THE ASBESTOS AND ASBESTIC COMPANY (DEFENDANT)..... } APPELLANT;

AND

ADELINE DURAND (PLAINTIFF).....RESPONDENT.

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*March 6.
*April 2.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Negligence—Use of dangerous materials—Cause of accident—Arts. 1053, 1056 *C. C.—Employer's liability.*

To permit an unnecessary quantity of dymanite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur either from the nature of the substance or through carelessness or otherwise, is such negligence on the part of a mining company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. Gwynne J. dissenting.

As the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen* v. *Filion*, (24 Can. S. C. R. 482) and *The Queen* v. *Grenier*, (30 Can. S. C. R. 42) followed.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review at Montreal, affirming the judgment of the Superior Court, District of Saint Francis, which maintained the plaintiff's action with costs.

The action was brought by the plaintiff for damages in her own behalf as widow of the late Theodore Rivard, deceased, and also in her quality of tutrix on behalf of the minor children of the deceased, in consequence of his death which occurred through an

* PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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explosion of dynamite caused, as was alleged, by the fault of the defendant under the following circumstances:

The deceased was employed by the defendant as driver of a compressor engine used in working drills in a mine. The engine was in a wooden building contiguous to and connected with which was another wooden building in which there were four steam engines used to work the derricks. In the latter building, on the day of the accident, a quantity of dynamite had been placed which exploded during the dinner hour killing the deceased, who was then eating his dinner in the compressor building, and also two other employees who appeared to have been, at the time, in or about the adjoining engine house. The evidence shewed that the defendant used large quantities of dynamite or dualine, which is a high explosive, kept usually in a frozen state and requiring to be thawed out to fit it for use. It explodes at 360° F. or through friction and in order to reduce the frozen sticks to pasty consistency for immediate use they were placed in the engine room near the steam pipe where the heat ranged between 90° and 100° F. The dynamite was stored in an isolated magazine about 1000 feet from the engine house, carried thence in wooden boxes and laid in a specially constructed zinc case in quantities generally of two boxes at a time when being thawed out for use, but at the time of the accident there were two unopened wooden boxes of dynamite in the engine room besides about the same quantity in the zinc case and no person had been placed particularly in charge of it or of the engine house during the dinner hour. This building was open on all sides and could be freely entered. At the time of the accident, one of the victims who had been sent by the foreman into the building to get some of the dualine and fulminating caps

was seen coming rapidly out of the engine house door and crying "fire! fire!" and the explosion followed immediately with the fatal results already stated.

The actual cause of the explosion of the dynamite was not proved but theories were advanced of spontaneous explosion arising from proximity to the steam pipes, or fire set to rubbish by carelessness, generating sufficient heat to explode the dynamite. The plaintiff charged the defendant with imprudence in allowing so large a quantity of dynamite to remain unguarded in such a dangerous place and for neglect to make proper arrangements and provide facilities to prepare it for use in some isolated situation.

The trial court maintained the action and awarded $1,000 damages to the plaintiff personally and an additional $1,000 damages on behalf of the children and found that the deceased had not been guilty of contributory negligence, that the cause of the explosion was unknown and that imprudence and neglect on the part of the defendant had been established by the evidence.

The Court of Review affirmed the trial court judgment and considered that the defendant was in fault in imprudently placing so large a quantity of dynamite in the engine room without anyone to take charge of it, especially while the engineers had gone away for dinner. The defendant appealed from the latter judgment.

Laflamme for the appellant cited *Montreal Rolling Mills Co.* v. *Corcoran* (1); *Mercier* v. *Morin* (2); *Dominion Cartridge Co.* v. *Cairns* (3); *Canada Paint Co.* v. *Trainor* (4); *George Matthews Co.* v. *Bouchard* (5); *Burland* v. *Lee* (6); *Tooke* v. *Bergeron* (7).

(1) 26 Can. S. C. R. 595.
(2) Q. R. 1 Q. B. 86.
(3) 28 Can. S. C. R. 361.
(4) 28 Can. S. C. R. 352.
(5) 28 Can. S. C. R. 580.
(6) 28 Can. S. C. R. 348.
(7) 27 Can. S. C. R. 567.

