Privy Council Appeal No. 129 *of* 1916.

The Quebec Railway, Light, Heat and Power Company, Limited - *Appellants*

v.

G. A. Vandry and others - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY, 1920.

Present at the Hearing:

VISCOUNT CAVE.
LORD SHAW.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* LORD SUMNER.]

The principal object of this appeal is to settle the true construction of Article 1054 of the Civil Code of Lower Canada. Special leave to appeal was given on the terms that the five actions brought in the Courts below should be consolidated and that the appellants should raise only questions of law.

The appellant Company generates and distributes electricity in the City of Quebec and its neighbourhood and along the St. Foye Road, in which the respondents' houses are situated, the Company had erected poles carrying two overhead cables, a primary cable charged with electricity at 2,200 volts and a secondary cable from which electricity was supplied to the houses at 108 volts. There were many trees along the roadside and in the adjacent enclosures and at the time in question a violent wind had torn a branch, coated with frozen rain, from a poplar growing some distance within one of the enclosures and had driven it against these cables, though many feet away. They broke down in consequence, and thus the high tension electricity found its way along the secondary cable into the customers'

houses and set them on fire. For the loss thus caused the actions now consolidated were brought against the appellant Company.

Though no Article of the Code is referred to by number in the Declaration, it is plain that both Articles 1053 and 1054 were relied on, and so the cases were treated both at the trial by Dorion, J., and in the Court of King's Bench on appeal and in the Supreme Court of Canada. There was much difference of opinion among the judges, but the Supreme Court, by a majority of one, restored the judgment of Dorion, J., in favour of the plaintiffs.

Two questions of law arise upon the Code—(1) whether the plaintiffs can succeed without proving negligence or *faute* against the Company ; (2) whether even so the defendants would succeed, if they proved that they could not have prevented the fire. In the Courts below it was argued for the defendants that they could not have foreseen the combination of bad weather overloading the branches with *verglas* and of wind breaking off the branch and driving it laterally on to the cables, and that they were accordingly the victims of *force majeure*. As to this the findings of fact are against them. It was also argued for the plaintiffs, that if the defendants had installed suitable apparatus they would have received automatic warning at the central station of the breakdown of the cable in St. Foye Road in time to have cut off the current before any mischief was done, but, as nothing was made of this below, it need not be pursued now.

The question whether and under what circumstances a defendant can be made liable in a case of quasi-delict, unless actual *faute* is proved against him, has been much discussed in Quebec in recent years. The case of *Doucet* (42, S.C.R. 281) brought the controversy to a head in 1909, and the Supreme Court was then divided in opinion. The present case renewed both the controversy and the division. In *Doucet's* case, which arose between employer and employee, no definite cause could be discovered for the explosion by which *Doucet* was injured. In the present case the cause of the occurrence is known. The issue, moreover, arises in the present case between contractor and customer. Accordingly *Doucet's* case might be no authority in the present case, but for the fact that in Quebec both cases depend on the language of the Code. Unfortunately this seems to have been imperfectly appreciated in the Canadian Courts, and the question " What do the words of Articles 1053 and 1054 mean as a matter of construction ? " was not in either case always kept in the forefront.

The opposing views may be summarised thus, without always referring them to the particular judgments in which they are stated. *Faute*, it is said, is the basis of all liability for quasi-delict. To hold a man liable for either delict or quasi-delict, when he is not to blame, is unjust. This must be so in principle and it rests also on authority. The whole jurisprudence of Quebec before *Doucet's* case so holds. Since the Code was enacted, it has been so interpreted, and the decisions before the Code were to the same effect. Furthermore, the framers of the Code were directed to codify existing law and, if they suggested alterations, to indicate which of their proposed Articles differed from the

existing law, and they did not so indicate Articles 1053 and 1054. As a matter of language these Articles can be made to give effect to these principles, (1) by holding that Article 1054 does but amplify and carry on Article 1053, and impliedly therefore rests on *faute*, as Article 1053 does expressly, or (2) by holding that paragraph 6 of Article 1054, the "exculpatory" paragraph, applies to the first paragraph of the Article as well as to the others, and implies that *faute* must be proved by the plaintiff before the defendant can be called upon for an excuse, or (3) by holding that paragraph 1 of Article 1054 really specifies circumstances from which *faute* may be presumed, leaving the defendant to rebut it by any evidence that may be available.

