SIR CHARLES ROSS (DEFENDANT).....APPELLANT;

AND

CHARLES O. DUNSTALL (PLAINTIFF) RESPONDENT

1921

*Feb. 17, 18.
*May 26.
*Oct. 11.

SIR CHARLES ROSS (DEFENDANT).....APPELLANT;

AND

SLOAN M. EMERY (PLAINTIFF).....RESPONDENT.

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

Negligence—Contract of sale—Fire-arm—Latent defect—Injuries—Liability—Delictual fault—Articles 1053, 1070, 1491, 1522, 1527 *C.C.*

The appellant was a manufacturer of sportsmen's rifles which, when placed by him on the market, were properly assembled and of good material and workmanship. His is the only make of bolt-action rifle which can be fired with the bolt unlocked though appearing to be locked. To prevent rust, the guns were heavily oiled by the manufacturer and purchasers were warned to wipe them out before using. In order to do this the bolt had to be taken apart but no instructions were given by the manufacturer as to the manner of reassembling the parts. Each of the respondents was injured by the bolt of one of these rifles being driven back through the breach when it was used by him for the first time after its purchase.

Held, Brodeur J. dissenting, that, even assuming that each of the respondents had improperly assembled the parts of the bolt after cleaning it as instructed, the fact that the rifle would fire when the bolt was unlocked while apparently locked, constituted a latent defect and source of danger in the rifle and the failure of the appellant to take any reasonable steps to warn purchasers against that latent danger was equivalent to "fault", "neglect" and "imprudence" within the purview of Art. 1053 C.C.

---

*PRESENT:—Sir Louis Davies C. J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Per Brodeur J. (dissenting):—Fault is either contractual or delictual, and delictual fault cannot be found in an action based on a contract. The appellant was not guilty of any contractual fault, the alleged defect of the rifle not being a latent defect within the purview of article 1522 C.C. The appellant was not liable for an apparent defect (art. 1523 C.C.) and he was not legally bound to warn purchasers as to the way of assembling the parts of the rifle (Art. 1491 C.C.)

Judgment of the Court of King's Bench (Q.R. 29 K.B. 476) affirmed, Brodeur J. dissenting.

APPEAL from the judgments of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgments of the trial court (2) which maintained the respondents' actions but reducing the amount of damages granted to them. The material facts of the case are fully stated in the above head-note and in the judgments now reported.

F. Roy K.C. for the appellant. The rifle, if properly assembled, is absolutely safe and offers no danger whatsoever; and the appellant cannot be held responsible for the act of a purchaser who, by his neglect and imprudence, deranges the mechanism and assembles it in a defective manner and other than when it left the factory.

A. C. Dobell K.C. and *J. P. A. Gravel K.C.* for the respondents. The appellant is liable either of a contractual fault within arts. 1522 *et seq.* C.C., or of a delictual fault within art. 1053 C.C.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault J., in which I fully concur, I am of opinion that both the appeals and the cross-appeals in these two cases should be dismissed with costs.

(1) Q.R. 29 K.B. 476. (2) Q.R. 58 S.C. 123.

IDINGTON J.—*Ross v. Dunstall.* I am of the opinion that this appeal should be dismissed with costs. And the cross-appeal, which raises no question but the measure of damages which for many long years has in numerous cases uniformly been held to be a matter we should not meddle with, must be dismissed with costs.

Ross v. *Emery.* For the reasons assigned by the learned trial judge and the judges constituting the majority in the Court of Appeal I am of the opinion that this appeal should be dismissed with costs.

Having regard to the jurisprudence of this court, for many years past, in refusing to interfere with the assessment of damages when no principle of law is violated in the actual determination of the amount, I would dismiss the cross-appeal herein.

DUFF J.—Negligence is clearly, I think, established in fact. The rifle, when the parts were assembled in a certain way—which to any eye but the expert eye might readily appear to be the right way—was a highly dangerous instrument. So much so indeed that when discharged in such circumstances injury to the holder of the rifle was almost certain to follow.

These rifles were sold without warning—that is to say were put into commercial circulation with the reasonable probability that some of them would come into non expert hands, where they would be received without suspicion and under the risks arising from the circumstances mentioned. There is sufficient evidence to support a finding that competent and careful inspection and testing must have revealed the existence of these risks to the appellant and I agree with the courts below that such is the proper conclusion.

1921
ROSS
v.
DUNSTALL
ROSS
v.
EMERY.
Duff J.

Is the appellant responsible? I can see no reason for holding that such responsibility does not arise from the very terms of Art. 1053 C. C. unless it can be successfully contended that responsibility in such circumstances is limited to that arising from the contract of sale. I see no reason for such a limitation of the effect of the article mentioned. I cannot understand why a delictual responsibility towards those with whom the negligent manufacturer has no contractual relation may not co-exist with contractual responsibility towards those with whom he has.

This is said to be inconsistent with the decisions of the English courts. But it is not, I think, inconsistent with *George* v. *Skivington* (1), which appears to be sufficient to support the proposition that a manufacturer is responsible if he negligently manufactures and puts into circulation a mischievous thing which is or may be a trap to people using it. *George* v. *Skivington* (1) has no doubt been adversely commented upon but it has not been considered by any court competent to overrule it and it has been applied widely in the American courts. See *MacPherson* v. *Buick Motor Co.* (2).

Whatever be the state of the English law the principle of *George* v. *Skivington* (1) is, in my opinion, a principle of responsibility which by force of Art. 1053 C.C. is part of the law of Quebec.

ANGLIN J.—The facts of these two cases sufficiently appear in the reports of the *Dunstall Case* in the Superior Court (3), and of both cases in the Court of King's Bench (4), and in the judgments of my learned brothers. They raise the very important

(1) [1869] L.R. 5 Ex. 1.
(2) 111 N. E. 1050.
(3) Q.R. 58 S.C. 123.
(4) Q.R. 29 K.B. 476.

question of the liability under the law of Quebec of the manufacturer of a firearm, placed by him on the market for general sale, which, though faultless in material and workmanship, causes injury to a purchaser (either from the manufacturer himself or his agent or from a merchant dealing in such goods) owing to a latent and unusual source of danger inherent in its design, to give warning of which no steps have been taken by the manufacturer. The existence of the source of danger in the Ross rifle—that it will fire when its bolt is unlocked—is indisputable. Its latent character is fully established—so much so that the manufacturer claims to have been himself unaware of it. While probably discernible by an expert and unlikely to be the cause of injury to a person who knows of it, it is apt to escape the notice of an ordinary user of a sportsman's rifle—even if somewhat experienced—as happened in each of these cases, without his being chargeable with any fault in the nature of temerity, carelessness or inattention.