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L. C. Bélanger Q.C. for the respondent. The cause of death was the explosion which occured through the negligence of defendant in placing dangerous material in unusual and unnecessary quantities in an unsafe situation and cases of mysterious accident from unknown cause do not apply. If dynamite had not been carelessly left lying about and unprotected the deceased would not have suffered. *Garon* v. *Anglo-Canadian Asbestos Co.* (1); Arts. 1053, 1056 C. C. Employers are liable when the accident might have been avoided, no matter how extensive or extraordinary the measures of precaution required. *Vide* Caen, 22 Dec., 1876; S. V. '77, 2, 49; Aix, 10 January, 1877; S. V. '77, 2, 336, 27 Nov. 1877; S. V. '78, 2, 232; Art. 1055 C. C. We refer also to *Robinson* v. *The Canadian Pacific Railway Co.* (2); (reversed in Supreme Court, but as to the solatium only) (3); *Canadian Pacific Railway Co.* v. *Goyette* (4); *Bélanger* v. *Riopel* (5); *Holmes* v. *McNevin* (6); *Legault* v. *City of Montreal* (7); Art. 877, par. 6: art. 1011 R. S. Q.; 55-56 V., c. 20, Quebec; *Ibbotson* v. *Trevethrick* (8); *Town of Prescott* v. *Connell* (9).

The judgment of the majority of the court was delivered by:

KING J.—Assuming it to be reasonable as between the mine owners and their servant that the dynamite needed for immediate use in the mines should be taken from the magazine to the hoisting engine house at the pit's mouth, there to be thawed out in preparation for use, the evidence still shows that an unnecessary large

(1) Q. R. 3 S. C. 185.
(2) M. L. R. 2 Q. B. 25.
(3) 14 Can. S. C. R. 105; 19 Can. S. C. R. 292; [1892] A. C. 481.
(4) 30 L. C. Jur. 207; M. L. R. 2 Q. B. 310.
(5) M. L. R. 3 S. C. 198, 258.
(6) 5 L. C. Jur. 271.
(7) 17 R. L. 279.
(8) Q. R. 4 S. C. 318.
(9) 22 Can. S. C. R. 147.

quantity was accumulated there at the time of the explosion.

The dynamite (or dualine as this preparation of it was called) as received from the manufacturers was contained in wooden boxes of from 18 to 20 inches in length by 15 by 9. The dynamite in each box weighed about 50 pounds, and was in the shape of sticks, of which there were sixty or seventy in each box. It was purchased by defendants in large quantities from the manufacturers, and was stored in a magazine constructed for the purpose upon defendant's premises at a safe distance from the works having regard to the possibility of an explosion.

It appears from the evidence of Williams, the superintendent of the mine, that the daily average use was about four boxes, and that the course of business was that a person specially entrusted with the duty would, in the morning and again at noon, carry two of the boxes from the magazine to the hoisting engine room, were they would be deposited in a certain manner near a steam pipe for the purpose of being thawed, the temperature of the sticks being originally at about 40° Fahrenheit. This transfer of two boxes at each of these stated periods, instead of the entire number for the day at one time, evidently points to this as being in the opinion and practice of the company a reasonable limit to the quantity to be accumulated in proximity to the works.

The like conclusion follows upon the fact that the company with a view to safety had prepared a specially constructed zinc box in which to place the dynamite brought from the magazine, and that the capacity of this was limited to that of two of the original boxes. It consisted of two zinc boxes placed one inside the other, with an air space of a couple of inches all around between the two, and as thus constructed it is

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stated by the superintendent to be the best sort of a receptacle for the purpose. In ordinary course when the two original boxes were brought from the magazine their contents were transferred to the zinc box.

The following appears in the examination of the superintendent:

Q. Did you ever have, to your knowledge, more dynamite in that building than you absolutely required for the daily use?

A. It has happened that there has been some left from the night that has not been used up that day.

Q. As a rule there never was more than two or three boxes?

A. No sir.

Now it appears that at the time of the explosion, although half the working day was over, there were nearly four boxes in the hoisting engine house. The zinc box, capable of containing two of the original boxes, was nearly full, and there were also, upon the platform beside it, two other of the original boxes which had not been opened at all, in all a quantity of between 150 and 200 pounds in weight.

