CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

OLIVE VALIQUETTE AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOHN B. FRASER AND WILLIAM H. C. FRASER, TRADING AS FRASER & CO. (DEFENDANTS) ..... } RESPONDENTS.

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*March 25.
*May 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Construction of building—Contract for construction—Collapse of wall—Building not completed—Vis major.

Held, per Davies and Maclennan JJ.—The owner of a building in course of construction owes to those whom he invites into or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.

Per Idington J.—The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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Per Duff J.—Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete and the invitee is engaged in completing it or fitting it for its intended use?

Per Davies and Maclennan JJ.—In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not have been expected was not negligence for which the owner was liable.

Judgment of the Court of Appeal (12 Ont. L.R. 4) and of the Divisional Court (9 Ont. L.R. 57) affirmed, Idington J. *dubitante.*

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a divisional court(2) in favour of the defendants, Fraser & Co.

The plaintiffs are the widow and children of J. S. Valiquette who was killed while working in a boiler-house under construction for Fraser & Co. by collapse of the walls owing to the roof having been blown off by a severe wind storm. The action was brought to recover damages from the owners and the contractor and in the courts below the owners were exonerated from liability.

J. Lorne McDougall, Jr. for the appellants, cited *Francis* v. *Cockrell*(3); *Hyman* v. *Nye & Sons*(4); *Heaven* v. *Pender*(5).

Shepley K.C. and *John Christie* for the respondents referred to *Indermaur* v. *Dames*(6); *Welfare* v. *London & Brighton Railway Co.*(7); *Pearson* v. *Cox* (8); *Broggi* v. *Robins*(9).

(1) 12 Ont. L.R. 4.
(2) 9 Ont. L.R. 57.
(3) L.R. 5 Q.B. 184, 501.
(4) 6 Q.B.D. 685.
(5) 11 Q.B.D. 503.
(6) L.R. 2 C.P. 311.
(7) L.R. 4 Q.B. 693.
(8) 2 C.P.D. 369.
(9) 15 Times L.R. 224.

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GIROUARD J.—The appeal should be dismissed with costs for the reasons given in the court below.

Davies J.

DAVIES J.—I am not able to assent to the law laid down by Street J. in deciding this case to the full extent stated by him, and apparently followed by the Court of Appeal, though in the ultimate result I do not dissent from the conclusions reached.

I do not think there is any difference in the result whether the duty which the owner of a building or structure into or upon which he invites workmen or people to enter owes to such workmen or people may be said to arise out of contract or tort.

That duty, as defined in *Indermaur* v. *Dames* (1); *Francis* v. *Cockrell* (2); *Tarry* v. *Ashton* (3); *Marney* v. *Scott* (4), and other cases, seems to be that he is bound towards those whom he invites into or upon the building or structure to use reasonable care and skill in providing that the property and appliances upon it, which it is intended shall be used in any work, are fit for the purposes they are to be put to or used for. The owner does not discharge that duty by contracting with a competent workman to do the work for him. It is no answer in a case where such building or structure is found unfit, for him to say I am myself incompetent to do the work or to say how it should be built so as to make it fit and proper, and I have employed a person who is competent to do the work for me, and if he fails in the discharge of his duty I am not liable. This is not the law as decided expressly

(1) L.R. 2 C.P. 311.
(2) L.R. 5 Q.B. 501.
(3) 1 Q.B.D. 314.
(4) [1899] 1 Q.B. 986

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in the cases I have cited. In *Tarry* v. *Ashton*(1), Blackburn J. says at page 319:

> It was the defendant's duty to make the lamp reasonably safe; the contractor failed to do that and the defendant having the duty has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty and he is liable to the plaintiff for the consequences.

