THE CITY OF MONTREAL (DEFENDANT) . APPELLANT;

AND

T. LESAGE (PLAINTIFF) . . . . . RESPONDENT.

1923
*Feb. 19.
*April 3.

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

Municipal corporation—Negligence—Water pipes—Damages to property—Onus—Art. 1054 C.C.

Upon an action brought by the owner of an immovable for damages caused by flooding due to the bursting of water pipes, a municipal corporation is liable under article 1054 C.C., unless it establishes that it was "unable by reasonable means to prevent the act (le fait) which caused the damage." *Quebec R.L.H. & P. Co.* v. *Vandry* ([1920] A.C. 662) and *The City of Montreal* v. *Watt & Scott* ([1922] 2 A.C. 555) followed; and in order to bring itself within the exculpatory clause of article 1054 C.C., it is not sufficient for the appellant to prove that the cause of the bursting is unknown.

Judgment of the Court of King's Bench (Q.R. 33 K.B. 458) affirmed.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court, Lafontaine J. and maintaining the respondent's action.

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

Chs. Laurendeau K.C. and *G. St. Pierre K.C.* for the appellant. The appellant, to be relieved from liability, was not obliged to prove fortuitous event, *vis major* or fault of the respondent, but it was sufficient to prove that it had acted with reasonable care and had adopted reasonable means to prevent the accident. The cause of the accident cannot be explained; all possible causes were examined and discussed by expert witnesses who testified that the accident is not attributable to any of them.

Paul Rainville K.C. for the respondent. Under article 1054 C.C., the appellant is responsible for the damages caused to the respondent by a thing which was under its care and control.

IDINGTON J.—The respondent sued the appellant for damages to his buildings on the corner of Cadieux and De-

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1922] Q.R. 33 K.B. 458.

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Montigny streets in said city, on the 25th April, 1919, by reason of the water pipes used by appellant on DeMontigny street in front of respondent's said building having burst and through the rupture so produced poured millions of gallons of water upon said buildings or the ground adjacent to the foundation thereof.

The learned trial judge maintained the respondent's claim and assessed the damages at $3,000.

The Court of King's Bench unanimously upheld the said judgment. Each of the five members thereof who heard said appeal gave written reasons in support of their said judgment founding the action upon the obligations resting upon appellant by virtue of Art. 1054 of the Civil Code.

The appellant's counsel admitted in answer to a question I put to him that he did not deny that the burden of rebutting a presumption created by the relevant law and fact against the appellant rested upon it.

I fail to see how that can be held to have been discharged by the evidence upon which he relied.

I do not propose going into a detailed account thereof and of the evidence adduced by the respondent.

I have considered same and the arguments adduced by counsel on each side resting respectively upon that class of evidence given on behalf of their respective clients.

If as the witnesses for appellant pretend that they cannot account for the repeated bursting of parts of said pipe and we are asked to allow this appeal because the appellant's employees cannot find anything to account for such bursting, I respectfully submit that they have not duly investigated the possible causes.

One of these witnesses admitted there had been water pipes in the city which lasted for forty years without bursting. No attempt was made to compare such enduring water pipes with those in question and to learn how it came about that the one set lasted so well and so long without bursting and this later structure had a dozen ruptures within ten years.

Is it conceivable that such a state of things is to continue and owners of property to suffer loss at such a rate

because appellant's employees will not listen to what others say and are blind to what experience demonstrates?

Such a case as appellant sets up does not present anything upon which we should say that it had discharged the burden cast upon it by law.

Nor do I find any error in the law as presented by the several judges below.

The question of damages, concurrently agreed upon by both courts, is one with which we should not interfere in such a case.

I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—I concur with Mr. Justice Brodeur.

ANGLIN J.—The impression left on my mind by a study of the somewhat voluminous record in this case cannot be better expressed than in the sentence in which the lamented Chief Justice Lamothe stated his conclusion:

> La preuve, telle que faite, ne nous permet pas de dire que le fait déterminant des dommages, *causa causans*, n'aurait pu être empêché.

Having regard to the history of the conduit—twelve breaks, many of them serious, within ten years in the other two sections—I am not so clearly convinced that the defendants were unable by any reasonable means to prevent the act (*le fait*) which caused the damage to the plaintiff's property (*City of Montreal* v. *Watt & Scott* (1)), that I would feel justified in reversing the judgment of the Superior Court unanimously affirmed by the Court of King's Bench, notwithstanding the fact that a majority of the learned judges of the latter court appear to have proceeded on a view of the effect of the judgment of the Judicial Committee in *Quebec Ry. L.H. & P. Co.* v. *Vandry* (2), which must, in the light of the "addition" made to it in the later judgment in *City of Montreal* v. *Watt and Scott* (1), now be deemed somewhat exaggerated.