No such hidden source of danger is to be found in such well known makes of bolt-action rifles as the Mauser, Lee-Enfield, Lebel, Mannlicher, Nagant and U.S. Springfield, none of which can be fired unless the bolt is securely locked. It was not shown to be present in any other make of rifle than the Ross.

There is evidence given by Mr. Power, formerly a foreman in the appellant's factory, that this source of danger was in fact brought to the appellant's attention in 1914. But as the manufacturer he should, in my opinion, not be heard to say that he was not or should not have been aware of it. 3 Pothier, Vente, No. 213; S. 1873.2.179; 2 Troplong, Vente, No. 574.

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Anglin J.

There is also uncontradicted evidence given by Mr. Blair, a Government expert, that the danger might have been eliminated by a very simple change in design. That being the case, if such change would neither materially affect the user of the rifle nor interfere with the "straight pull," its characteristic feature—and, while there is no direct evidence to that effect, in the absence of any suggestion in the record that it would deem it a fair inference—I have little difficulty in accepting the conclusion that the fact that the Ross Sports Rifle could be fired while the bolt was in a wrong position and unlocked and nothing to indicate that fact was apparent to the ordinary user constituted a latent defect in its design.

I assume that the rifles were properly assembled when they left the appellant's factory and that the bolts became subsequently disarranged—not improbably while in the hands of the respective plaintiffs.

The learned trial judge found that the existence of this source of danger constituted a defect in the rifle which entailed responsibility on the manufacturer for resultant injuries. Three "Considérants" of his judgment read as follows:

> Considérant que le dit accident a été causé non par quelque défaut dans les matériaux employés ou dans la main-d'œuvre, mais par un défaut dans le modèle du fusil lui-même et du mécanisme de la culasse;
>
> Considérant que ce défaut consiste en ce que les pièces qui composent la culasse mobile dudit fusil sont susceptibles d'être déplacées par la manipulation sans que le changement soit suffisamment apparent pour autre qu'un expert, et en ce que la culasse ainsi dérangée est susceptible d'être mise en place et fermée, et le fusil armé, sans que la dite culasse soit fixée au canon du fusil—état de choses qui n'est pas visible à l'extérieur,—et surtout en ce que le fusil, ainsi apparemment bien armé, peut être tiré avec le résultat que la culasse en est repoussée par la détonation, s'en détache et frappe le tireur à la figure avec une grande force;

Considérant que, indépendamment de toute responsabilité contractuelle, la vente publique et la mise en circulation d'une arme affectée de ce vice constitue un quasi-délit dont l'auteur est responsable du dommage qui peut en résulter.

In the Court of King's Bench, while the judgments holding the defendant liable were sustained, the damages awarded to the plaintiff Dunstall were reduced from $11,060 to $8,560 and those awarded to the plaintiff Emery from $10,000 to $5,482. The respondents have both cross-appealed against these reductions in the amounts of their respective recoveries. These cross-appeals may be disposed of on the short ground that neither case is of the very exceptional class in which this court feels justified in interfering on the ground of gross and palpable excess or inadequacy with the quantum of damages fixed by the provincial appellate court.

The failure of the appellant to take any reasonable steps to insure that warning of the latent danger of the misplaced bolt—whether it did or did not amount to a defect in design—should be given to purchasers in the ordinary course of the sporting rifles which he put on the market in my opinion renders him liable to the plaintiffs in these actions. His omission to do so was a failure to take a precaution which human prudence should have dictated and which it was his duty to have taken and as such constituted a fault which, when injury resulted from it to a person of a class who the manufacturer must have contemplated should become users of the rifle, gave rise to a cause of action against him.

The cases fall within the purview of Art. 1053 C.C. Taking no steps to warn purchasers of the rifle of its peculiar hidden danger was "neglect" and "imprudence" on the part of the defendant (whether his

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Anglin J.

knowledge of it was actual or should be presumed) which caused injury to the plaintiff in each instance. If his failure to make an effort to give such warning was due to ignorance of the danger, such ignorance may well be deemed "want of skill" (*imperitia*) under the circumstances.

The principle of the case in D. 1869.2.195, cited for the respondents, where a doctor attending a child who failed to notify its nurse of the contagious character of the disease with which it was afflicted and which she contracted was held liable to her, may be invoked. Purchasers of the Ross rifle were entitled to rely on the skill and prudence of its manufacturer as the nurse was on that of the doctor. Another case, reported in the Court of Cassation in S. 1899.1.371 and in the Court of Appeal in D. 1894.2.573, may also be referred to where failure to warn the purchaser of a bicycle of the danger, owing to weakness in the tubing forming the post, of raising the handle bar of the bicycle too high was indicated as a ground of liability on the part of the manufacturer-vendor, the purchaser having been injured because the tubing in the post broke.

The responsibility of the manufacturer where he has himself sold to the plaintiff, either directly or through an agent, for injuries occasioned to the purchaser by hidden defects in the thing sold is clearly covered by Arts. 1522 and 1527 C.C. All the authorities have followed Pothier in regarding him as a person who is legally presumed to know of such defects (Pandectes Françaises, Rep. vbo. Vices Redhib. Nos. 337-40: Guillouard, Vente, No. 462) and this presumption applies in favour of sub-purchasers as well as the original vendees. It puts the manufacturer who is ignorant of latent defects in the same plight as if he knew of them.

There is good authority for the proposition that this contractual or quasi-contractual responsibility extends to sub-purchasers of his products from merchants to whom the manufacturer has supplied them whether directly or through the intervention of wholesale dealers. Baudry-Lacantinerie (Saignat) Vente, No. 432: Guillouard, Vente, No. 452: S. 1891.2.5. But it is perhaps not so clear that it also covers unusual latent sources of danger not amounting to defects.

