Privy Council Appeal No. 102 *of* 1920.

The City of Montreal - - - - - - - *Appellant*

v.

Watt and Scott, Limited - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD AUGUST, 1922.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD PARMOOR.
LORD PHILLIMORE.

[*Delivered by* LORD DUNEDIN.]

The City of Montreal by its charter was empowered to construct and did construct a sewerage system. One of its sewers ran along Commissioners Street, on which the premises of the respondents are situated. These premises have a cellar, from the floor of which a drain is laid which connects with the sewer in the said street. Before its junction with this sewer there is laid into it another drain which serves to carry away the water from the roof of the respondents' premises, the water therefrom being collected in the ordinary way by runnells or gutters which have perpendicular pipes laid into the drain. These connections were made with the sanction and approval of the City Authorities.

On the night of the 29th July and the early morning of the 30th July, 1917, a very heavy rain storm occurred in the city; in consequence thereof the sewer in Commissioners Street became full and was unable to carry away all the rainwater brought to it from various sources. The result was that the respondents'

cellar was flooded to a depth of about 2 feet and some goods stored therein were damaged.

The present action was raised by the respondents against the appellants—The City of Montreal—to recover the value of the damage so suffered. The action was tried by Weir J. without a jury. It was tried simultaneously with another action raised in respect of the flooding of the same cellar in March, 1917. That action is, however, not the subject of this appeal. The learned Judge found in fact that the sewer had become full during the storm and that in consequence the water in the sewer had regurgitated and flooded the cellar. He then in law found the City liable and rested the liability on three grounds :—

(1) He held that the sewer as constructed was insufficient to cope with such rain storms as might well be expected.

(2) He held that the City, having power to place automatic valves at the junction of the premises drained with the sewer, which valves would have prevented regurgitation from the sewer, had failed to do so.

(3) He found that they had failed to put in operation a pumping station which would have relieved the pressure in the sewer.

On appeal to the King's Bench that Court while affirming the conclusion in fact that the flooding was caused by regurgitation from the sewer, held that the storm in question was so exceptional as to amount to a *cas fortuit* or *force majeure* and that that circumstance destroyed all the grounds of liability above specified.

Neither the Trial Judge nor the Judges of the King's Bench made any allusion to Article 1054 of the Code. It is right, however, to point out that both judgments were pronounced before the case of the *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1920), A.C. 662, had been decided by this Board. Appeal was then taken to the Supreme Court of Canada. That Court, by a majority of 4 to 1, held that the rain fall was not so exceptional as to constitute a *cas fortuit* or *force majeure*. Inasmuch, however, as they considered that the plaintiffs might themselves have avoided some of the damage by installing a block valve at the entrance to the cellars, they halved the damage found due by the Trial Judge. From that judgment appeal has been taken by the City to the King in Council.

Mignault J., with whom Anglin J. agreed, expressed the view that the liability of the City depended upon Article 1054 of the Code inasmuch as the damage, in his view, was caused by a thing, to wit, the sewer, which was under the control of the appellants. In so holding their Lordships think that he was clearly right. The fact that liability depends upon the words of the Code renders quite inappropriate many of the cases which were cited to their Lordships decided under other systems of law, such as *e.g.*, *Blyth* v. *The Birmingham Waterworks Company*, 11 Ex. 781. In systems not regulated by the Code or by legisla-

tion or decision equivalent to the Code, there can be no liability without proof of fault or negligence ; mere ownership or control cannot be enough to infer liability. Fault or negligence consists in the breach of a duty and what that duty is will vary according to circumstances. Reference may be made to what was said in the judgment of the Board in the case of the *Dominion Natural Gas Company, Limited* v. *Collins and others*, 1909, App. Cas. 640. The learned Judge then cited the judgment of the Board in the case of *Vandry* and particularly that passage in which it was said that the first paragraph of Section 1054 :—

> " does not, in the case of damage caused by things which a person has under his care 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 defeasable by proof of inability to prevent the damage."

He goes on to state a view which their Lordships think is clearly erroneous as regards the considerations which moved the Board to give the opinion they did in the said case and which, in order to prevent misapprehension in subsequent cases, their Lordships think it their duty to correct. The learned Judge says as follows :—

> " Their Lordships also held that the ' exculpatory paragraph,' the penultimate paragraph of Article 1054 C.C. :
>
> > " 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 ;
>
> applies to the first paragraph of the article as well as to the four next succeeding paragraphs concerning the vicarious liability of fathers and mothers, tutors, curators, schoolmasters and artisans. This is an absolutely new construction, and in adopting it preference was given to the French version of Article 1054 C.C. without apparently considering the rule of construction laid down by Article 2615 C.C. that when a difference exists between the English and French texts of any article of the code :
>
> > " that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded.
>
> " Hitherto it has always been considered that the ' exculpatory paragraph ' of Article 1054 C.C. referred merely to the specific cases mentioned in the four preceding paragraphs, this being more consistent with the provisions of the existing laws (*see* Pothier, *Obligations*, Bugnet ed. No. 121)."

