NAPOLÉON OUELLET,
(DEFENDANT) ..... } APPELLANT;

AND

ROBERT CLOUTIER ÈS-QUAL,
(PLAINTIFF) ..... } RESPONDENT.

1947
*May 7, 8.
*Jun. 18.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Torts—Farm thrashing machine—Boy about ten years helping owner—Main belt disconnected but shaft continued revolving—Boy injured while trying to stop it—Owner not liable—No duty owed by him—Imprudent act voluntarily committed by boy—Danger probable or possible—Degree of caution required from owner—Contingencies when a prudent man should foresee danger—Evidence—Burden of proof—Art. 1053 C.C.

*PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

1947

OUELLET v. CLOUTIER

M.C., a boy about ten years of age, was injured in the barn of the appellant, a farmer. The boy, already acquainted with that kind of operations, went to the appellant's farm to help him with his thrashing. He had not been invited but was not prevented doing so. He was asked to hold the bags to receive the grain, which was not a dangerous job. At the end of the day's work, the appellant removed the main belt running from the tractor to the thresher and two smaller belts in the machine itself; but the shaft of the drum continued to revolve under its own momentum. The boy, having tried without success to stop it with his hands, picked up one of the small belts and pressed it to the end of the shaft to slow it down, although called to by an employee to leave it alone. A momen later, the belt seemed to have been seized by the shaft and whirled around, and the boy's arm caught up in it was badly broken above the wrist. An action for damages brought by the respondent, in his quality of tutor to his minor son, was dismissed by the trial judge; but that judgment was reversed by a majority of the appellate court.

Held: The appeal should be allowed and the judgment of the trial judge restored.

Per Kerwin and Kellock JJ.:—Under all the circumstances of this case, there was not any duty owing by the appellant to the injured boy. More particularly the boy was not left alone at the time of the accident but there were three other men present who tried to stop him.—The accident happened in such a short time that there was no obligation on the appellant to have previously warned the boy or to have sent him away from the premises.

Per Taschereau, Rand, Kellock and Estey JJ.:—The respondent's claim must be decided under the terms of article 1053 C.C. and the burden of proof was upon him. The machine was not by itself dangerous. The boy was injured not on account of the nature of the work he was doing, but because he voluntarily committed an imprudent act which the appellant was not at fault in not foreseeing.

Per Taschereau, Kellock and Estey JJ.:—The fact that it was possible that an accident might occur is not the criterion which should be used to determine whether there has been negligence or not. The law does not require a prudent man to foresee everything *possible* that might happen. Caution must be exercised against a danger if such danger is sufficiently *probable* so that it would be included in the category of contingencies normally to be foreseen. To require more and contend that a prudent man must foresee any possibility, however vague it may be, would render impossible any practical activity.

APPEAL from a judgment rendered by a majority of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Boulanger J. and maintaining an action for damages brought by the respondent for injuries which his minor son sustained in an accident.

The material facts of the case and the questions at issue are stated in the above headnote and in the judgments now reported.

Alexandre Chouinard K.C. and *Louis A. Pouliot K.C.* for the appellant.

Louis P. Pigeon K.C. and *Geo. René Fournier* for the respondent.

KERWIN J.:—Marcel Cloutier, a boy of about ten years and five months of age, was injured in the barn of the appellant Ouellet, a farmer in the province of Quebec, in September, 1944. Although the boy did not give evidence at the trial and the trial judge did not, therefore, have an opportunity of observing his demeanour in the witness box, he was present in court. It is true that at that time he was more than a year older than at the time of the accident but, under all the circumstances, I do not know that the lack of the trial judge's opportunity to conclude from his appearance in the witness box as to his capacity is very important as an appeal court does not need a finding upon the boy's ability in order to dispose of the matter. I should add, however, that I do not adopt the view which it is contended the trial judge took that Marcel was under the care of Eugene Talbot.