I therefore prefer to rest my opinion in favour of the plaintiffs on Art. 1053 C.C. (S. 1879.1.374). The defendant's failure to take steps to warn purchasers of his rifles of the hidden danger peculiar to them, that they would fire when the bolt appeared to be locked but was in fact unlocked, I regard as an imprudence or neglect within the purview of that article and therefore actionable. Sourdat, Resp. Vol. 1, Nos. 668, 670, 675, 680.

While English law is not applicable to these cases I incline to think that under it the defendant would likewise be liable—at all events if he knew of the latent danger of his rifle—and probably if he did not. Reference may be made to the very recent edition (1921) of Clark and Lindsell on Torts, pp. 455, 469, 471-5: 25 Hals. L. of E., No. 293: 21 Hals. L. of E., No. 638 and 686: *White* v. *Steadman* (1); *Bates* v. *Batey* (2); *Cavalier* v. *Pope* (3); and *Parry* v. *Smith* (4). In *Blacker* v. *Lake & Elliot* (5), Hamilton and Lush JJ., held knowledge by the manufacturer of the defect or condition creating the danger essential to

(1) [1913] 3 K.B. 340.
(2) [1913] 3 K.B. 351.
(3) [1906] A.C. 428.
(4) [1879] 4 C.P.D. 325, at p. 327.
(5) [1912] 106 L. T. 533.

1921
ROSS
v.
DUNSTALL
ROSS
v.
EMERY.
Anglin J.

render him liable to a sub-purchaser from his vendee of an article not ordinarily of a dangerous character even though it must have been in contemplation that such a resale should take place. *George* v. *Skivington* (1), the well-known case of the deleterious hair wash, where the contrary was held, is treated as virtually overruled. Lush J. in *White* v. *Steadman* (2), however, indicates that in his view the decision in *George* v. *Skivington* (1) might have been supported if it had been put upon the ground that the defendant had failed to take ordinary care to avail himself of his opportunity of knowledge of the danger of the ingredients composing his hair wash. With respect, it seems to me that ground of liability, though not expressed, is fairly implied in the judgments delivered in the Court of Exchequer. *Thomas* v. *Winchester* (3), cited with approval in *Dominion Natural Gas Co.* v. *Collins* (4), and the opinion of Matthew L.J., in *Clarke* v. *Army & Navy Society* (5), may also be looked at in this connection. *George* v. *Skivington* (1) is still cited as an authority in Clark and Lindsell's recent book at p. 472. I find it difficult to reconcile the decision in *Blacker* v. *Lake & Elliott* (6), with the classical passage in the judgment of Brett M. R., in *Heaven* v. *Pender* (7).

> Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

(1) L. R. 5 Ex. 1.
(2) [1913] 3 K.B. 340.
(3) [1852] 6 N.Y. 397.
(4) [1909] A.C. 640, at p. 646.
(5) [1903] 1 K.B. 155, at p. 168.
(6) [1912] 106 L.T. 533.
(7) [1883] 11 Q.B.D. 503, at p. 509.

The duty of a manufacturer of articles (such as rifles), which are highly dangerous unless designed and made with great skill and care, to possess and exercise skill and to take care exists towards all persons to whom an original vendee from him, reasonably relying on such skill having been exercised and due care having been taken, may innocently deliver the thing as fit and proper to be dealt with in the way in which the manufacturer intended it should be dealt with. The manufacturer of such articles is a person rightly assumed to possess and to have exercised superior knowledge and skill in regard to them on which purchasers from retail dealers in the ordinary course of trade may be expected to rely. From his position he ought to know of any hidden sources of danger connected with their use. The law cannot be so impotent as to allow such a manufacturer to escape liability for injuries—possibly fatal—to a person of a class who he contemplated would use his product in the way in which it was used caused by a latent source of danger which reasonable care on his part should have discovered and to give warning of which no steps have been taken.

I agree with the learned judges of the Court of King's Bench and the Superior Court that the respondents' actions are not prescribed.

I would dismiss both the appeal and the cross-appeal with costs.

BRODEUR J. (dissenting).—Ces deux causes, qui avaient été réunies pour les fins de la preuve, ont été plaidées séparément devant nous; mais comme les faits y sont à peu près identiques et que les mêmes questions de droit s'y présentent, nous pouvons les décider en même temps.

1921

ROSS
v.
DUNSTALL

ROSS
v.
EMERY.

Brodeur J.

Les faits sont les suivants:

L'appelant, Sir Charles Ross, est fabricant d'une carabine communément appelée "Ross Rifle." Les intimés, qui sont amateurs de chasse, ont acheté chacun une de ces carabines. Avant de s'en servir cependant ces derniers ont été obligés de les nettoyer, et à cette fin il leur a fallu défaire quelques pièces de la culasse. Quand ils sont venus pour assembler ces pièces, ils n'ont pas suffisamment poussé et fixé la culasse, de sorte que plus tard, quand ils se sont servis de la carabine pour tirer sur le gibier, la culasse, par l'action de la cartouche, a laissé sa gaine, est venue les frapper à la figure et les a blessés grièvement. De là action en dommages contre le fabricant en alléguant que les accidents étaient dus à sa négligence et que ces carabines étaient entachées d'un vice caché.

Le fabricant a plaidé que ces accidents étaient dus à l'impéritie des deux demandeurs Dunstall et Emery et que ces carabines n'avaient pas de défauts cachés.

La Cour Supérieure, présidée par l'honorable Juge Dorion, a décidé que l'accident

> a été causé non pas par quelque défaut dans les matériaux employés ou dans la main-d'oeuvre, mais par un défaut dans le modèle du fusil lui-même et du mécanisme de la culasse * * et que indépendamment de toute responsabilité contractuelle, la vente publique . . d'une arme affectée de ce vice constitue un quasi-délit dont l'auteur est responsable du dommage qui peut en résulter.

Elle a condamné Ross, dans le cas de Dunstall, à lui payer $11,060.00, et, dans le cas d'Emery, à lui payer $10,000.00.

