IN THE MATTER of the Petition of Right of

BERCHMANS CLOUTIER.....SUPPLIANT; 1910 April 13.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Common employment—Arts. 1053 and 1054 C. C. P. Q.—The Exchequer Court Act, sec. 20, sub-sec. (c)—"Fault"—Liability of Crown for negligence of servant.

Applying the provisions of Art. 1054, C. C. P. Q., together with those of sub-sec. (c) of sec. 20 of *The Exchequer Court Act* (R. S. 1906, c. 140), to a case arising in the Province of Quebec, where a servant of the Crown was injured through the negligence of a fellow-servant, the Crown was held liable in damages.

2. The word 'fault' as used in Art. 1053, C. C. P. Q., is equivalent to the term 'negligence' as employed in sub-sec. (c) of sec. 20 of *The Exchequer Court Act.*

PETITION OF RIGHT for damages arising from an injury occasioned by a fellow-servant employed by the Crown in the Dominion Arsenal, in the City of Quebec.

The facts are fully stated in the reasons for judgment.

March 10th, 1910.

L. St. Laurent for the suppliant;

A. Fitzpatrick for the respondent.

CASSELS, J., now (April 13th, 1910,) delivered judgment.

This was a petition of right tried before me at Quebec on the 10th March, 1910.

The suppliant alleges that

"1. He was up to September 18th last (1908) and for several years previous thereto, in the employ of His Majesty as blacksmith at the Dominion Arsenal in the City of Quebec at a salary of $10.60 per week.

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"2. The said Dominion Arsenal and the operations carried on thereat for and on behalf of His Majesty constitute and did constitute during the whole of the said month of September last (1908) a public work within the meaning of the statutes and laws of Canada.

"3. On or about the said date of September 18th last, while the suppliant was, in the course of his said employment, engaged in cutting an iron rod with the help of one Louis Villeneuve, a servant of the Crown then and there acting within the scope of his duties or employment as such, the said suppliant holding the said rod across an anvil by means of locked tongs held tightly in his left hand and holding over said rod with his right hand a chisel or cutter ('tranche'), and the said Villeneuve striking on said chisel or cutter ('tranche') with a heavy sledge hammer swung at arms length,—at a moment when the said rod was already cut nearly through, the said Villeneuve swung his hammer much too heavily and too awkwardly striking not only the said chisel or cutter ('tranche') but also said rod and anvil.

"14. The said Villeneuve is and was an unskilled, negligent and awkward workman, was not a fit and proper person to perform the said work, which was then within the scope of his duties and employment as such servant of the Crown, and was performing it in a negligent, awkward, careless and improper manner notwithstanding repeated cautions to him both from the foreman and his co-employees."

The allegations in paragraphs 1 and 2 are admitted by the Crown to be true.

Cloutier, the suppliant, was at the date of his giving evidence 32 years of age. The injury complained of was on the 18th September, 1908.

The suppliant had been for several years employed at the Dominion Arsenal as a blacksmith. His wages, as alleged in his petition, were the sum of $10.60 a week

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for as I understand it fifty hours work per week. There were two other blacksmiths employed at the Arsenal, Grenon and Ferland. There were two "frappeurs," or helpers, Gagnon and Villeneuve. One Theophile Genest was a "mecanicien".

The blacksmiths were under the orders of Genest. The two "frappeurs," or helpers, were under the control of and subject to the orders of the blacksmiths. Villeneuve was employed by the Crown. At the time of the accident he had been in the employ of the Crown at the Arsenal as a helper, and according to the statement of the suppliant had worked with him for about one and one half, or two years, at the same class of work on which he was engaged at the time of the accident.

I think the allegations in the 14th paragraph of the petition are not proved. No complaints in regard to Villeneuve had ever been made to those in charge. He may not have been as adroit as Gagnon, and he may not have held his hammer in the proper manner, but no accident had previously occurred and the accident in question was not due to any error in the way in which Villeneuve held his hammer. I accept Col. Gaudet's evidence on the question of Villeneuve's capability.

On the day in question when the accident happened Genest ordered Cloutier to cut a piece off a rod or bar of cast steel. The rod was one inch and a quarter ($1\frac{1}{4}$) in diameter.

The work in question was very ordinary and every day work. The method of performing it was as follows:—

Cloutier, the blacksmith, would hold the rod from which a piece was to be cut by a pair of tongs. The ends of these tongs gripped the bar, and a ring was drawn up towards the ends of the tongs so as to form a tight and locked grip of the bar. The bar was then laid across the anvil, the piece to be cut off projecting beyond

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the anvil. The blacksmith Cloutier held the tongs with his left hand so as to keep the bar, in position on the anvil. In his right hand Cloutier held the chisel. This chisel was attached to a wooden rod, the whole being from 18 to 24 inches in length. The chisel itself was of a depth greater than the diameter of the cast steel to be cut and had in addition a heavy and broader head than the lower part forming the chisel, to receive the blow from the hammer.