The contention on the other hand is that the Civil Code of Lower Canada was founded on the Code Napoléon, from which it differed only in language, and that the reasoning of recent decisions of the French Courts on the corresponding Article, 1384, ought to be applied, the prior decisions of the Canadian Courts notwithstanding. The result is to apply a principle thus formulated by Fitzpatrick, C.J., in *Doucet's* case:—"Celui qui perçoit les émoluments procurés par une machine susceptible de nuire au tiers, doit s'attendre à réparer la préjudice que cette machine cause—*ubi emolumentum ibi onus.*" Article 1054 must be held to raise a presumption of *faute* against the defendant Company as the basis of responsibility "non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé . . . par les choses qu'elle a sous sa garde." In other words, the fact of the accident supplies all the proof of negligence, which it is necessary for the plaintiff to give.

It seems plain that both these trains of reasoning start rather from the text of the Code Napoléon as interpreted by French Courts and the general jurisprudence of Quebec than from the very words of Articles 1053 and 1054 themselves. Natural as this may be, the statutory character of the Civil Code of Lower Canada must always be borne in mind.

> "The connexion between Canadian law and French law dates from a time earlier than the compilation of the Code Napoléon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law." (*Maclaren* v. *Attorney-General for Quebec*; 1914 A.C. at p. 279.)

Thus, however stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subjects and not dissimilar texts undoubtedly is, "recent French decisions, though entitled to the highest respect . . . are not of binding authority in Quebec" (*McArthur* v. *Dominion Cartridge Co.*, 1905 A.C., at p. 77), still less can they prevail to alter or control what is and always must be remembered to be the language of a legislature established within the British Empire. In the present case, as in *Doucet's* case, the learned judges of the Supreme Court of Canada sedulously, and as they conceived successfully, conformed to this rule and decided, though in different ways, a question of construction of the Quebec Code in accordance with reasoning, which

seemed none the less convincing, because it was suggested by French authors or followed a view long laid down by the Courts in Quebec. Nor can the history of the Quebec Code be altogether banished from the recollection of those who administer its provisions, and it is true that under certain conditions it is legitimate to refer to the prior cases which it was intended to codify (*Vagliano* v. *Bank of England*, 1891 A.C. p. 145). A construction of Articles, which have long been before the Courts, differing from that hitherto accepted, will always, even in a tribunal not bound by prior decisions, be adopted with caution.

Still, the first step, the indispensable starting point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources. Of course it must not be forgotten what the enactment is, namely, a Code of systematised principles and rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate Articles, should be read as a whole, forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the legislature. Whether particular words are plain or not is rarely susceptible of much argument. They must be read and passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide. In the present case their Lordships have arrived at the conclusion that the language of the Articles is plain, in the sense that their meaning must be found in their words, though they are far from denying that the true construction is a matter of nicety and even of difficulty. It follows that the decision of this question is not legitimately assisted even by reference to the prior decisions in Quebec, which, in fact, are much less definite than they have been supposed to be, and that no useful suggestion can be derived from articles in the Code Napoléon differently expressed, or from the expositions of them, however brilliant, by learned French jurists. In no event can the intention of the legislature in passing the Articles under discussion be gathered from the category in which they were placed by the commission which drafted the Code.

Articles 1053 and 1054 are the first two of a group of Articles headed "Offences and quasi-offences." The first deals with damage caused by *faute* on the part of a person, who can tell right from wrong. The second deals further with the liability of such a person not only for damage caused by his own fault, but also for damage caused by persons whom he controls or things which he has under his care. It is not necessary now to define the meaning of "controls" or "under his care." There is obviously much to be said in a proper case about both. The

Article proceeds to speak specifically of the liability of parents for the acts of infant children, of guardians for those of wards, of curators for those of lunatics, and of teachers and artisans for those of scholars and apprentices. Then follows provision for what has been called "Exculpation," a term, which, however, begs the question that *culpa* is implied in the "*responsabilité ci-dessus.*" To this succeeds a rule as to the responsibility of masters and employers for their servants and workmen. Subsequent passages deal with responsibility for damage done by animals, or by buildings originally ill-constructed or afterwards allowed to get out of repair.

The language of the exculpatory clause is as follows :--

> "The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage."