According to his own admission, the boy had been at a thrashing before and, on this occasion, went with some employees of a neighbour of the respondent, Madame Fournier. These employees went to Ouellet's barn in order to assist the appellant with his thrashing. Without deciding, I am willing to accept the position of the boy, contended for by counsel, as doing work for the appellant. I cannot see that any duty owing by the appellant to the boy is enlarged by that circumstance as the boy certainly was not a trespasser. He was not left alone at the time of the accident but there were three other men present. It was suggested that because the boy saw the appellant remove the small belt from the shaft, he was justified in assuming that it would be safe for him to replace the belt while the shaft was still revolving of its own momentum. Everything happened in such a short time that I think

1947

OUELLET v. CLOUTIER

Kerwin J.

there was no obligation on the defendant to have previously warned the boy or to have sent him away from the premises.

The appeal should be allowed and the trial judgment restored, with costs throughout.

The judgment of Taschereau and Estey JJ. was delivered by

TASCHEREAU J.: Le demandeur-intimé, en sa qualité de tuteur à son enfant mineur, a poursuivi Napoléon Ouellet et Joseph Ouellet, et leur a réclamé conjointement et solidairement la somme de $2,722. Il allègue dans son action que son fils mineur, Marcel Cloutier, âgé de 10½ ans, a été, le 21 septembre 1944, sérieusement blessé alors qu'il aidait les défendeurs à la mise en sacs du grain dans un moulin à battre, opéré par Napoléon Ouellet et propriété de l'autre défendeur Joseph Ouellet.

La Cour Supérieure présidée par M. le juge Boulanger a rejeté l'action, mais la Cour du Banc du Roi, infirmant ce jugement, a fait droit à l'appel et a maintenu l'action du demandeur ès-qualité pour la somme de $2,484.20. Devant cette Cour, seuls Napoléon Ouellet et l'intimé sont en cause.

L'accident qui fait la base de ce litige est arrivé alors qu'un jour de congé, Marcel Cloutier, fils mineur du demandeur, s'était rendu chez une dame Thomas Fournier pour aider un nommé Talbot à charroyer du bois. Avec tous les hommes de madame Fournier, l'enfant se rendit chez le défendeur pour lui aider à battre du grain, sans être invité à le faire, mais sans qu'on lui défende de s'y rendre. Le défendeur Napoléon dirigeait les opérations de battage, et c'est lui qui indiquait aux hommes le travail qu'ils devaient faire. Le jeune Marcel n'a pas reçu d'instructions particulières, mais, au cours de la journée, a fait des travaux divers, et, quelque temps avant que le travail ne prit fin, Talbot qui recevait le grain dans les sacs a demandé au jeune Marcel de faire ce travail qui, d'après la preuve, n'est pas un travail dangereux.

La machinerie était composée d'un tracteur qui fournissait la force motrice à la batteuse, et les deux étaient reliés l'une à l'autre par une courroie de transmission. Une autre courroie reliait également deux organes mobiles de la ma-

chine. Lorsque le travail, vers la fin de la journée, fut terminé, Napoléon Ouellet ordonna la fin des travaux et enleva la grande courroie reliant le tracteur à la batteuse, ainsi que les deux courroies plus petites qui partent de poulies à chaque extrémité de l'axe du batteur et actionnent le secoueur et le cribe ventilateur. Sous l'effet de la force acquise, le batteur continua cependant à tourner encore, et Marcel s'aventura de l'arrêter avec ses mains qu'il appuya sur la poulie de l'axe; mais, voyant qu'il ne pouvait réussir, il prit la courroie qui gisait à terre, l'appuya sur la poulie, mais malheureusement cette courroie s'enroula sur l'arbre, happa le bras droit de l'enfant qui fut fracturé au poignet.

Le demandeur ès-qualité prétend que cet accident est dû à la faute, à la négligence, à l'imprudence du défendeur Ouellet, en tolérant la présence du jeune enfant près de la machine à battre, qui serait une machine dangereuse et en n'ayant pas prévu l'imprudence de l'enfant qui accomplissait un acte dans l'ignorance totale du danger qu'il comportait.