The question is not one solely of the owner's competence or knowledge but whether the building work or appliances have been erected or provided with reasonable care and skill for the purposes intended. And the same rule must apply to an architect. It is not a question alone whether a competent architect was employed. The affirmative answer to that question would not of itself settle the liability of the owner any more than the affirmative answer to the question whether or not he employed a competent contractor. The ultimate question upon which the liability of the owner or occupier must rest is whether the building or structure was erected, or appliances were provided, with reasonable care and skill having in view the object and purpose for which they were intended and were to be used or applied. If that reasonable care and skill is shewn to have been wanting and to have been the cause of the injury complained of the owner cannot escape from liability by shewing simply that he employed a competent architect or competent contractor. As Sir Frederick Pollock puts it in the 5th edition of his work on Torts, at page 477, adopted by Bigham J. in his judgment in *Marney* v. *Scott*(1);

> The duty (of the owner or occupier) goes beyond the common doctrine of responsibility for servants for the occupier cannot discharge himself by employing an independent contractor for the

(1) 1 Q.B.D. 314. (2) [1899] 1 Q.B. 986.

maintenance and repair of the structure, however careful he may be in the choice of that contractor. * * * The structure has to be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so.

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And see Addison on Torts, 8 ed. (1906), at page 722.

Compare on this point the judgments of this court in *Grant* v. *Acadia Coal Co.*(1); *McKelvey* v. *Le Roi Mining Co.*(2); *Canada Woollen Mills* v. *Traplin*(3).

The question then that seems to be for us to decide is whether or not the structure at the time it was blown down had been constructed with reasonable care and skill, having regard to its size, situation and intended purpose.

I have gone carefully through the evidence and find upon this crucial point a great difference of opinion between contractors and architects of great experience and reputation.

I have reached the conclusion that the storm of wind, call it cyclone, tornado, hurricane, or what you will, was of a very unique, severe and exceptional kind, confined to a narrow area and striking upon this building in its unfinished state with extraordinary force and fury.

The openings in the gable wall which first blew down, intended for doors and windows, were all open and unclosed and were being used in part to take into the building parts of the boiler and its appurtenances then being erected. I do not think that under the circumstances the failure to have these openings closed at the moment the storm struck the building necessarily indicated negligence as the sudden and extra-

(1) 32 Can. S.C.R. 427. (2) 32 Can. S.C.R. 664.
(3) 35 Can. S.C.R. 424.

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ordinary wind was not one of a character which should reasonably have been expected or guarded against.

I am not satisfied from a careful reading of the conflicting evidence that I could clearly find there was want of reasonable care and skill in the construction of the building and that this caused its destruction and the consequent loss of life.

I am rather inclined to hold that the cause of the disaster was the violent hurricane of an extraordinary kind which struck the unfinished building at a time when the opening for the windows and doors on the gable end were still unclosed, a condition which under the circumstances as I have stated already did not necessarily indicate actionable negligence.

I would therefore dismiss the appeal.

IDINGTON J.—I understand that a majority of this court, some for reasons of fact, and others of law, have come to the conclusion that this appeal should be dismissed.

I desire to say that in my opinion, if the findings of fact by the learned trial judge be correct, I have great doubt of the correctness of the result about to be arrived at.

It may be that the unfinished state of the building, to the knowledge of deceased, rendered the responsibility of respondents less onerous than in law it seems to be in the case of a completed structure into which the possessor invites others.

The stress laid upon the engagement of a competent superintendent in the place of an architect and competent contractors, does not seem to me warranted when we find the superintendent architect disclaiming

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all responsibility for the connection between the steel and brick just where the weak spot proved to be in the building.

It can serve no useful purpose for me now to pursue the matter further than to express my doubt.

MACLENNAN J.—I concur in the opinion of my brother Davies.

DUFF J.—As the evidence does not entirely satisfy me that the collapse of the defendants' building was due to any want of care or skill in the construction or maintenance of it, I am unable to say that the case is within the operation of the rule expressed in the passage quoted from Pollock on Torts (7th ed.) at page 498, and relied on by Mr. McDougall; that passage, I think, correctly states the rule governing the duty of occupiers respecting the safe condition of completed structures ready for use and occupation; but I should require further consideration before deciding that it applies without qualification where the structure is incomplete, and the person injured is engaged either in the completion of the structure itself or in fitting it for its intended use.

Appeal dismissed with costs.

Solicitors for the appellants: *Latchford & Daly.*

Solicitors for the respondents: *Christie, Green & Hill.*