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ANDREW LEZNEK (PLAINTIFF) . . . . . APPELLANT;

AND

THE CITY OF VERDUN (DEFENDANT) . . . . . RESPONDENT.

1939

\* Nov. 3.

1940

\* Feb. 26.

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

*Negligence—Municipal corporations—Repairs to public buildings done by contract—Work of cleaning windows given by sub-contractor to independent contractor—Latter injured by fall—Transom bar of window frame giving way—Liability of city under paragraph 3 of article 1055 C.C.*

The city respondent had a contract with one C. to effect certain repairs in its City Hall building, and those pertaining to painting and glazing were delegated to a sub-contractor. The appellant was engaged by

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\* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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the sub-contractor to clean the windows. While doing that work, the appellant attempted to support himself on the transom bar of a window frame and, the transom bar giving way, lost his balance and fell to the pavement below. The appellant brought an action for damages against the city. The answers of the jury contained in their verdict were to the effect that the accident had been occasioned by the common fault of the appellant and the respondent, the fault of the appellant consisting in "not taking sufficient precaution for his personal safety and using the transom bar for a purpose for which it was not intended," and the fault of the respondent being "the failure to keep the building in proper state of repair." The trial judge, confirming the verdict of the jury, awarded \$12,600 damages; but that judgment was reversed by the appellate court.

*Held* that the judgment appealed from should be affirmed. The effect of the jury's answers was to eliminate any responsibility under article 1053 C.C. and to place the respondent's liability under article 1055 (3) C.C. The respondent therefore could be held legally responsible only for failure to keep the building in proper state of repair for the purpose for which it was intended. The answer of the jury being that the appellant used the transom bar "for a purpose for which it was not intended," the jury thus negatived the application of article 1055 C.C. and the respondent cannot accordingly be held responsible: the jury could not find a legal foundation where there was no legal obligation.

Judgment of the Court of King's Bench (Q.R. 66 K.B. 324) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the trial judge, Duclos J., with a jury, and dismissing the appellant's action for damages.

The material facts of the case are as follows: On the 30th April, 1936, the city of Verdun awarded one Chartrand a general contract for the renovation of the City Hall for the sum of \$44,499. Chartrand in turn gave a sub-contract to Heroux & Robert, who, in turn, made a contract with one Raymond for the painting of the windows of the City Hall. When Raymond's work was nearing completion, he entered into a contract with the appellant for the washing of the windows. During the course of his work the appellant, with the object of washing the outside of the windows, stood on the outside sill, and to steady himself grasped the transom, that is, a central bar of the framework for the outside shutters, and as the wood at the end of the transom had become rotten through old age and exposure to the weather, it was not sufficiently strong to support his weight and, giving way, he was precipitated to the con-

crete yard below, receiving, as a result of the fall, very grave injuries, which resulted in the amputation of his leg and other injuries which totally incapacitated him. The appellant instituted the present action against the city, charging it with negligence, on the ground that the building, and particularly the window-frame, was not maintained in a proper state of repair; that the window-frame suffered from latent defects, which were completely hidden by the fresh paint; that the city failed to provide the appellant with the necessary equipment to which a safety-belt could be attached by the respondent during the course of his duties, as a result of which he was compelled to support himself by the window-frame which, had it been in a proper state of repair, would not have given way; that the city had, prior to the accident, been duly informed of the dangerous condition of the woodwork referred to, but nevertheless failed and neglected to make the necessary repairs. Upon the action being tried before a jury, the following verdict was rendered:

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1. Did the plaintiff suffer an accident on or about the 15th day of October, 1936, whilst fulfilling his duties, in cleaning the windows of the City Hall, the property of the defendant in the city of Verdun? Ans. Yes.

2. Was the said accident due to the breaking of the transom bar fixed to the window frame of the said building? Ans. Yes.

3. Was the said transom bar of the window frame the property, in the possession and under the care and control of the city of Verdun? Ans. Yes.

4. Was the said transom bar of the window-frame in a defective and dangerous condition? Ans. Yes.

4a. Did the plaintiff suffer damages as a result of the said accident and, if so, what amount? Ans. \$18,000.

5. Was the said accident due to the sole fault, imprudence, negligence and lack of care of the defendant, and, if so, then what did such fault, imprudence and lack of care consist of?

9—They are not solely responsible.

3—Solely responsible.