La Cour du Banc du Roi a déclaré qu'il y avait responsabilité de la part de Ross, mais elle a réduit les dommages en déclarant que le montant accordé était excessif.

Le défendeur Ross appelle de ces jugements et demande que les actions soient renvoyées.

Les demandeurs Dunstall et Emery font contre-appels et demandent le rétablissement des jugements de la Cour Supérieure.

Sur ces contre-appels nous n'avons pas jugé à propos d'entendre le défendeur. Il est de jurisprudence que nous n'intervenons presque jamais dans les décisions qui fixent ces dommages, à moins qu'il n'y ait application d'un principe erroné. Dans le cas actuel, la Cour du Banc du Roi a jugé à propos de réduire les dommages; et, de fait, je crois que les montants accordés par la Cour Supérieure étaient trop élevés. La Cour du Banc du Roi a exercé sagement la discrétion qui lui incombait.

Au mérite, sur la question de responsabilité, se présentent des points de droit des plus intéressants.

Les actions sont apparemment basées sur une faute contractuelle, c'est-à-dire sur le fait que la chose vendue serait entachée d'un défaut caché.

Les cours inférieures ont trouvé dans les faits de la cause non-seulement une faute contractuelle, mais un quasi-délit ou une faute délictuelle.

Il est assez important de préciser le débat sur ce point, car les deux fautes n'entraînent pas les mêmes conséquences et ne sont pas soumises au même mode d'enquête.

La première question est donc de savoir si les faits de la cause constituent une faute délictuelle.

En d'autres termes, l'inexécution d'une obligation contractuelle engage-t-elle la responsabilité du débiteur au point de vue délictuel?

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Brodeur J.

Tous les commentateurs du Code Napoléon qui avaient écrit sur la matière jusqu'à la codification, à quatre exceptions près, sont d'opinion que là où il y a faute contractuelle il n'y a pas lieu d'appliquer la responsabilité résultant des délits et des quasi-délits.

Aubry & Rau, vol. 4, par. 446, p. 755, 4e éd.;

Larombière, art. 1382, nos. 8 & 9;

Laurent, vol. 16, nos. 213–230, vol. 20, no. 463;

Demolombe, vol. 8, nos. 472, 477;

Sourdat, Traité de la responsabilité, vol. 1er, no. 6;

Saleilles, Traité de l'obligation d'après le code allemand, nos. 330 et suivants;

Huc, vol. 7, no. 95, et vol. 8, nos. 424 et suivants;

Saincteclette, Responsabilité et garantie;

Fromageot, De la faute comme source de la responsabilité, Paris, 1891;

Baudry-Lacantinerie, vol. 4, no. 2865;

Sauzet, Revue Critique, 1883, p. 616;

Labbé, Notes dans Sirey, 1885-2-33; 1886-4-25; 1886-2-42; 1889-4-1;

Glasson, Code Civil et la question ouvrière, pp. 30 & 32;

Dalloz, Supplément, verbo Responsabilité, no. 57;

Rouard de Card, France Judiciaire, vol. 15-1-97;

Colin & Capitant, vol. 2, p. 368 (1915).

Il y a donc, suivant ces auteurs, deux espèces de faute, c'est-à-dire la faute contractuelle, si le débiteur n'exécute pas son obligation résultant d'une convention ou l'exécute imparfaitement, et la faute délictuelle, c'est-à-dire celle qui consiste à causer un préjudice à autrui, préjudice autre que celui résultant d'une obligation contractuelle.

Notre code civil a, dans les articles 1070 et suivants, déterminé la responsabilité résultant de la faute contractuelle; et il a, dans les articles 1053 et suivants, fixé la responsabilité qui résulte des délits et quasi-dé-

lits. Il a donc indiqué d'une manière certaine les règles qui doivent nous guider dans le cas de faute contractuelle et dans le cas de faute délictuelle. S'il y a une convention entre les parties, alors nous devons fixer la responsabilité des parties suivant les dispositions du chapitre qui traite de l'effet des obligations: et s'il n'y a pas eu de convention, alors nous devons fixer cette responsabilité suivant les dispositions du chapitre qui traite des délits et des quasi-délits.

Dans les trente dernières années en France une opinion différente a été exprimée par M. Lefebvre, auteur peu connu, qui a prétendu qu'il n'y avait qu'une seule responsabilité, celle résultant de la faute délictuelle (Revue Critique de 1886, p. 485).

Etait-ce l'influence de la doctrine allemande qui se faisait sentir dans cette opinion de M. Lefebvre? En effet, la doctrine allemande veut qu'il n'y ait pas de fautes contractuelles en droit civil, mais que la faute délictuelle soit la seule qui existe et qui donne ouverture à la responsabilité (Voir Saleilles, Traité de l'obligation par le Code allemand, nos. 330 et suivants.)

Cette opinion de Lefebvre a été reprise dans une forme mitigée par Desjardins, Revue des Deux Mondes, 1888, p. 362, et par Grandmoulin, deux auteurs peu connus, et par Planiol, dont on ne saurait contester la grande autorité. Nous trouvons l'opinion de Planiol dans son ouvrage sur le Droit Civil, vol. 2, no. 911, 1ère édition, et dans sa note dans Dalloz, 1896-2-457. Ces derniers auteurs ne disent pas, comme Lefebvre, qu'il n'y a que des fautes délictuelles, mais que l'existence d'un contrat n'exclut pas nécessairement la responsabilité quasi-délictuelle, et que la responsabilité quasi-délictuelle peut trouver son application lorsque dans l'inexécution ou dans l'exécution défectueuse du contrat il apparaît un élément délictueux.

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Brodeur J.

C'est la théorie que nous retrouvons dans les jugements des cours inférieures, qui déclarent qu'une faute peut être à la fois délictuelle et contractuelle.

Je ne puis, pour ma part, accepter cette théorie de Lefebvre et de Planiol. Si notre code avait voulu établir l'unité de faute, il se serait contenté de l'article 1053; mais il a, au contraire, énoncé la dualité des fautes, tant par les articles 1053 et suivants que par les articles 1070 et suivants, et alors nous devons avoir recours aux articles 1070 et suivants chaque fois qu'il s'agit de dommages résultant de l'inexécution d'un contrat.