The defendants produced an expert witness named Penhale, the manager of another asbestos mine. It appears that at his works the magazine was 1,500 feet distant from other buildings, and that the thawing out process was carried on in a small building separate from others which, when not in use, was kept locked. Upon his direct examination the following occurs:

Q. How many times a day or a week do you carry a certain quantity of dynamite from the magazine to the distributing point?

A. It is usually brought down a box at a time.

Q. And when this box is used up?

A. More is brought down.

Then on cross-examination:

Q. What quantity at a time do you allow to be kept in the distributing building?

A. Only a box at a time, and, as it is used, it is replaced.

Clearly, therefore, upon the evidence adduced by the defendants themselves there was, at the time of the explosion, an unnecessary and unreasonable quantity of this highly dangerous explosive in dangerous proximity to the workmen engaged in carrying on their work; and no attempt is made to excuse or explain the circumstance.

The negligence involved in this was one of the efficient causes of Rivard's death which, as admitted and as found, was caused by the explosion that in fact took place, and was not the conjectural consequence of a smaller explosion.

The peril to life from high explosives is so great and, as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstance or neglect of others or other cause, he takes the chance of the happening of such other event and cannot disconnect himself from the fairly to be anticipated consequences of his own negligence.

It hence becomes unnecessary to determine as to other agencies contributing to the result, provided it appears that neither the deceased (nor any one whose act or omission may prove a legal bar) had any connection with it, and that he is not precluded from urging defendant's neglect.

Then as to whether Rivard had any part in causing the explosion; he was employed as engineer in a wholly distinct but contiguous building, and his body was found more remote from the point of explosion than the farthest limits of his engine house. Besides, the fact that victuals were found in his mouth shows

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(as stated by the superintendent) that he was eating his dinner when the explosion took place, and the court below naturally acquitted him of all participation in the cause of the explosion.

Then as to the acts or omissions of fellow servants. According to the French law common employment is no defence, and does not exonerate the employer from liability for the negligence of a servant who may by his negligence have caused an accident from which another servant has suffered. This has been held more than once in this court. *The Queen* v. *Filion* (1); *The Queen* v. *Grenier* (2). Nor was the deceased a consenting party to the excessive quantity of dynamite being deposited near him, for the evidence shews that the deposit of such a quantity was contrary to the usual course of business.

In the declaration, (after averring that the explosion which caused the death was that of at least three boxes of dualine, in the building contiguous to that occupied by the deceased,) it is averred that

> it was an act of gross neglect on the part of the defendant to leave such a large quantity of explosive matter, such as dualine, in the said building, and the death of the said Theodore Rivard resulted from, and was due to the carelessness, gross neglect, and fault of the said defendant.

In what has been adduced there is proof of this allegation and hence the appeal should be dismissed.

GWYNNE J. (dissenting).—If this case were not concluded by authority I must confess that I should have reason to distrust my own judgment in hesitating to concur in a judgment in which so many of my learned brothers, as well in the courts of the Province of Quebec, as in this court, so unanimously concur. However, I am bound to say that in my opinion, the

(1) 24 Can. S. C. R. 482. (2) 30 Can. S. C. R. 42.

case is concluded by the authority of this court in several cases, and by the authority of all the courts in England in very many cases wherein the principles governing the determination of cases of the nature of that now under consideration are clearly laid down, to all of which authorities the judgment in the present case is, in my opinion, directly adverse. That judgment appears to me to introduce a wholly new principle for the determination of actions like the present one, namely, that although the cause of the explosion which occasioned the injury complained of is admitted to be absolutely unknown, it is nevertheless to be presumed that the explosion was caused by some negligence of the defendant, that is to say, that some negligence of the defendant was the *causa causans* of the explosion and that the onus of removing this presumption is cast upon the defendant. This, with great deference, appears to me to amount to the proclamation of the doctrine that upon the defendant was cast the onus of showing the actual cause of the explosion which is admitted to be absolutely unknown.