While proof of fault *dans locum injuriae* is certainly lacking, the burden thrown on the defendants by the Vandry decision (2) of bringing themselves within the exculpatory clause of article 1054 C.C., even as tempered by the "addition" made by their Lordships in the *Watt and Scott*

(1) [1922] 2 A.C. 555. (2) [1920] A.C. 662.

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Case (1), remains so onerous that I am not satisfied it has been discharged. That burden is, of course, enormously increased where, as here, the cause of the accident is unknown.

It would require a very strong case indeed to justify interference with the assessment of the plaintiff's damages, unanimously confirmed by the Court of King's Bench. Such a case has not been made out.

The appeal in my opinion fails.

BRODEUR J.—L'article 1054 du Code Civil, après avoir énoncé le principe qu'une personne est responsable du dommage causé par la faute de ceux dont elle a le contrôle, ajoute qu'elle est aussi responsable du dommage causé " par les choses qu'elle a sous sa garde."

L'article énumère ensuite quels sont ceux qui sont sous contrôle au sens de cet article, et ajoute:

> La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage.

Le dommage causé par une chose n'a pas donné lieu d'abord dans notre jurisprudence à l'application du principe que celui qui en avait la garde pouvait écarter la responsabilité en prouvant qu'il n'avait pu empêcher le fait qui avait causé ce dommage. Mais la théorie du risque professionnel, qui a été favorisé par certains auteurs, et surtout par Saleilles, à la fin du siècle dernier et au commencement de celui-ci, a donné lieu à une certaine indécision dans la jurisprudence française et dans la nôtre. Cette cour, dans cette célèbre cause de *Shawinigan Carbide Co.* v. *Doucet* (1), a été également divisée sur la question de savoir s'il y avait présomption de faute contre le propriétaire dans le cas où le dommage était causé par sa chose. Cette opinion de la cour suprême a été savamment examinée dans la Revue Trimestrielle du Droit Civil, Vol. 10 (1911), page 23.

En 1915, cette question de la responsibilité fut discutée devant nous dans cette célèbre cause de *Vandry* v. *Quebec Ry. L.H. & P. Co.* (2), et là encore nous voyons une grande divergence d'opinion.

(1) [1909] 42 Can. S.C.R. 281. (2) [1915] 53 Can. S.C.R. 72.

En 1918, la même question a été soulevée de nouveau devant nous dans une cause de *Norcross* v. *Gohier* (1), et nous avons décidé que le dommage causé par une chose crée contre le propriétaire une présomption de faute qu'il est tenu de repousser.

En 1920, le Conseil Privé a tranché cette question *d'onus probandi* en décidant dans la cause ci-dessus mentionné de *Vandry* v. *Quebec Ry. L.H. & P. Co.* (2),

that a person capable of discerning right from wrong is responsible, without proof of negligence, for damage caused by things which he has under his care, unless he establishes that he was unable to prevent the event which caused the damage.

Et dans une cause encore plus récente, décidée par le conseil privé, savoir celle de *City of Montreal* v. *Watt & Scott* (3), le conseil privé a maintenu le principe qu'il avait énoncé dans la cause de Vandry (2), en y ajoutant cependant ceci:—

In their Lordships' views "unable to prevent the damage complained of" means: "unable by reasonable means." It does not denote an absolute inability.

Je n'ai pas besoin de faire une revue de la jurisprudence et de la doctrine en France sur cette question de la responsabilité de la chose et sur *l'onus probandi*; mais nous constatons qu'il y eut là aussi pendant un grand nombre d'années une grande incertitude. Dalloz, 1897.1.433; Le centenaire du code civil p. 33; Dalloz, 1900.2.289; Dalloz, 1904.2.257; Dalloz, 1905.2.417; Dalloz, 1906.2.249; Dalloz, 1908.1.217; Dalloz, 1909.1.73 (note de Planiol); Dalloz, 1910.1.17 (note de Desmain); Dalloz, 1913.1.427; Dalloz, 1914.1.303; Laurent, vol. 20, no. 475; Planiol, vol. 2, no. 930; Saleilles, Revue de Jurisprudence, 1911; Colin & Capitant, vol. 2, p. 291.

Le principe est maintenant parfaitement bien établi tant dans notre jurisprudence que dans la jurisprudence française que le dommage causé par le fait des choses qu'on a sous sa garde établit une présomption de faute.

Il s'agit maintenant de savoir quelle preuve est exigée pour faire disparaître cette présomption de faute.

D'abord, quelle est la faute dont le débiteur doit être tenu responsable? La doctrine enseigne que la faute la

(1) [1918] 56 Can. S.C.R. 415. (2) [1920] A.C. 662.
(3) [1922] 2 A.C. 555.