It must be noticed, as will be clearly seen by a perusal of the judgment in the *Vandry* case, that there had been a sharply marked divergence of opinion among the Judges in Canada as to the interpretation of Section 1054 and that that divergence of opinion had been clearly expressed in the conflicting opinions delivered in *Doucet's case*, 42 Canada, S.C.R. 281. Their Lordships had, in *Vandry's* case, to decide in favour of one view or the other and they did not disguise from themselves either that the question was one of nicety, as indeed was shown by the division of opinion above mentioned, or that when one view had been taken criticism might yet remain based on various expressions in the section concerned. Now in this divergence of opinion it was

not permissible to treat the scope and ambit of the exculpatory paragraph as a question separate in itself. Yet to do so is what Mignault J. infers when he says " They *also* held, etc." That the exculpatory paragraph should apply to things is indeed a necessary corollary to what had already been said when the liability imposed is described as a liability defeasable by proof of inability to prevent the damage. Furthermore, their Lordships consider that the learned Judge was completely in error when he supposed that the result arrived at was reached by preferring the French version to the English without adverting to the rule of construction laid down by Section 2615. In the first place, as already stated, the paragraph had to be considered not in the isolation of its own expression but as part of the whole scheme of the section. But further this was not a case where Section 2615 could come in. What is the meaning of the expression " difference between the French and English texts " ? Obviously not that one is in French and the other in English, because then there would be a difference in every article. It must mean, therefore, that the plain meaning of the French words is one thing and that of the English another. But when the words in either language are capable of two meanings, it is perfectly legitimate to look at the other language to throw a light on the construction of the first. Now the English word " cases " does not necessarily mean " special cases," so as to be only applicable to the four paragraphs dealing with specified cases, but it is also quite apt to include all the instances general and special which the article so far contains. It is therefore quite legitimate to turn to the French and to say that " ci-dessus " seems to indicate that it had applied to all that had preceded it in the article. Their Lordships, therefore, think it better to repeat emphatically that the exculpatory paragraph applies to the first paragraph as well as to the 2nd, 3rd, 4th and 5th, and that that is a necessary part of the interpretation given to the article in *Vandry's* case. It is indeed obvious that if this was not so then the first paragraph would, as regards the damage done by things, impose a most onerous liability on those who had those things under their control. The only addition to the views expressed in *Vandry's* case, 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 shown 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.

This brings them to a consideration of the facts, and here they agree with the learned Trial Judge and with the majority of the Supreme Court. They think that the duty of the defendants was to construct sewers which were sufficient to cope with the

amount of water which might be expected from time to time in the course of years. As was pointed out in the case of *The Great Western Railway Company of Canada* v. *Braid*, 1 Moore P.C.N.S., at page 121, by Lord Chelmsford, "the works must be constructed in such a manner as to be capable of resisting all the violence of weather which, in the climate of Canada (by which he obviously means that part of Canada) might be expected, though perhaps rarely, to occur," and the same view was taken by nearly all the learned Lords in the *Greenock* case, 1917 App. Cas. 556. Judged by this standard, it is evident that at least on two occasions before and one after the storm in question there was a rainfall of at least as great intensity. So far, therefore, the appellants have not made good the exculpatory paragraph. There might have been another way of avoiding the damage, viz., by the insertion of stop valves at the junction of the sewer to the drain. This the appellants did not do, so here again they fail.

Their Lordships agree with the majority of the Court in considering that the damage was done by the sewer which was obviously under the control of the appellants. It was indeed argued that the water which did the actual flooding was water from the respondents' own roof and not water regurgitated from the sewer. It is practically impossible to say how much of the water in the cellar was water of the one class or the other, but as Mignault J. says, it matters little, for if the sewer had been running free the water from the roof would have got away and could not have regurgitated along the connection drain.

It only remains to be considered, although the point was scarcely argued before their Lordships, whether the Supreme Court was right in apportioning the damage caused by the failure of the respondents to adopt the precaution of putting a resisting valve on the entrance drain to the building. Their Lordships think that they were. As was admitted in *Frechette's* case, 1915, A.C. 871, the law of Lower Canada, unlike the law of England, enjoins apportionment of the damage where there has been a negligence of the plaintiff contributing to the accident. Their Lordships agree that the doctrine is applicable to modify a liability established by Article 1054 of the Code.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE CITY OF MONTREAL

v.

WATT AND SCOTT, LIMITED.

DELIVERED BY LORD DUNEDIN.

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