It has been judicially declared over and over again that in actions of this nature the inquiry is whether the defendants were guilty of negligence which was the *causa causans* of the accident which occasioned the injury complained of, that is to say, in the present case, was the *causa causans* of the explosion which killed Rivard the deceased husband of the plaintiff. In the statement of claim the only matter which is charged as the negligence of the defendant, the now appellant, which was complained of, was the mere fact of having the explosive material which consisted of dynamite in the building where the explosion took place, which killed Rivard, and two other employees of the appellant, namely Pierre Ratté and Alphonse Morin. It was not contended that there was any positive provi-

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sion of law which made it to be unlawful for the defendant to use the dynamite in the manner in which it was being used, or to have it in the building where it was when the explosion took place, but at the trial in the Superior Court several suggestions were made on behalf of the plaintiff as to the actual cause of the explosion and, among them, that it had occurred in some unexplained manner by spontaneous combustion. If it had been so caused it did not clearly appear how such a cause of the explosion could be attributed as actionable negligence in the defendant, but this is unimportant now, for the evidence established sufficiently the absolute impossibility of dynamite being exploded by spontaneous combustion, and this suggestion as well as the others made on behalf of the plaintiff were rejected by the learned judge of the Superior Court as wholly inadmissible. The learned judge in pronouncing his judgment thus expresses himself:

La cause déterminate de la mort a été l'explosion de la dynamite mais comment cette explosion a eu lieu, personne ne peut le dire l'expèrt Brainerd n'a pu l'expliquer, et sur ce sujet nous sommes absolument dans les ténèbres.

In another place the learned judge says:

We have to occupy ourselves not so much with the direct cause of the explosion, as with its consequences; it is of little consequence how the explosion had occurred or what was the cause of it.

The material question he thought was:

Would it have taken place if the defendant had taken prudent measures and ordinary precautions?

But with deference, the actual cause of the explosion is the very essential point with which we have to deal in the present action, the very gist of which is to establish that cause to be due to the negligence of the defendants as the *causa causans* of the explosion, and with the consequences of the explosion we cannot intelligently and judicially deal until we know its

cause. Moreover, in order to determine whether prudent precautionary measures to prevent the explosion which occurred had been taken, it is necessary to know what it was that caused the explosion, for by that cause the nature, character and sufficiency of the precautionary measures that should have been taken to prevent the explosion must be tested. Otherwise the happening of the explosion must be taken as conclusive evidence of its having been caused by the negligence of the defendant.

The learned judge, while rejecting the suggestions made on behalf of the plaintiff as to the cause of the explosion, came himself to the conclusion that the explosion was caused by fire kindled by the ashes of pipes, by matches or in some other way before the engineers had left off work at 12 o'clock. This fire, as he held, had remained latent during some time and developed itself and produced the heat requisite to cause the explosion, that is to say 360° F., for by the evidence it had appeared that for fire to cause the explosion of dynamite, it was necessary that a heat of 360° F. should be attained. The sole evidence upon which this theory of the explosion having been caused by pre-existing fire was rested consisted of evidence which was given to the effect that Morin, one of the persons killed by the explosion, and who had just reached the door of the building and was about to enter therein when the explosion took place, cried out "fire" upon the instant of the explosion taking place, and was killed.

Now, with the greatest deference, it appears to me that this theory of pre-existing fire, caused in the manner suggested, having been the *causa causans* of the explosion belongs as much to the region of conjecture and surmise as did the theory of spontaneous combustion, and the other theories put forward on the

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part of the plaintiff and which were rejected by the learned judge as inadmissible. Moreover, the evidence had shown that when the engineers left off working at 12 o'clock for their dinner everything was in a good and safe condition, and further assuming that a pre-existing fire caused in the manner suggested was the *causa causans* of the explosion, it was as reasonable to conclude that such fire was caused by ashes from pipes or by matches in the hands of the deceased Rivard or of some other of the employees of the defendant who were in the buildings before the engineers stopped work at 12 o'clock, or in the hands of those who remain in the building after twelve o'clock. All however is mere conjecture and surmise.