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plus légère suffirait pour faire rejeter l'excuse d'impossibilité énoncée. La loi ne peut balancer entre celui qui a commis une faute même légère et celui qui a souffert sans en avoir commis aucune. Quiconque suivant la doctrine a causé ou occasionné du dommage doit le réparer. Toullier, vol. 11 no. 264; Laurent, vol. 20, no. 475.

On enseigne généralement en France que l'excuse d'impossibilité peut s'appliquer dans le cas où il y a eu cas fortuit, force majeure, ou faute de la victime.

Le Conseil Privé, dans la cause de *La Cité de Montréal* v. *Watt & Scott* (1), après avoir déclaré que le débiteur, pour s'exonérer, doit montrer d'une manière raisonnable qu'il n'a pu empêcher le fait qui a causé le dommage, ajoute que le cas fortuit et la force majeure pourraient en conséquence produire cette exonération.

Je considère que si le débiteur n'apporte pas une preuve formelle et décisive, s'il se contente de prouver qu'il ne connaît pas la cause de l'accident, il ne détruit pas la présomption de faute édictée contre lui.

Dans le cas actuel, la cité de Montréal a tenté de prouver qu'elle ne connaissait pas la cause de l'accident. Mais en même temps il est démontré que les conduites d'eau qui se sont brisées et qui ont causé les dommages n'étaient pas placées assez profondément dans la terre et qu'elles étaient soumises à l'action de la gelée, pour partie du moins, la partie supérieure étant en contact avec la terre gelée pendant que la partie inférieure reposait sur une couche plus chaude. Il pouvait se produire alors une différence de dilatation qui a pu affaiblir la conduite et occasionner la rupture. Cela est d'autant plus possible que plusieurs ruptures ont eu lieu dans ces dernières années et qu'elles se sont toutes produites, à l'exception d'une, à l'époque où la terre gelait ou dégelait.

De plus, on n'a pas suivi les devis. Ces devis avaient été faits avec beaucoup de soin par les officiers techniques de la cité de Montréal. Pourquoi ne pas avoir pourvu alors à ce que ces spécifications soient en tous points observées?

Maintenant plusieurs accidents semblables se sont produits et je ne vois pas que la cité ait pris des mesures éner-

(1) [1922] 2 A.C. 555.

giques pour tâcher de prévenir ces accidents dans l'avenir.

Il paraît également que des conduites avec un diamètre aussi considérable que celui dont on s'est servi offrent une source de dangers plus considérables.

Pour ces raisons, je considère que la cité de Montréal n'a pas établi qu'elle n'a pas pu empêcher le fait qui a engagé sa responsabilité. En conséquence le jugement qui l'a condamnée doit être maintenu et l'appel doit être renvoyé avec dépens.

MIGNAULT J.—The Court of King's Bench in deciding this case followed the decision of the Privy Council in *Quebec Railway, Light, Heat & Power Co.* v. *Vandry* (1), the majority of the learned judges being of the opinion that under that decision, where damage is caused by a thing under the care of the defendant, the latter cannot claim the benefit of the exculpatory paragraph of Art. 1054 of the Quebec Civil Code unless he shews that the act (*le fait*) which caused the damage amounted to a *cas fortuit* or *force majeure*. Since the judgment of the Court of King's Bench was rendered, their Lordships of the Judicial Committee in *City of Montreal* v. *Watt & Scott, Limited* (2), explained the meaning of their decision in the *Vandry Case* (1), and said at p. 563:—

> The only addition to the views expressed in Vandry's Case (1), which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of" means "unable by reasonable means." It does not denote an absolute inability. If, therefore, the storm in question could be described as a *cas fortuit* or *force majeure*, and if the appellants had shewn that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships' view, have been a case where the exculpatory paragraph would have applied.

While the reference to the storm there in question might appear to give some support to the opinion expressed in the court below that the defendant cannot claim the benefit of the exculpatory paragraph of article 1054 C.C. unless he shews that the act which caused the damage can be described as a *cas fortuit* or *force majeure*, it seems to me that the language of their Lordships should not be so construed. For were the defendant constrained to go the length of proving that the accident which caused the dam-

(1) [1920] A.C. 662. (2) [1922] 2 A.C. 555.

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age was a *cas fortuit* or the result of *force majeure*, he would be obliged to establish "an absolute inability" to prevent the damage complained of, and their Lordships are very careful to state that "unable to prevent the damage" does not denote such an inability, but means "unable by reasonable means," which of course excludes the idea of irresistible force as a necessary element of exculpation. It follows that I cannot agree with the view expressed by the majority of the learned judges of the Court of King's Bench that the defendant here was obliged to shew that the damage was caused by a *cas fortuit* or resulted from *force majeure*.

Nevertheless the question remains whether the city of Montreal has established that it could not, by reasonable means, prevent the bursting of the pipe which caused the damage complained of. It is certainly no defence to say that the cause of the bursting is unknown.