6. Was the said accident occasioned by the sole fault of the plaintiff? Ans. No.

7. Was the said accident occasioned by the common fault of the plaintiff and defendant, and, if in the affirmative, say in what fault?

(a) of the plaintiff consisted.

9—Not taking sufficient precautions for his personal safety, and using the transom's bar for a purpose for which it was not intended.

(b) of the defendant;

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8. If you answer question number 7 in the affirmative what amount do you reduce from the total amount given?

\$5,400; all in favour except 1 or 30%.

The trial judge, holding that the city as owner of the premises—including the window-bar—which was the immediate cause of the accident, should be held responsible for the damages caused by want of repairs under article 1055 C.C., and that the appellant's use of the same was reasonable, dismissed the respondent's motion for a judgment *non obstante veredicto*, and, maintaining the appellant's motion for judgment in accordance with the verdict, condemned the respondent to pay the sum of \$12,600. The city appealed to the appellate court and contended that the verdict, and the judgment, should not have been based on the mere fact that the window-bar gave way because it was old and decayed, but should have taken into account the purpose it was designed to serve, and that, since the appellant submitted it to a strain entirely foreign to that purpose, the accident was due to his own fault, and his action should have been dismissed.

*Louis St-Laurent K.C., M. Gameroff and S. Fenster* for the appellant.

*L. E. Beaulieu K.C. and Francis Fauteux K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—In my view the judgment of the Court of King's Bench dismissing the appellant's action was justified by the answers of the jury to the questions put to them.

It was open to the Court of King's Bench to give a judgment different from that rendered by the trial judge on the facts as found by the jury. (Art. 508-1 C.C.P.).

The appellant was not working for the city of Verdun. The city had contracted with one Chartrand to effect certain repairs in its City Hall building. Among these repairs were those pertaining to painting and glazing which had been delegated to a sub-contractor; and the appellant was engaged by the sub-contractor to clean the windows. He was an independent contractor of his own.

While doing that work the appellant attempted to support himself on the transom bar of a window frame, the

transom bar gave way, the appellant lost his balance and fell to the pavement below.

The jury was asked to determine the cause of the accident. Their answers were to the effect that the accident had been occasioned by the common fault of the appellant and the respondent and that the fault of the appellant consisted in

not taking sufficient precaution for his personal safety and using the transom bar for a purpose for which it was not intended

and that the fault of the respondent was the failure to keep the building in proper state of repair.

The effect of the jury's answers was to eliminate any responsibility under article 1053 of the Civil Code and to place the respondent's liability under article 1055 C.C., paragraph 3, which reads as follows:—

The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.

We may disregard that part of the article which deals with "an original defect in its construction," since the answer of the jury is limited to the "want of repairs."

Now the interpretation given to that article has been invariably that the want of repairs must be looked at from the viewpoint of the purpose for which the building or part of building was intended.

Le défaut d'entretien ou le vice de construction s'apprécie eu égard à la destination qu'avait reçue la partie du bâtiment à la ruine de laquelle est dû le dommage à réparer (Aubry et Rau, Fifth Ed. Tome 6, page 433).

Planiol (Vol. 6, No. 609) says that the proprietor should not be held responsible

s'il prouve que le vice ou la vétusté n'auraient pas entraîné la ruine sans l'acte fautif de la victime.

(See also Demogue, *Obligation*, vol. 5, pages 313 and 325); *Bourassa v. Grégoire* (1).

In this case, therefore, the respondent could be held legally responsible only for failure to keep the building in proper state of repair for the purpose for which it was intended.

Such is the meaning of paragraph 3 of article 1055 C.C.

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Now the answer of the jury was that the appellant used the transom bar "for a purpose for which it was not intended." The jury thus negated the application of article 1055 C.C. and the necessary result must be that the respondent, under the circumstances, could not be held legally responsible. The jury could not find a legal foundation where there was no legal obligation.

As for the other contentions of the appellant, they were disregarded and set aside by the verdict of the jury, which is strictly limited to the alleged responsibility under article 1055 C.C.

Upon the finding of the jury that the appellant used the transom bar for a purpose for which it was not intended, the respondent was relieved of any legal responsibility under that article and the Court of King's Bench was right in reversing the judgment of the trial judge and in dismissing the action. The appeal ought, therefore, to be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Seymour Fenster.*

Solicitors for the respondent: *Fauteux & Fauteux.*

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