Les derniers auteurs qui ont écrit sur la matière sont Colin et Capitant, qui font grande autorité en France. Ils ont succédé à Planiol dans la chaire de droit à Paris, et leur opinion est fort prisée non-seulement dans les cercles universitaires mais aussi au barreau et sur le banc. Voici ce qu'ils enseignent dans leur volume 2, page 368, qui a été publié en 1915:

> Cette distinction, qui constitue l'une des notions fondamentales et élémentaires de notre droit privé, a été très contestée dans ces vingt dernières années. Naturellement, en effet, les jurisconsultes qui voient dans la *faute* constitutive du délit civil le manquement à une obligation préexistante, en donnent une définition qui s'applique tout aussi bien à la faute du débiteur contractuel. Mais cette théorie nouvelle n'a pas détruit la thèse classique de la *dualite* des *fautes*. Elle est demeurée sans influence aucune sur la pratique. Voici en réalité quelles sont les différences qu'il convient de relever entre les deux fautes.
>
> La *faute contractuelle* consiste, nous l'avons vu, dans le fait de la part d'un débiteur de n'avoir pas exécuté l'obligation à laquelle il était astreint par le contrat le liant à son créancier. La faute *délictuelle* consiste à causer un préjudice à autrui, préjudice autre que celui résultant de l'inexécution d'une obligation, et cela, soit par méchanceté et intention de nuire, soit par simple manquement aux précautions que la prudence doit inspirer à un homme diligent.
>
> A cette première opposition, les jurisconsultes classiques ont souvent rattaché ce corollaire qu'il y aurait un degré différent dans la faute répréhensible de la part d'un débiteur et de la part d'un délinquant. Le débiteur répondrait seulement de sa faute légère (culpa levis in

abstracto). Le délinquant répondrait de sa faute même très légère (In lege Aquilia culpa levissima venit). Nous avons vu ce qu'il faut penser de cette prétendue gradation. En matière contractuelle, il y a faute, en réalité, dès lors que le débiteur a contrevenu à son engagement, n'a pas accompli toute la prestation qu'il devait fournir. Le droit en cette matière consacre la responsabilité du *simple fait*. C'est seulement en matière délictuelle qu'il y a lieu de comparer, comme le faisaient les Romains, les agissements concrets du défendeur avec ceux qu'on eût pu attendre du type abstrait de l'homme prudent et diligent.

Ils font ressortir ensuite que la différence la plus importante entre la faute contractuelle et la faute délictuelle est dans *l'onus probandi.*

Notre code de Québec s'étant inspiré de la plupart des auteurs favorables à la dualité ou à la séparation de la faute, il me paraît raisonnable de les suivre et de s'écarter de ce principe du germanisme qui, sur ce point comme sur bien d'autres, ne paraît pas disposé à suivre les principes généralement acceptés dans la civilisation moderne. Je trouve donc que les cours inférieures ont fait erreur en décidant qu'une faute pouvait être à la fois contractuelle et délictuelle.

Maintenant il nous reste à examiner les obligations contractuelles de l'appelant.

Nous sommes en face d'un contrat de vente et nous devons rechercher dans le contrat, ainsi que dans les obligations qui en découlent, les principes qui doivent nous guider. Nous avons à rechercher si le vendeur a violé cette disposition implicite de son obligation qui l'obligeait à garantir son acheteur contre les défauts cachés de la chose.

Qu'est-ce qu'un défaut caché? C'est, nous dit l'article 1522 du code civil, un défaut qui rend la chose vendue impropre à l'usage auquel on la destine.

L'article 1523 nous enseigne que le vendeur n'est pas tenu des vices apparents et dont il a pu lui-même connaître l'existence.

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Brodeur J.

Le fusil vendu dans le cas actuel n'était pas impropre à l'usage auquel il était destiné; au contraire, c'était un fusil perfectionné qui avait été dûment breveté et qui avait l'avantage de tirer plus rapidement que ceux qui sont sur le marché. Le chasseur, dans le maniement de la culasse, n'a qu'à faire un mouvement, c'est-à-dire la pousser en avant, et alors la culasse se ferme d'elle-même sans exiger le mouvement de fermeture qui est nécessaire pour les autres carabines. On conçoit de suite le grand avantage qu'une invention comme celle-là peut produire. L'économie du temps et des mouvements compte pour beaucoup dans le succès du chasseur ou du soldat.

Mais il est nécessaire que l'assemblage des deux parties de la culasse soit bien fait. Si ces deux parties sont improprement réunies, alors la fermeture ne s'opère pas et il arrive un accident comme dans les causes qui nous occupent.

Les intimés n'avaient évidemment pas les connaissances voulues pour faire l'assemblage requis. Ils se sont fiés à leur connaissance des anciens modèles et ils se sont mis en frais de nettoyer la culasse et le canon du fusil. Ils ont évidemment dérangé le boulon qui va à l'intérieur du cylindre, ne lui ont pas donné, en rassemblant les pièces, la longueur voulue pour qu'il pénètre suffisamment et se ferme ensuite automatiquement. Et alors en tirant la carabine, la culasse, qui n'était pas fermée, a fait un mouvement de recul et a causé l'accident dont les intimés se plaignent.

La question de responsabilité qui se pose est de savoir si le vendeur d'une machine dangereuse, qui est parfaite en elle-même mais dont les parties mal assemblées par l'acheteur causent un accident, est responsable de cet accident. En d'autres termes, a-t-il vendu un article atteint d'un vice caché?

La question a un intérêt considerable, car avec notre développement industriel la décision que nous allons rendre peut être grosse de conséquences. Tous les jours il se met sur le marché des automobiles, des engins à gazoline, des moteurs électriques, qui, s'ils sont mis entre les mains de personnes compétentes, n'offrent pas de grands dangers; mais s'ils sont menés, réparés ou assemblés par les premiers venus, ils peuvent donner lieu à de sérieux accidents. Des mécanismes perfectionnés sont tous les jours mis en vente; mais avant d'y toucher l'acheteur doit se renseigner sur la manière de les manier. Le vendeur a rempli son obligation du moment que la chose vendue n'est pas impropre à l'usage auquel elle est destinée.