Under all the circumstances it can reasonably be inferred that there was a flaw in the pipe which burst, for of course the bursting was not without a cause. This pipe formed part of a water distribution system carrying the water by means of a thirty-inch main pipe which extended some 18,000 feet from Aqueduct street to DeLorimier avenue. It was manufactured by the Canada Iron Corporation, Limited, of Three Rivers, in 1910 and was laid down in that year. This distribution system had three distinct sections however, manufactured under separate contracts, and in the section where the accident occurred this was the first case of the bursting of a pipe. There were, it is true, blow-outs in the other sections, but as they may have happened through causes that are not disclosed I do not think that they should be considered here. So we have the mere fact of this accident, without any similar occurrence in this section to indicate a weakness in the pipes.

That the appellant was at considerable pains to secure proper pipes for its water distribution system is shewn by the following "considérant" of the learned trial judge:

Considérant que si dans la confection des conduites dont la défenderesse s'est servie, et dans le choix des matériaux employés, ainsi que dans la confection des travaux d'installation et le posage des divers tuyaux servant à conduire l'eau, dont l'un s'est brisé, la cité de Montréal paraît, suivant la preuve, avoir mis tout le soin et pris toutes les précautions que la science, l'art et l'expérience peuvent suggérer en semblable cas,

et si avant de s'en servir, les divers tuyaux dont l'ensemble forme l'une des conduites principales du système d'aqueduc de la défenderesse, ont été soumis à de sérieuses expériences qui ont demontré qu'ils pouvaient être employés avec sécurité, tout de même la défenderesse n'en a pas moins pris un risque en employant des tuyaux qui à cause de leur diamètre considérable ou pour des causes inconnues présentaient certain danger suivant la science et l'expérience.

The learned trial judge had in a preceding " considérant," placed the liability of the appellant upon article 1054 C.C., but perhaps as to this " considerant," I may say that in my opinion the mere use of a thirty-inch pipe, which was no doubt necessary to carry a sufficient supply of water in a city of the size of Montreal, does not appear to be a safe ground for a judgment condemning the city to pay damages when, as the learned trial judge finds, the civic authorities took all the precautions which science, art and experience could suggest, and when the pipes were submitted to serious tests showing that they could be used with safety. But the weakness of the appellant's case under article 1054 C.C. is that, in relation to the accident which caused the damage, its evidence, apart from proof of the precautions to which I have referred, is chiefly of a negative character, the attempt being to shew that the accident could not be explained. What was neccessary was to prove that the accident could not have been prevented by reasonable means. And to my mind, after carefully reading the appellant's evidence, one fact stands out as a possible cause of the bursting. The pipe in question was placed in a trench and was covered only by two feet four inches of earth and asphalt paving. Frost, it is shewn, extends much deeper than that, and in winter the top of the pipe was in frozen earth, while the bottom was probably below the line of frost, thus causing a tension which tended to weaken the pipes. Accidents did not take place for several years, but as time went on and the pipe was winter after winter exposed to these strains, its force of resistance was no doubt decreased. In cross-examination, Mr. Vanier, the appellant's principal expert witness, admits the possibility of an accident under these circumstances. I will quote a short passage from his testimony:

Q. Mais est-ce que, sous l'influence du froid et sous l'influence de la chaleur, lors du dégel, ce tuyau n'était pas soumis à une dilatation, à une contraction à chaque changement de saison?

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R. C'est comme tous les tuyaux d'aqueduc, c'est justement ce point-là que je touchais tout à l'heure, ces cas des différences de température à l'intérieur et à l'extérieur du tuyau, qui peuvent avoir une influence sur la fonte.

Q. Et étant donné que dans tous les tuyaux il y aurait ou peut y avoir des "cooling strains," est-ce que ce ne serait pas de nature à soumettre ces tuyaux à une tension telle que le tuyau, à un certain moment, devient trop faible pour résister à la pression de l'eau intérieure?

R. C'est possible théoriquement, c'est possible, mais ce n'est pas démontré.

It is not sufficient to say "ça n'est pas demontré," for the respondent did not have to explain the bursting, the burden being on the appellant to shew that it could not have prevented it. And here is an admitted possible cause of the accident which the appellant has not excluded by the evidence which it adduced, as the quotation from Mr. Vanier's testimony shews.

There is no doubt that article 1054 C.C. as now construed imposes a very serious responsibility on municipal corporations which in the interest of their citizens have installed public services. But this is really a question of policy for the consideration of the legislature, for the law, however rigorous it may seem, must be applied to public bodies as well as to private individuals. I therefore think that the evidence adduced by the appellant does not entitle it to claim the benefit of the exculpatory paragraph of article 1054.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jarry, Damphouse, Butler & St. Pierre.*

Solicitors for the respondent: *Rainville & Rainville.*