Il est certain que la présente action ne repose pas sur l'article 1054 du Code Civil, mais que la demande ne peut être fondée que sur les dispositions de l'article 1053 C.C. Pour réussir, le demandeur ès-qualité doit nécessairement prouver la faute de l'intimé.

Ce dernier a-t-il manqué à un devoir quelconque? Je ne le crois pas. Il est incontestable que la présence du jeune Cloutier était tolérée dans la grange où se faisaient les travaux de battage et que même ce dernier a été autorisé à y participer. Mais, dans les circonstances, le fait de laisser ce jeune enfant, habitué à ce genre de travaux, aider les autres hommes ne présentait aucun danger. Je m'accorde avec M. le juge Pratte de la Cour du Banc du Roi qui a dit:

A la date de l'accident, Marcel était âgé de 10 ans et 5 mois. Fils d'ouvrier, vivant à la campagne, il avait l'habitude de participer aux travaux de la ferme quand il n'allait pas à l'école. D'une intelligence normalement développée, il avait dû acquérir les connaissances que prennent les enfants de la campagne au contact des choses de la ferme. Il ne saurait y avoir de doute là-dessus. Il n'est pas un enfant de la campagne, vivant sur une ferme ou fréquentant les cultivateurs à leur travail, qui n'ait pris part, même avant l'âge de 10 ans, à tous les travaux de la ferme, et qui ne connaisse le fonctionnement des machines agricoles

1947

OUELLET v. CLOUTIER

Taschereau J.

même s'il n'a pas la dextérité ou la sûreté requises pour qu'on lui en confie la direction. Cela fait partie de son éducation. Marcel Cloutier avait déjà assisté au battage du grain; et s'il n'est pas établi qu'il connaissait en détail le fonctionnement de la batteuse, il savait, à n'en point douter, le danger que présente une roue ou un arbre de couche en mouvement.

Or, le défendeur connaissait Marcel; non seulement il l'avait déjà vu travailler avec les ouvriers de madame Fournier, mais l'enfant avait déjà assisté au battage chez lui. Le défendeur avait raison de croire que l'enfant en savait tout autant, sur les travaux de la ferme, qu'un fils de cultivateur. Peut-on dire alors qu'il a commis une faute en l'admettant dans la grange avec les ouvriers de madame Fournier qu'il accompagnait souvent et qu'il avait suivis ce jour-là? Non pas. Certes, s'il se fut agi d'un enfant inconnu, ou absolument étranger aux travaux de la ferme, le défendeur aurait été tenu d'exercer sur lui une surveillance étroite; mais dans le cas qui nous occupe, une telle mesure ne s'imposait pas.

La machine elle-même n'était pas dangereuse, et le travail confié au jeune homme ne l'exposait à aucun péril. S'il a été blessé, ce n'est pas à cause de la nature de son travail, mais bien parce qu'il a volontairement commis une imprudence, qu'on ne peut pas reprocher à Ouellet de ne pas avoir prévue. Cet enfant, normalement intelligent, a été par son imprudente activité l'auteur de sa propre mésaventure, en essayant, malgré que l'on eut tenté de l'en dissuader, d'arrêter par le moyen que l'on sait la poulie en mouvement. Il s'est exposé lui-même à un danger évident, qu'il avait pourtant l'âge voulu pour apprécier.

Il se peut qu'il était possible qu'un accident semblable arrivât. Mais ce n'est pas là le critère qui doive servir à déterminer s'il y a eu oui ou non négligence. La loi n'exige pas qu'un homme prévoie tout ce qui est *possible*. On doit se prémunir contre un danger à condition que celui-ci soit assez *probable*, qu'il entre ainsi dans la catégorie des éventualités normalement prévisibles. Exiger davantage et prétendre que l'homme prudent doive prévoir toute possibilité, quelque vague qu'elle puisse être, rendrait impossible toute activité pratique. (*Bacon* v. *Hôpital du St-Sacrement* (1); Savatier, Responsabilité Civile, tome 1, n° 163; Mazeaud, Responsabilité Civile, 2e éd. tome 2, p. 465; Demogue, Des Obligations, tome 6, n° 538, p. 576; Planiol et Ripert, Droit Civil, 1930, Des Obligations, tome 6, p. 531; *Volkert* v. *Diamond Truck Co.* (2); *Donoghue* v. *Stevenson* (3).