From this it is argued that the exculpatory clause does not refer at any rate to that part of the first paragraph which contains the words "and by things which he has under his care," firstly because "the act which has caused the damage" cannot be applicable to a case of "damage caused by things which he has under his care," for the act of a thing would be a meaningless expression; and secondly, because "the above cases" means only the "cases" properly so called of parent and child and so forth, which figure as particular cases, and even though taken together are far from exhausting the first paragraph. In the French text, however, the exculpatory clause is as follows :—

> "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."

On these words it is pretty plain that the above comment, founded only on the English text, fails. "La responsabilité ci-dessus" refers to the whole preceding part of the Article, every paragraph of which contains expressly or by implication the word "responsible," and "le fait qui a causé le dommage" is an expression not inapt to cover damage caused by inanimate things as well as by animate persons.

Behind this linguistic criticism lies the structure of the Article. Article 1053 deals with damage caused by the defendant's own *faute*. Article 1054 takes up another and a wider responsibility, namely for damage otherwise caused, whether by persons or by things. It deals with what may be conveniently called vicarious responsibility and this under three categories: (*a*) persons who know right from wrong, and would therefore be themselves liable also for their own *faute* under Article 1053; for these the defendant answers on the principle of *respondeat superior*; (*b*) persons, knowing right from wrong, and therefore personally liable, who though not strictly falling under that principle, impose a vicarious liability on the defendant because they are under his control in one capacity or another; and (*c*) persons who do not know right from wrong, and things, animate or

inanimate, for whom the defendant answers on the ground of his control or charge, his being the only responsibility which the law recognises. Paragraphs 2, 3, 4, and 5 are not mere instances of paragraph 1: they include persons incapable of knowing right from wrong, who are therefore outside of the words "the fault of persons under his control." They make a defendant liable, when the actor himself is incapable of *faute* and is therefore guiltless of it and another person is made liable for him vicariously, regardless of any *faute* of his own. This position as applied to persons is the same as that which paragraph 1 applies to things. Such being the object of the Article it would be illogical to refuse to the defendant, who is called on to answer for things in his care, the same exculpation, namely that he could not have prevented the injurious occurrence, which is open to him when called on to answer for minors, lunatics or apprentices under his control.

If, then, it is open to a defendant sued in respect of damage done by things in his care to raise a defence under the "exculpatory paragraph," the next question that arises is whether before the defendant can be called on to excuse himself, the plaintiff must prove that there was *faute* on the defendant's part, or whether proof of the facts (1) that a certain thing was under the defendant's care and (2) that the plaintiff was hurt by it, will in themselves suffice to discharge the whole of the plaintiff's burthen. First of all, Article 1054 expressly goes beyond Article 1053 in that, after saying "non seulement du dommage qu'elle cause par sa faute à autrui," which refers to Article 1053, it takes up another's *faute*, "mais encore de celui causé par la faute de ceux dont elle a la contrôle," that is to say not caused by the defendant's own fault. Indeed, if *faute* must be proved against the defendant before he can be made liable under Article 1054, it is difficult to see what efficacy attaches to the exculpatory clause at all. If the defendant is proved to have been guilty of *faute*, how can he say that he could not have prevented its consequences? if he is not, he needs no exculpation. Secondly, there is no reason why the usual rule should not apply to this as to other statutes, namely that effect must be given, if possible, to all the words used, for the legislature is deemed not to waste its words or to say anything in vain. Accordingly, the observation at once applies that, if the defendant must be guilty of *faute* before Article 1054 can apply, Article 1054 is otiose, for he might have been made liable for that *faute* under Article 1053. There can be no answer to this argument, unless it be that the *faute* required under Article 1053 is *faute* causing the damage, and that under Article 1054 *faute* not causing the damage is brought in, and this cannot be the intention of the Code, for then under Article 1054 a person would be answerable for damage done by things under his care, when his conduct has been blameworthy in some immaterial respect, but not when he has been blameless altogether. In other words he would be visited with civil liability to a private person as a penalty for some unconnected error, and an injured person's right to

compensation for damage actually sustained would depend on the question whether the defendant was a person not beyond reproach or was a person of invincible impeccability. In the third place, to hold that even under Article 1054 the plaintiff must prove *faute* against the defendant would have the singular result that either masters would not be responsible for the *faute* of their servants, unless they were also guilty of *faute* themselves, or the seventh paragraph of the Article would have to be read without the implication of *faute*, which on this construction is to be made in the first. There seems to be no doubt that Article 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of *faute* which is the foundation of the defendant's liability under Article 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage.

