumstances, error in the finding not being demonstrated,—not being made manifest—it is impossible for us to interfere.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Ernest Lafontaine.*

Solicitor for the respondent: *H. J. Tribey.*