At the time of the accident in question Villeneuve was using a hammer weighing about 16 pounds. According to his statement he had commenced with a lighter hammer, but took to the heavier hammer as he considered it was necessary to do so in order to perform the operation of cutting. The bar in question was nearly cut through when Villeneuve administered the last blow. He was aware it was nearly cut through, but instead of giving the chisel a comparatively light blow, the hammer weighing 16 pounds was raised above his head and evidently brought down with great force with the resnlt that the chisel was knocked out of Cloutier's hand and the hammer which projected on both sides came down with force on the nearest part of the rod on the anvil and forced the suppliant forward and the tongs out of his hand, and hence the accident.

I think Villeneuve was guilty of negligence in striking the chisel with the force he used.

The suppliant says he warned Villeneuve to give but a slight blow. Genest states he heard the instructions. His evidence is corroborative although it would appear as if his statement as to the warning was before any blow had been struck. In this however he may have been mistaken. Villeneuve does not contradict Cloutier. He does not recollect. See *Lefeunteum* v. *Beaudoin*. (1) In any event Villeneuve knew how deep the cut had been

(1) 28 S. C. R. 93.

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made, and in using a hammer of such weight with such force was guilty of negligence.

The suppliant, as far as the evidence shews, performed his part of the work in the usual way and was not guilty of any negligence.

On this state of facts is the Crown liable in damages?

I have asked the counsel for the suppliant and respondent for some authorities on this point and also on the question of damages, and have been furnished with none, except *Asbestos, etc. Co.* v. *Durand* (1) and *Shawinigan Carbide Co.* v. *Doucet* (2) cited by counsel for the suppliant at the trial, neither of which has any application to this branch of the case.

The defence of common employment has no application to the law of the Province of Quebec, and for this reason it may be difficult to find direct authority in the English jurisprudence.

Sub-section (c) of section 20 of *The Exchequer Court Act* (R. S. 1906, ch. 140) is as follows:—

> "(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

Article 1053 of the Civil Code is as follows:—

> "1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

And Article 1054:—

> "1054..... .....Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

(1) 30 S. C. R. 285.

(2) Q. R. 18 K. B. 271; 42 S. C. R. 231.

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I have looked over the authorities cited by Sharp on the Civil Code, also by Beauchamp in his work, and find no case exactly similar.

In Dr. Morse's book *Apices Juris*, page 112 et. seq. will be found the meaning of the word "fault" as used in the Civil Law, and several English authorities are there cited which indicate that "fault" is equivalent to the term "negligence" in the common law.

In my opinion the case comes within sub-section (c) of section 20 of *The Exchequer Court Act*, and the Crown is liable.

As to the amount of damages: Cloutier was absent from his work four months from the 18th September to the 18th of January. He was provided with the best medical skill. The expenses were paid by the Government, and during the four months he received full wages.

Dr. Beaupre states that on the 18th May, 1909 he examined him. His right eye was perfect. He recommends the removal of the left eye for fear of sympathetic affection of the right eye, but gives it as his opinion that he is quite fitted for the post of superintendent.

Dr. Dussault details the treatment, and states the left eye is lost but expresses the opinion that he is quite competent to fill the post of superintendent.

Dr. Jinchereau gives evidence to the same effect.

On his return to the Arsenal, Cloutier was given the same work as he was employed at previously and after a few days he applied to Col. Gaudet for other work, complaining the fire was injurious. Col. Gaudet appointed him superintendent at $11.00 a week with less work. Cloutier remained two weeks. He then complained of his wages being too low, and he was appointed "mecanicien" at $12.25 a week. He worked at this for three weeks and then left and embarked in the milk business, and is clearing from $4 to $5 per week, with hopes of doubling his earnings.

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I think he is quite capable of performing either the duties of superintendent or "mecanicien." His idea of soap fumes is not reasonable. The probability is he wished to leave the service before commencing this action.

A late case under the English statute decided by the Court of Appeal in England is to be found in *Eyre* v. *Houghton Main Colliery Co., Ltd.*, (March 1st, 1910) (1) where the plaintiff lost an eye. This case also deals with the meaning of "suitable employment" under the English statute.

I think the suppliant is entitled to damages, and I assess them at $1,000. The suppliant's counsel at the trial was willing to accept $1,500.

The suppliant is entitled to his costs.

Judgment accordingly

Solicitors for the suppliant: *Pelletier, Baillargeon, St. Laurent & Alleyn.*

Solicitor for the Crown: *A. Fitzpatrick.*

(1) 26 T. L. R. 302.