BETWEEN:

HER MAJESTY THE QUEEN ..... PLAINTIFF;

AND

CITY GAS & ELECTRIC CORPORATION LIMITED ..... DEFENDANT.

1958
Dec. 9, 10, 15 16, 17 & 18
1959
July 3

Crown—Loss of hutments and equipment due to negligence of defendant—Art. 1054, Para. 1, Civil Code of Quebec—Damages—Physical deterioration and obsolescence to be considered in establishing damages.

In an action for damages arising out of an explosion followed by a fire caused by propane gas escaping from a tank truck owned by the defendant and operated by one of its employees becoming ignited which resulted in the burning and partial destruction of certain military hutments and their contents, the property of the plaintiff, the Court found the loss was due entirely to the negligence of the defendant.

Held: That defendant failed to discharge the onus on it of disproving negligence in virtue of Para. 1 of Art. 1054 of the *Civil Code* of the Province of Quebec and the fact that a contractual as well as a *quasi* delictual relationship existed between the parties added to the defendant's responsibilities.

2. That in estimating the damages besides taking into account the physical deterioration of the hutment some additional allowance should be made for functional depreciation or obsolescence.

ACTION by the Crown to recover damages through the loss of military hutments and stores due to the alleged negligence of defendant.

The action was tried before the Honourable Mr. Justice Kearney at Quebec.

Marcel Letourneau and *Paul Ollivier* for plaintiff.

Alexandre Labrecque, Q.C., Robert E. Morrow and *W. A. Grant* for defendant.

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The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (July 3, 1959) delivered the following judgment:

This is a claim in damages for the sum of $29,531.92 arising out of an explosion of relatively minor violence followed by a fire, which occurred at Valcartier Camp, Que., on July 18, 1953. Propane gas escaping from a tank truck owned by the defendant and operated by one of its employees became ignited, causing the burning and partial destruction of certain military hutments and their contents, the property of the plaintiff.

The defendant, in virtue of a contract with the Department of National Defence, dated June 1, 1953, undertook to furnish the propane gas required for the camp and to install and maintain gas tanks and the equipment necessary for the purpose.

Shortly before noon on the day of the accident, one Robert Rouet, chauffeur of the defendant, after connecting the gas delivery tube of the truck with a kitchen gas storage tank installed by the defendant close to hut No. 411, repaired with one Gaudiose Letarte, an army employee detailed to check camp gas delivery, to a passageway leading to the kitchen. A few minutes later they heard a hissing sound and saw clouds of gas rising in the enclave formed by the kitchen, which connected two elongated wings used as dining rooms and forming together an H-shaped hut. The truck was equipped with two tanks and Rouet ran through the front door into the enclave to stop gas likely escaping from the truck tanks, or the kitchen tank, or all three. In this valiant but futile effort he unfortunately lost his life. I need not elaborate on this regrettable fatality since this action is concerned only with property damage, and I will confine myself to saying that, though Rouet's remains were badly charred, death, according to expert evidence, was due neither to explosive shock nor burns but to asphyxiation. Gaudiose Letarte and others in the kitchen managed to escape safely in the opposite direction through the rear door.

The defendant admitted the ownership of the truck and that it was under the care and control of its employee at the time of the accident but disclaimed responsibility on the grounds that it was not guilty of any fault or negligence and that the accident was due to a hidden defect in a safety valve on the truck, which caused it to break. It was proved that the truck was new and had been purchased from reputable automobile manufacturers and, according to the defendant, it had no way of knowing of the hidden defect and had done everything it could to maintain the truck in perfect running order.

Apart from claiming that the burden of disproving negligence rested on the defendant, as owner or operator of the truck, the plaintiff alleged that the chauffeur of the truck failed to take elementary precautions to prevent the accident which was foreseeable, more particularly when he neglected to remain with his truck during filling operations and to see that the gas burners on the kitchen stove were extinguished. It was also said that shortly before the fire Rouet was aware that his truck was not in good running order.

As to where the burden of proof lies, there can be no doubt. In virtue of the first paragraph of art. 1054 of the *Civil Code* of the Province of Quebec, the defendant became and remained responsible for as long as it failed to exculpate itself in the manner described in the penultimate paragraph of the said article. The relevant paragraphs read as follows:

> 1054 C.C.—"He" (every person capable of discerning right from wrong) "is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;
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> 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."