Their Lordships fully appreciate that a considerable number of points can be made against this construction. It is said that absolute liability without *faute* shown was unknown in Quebec before *Doucet's* case. It would, perhaps, be more correct to say that the occasion for so deciding has only recently arisen with the growth of scientific inventions and their industrial exploitation. It may be said that Article 1054 is not the place for obligations arising from what Article 983 calls "the operation of the law solely," but is confined by the title of this group of Articles to "delicts and quasi-delicts;" that absolute liability for damage done for things under a man's care, whether those things be in themselves dangerous or not and whether or not they have been brought into the condition which makes them dangerous for purposes of the defendant's own, is a liability transcending the rule in *Fletcher* v. *Rylands* (L.R. 3 H.L. 330) and *Nichols* v. *Marsland* (2 Ex. D. 1) and might work great injustice; that Article 1054 does not begin with the words "Toute personne est responsable," but with the words "Elle est responsable," *Elle* referring to the words of Article 1053, viz., "Toute personne capable de discerner le bien du mal," a reference which is pointless if the *faute* of such "personne" is immaterial and if all that is needed is that in fact the thing should be under his care. To all this the plain words of the Article, if they are plain as their Lordships conceive them to be, are a sufficient answer. In enacting the Code the legislature may have foreseen cases of the kind now in question many years before any of them arose. In construing it *Fletcher* v. *Rylands* and *Nichols* v. *Marsland* had better be left out of account. There is no reason why

the Code should be made to conform to them. The mere title given to a group of Articles is not in itself enough to contradict the prescriptions of one of them. As to the fact that the Article begins with " Elle " and not with " Toute personne," it may be that a person incapable of knowing good from evil would be also incapable of having others under his control or of having things under his care, or at any rate would by that very incapacity be entitled to exculpation, on the ground that, if he could not tell right from wrong, neither could he prevent the *fait* which caused the damage. Even if this be not so, the only result would be to exempt from liability under Article 1054 persons incapable of knowing right from wrong, though they may occupy the positions mentioned. As no case of this kind arises here, no decision or opinion need be given about it. The positive words of the Article stand and must have effect.

Two other points may be briefly disposed of. The poplar tree grew in the field of one of the plaintiffs and belonged to him and both the houses burnt belonged to customers of the defendant Company. Though these points were touched upon, it is not clear what legal consequence was supposed to result from them. The owner of the poplar was not shown to have been in fault and, even if every tree that grows is " in the charge " of its owner, the tree was not the cause of the damage, but only an antecedent prerequisite. As to the other point there was no evidence that the owner of the houses consented to take the risk of what happened or even knew of it, and if it is said that the exploitation of the electricity was not solely for the supplier's benefit, but also for the consumer's, which is somewhat far-fetched, the Article says nothing about the liability of exploiters. On neither of these points have the facts been found, so as to raise in the appellants' favour any contention requiring decision.

Apart from the articles of the Code the appellants resorted to a separate line of argument. The powers under which they carry on their undertaking are statutory and are contained some in private and some in public statutes. Their Lordships think there is no substance in the objection taken by the respondents that under Article 10 of the Code private statutes must be pleaded, which implies proof, and that evidence was not given of the private statutes in this case. The Article does not provide that if such evidence is not forthcoming the same result may not be obtained by admissions and as all the statutes without distinction were the subject of discussion in the Courts below, as if the terms of both kinds of legislation had been duly brought before the Court, and as the printed text was in fact readily available, their Lordships think that this objection is not now open to the respondents.

The powers which these statutes give are of a very familiar type. The undertakers are authorised to carry and distribute high tension electricity over cables, which may be either overhead or underground. Section 13 of 58 and 59 Vict., ch. 58, expressly provides that the Company may erect equip and maintain poles in the streets for the purpose of working and maintaining its lines

for the conveyance of electric power upon, along, across, over and under the same. It was contended by the respondents that Subsection (*e*) of this section, by the words, "the Company shall be responsible for all damage which its agents, servants or workmen cause to individuals or property in carrying out or maintaining any of its said works," made the Company absolutely liable for the damage sued for in the present case. Their Lordships think that, as an independent cause of action, this case fails. The damage here is not, in any view of the construction of the subsection, caused in carrying out or maintaining works.