(1) (1935) 41 R.L.N.S. 497.
(2) (1939) Q.R. 66 K.B. 385; affirmed [1940] S.C.R. 455.
(3) [1932] A. C. 562.

Je suis en conséquence d'opinion que l'appelant n'a pas commis de faute en tolérant dans la grange la présence du fils de l'intimé, pas plus qu'en ne prévoyant pas l'imprudence que ce dernier a commise. On ne peut reprocher à l'appelant de ne pas avoir fourni les soins ordinaires qu'un homme diligent devait fournir dans des conditions identiques. (*L'Œuvre des Terrains de Jeux de Québec* v. *Cannon* (1), M. le juge Rivard à la page 114.)

L'appel doit être maintenu, l'action rejetée et le jugement de M. le juge Boulanger rétabli avec dépens devant toutes les cours.

RAND J.:—I see nothing in the evidence to support the case against the appellant. He is charged with fault in failing to exercise the care which, in the circumstances, a prudent man would have exercised to protect the young boy aged ten years and five months against the danger presented by the revolving shaft of the threshing machine. The boy had gone along to the barn with a group of four men sent over by a neighbour to assist in the threshing. Like a child of that age, he wanted to be in the work, and he was allowed to hold the bags into which the grain was poured by hand out of the containers into which it came from the machine; but he was in and out of the barn at will all day, and when near the machine would be in the presence of the workmen. Late in the afternoon, the appellant removed the main belt running from the tractor to the thresher on the left side and the small belt on the right side of the thresher connecting the main shaft with a smaller one, and set about to back the tractor out of the barn. At that moment, the shaft of the drum of about 2″ in diameter and projecting a few inches beyond the closed side of the drum was revolving under its own momentum, and three of the men were watching the teeth or arms of the shaft with the boy within five or six feet of them. All of a sudden, he picked up the small belt, about $1\frac{1}{2}$″ in width and 5′ in length, and pressed it to the end of the shaft to slow it down. One of the men called out to leave it alone, but he answered: "Non, je l'arrête". A moment later, the belt seems to have been seized by the shaft and whirled around, and the boy's arm caught up in it was badly broken above the wrist.

(1) (1940) Q.R. 69 K.B. 112.

1947

OUELLET v. CLOUTIER

Rand J.

I will assume that the end of the revolving shaft did present some degree of danger, but having regard to the fact that the boy was almost within reach of three men with whom he had come to the barn, that the shaft was merely running down, and that the boy was acquainted with the operations of the machine, I think it impossible to say that a reasonably prudent father would have taken any further step to guard against such a sudden and unexpected sortie. The appellant must show that the boy was surrounded with the care and foresight of such a person, and this I think he has done. Boys at farms, as part of their practical education as well as a satisfaction of their natural propensity to imitate their elders, assist at small jobs where they do not interfere with the work, and where the conditions are reasonably safe for them; and although the boy's father was not a farmer, he lived in a farming district and the boy spent a good deal of his spare time around the farms in the vicinity of his home, including the appellant's. He had the ordinary boy's discipline and dependability in these practical situations. But here was an impulsive act of wantonness indulged in a few moments before the last motion of the machinery would have been ended. Normally, in such circumstances, particularly the presence of the men, a boy of that age would not touch a revolving shaft, but certainly he would be expected to drop the belt instantly upon a sharp command to do so; and the injury suffered by him is due to that momentary wilfulness in disobedience.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

KELLOCK J.:—Mr. Pigeon agrees that there is no difference between the civil law and the common law as to the principles applicable to such a case as the present. I proceed on the assumption contended for by the respondent that the infant was an employee of the appellant. In *Smith* v. *Baker* (1), Lord Herschell said at p. 362:

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

(1) [1891]) A.C. 325.