In the case of *Quebec Railway, Light, Heat & Power Company v. Vandry*[1], as stated in the succint headnote, it was held that "Upon the true construction of art. 1054 of the *Civil Code of Quebec* a person capable of discerning

[1] [1920] A.C. 662.

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right from wrong is responsible, without proof of negligence, for damage caused by things which he has under his care, unless he establishes that he was unable to prevent the event which caused the damage." It was further held in *City of Montreal v. Watt and Scott, Ltd.*[1] that "unable to prevent the damage complained of means unable by reasonable means."

The defendant accepted the burden of proof and endeavored to establish that he was unable to prevent the event which caused the damage. Roger Potvin, a qualified engineer and a doctor and expert in physical chemistry, who examined the wreckage in July 1953, testified at the instance of the defendant that propane gas had escaped from a tank on the truck by reason of the sudden breaking of a bronze pressure relief valve. He attributed the cause of the breakage to a latent defect in material which, after laboratory examination, he termed material fatigue. He found also that the vibration which occurred when the truck was in motion accelerated the fracture. In his opinion, Rouet had no way of knowing of the hidden defect. I am disposed to accept the foregoing evidence as proof that the basic cause of the breakage was due to a latent defect, but in my opinion this falls far short of establishing that Rouet took all reasonable precautions to prevent the act which caused the damage complained of.

That gas was liable to escape from the equipment used is self-evident because the truck tanks and the one near the kitchen were equipped with safety valves. It was because of this possibility that Rouet was under strict instructions to make certain that no cigarettes or matches were lighted in the vicinity, while gas was being pumped into the storage tanks. The evidence shows that Rouet entered the kitchen to look at the meter and to warn against smoking. He saw or should have seen that the gas jets on the kitchen stove were lighted but he failed to have them extinguished; and Dr. Potvin, the defendant's own witness, gave as his opinion, which I find reasonable and probable, that the fire was caused by the escaping gas moving through the open door of the passageway and coming in contact with the lighted range in the kitchen.

[1] [1922] A.C. 555, 563.

I agree, as stated for the Crown, that, although it was an exceedingly hot day (94° in the shade), this did not justify Rouet's quitting his truck and seeking relief in the shade of the hallway; but I do not think it likely that, had he not done so, he could have prevented the accident. I regret to say that, in my opinion, the brave young man nevertheless failed to take even elementary precautions and was acting contrary to instructions when he left the hall door wide open and allowed the stove to remain lighted during the dangerous operation of refuelling.

There was some evidence to support a reproach made against the defendant for not having placed the hutment storage tank on the opposite side of the road, well removed from the kitchen, where during refuelling operations any escape of gas from any tank could have vanished in an open field instead of being confined in the enclave. One witness, to whom the chauffeur spoke shortly before the accident, testified that Rouet knew his truck was not in good order because he had stated that something had happened to it when he passed over a railway crossing while en route to Valcartier. I do not think it necessary to deal with these further questions of fact because of the negligence which I have already found to exist. The fact that a contractual as well as a *quasi* delictual relationship existed between the parties in this case only adds to the defendant's responsibilities and is another aspect of the case which does not, in my view, require further comment.

To determine the amount of damages for which the defendant is responsible is by no means a simple task because of certain unusual circumstances. The plaintiff's claim for damages in round figures amounts to $29,500 and is made up chiefly of three items: damage to hut, $13,735; loss of ordnance stores, $10,690; engineering stores, $3,400.

The plaintiff claimed that the replacement cost of hut 411 at the time of the fire should govern and it relied on the evidence of F. A. Walker, architect, to justify the sum of $13,735 under this heading. According to the architect, its replacement cost in 1953 was $39,544 from which should be deducted $25,704 for depreciation at five per cent per annum for thirteen years, namely, from its construction in 1940 until the time of the fire in 1953. The same witness

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testified that, on the basis of its cost to the owner, its depreciated value in 1953 was $9,485. F. X. Lamontagne, a contractor called by the plaintiff, was of the opinion that the replacement cost of the hut was $30,181 on which a total depreciation of only $3,589 should be allowed. This is a little less than one per cent per annum for thirteen years.