The appellants, however, rely on the authority to carry their wires overhead which the statutes give, as an answer to the claim, and contend that the statutes exclude the operation of Articles 1053 and 1054 of the Code in matters concerning the distribution of high tension electricity by overhead cables, as repugnant to the power which the legislature has bestowed. The application of enactments of this kind is familiar and well settled. Such powers are not in themselves charters to commit torts and to damage third persons at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorised by implication and therefore it is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so by implication in such cases. Nor need a use of the power conferred, which is injurious to others, be excluded from the ambit of that which is necessarily incidental to their enjoyment merely because the progress of discovery or invention reveals some extraordinary means of preventing that injury to others which has previously been unavoidable. This point arose and was settled in connection with sparks falling from locomotive engines many years ago. It therefore becomes necessary to consider how far such an escape of electricity as took place in this case was incidental to the use of overhead cables and how far and by what reasonable precautions injurious consequences were preventible.

The question, whether it was necessary to hang the two sets of cables on the same poles or in such proximity to one another that the fall of the branch upon one would lead to the flow of the high tension current into the other, hardly seems to have been examined at the trial. The main contention is this. It was the result of voluminous evidence called at the trial, and indeed in their Lordships' view the Company's case, that, if the wires of the transformers, which are used at intervals along the line of cable, had been grounded, the escaping high-tension electricity would have found its way innocuously to earth instead of entering the houses and setting them on fire. The value of this precaution had been established by the experience of several years, but it was the view of some distributors of electricity, and of the defendant Company among them, that

there was an offset to this advantage in the fact that, if the wiring of the customers' houses was defective, the grounding of the transformer wires would substitute new difficulties for the old. It was not, however, shown that the wiring of the plaintiffs' houses was defective to this extent, although it was " démodé," nor did the evidence compare the one disadvantage with the other quantitatively. The Company could have inspected the wiring and, if it was not safe, could have declined to supply current. It is plain that the Company was quite willing to have carried out the grounding of the transformer wires, if the representatives of the Fire Insurance Companies, who advised this course, had given an instruction instead of a recommendation. The latter naturally pointed out that they had no authority to issue instructions but must confine themselves to advice, and as their Lordships are neither prepared to assume that this request on the appellants' part for instructions was a mere quibble, designed to disguise their own reluctance to do anything, nor even to infer that they saw any objection to the proposal except the expense of it, they conclude that the grounding of the wires of the transformers would, some substantial time before the accident in question, have been a practicable and efficient safeguard against the injury which in fact was inflicted. If so, it is impossible to say that the escape of electricity into customers' houses and the consequent damage in time of storm was a necessary incident of the exercise of the power to distribute high tension current by overhead cables along roads, such as would by implication relieve the Company from liability for the consequences.

Two decisions which were pressed on their Lordships' attention require particular examination, viz., *Roy's* case (1902 A.C. 220) and *Dumphy's* case (1907 A.C. 454). The former is a case of damage by the escape of sparks from a locomotive engine and the decision in terms is in line with the well-known authorities of *Vaughan* v. *The Taff Vale Railway Company* (5 H. & N. 679) and *Brand* v. *The Hammersmith Railway Company* (L.R. 4 H.L. 171); it is a case of " plain words authorising the doing of the very thing complained of." *Dumphy's* is a case of high tension electricity released by the act of a third party's workman, whom the jury acquitted of negligence. No specific Article of the Code is mentioned, and the presence of a high tension current in the cable was only the *causa sine qua non* and the human action which released it was the *causa causans* of the accident. There was statutory authority to circulate high tension electricity overhead, but on the simple issue, whether the damage caused by the escape of that electricity was caused by the Company's negligence, it was held that no negligence had been proved, and indeed but for the act of a stranger, who himself was not careless, the Company's electricity would have done no harm to anybody.

Whether in the present cases the evidence established affirmatively a case of negligence against the defendants is a question on which the Supreme Court arrived at no definite conclusion.

Had it been necessary, the respondents would have been entitled to claim before their Lordships' Board that this issue should be decided now, since the terms imposed on the appellants under the special leave to appeal bound them to rely on points of law only but did not preclude the respondents from meeting those points upon the facts in any way which the evidence warranted. In the view, however, above taken of the case no decision on this question is needed.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE QUEBEC RAILWAY, LIGHT, HEAT AND POWER COMPANY, LIMITED,

v.

G. A. VANDRY AND OTHERS.

DELIVERED BY LORD SUMNER.

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