Le major Blair, qui a été le témoin expert des demandeurs, nous dit lui-même comment les accidents sont survenus:

It is owing to the bolt having been assembled with the sleeve in the wrong position, in such a position that the sleeve of the bolt was unable to travel forward on the bolt itself and lock the lugs.

Ce n'est donc pas un défaut de l'article vendu qui a causé les accidents, mais ces accidents sont dus au fait qu'on a mal assemblé les pièces de la carabine. Et cela a été fait par les demandeurs eux-mêmes. La preuve démontre que les fusils, quand ils ont laissé la fabrique, étaient parfaitement assemblés.

Le même témoin nous dit:

Q.—What have you to say regarding a rifle that could have its bolt assembled in the wrong way and yet fire? A.—Well, in the hands of one unacquainted with its mechanism, in the hands of the every day individual, I would have to say that there was danger.

On lui demande:

Q.—Would you call that a faulty design? A.—In my opinion, it would be a fault in design.

1921

Ross
v.
DUNSTALL

Ross
v.
EMERY.

Brodeur J.

Q.—Would you consider it a dangerous defect? A.—I would in the hands of a person who did not know whether it was rightly or wrongly assembled; there would be danger of his getting it into action in a wrong manner which would, if he did so, of course, be dangerous to the firer.

Q.—I am asking you whether there is anything from the external point of view in the rifle to show that that rifle is assembled in the wrong way? A.—To one who knows it, yes; to one who does not know it, there is not; in my opinion there is not.

L'opinion de cet expert n'est pas corroborée, au contraire les autres experts qui ont été entendus ne paraissent pas abonder dans son sens. Mais prenant même son opinion, je dis que le défendeur ne devrait pas être tenu responsable, parce que, suivant les dispositions de l'article 1523 C.C. le vendeur n'est pas tenu des défauts dont l'acheteur a pu lui-même connaître l'existence.

Pothier, Vente, no. 207, parlant des vices qui peuvent s'apercevoir, dit:

> Et quand bien même il (l'acheteur) ne l'aurait pas connu (le défaut) il ne serait pas encore recevable à se plaindre du tort qu'il souffre de ce contrat, car c'est par sa faute qu'il le souffre: il ne tenait qu'à lui d'examiner la chose avant de l'acheter *ou de la faire examiner par quelqu'un* s'il ne s'y connaissait pas lui-même. Or un tort qu'une personne souffre par sa faute n'est pas un tort auquel les lois doivent subvenir.

Baudry-Lacantinerie, au no. 418, Vente, après avoir cité ce passage de Pothier, dit:

> L'ignorance de l'acheteur ne suffirait donc pas pour que le vice fût considéré comme caché quant à lui s'il était apparent pour une personne connaissant les choses dont il s'agit.

Un homme ne doit pas s'aventurer de toucher à des machines dangereuses ou susceptibles de le devenir, à moins qu'il ne soit parfaitement renseigné sur leur mécanisme.

Mais on dit: On aurait pu rendre ce mécanisme tellement parfait qu'un ignorant même n'aurait pas pu en faire improprement l'assemblage.

Il me semble qu'une telle exigence dépasse les dispositions de la loi. Le vendeur n'est pas tenu de protéger son acheteur contre les imprudences de ce dernier. Il n'est tenu que de livrer un article qui ne sera pas impropre à l'usage auquel il est destiné.

L'absence seule de certaines qualités,

disent Aubry et Rau, 4ème édition, vol. 4, p. 387,

dont se trouverait dépourvue le chose vendue ne constitue pas un vice de nature à donner lieu à l'action redhibitoire.

Il en est de même des dommages, car on ne peut réclamer des dommages que si on peut exercer l'action rédhibitoire (arts. 1526, 1527 C.C.).

Si l'acheteur juge à propos de manier une arme, d'en défaire les parties du mécanisme et de les assembler irrégulièrement, il n'a qu'à s'en prendre à lui s'il lui arrive ensuite un accident.

Le vendeur est-il obligé de faire l'éducation de son acheteur? Je n'hésite pas à dire que non.

C'est pourtant cette obligation que les cours inférieures lui ont imposée. On s'est basé sur un jugement rapporté dans Dalloz, 1894-2-573, concernant un bicycle. Mais dans cette cause l'accident était dû à la faiblesse du tube de direction qui avait été dissimulée aux yeux de l'acheteur par différentes pièces. Il y avait défaut caché. Par conséquent, le contrat était susceptible d'être annulé à moins que le vendeur ne mît son acheteur au courant de ce défaut caché.

Mais ici il n'y a pas de défaut caché dans le modèle du fusil et dans le mécanisme de la culasse.

Dans un jugement rapporté dans Dalloz, 1857-1-65, il a été décidé par la Cour de Cassation que le vendeur n'est pas responsable du vice relatif dont deux choses vendues séparément par lui au même acheteur peuvent

1921
ROSS
v.
DUNSTALL
ROSS
v.
EMERY.
Brodeur J.

être affectées par leur mode de réunion ou d'assortiment, si cet assortiment constitue un fait personnel à l'acheteur, *qu'on reprocherait vainement au vendeur de n'avoir pas fait connaître à l'acheteur par des prospectus ou autrement dans quelles conditions la réuniom devait être opérée, une telle obligation ne résultant d'aucune loi.*

En résumé, je suis d'opinion:

1° que dans les circonstances actuelles la seule faute qui puisse être imputée au défendeur est une faute contractuelle et non pas quasi-délictuelle;

2° qu'il n'y avait pas de défaut caché dans la carabine qui a été vendue aux demandeurs;

3° que le vendeur n'était pas tenu de faire l'éducation de son acheteur sur la manière de manier ou d'assembler les articles qui lui étaient vendus.

Pour toutes ces raisons, les appels doivent être maintenus avec dépens et les contre-appels doivent être renvoyés aussi avec dépens.