It is part of the obligation of the master that he shall warn the servant where the employment involves the use of machinery which may prove dangerous to the servant unless he is instructed with regard thereto, and instruction which reaches the standard of reasonable care in the case of an adult may not be sufficient in the case of a young person; *Young* v. *Hoffman Mfg. Co. Ld.* (1).

I do not think there was any fault on the part of the appellant in permitting the boy to be engaged at all as he was that day. The evidence shows that he had been engaged in doing much the same sort of thing the year before without incident.

The other ground of liability which is urged is that the appellant ought to have anticipated that what happened was just the sort of thing a young boy would be likely to do and that the appellant failed in his duty to warn against it.

It is to be observed in the first place that in the case at bar the boy was not injured during the course of any work which he had been engaged in during the day or which he had been called upon to do. He had not been called upon to operate any part of the machinery or to come in contact with it. Moreover, the machine was not, when properly used, a dangerous machine, and even if the end of the shaft, which continued in motion after the belts were thrown off, came into contact with anyone it would not have caused any injury as is shown by the fact that the boy said he first placed his two hands on it to try to stop it.

Nor was the boy left alone. There were three adult workmen near him at all times. I do not think it can be said that the appellant ought to have anticipated the combination of circumstances that the boy would take from the floor one of the belts lying there and apply it to the shaft without being observed by one of the workmen in time to prevent him. I think the principle applicable is to be found in the following authorities:

Mazeaud: Responsabilité Civile, 2e édition 1934, t. 2, no. 1597, p. 464;

Une simple possibilité vague de réalisation ne saurait suffire à exclure l'imprévisibilité.

(1) [1907] 2 K.B. 646.

1947

OUELLET v. CLOUTIER

Kellock J.

Demogue: Des Obligations, 7, 6, no. 538, page 576:

Le fait doit être assez probable pour qu'on doive se prémunir contre lui car on ne peut se prémunir contre tout ce qui est possible.

In *Glasgow Corporation* v. *Taylor* (1) Lord Sumner said at p. 67:

Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such on others to respect it, than infirmity or imbecility; but a measure of care is no more a status conferring right or a root of title imposing obligations on others to respect it, than infirmity or imbecillity; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operation.

As to the boy himself the learned trial judge says:

1. Selon son certificat de naissance, Marcel Cloutier est né à Québec, le 6 avril 1934. Il était donc âgé exactement de 10 ans, 5 mois et 15 jours à la date de l'accident. Les témoins sont unanimes à dire que c'est un enfant intelligent et éveillé. Le soussigné l'a vu en Cour au cours du procès et il s'est très bien tenu. Il n'a pas été entendu cependant, devant le tribunal, mais, en autant qu'on peut en juger à la lecture de sa déposition au préalable, il paraît, en effet, normalement intelligent, raisonnable et averti.

The present is not such a case as *Murphy* v. *Smith*, (2). There, while the plaintiff was injured in the course of doing an act which he had no right to do, he was observed and permitted to do the act by the employee in charge. This, had it been done by the defendant himself, would, in the opinion of the court in that case, have involved liability.

In *Lawson* v. *Packard Electric Company, Ltd.*, (3), the difference of opinion among the members of the court was as to whether operation of the machine causing the injury was within the scope of the instructions the plaintiff had received.

I do not think that the case *Bouvier* v. *Fee* (4), is of assistance here. In that case the machine was left unguarded and it was the breach of that duty upon which liability was founded.

I think the appeal must be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Alexandre Chouinard.*

Solicitors for the respondent: *Fournier & Désilets.*

(1) [1922] 1 A.C. 44.
(2) (1865) 19 C.B. N.S. 361.
(3) [1907] 16 O.L.R. 1.
(4) [1932] S.C.R. 118.