Hutment 411 was a wood frame building with exterior siding and roof of asphalt treated felt, and lined with "Donnacona" board. It rested on wooden posts and stringers and depended on space heaters for warmth. The defendant did not call any witnesses on the subject of valuation but urged that a ten per cent depreciation be applied as provided in regulation 1101, class 6, schedule B of the federal *Income Tax Regulations*. See *The Income Tax Act*, 11-12 George VI (1948), c. 52, s. 11(1)(*a*). In addition to the foregoing evidence, I had the advantage of a personal visit to the scene of the accident. There I inspected hut 408 which was built to the same dimensions and at the same time as hut 411 and replaced it after the fire.

Leaving aside the basis on which it should be applied, in my opinion a depreciation allowance on hut 411 of one per cent per annum, which means that its utility would extend to one hundred years, is too little, and ten per cent, which would write it off in ten years, is too much. The five per cent suggested by F. A. Walker, while otherwise acceptable, seems to take into account only physical deterioration; and before it could be used as a criterion, I think some additional allowance should be made, particularly in this case, for functional depreciation or obsolescence as it is called.

The evidence shows that the hutments built in 1940 were temporary structures and were being replaced by permanent structures. It is true that at the time of the fire hut 411 had not been declared surplus and was being used as a summer mess-hall for some 400 cadets, but it was proved that over twenty similar huts had already been declared surplus and were sold to the highest bidder at prices varying from $670 to $2,300, and counsel for the defendant was prepared to accept $2,300 as the fair market

value of hut 411. For the plaintiff it was said that resale or market value does not apply in a case of this kind wherein the land cannot be sold with the building and possession of both given to a purchaser. There seems to be no Canadian case reported closely resembling the present one, and the nearest approach thereto is a judgment of Marriott, Master of the High Court of Justice of Ontario, in *Canadian National Railway v. Canada Steamship Lines*[1]. The building destroyed by fire in the above-mentioned case was a freight shed, and with respect to the method of determining the loss, it was stated that—

> Dealing first with the method of determining the loss suffered by the plaintiff as a result of the destruction by fire of the property in question, as a general rule the market price is considered to be the best evidence of value in fixing damages in tort as well as in fixing the value of property expropriated. But where, as here, the property is unusual in character, in that there is practically no market for it, such a yardstick is not available and the fairest way of arriving at its value is to calculate the replacement costs and deduct therefrom the depreciation suffered by the buildings since their erection. . . .

I agree that the circumstances of the above-mentioned case were unusual and that the general rule of applying the market price as the sole criterion of value was inappropriate; but here the circumstances are even more extraordinary and call for special consideration. It was the intention of the Canadian National Railways to rebuild the destroyed freight shed, which it did at a cost of $60,000. This building which had a superstructure of wood and cement floor, resting on concrete pillars, was very serviceable and of a permanent nature. Such circumstances do not exist in the present instance, and the *Canadian National Railway* case is of assistance only to a limited extent.

Taking all the foregoing factors into consideration, I am of the opinion that $3,500, which at first sight may appear low, would be appropriate compensation for the damages suffered by the plaintiff through the loss of hut 411. The amount is something in excess of what the hut would have realized if sold to best advantage; and, conceding that its replacement cost in 1953 was $39,000, a deduction therefrom of seven per cent per annum for physical and functional depreciation would reduce its value, as of that year;

[1] [1949] O.W.N. 583, 585.

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to approximately $3,500. One can also look at the matter from the point of view of the capital expenditure made by the plaintiff on the hut. According to the evidence of Mr. Walker, the plaintiff's out-of-pocket cost was $27,000 and, if seven per cent were substituted for the five per cent advocated by him, the depreciated value of the property would be $24,570, and the difference of $2,430 is more than compensated by the sum of $3,500 which I am disposed to allow.