MIGNAULT J.—In these two cases which present virtually the same question of civil responsibility, we have had the advantage of two arguments, the case of *Ross* v. *Dunstall* having been argued in February and that of *Ross* v. *Emery* in May. The accident of which the two respondents complain occurred in a similar manner, through the back-firing of a sporting rifle manufactured by the appellant, and each of the respondents lost the use of his right eye besides suffering other injuries to the head and face. In the case of Dunstall however the rifle was purchased in Minneapolis from dealers in firearms who had themselves procured it from the selling agents of the appellant. In the other case, the respondent Emery bought the rifle directly from the appellant.

This difference in circumstances has given rise to the suggestion that the liability in the *Dunstall case* is delictual and in the *Emery case* contractual. In my opinion, whether the civil responsibility incurred proceeds from a contract or rests on a *quasi-délit*, matters very little in this case. Indeed there is perhaps some ground for the pungent criticism which Mr. Planiol, vol. 2, nos. 873 and following, makes of the generally admitted distinction between *la faute délictuelle* and *la faute contractuelle*, which, in the opinion of the learned author, "*n'a ni sens ni raison d'être.*" It is obvious that no civil responsibility can exist without a *faute*, and *faute* is defined as "un manquement à une obligation préexistante." (Planiol, no. 863). Whether this obligation be one imposed by a law or by a contract, and cases can easily be conceived where there is an obligation imposed by law together with one created by a contract, the result, generally speaking, is the same, in the sense that the person in fault is obliged to indemnify the person aggrieved to the extent of the injury suffered. Therefore, if the appellant was guilty either of a delictual or of a contractual fault, and if this fault caused the injuries complained of, there can be no question as to the civil liability which he has incurred for the damages suffered by the respondents. And while no doubt the code deals separately with the two kinds of responsibility (see articles 1053 and following in the case of *délits* and *quasi-délits*, articles 1070 and following with regard to obligations generally, and articles 1522 and following as to the sale of things having latent defects), and while these articles may be referred to accordingly as they apply to one or the other of the judgments in question on these appeals, I do not apprehend that the practical result of one rule or of the other, as applicable to the cases under consideration, will be in any way different.

1921
ROSS
v.
DUNSTALL
ROSS
v.
EMERY.
Mignault J.

The rifle, the back-firing of which injured the two respondents, is called the "Ross Straight Pull Rifle." Without attempting any too technical description of this rifle, I may say that to be safely fired the bolt of the rifle must be locked. This bolt is contained in a bolt carrier or sleeve and is turned by spiral projections around it which act in spirally cut grooves inside the bolt carrier. To lock it, the handle on the bolt carrier is forced straight forward. This turns the bolt and lugs about one-quarter of a revolution and the lugs are locked into grooves in the extension of the barrel. When the assembled bolt is removed for cleaning the rifle or other purposes, the bolt may easily be slipped back into the wrong spiral groove, bringing the lugs against the end of the bolt carrier about in line with the handle. In this condition the bolt may be returned to its place in the rifle, and have the appearance of being locked, but as the lugs have not turned to the locking position, the rifle is not locked. If then it be fired, and it can be thus fired, the bolt is thrown back in the face of the user. In other rifles with a bolt action, such as the Mauser, Lee-Enfield, Lebel, Mannlicker, Nagant, United States Springfield, the rifle cannot be fired until the bolt is locked.

In so far as any defect has been charged against the Ross rifle, it lies in the fact that the bolt may be improperly assembled and appear to the user to be locked, and that although it be really not locked, the rifle can nevertheless be fired in this unlocked position, with the result of throwing back the bolt in the face of the user. There is no doubt whatever in my mind that it is because the respondents, in using the rifle, improperly assembled the bolt that they suffered the injuries which gave rise to their actions. When the

rifle is properly used and the bolt is locked in position, no such accident is possible. I do not think therefore, although the learned trial judge so found, that there is a defect in the design *qua* design of the rifle, for it contains a properly constructed locking device, and it was never intended that it should be fired in an unlocked position, but there is a possibility that the user, unless he be properly instructed as to the locking of the bolt, may assemble it in the wrong way and be deceived by the appearance of the rifle into thinking it properly locked. And the danger is that, unlike other types of bolt action rifles, the Ross rifle can be fired although the bolt is unlocked, with the consequence that the user, if he aims the rifle in the ordinary way from the shoulder, will be injured as were these respondents.

The evidence is that these rifles, and there was a military as well as a sporting rifle, were inspected at the factory by Government inspectors, that they were fired several times with a charge heavier than the usual one in order to test their strength of resistance, and that no rifle was put on the market except with the bolt properly assembled. To prevent rust, the gun was heavily oiled and the purchaser was warned to wipe it out thoroughly before using it. No warning was given of the possibility of wrongly assembling the bolt, and the danger that the rifle might be fired with the bolt in an unlocked position was not pointed out to users of the rifle. Certain instructions with respect to cleaning the gun accompanied each rifle, but no instructions as to the manner of assembling the bolt were given to purchasers. Indeed the appellant does not appear to have imagined that an accident like the one in question was possible.

1921
ROSS
v.
DUNSTALL
ROSS
v.
EMERY.
Mignault J.

The troops of the Canadian expeditionary force stationed at Valcartier to the number of some 30,000 were all armed with the Ross rifle. I think it sufficiently appears that no accident such as the one in question occurred there, although the rifle was fired thousands of times, but no doubt the troops were carefully instructed as to the use of the rifle. In fact, besides the case of these two respondents, the only other instance testified to is that of one Leonard in 1896, where the bolt is shown to have been thrown back in the face of the user through being improperly assembled in the rifle.

The question now is whether the appellant is liable in damages for the reason that, although he manufactured and sold a rifle with a properly constructed locking device, these respondents were injured because they improperly assembled the bolt in the rifle and were deceived by the general appearance of the rifle into thinking that the bolt action was properly locked. Or perhaps the question should be stated thus, and this appears to be the ground chiefly insisted on by the respondents, is the appellant liable because the rifle constructed by him could be fired in an unlocked position? It is important to mention that both these respondents were experienced in the use of firearms, but, when injured, were using the Ross rifle for the first time. As I have said, the circumstance that one of the respondents purchased the rifle directly from the appellant and the other through a dealer who had obtained it from the selling agents of the appellant, does not alter the responsibility of the latter if through the violation of a contract or by reason of the mere negligence of the appellant either of the respondents suffered injury.