In the *Dominion Cartridge Co.* v. *Cairns* (1), this court was of opinion that for the determination of that case,

> it was sufficient to say that the evidence shews that the explosion originated at the press which was at the time being worked by Cairns, (the deceased,) and that the evidence not only does not warrant an adjudication that the explosion was not caused by any negligence on the part of Cairns, but on the contrary does warrant the fair presumption that it was caused by his negligence. *If not caused by his negligence the evidence fails to shew what did in fact cause it, and it cannot therefore be imputed to the defendants.*

This contains the very gist and substance of that decision, and, if I am not mistaken, the Privy Council refused leave to appeal from that judgment (2).

The last sentence in the above judgment appears to describe precisely the condition of the present case in this, that the actual cause of the explosion is still a matter absolutely unknown and it cannot therefore be judicially pronounced that the explosion was caused by negligence of the defendant. So likewise, and for the same reason the judgment in the present case appears to me to be in direct conflict with the unani-

(1) 28 S. C. R. 361. (2) Cout. Dig. 289.

mous judgment of this court in the *Canada Paint Co.* v. *Trainor* (1), wherein the court said:

> The utmost that the evidence warrants is that the cause of the accident still is as it was at the close of the plaintiff's case, a matter merely speculative and conjectural

and for that reason the appeal was allowed.

So likewise and for the same reason the judgment in the present case now before us in appeal appears to be directly at variance with the judgment of this court in *The Montreal Rolling Mills Co.* v. *Corcoran* (2), and the principle there enunciated as governing actions of like nature as the present, and indeed at variance with all the judgments of this court and of the courts in England in cases like the present.

In *Tooke* v. *Bergeron* (3) an appeal was allowed by this court because it was not shewn sufficiently in the evidence that the cause of the accident was directly due to the negligence of the defendant, appellant. So likewise in *Cowans* v. *Marshall* (4), which was the case of injury caused by explosion, and wherein the principles governing cases of this nature as established in the English courts, were discussed, an appeal was allowed because the evidence failed to prove the cause of the explosion. So likewise in the *Canada Coloured Cotton Mills Co. v. Kervin* (5), the latest case in this court upon the question under consideration. The case was of a person employed in a cotton factory being caught by the machinery and killed. The case of the plaintiff, the personal representative and widow of the deceased, was that the deceased was caught by the machinery at the place where in the course of his duty he was engaged, and that he had been so caught by reason of the default and neglect of the appellants in not having the place where the deceased was

(1) 28 S. C. R. 352,
(2) 26 S.C. R. 595.
(3) 27 S. C. R. 567.
(4) 28 S. C. R. 161.
(5) 29 S. C. R. 478.

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engaged in the discharge of his duty sufficiently protected. The case of the appellants was that there was no evidence of the accident having been caused at the place suggested by the plaintiff, and that the accident might have occurred at a different part of the machinery where the deceased had no business to be, and the court allowed the appeal upon the ground that the evidence failed to establish the cause of the accident and how it had occurred. This is the latest case in this court and in it the principle is unequivocally affirmed that if the actual *causa causans* of the catastrophe which causes injury to any one is unknown, judgment cannot be recovered against the defendant upon a charge of his negligence having *caused* the accident.

It is suggested that the quantity of dynamite which was in the building at the time of the explosion was greater than should have been allowed to be there, but there is nothing in the judgment asserting a contention, nor anything in the evidence to support a contention that the *quantity* of the dynamite in the buiding had, or could have had any effect in causing the explosion.

In fine, the judgment of the Superior Court appears to me to amount to this, that although the actual cause of the explosion is absolutely unknown, and although no cause can be suggested for it which rests upon anything else than conjecture and surmise, still as the explosion could not have taken place in the building if the dynamite had not been there, this is sufficient to require the court to pronounce a judgment that the explosion was caused by negligence of the defendant. If the judgment of the Superior Court be maintained by this court, it appears to me to be so in conflict with all the judgments heretofore rendered by this court in cases of a like nature with the present,

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as to cause the very greatest confusion in applying the judgments of this court to cases of a like nature in the future.

I am therefore of opinin that the appeal should be allowed with costs, and the action in the court below dismissed with costs.

Appeal dismised with costs.

Solicitors for the appellant: *Greenshields Greenshields, Laflamme & Dickson.*

Solicitor for the respondent: *L. C. Bélanger.*