The loss from ordnance stores is made up of three items $4,847.55 and $276.25 (Ex. P-19) covering mainly loss of furniture and repairs to furniture damaged, respectively; also $5,557.05 (Ex. P-20) for kitchen utensils consisting chiefly of equipment, cutlery and dishware, less salvage amounting to $27.95, making a total combined claim for ordnance stores of $10,652.90. Exhibit P-19 was signed on July 23, 1953, by Lieutenant R. M. Dion who was then quarter-master. Minor amendments to it were made later by Major Lahaye, Lieutenant Dion's Commanding Officer, who also signed the exhibit and certified its accuracy as amended. The amounts claimed for loss of furniture were based on catalogue figures compiled by the Army Ordnance Branch. The catalogue price made no allowance for depreciation. Major Lahaye alone vouched for the accuracy of exhibit P-20, to which his signature was affixed. He testified that he recognized the initials G.B. on the exhibit as those of Sergeant Gaston Bélanger, a subordinate who prepared the details of the exhibit but who was not heard as a witness. Understandably, neither Major Lahaye nor Lieutenant Dion was able to give evidence of the dates of purchase of the articles in question, as no records were available for the purpose. The above witnesses acknowledged that exhibits P-19 and P-20 made no allowance for depreciation, and Major Lahaye admitted that many of the articles claimed in P-20 were fragile and required frequent replacement. Class 12 of schedule B of the *Income Tax Regulations* (*supra*) deals with chinaware, cooking utensils and the like, of a value under $50, and allows one hundred per cent depreciation per annum. As will be seen later, Captain Berry, in speaking of loss of engineering stores, allowed a depreciation of ten per cent per annum,

but I think that the type of articles with which we are now concerned would depreciate much more rapidly. Without firm proof of the date of acquisition of the articles as a starting point from which depreciation would commence, it is difficult to make even an approximate appraisal of their worth. Furthermore, for what it might be worth, there is no evidence of the resale value of the articles in question. On the proof before me I am not disposed to allow more than fifty per cent of the amount claimed and I would accordingly reduce this amount to $5,326.45. The same result would be obtained on the assumption, which I think is reasonable under the circumstances, that the annual average depreciation of the articles was twenty per cent per annum and that they had been in use for two and a half years.

With regard to the claim for lost equipment which came from engineering stores (Ex. P-23), the cost value of it was $4,717 from which the plaintiff deducted depreciation of ten per cent per annum for the years 1951 and 1952, reducing it to $3,884.30 which, after subtraction of the value of materials salvaged amounting to $476.20, leaves a net claim of $3,408.10. This item was supported by the testimony of Captain Berry who stated that, although army accounting practice ordinarily made no allowance for depreciation, in this instance an annual depreciation of ten per cent was conceded. Taking into account the nature of the equipment, I think the above depreciation is sufficient. In his examination in chief he affirmed that the equipment in question was purchased in 1951, but on cross-examination he admitted that some of it could have been purchased in 1950. The purchase orders which would have established the dates of purchase had been destroyed or lost, and again the importance of a datum point arises. Thus, for instance, if the articles were purchased in January 1951, it would mean that a depreciation allowance should be made for two and a half years. What part of the equipment, if any, was purchased in 1950, it is impossible to say. As counsel for the plaintiff observed, it was difficult to produce full and satisfactory proof of the losses incurred owing partly to loss by fire of some documents, destruction of others, in accordance with army regulations,

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every three or five years, and unavailability as witnesses in 1958 of personnel involved in the events in 1951, with which we are concerned.

I think it would be a fair inference to draw from the evidence that practically all the lost equipment from engineering stores, amounting to $3,408.10, was purchased in January 1951 and, allowing for a depreciation of $1,180 representing ten per cent per annum for two and a half years calculated on the cost value of $4,717, and $476.20 for salvaged materials, I would reduce the amount claimed to $3,061.

Of the items concerning which Captain Berry testified, two remain to be dealt with: $400 covering labor and materials for repairs to building 413 and two garbage huts; $389.45 for labor and materials required to repair power lines similarly damaged. Although Captain Berry's evidence could be stronger, I am satisfied that these losses were suffered and I would allow them in full.

A last item requiring consideration is the sum of $874.55 representing R.C.A.S.C. food supplies which were lost. Staff Sergeant F. M. Gauthier testified that there had been delivered to hut 411 rations for at least 400 men, but he was not sure whether they were calculated to last for two or three days. He produced a list of food supplies totalling $573.19. See exhibit P-33. This exhibit was signed in 1953 by Major Chisholm and Captain McIntyre, who were then first and second in command of the R.C.A.S.C. Supply Depot but were not available as witnesses at the hearing. However, Staff Sergeant Gauthier was able to identify their signatures and spoke with first-hand knowledge of the contents of exhibit P-33, and I am satisfied that the plaintiff is entitled to recover the above-mentioned sum of $573.19.

The foregoing amounts of $3,500, $5,326.45, $3,061, $400, $389.45 and $573.10 make a total of $13,250, and this sum I would allow together with taxable costs.

Judgment accordingly.