The principles governing civil responsibility are very familiar. In the absence of any contractual relations between two persons, the one is liable towards the other if, being *doli capax*, he has caused him damage by his fault, whether by positive act, imprudence, neglect or want of skill (art. 1053 C.C.). This fault may be an act of commission or of omission, and however slight the negligence may be it engenders civil responsibility where it is productive of injury to another. In the case of the sale of a thing with a latent defect, the usual remedy is the rescission of the sale or a diminution of the price. A distinction is made between the case where the defect was unknown to the seller and where it was known to him; in the former case the price and the expenses of the sale only can be demanded, in the latter, the seller is obliged to pay all damages suffered by the buyer (arts. 1527, 1528 C.C.). Knowledge of the defect is either actual or presumed, for, according to article 1527 C.C., the seller is obliged to pay damages in all cases in which he is legally presumed to know the defects.

The authors, and chiefly Pothier (*Vente*, nos. 212 and following, *Obligations*, no. 163), explain that the seller is legally presumed to know the defects when the thing sold is one in which the seller usually deals, or one manufactured by him. The mere dealer is generally allowed to rebut the legal presumption of knowledge by shewing that in fact it was impossible for him to discover the defect, but the manufacturer is not listened to when he pleads ignorance of the defect, for he is held to have guaranteed the product created by him as free from latent defect, *spondet peritiam artis*, and, as Pothier observes, his ignorance of the defect in the thing manufactured by him is in itself a fault. *Imperitia culpae annumeratur.*

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Mignault J.

The appellant here manufactured the rifle and knowledge of any latent defect in it must therefore be imputed to him.

Consequently it is not material in these cases to discuss the nature of the presumption, either *juris tantum* or *juris et de jure*, mentioned by article 1527. If ignorance of a latent defect is in itself a fault, in the case of the manufacturer who sells a thing manufactured by him, it becomes unnecessary to determine whether the presumption of knowledge of this defect can be rebutted by him, for, even if he could rebut it and establish his ignorance, he would nevertheless be in fault, so that whether the appellant knew or did not know that his rifle could be fired in an unlocked position is immaterial if this be a latent defect of the rifle manufactured by him.

After due consideration, I have come to the conclusion that the possibility of the rifle being fired in an unlocked position, when to the ordinary and even cautious user the bolt action would appear to be locked, is a latent defect of the Ross rifle entailing the civil liability of the appellant as its manufacturer for the damages incurred by the respondents. I have been careful to say that I do not consider the design of the rifle defective, as a design, for a properly constructed locking device was provided, but there was a hidden and undisclosed danger and this certainly was a defect in the rifle and a latent one, as an inspection of the rifle locked or unlocked shows. That such a defect might have been detected by an expert is no reason to hold the defect to be other than latent, or to free the appellant from liability, for it suffices that a reasonably prudent user could be deceived by the appearance of the rifle into thinking that it was properly locked and ready to fire. And to put on the

market without proper instructions or warning such a rifle—whether the liability be contractual or delictual—is a fault for the consequences of which the appellant must be held liable.

There is an instructive case in Dalloz, 1894. 2. 573, where the *cour d'appel* of Bruges held in 1893, as follows:

> La faiblesse du tube de direction d'une bicyclette, dissimulée aux yeux de l'acheteur par différentes pièces et ne pouvant d'ailleurs être appreciée en l'absence de connaissances techniques, constitue un vice caché de nature à entraîner la résolution de la vente et le principe de dommages-intérêts au profit de l'acheteur.
>
> Le vendeur exciperait en vain de ce que la rupture du tube de direction aurait été causée par l'élévation trop grande que l'acheteur aurait, par ignorance, donnée au guidon, s'il a négligé de mettre de dernier au courant du mécanisme et des organes de la machine.

The note to this decision contains the following observation:

> Au reste, l'allocation de dommages-intérêts à l'acheteur se justifiait, dans l'espèce, à un autre point de vue par la faute que les vendeurs avaient commise en ne lui faisant pas connaître le mécanisme de la machine et les dangers que pouvaient présenter certains organes.

I have no intention to hold that every manufacturer or vendor of machinery must instruct the purchaser as to its use, or that the purchaser, who without sufficient knowledge attempts to operate machinery, is to be indemnified for the damage resulting from his ignorance, but where as here there is a hidden danger not existing in similar articles and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser. Subject to what I have said, I do not intend to go beyond the circumstances of the present case in laying down a rule of liability, for each case must be disposed of according to the circumstances disclosed by the evidence.

1921

ROSS v. DUNSTALL

ROSS v. EMERY.

Mignault J.

The respondent Emery pretends that when the rifle was sent to him the bolt had been improperly assembled, that he fired it in the condition in which he had received it—it was only fired some three years after its receipt—and that consequently the appellant is liable for the accident. The finding of the learned trial judge is adverse to this contention and I do not base my conclusions on it.

The appellant's plea of prescription is not made out, for prescription certainly cannot run before the injury was incurred and these actions were served within the year of the accident. Were this a redhibitory action claiming annulment of the sale, it would possibly be a fatal objection that the respondent Emery allowed the rifle to remain in his possession for three years without firing it. But, as I take it, his action can stand, notwithstanding the contractual relations between the parties, upon article 1053 as well as upon articles 1527, 1528 C.C. The former article is applied every day in the case of passengers injured while travelling on railway carriages, although a contract is made between them and the railway company for their transportation. And I cannot assent to the broad proposition that where the relations between the parties are contractual there cannot also be an action *ex delicto* in favour of one of them. Very much depends on the circumstances of each particular case.

I would therefore dismiss the two appeals with costs.

The cross-appeals of both respondents against the reduction, by the Court of King's Bench, of the damages allowed by the Superior Court, in my opinion, cannot be entertained. The practice of this court, except in

very exceptional cases, is not to allow appeals which put in question the quantum of damages assessed by the courts below. For that reason I would not interfere with the judgment of the Court of King's Bench.

The cross-appeals should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon, Parent & Taschereau.*

Solicitors for the respondent Dunstall: *A. C. Dobell.*

Solicitors for the respondent Emery: *Pentland, Gravel & Thompson.*