DOMINIQUE GRIECO AND DAME JOSEPHINE ZICARDI (*Plaintiffs*) } APPELLANTS;

1961 *Nov. 6

AND

1962 Jan. 23

L'EXTERNAT CLASSIQUE STE. CROIX (*Defendant*) ..... } RESPONDENT.

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

Negligence—Torts—Liability—Summer camp—15 year old boy drowning—Water fight under supervision of camp councillors—Boy disobeying orders and swimming in deep water although only a beginner—Action against camp authorities—Whether joint liability—Civil Code, arts. 1053, 1054, 1056.

The plaintiffs' son, a boy of 15 years of age and a pupil of the defendant school, was drowned while attending, on payment of a nominal sum, a summer camp operated by the defendant. The summer camp had been advertised by a circular letter sent to the parents. The fatality occurred while the boy was participating in a "water fight" between the occupants of the two rowboats, which consisted of splashing water from one boat to another and which was supervised by two camp councillors. The boy, who was just learning to swim, jumped into the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

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water in disregard of express orders which had been given to all the boys to remain in the boats. He stayed in the water near the boat although specifically told several times to get back into the boat by one of the councillors, who was himself swimming between the two boats. The boy swam some 15 feet away from the boats and was soon in difficulty. The two councillors, one of whom was very nearsighted, went to his rescue but could not save him.

The trial judge maintained the action. The Court of Appeal, by a majority judgment, found the boy to have been 50% negligent. The dissenting judges would have affirmed the trial judge's decision. The plaintiffs appealed to this Court and the defendant school cross-appealed.

Held: (Locke J. dissenting): The appeal and the cross-appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: The relationship between the parents and the camp authorities was not contractual but was quasi-delictual; and since that relationship was not that of school masters and pupils within art. 1054 of the *Civil Code,* whereby there is a presumption of fault against the school master requiring him to prove that he could not have prevented the event which caused the harm, the liability of the camp authorities must be found in art. 1053 of the *Civil Code* and consequently must be proven. The warranty of security was neither an essential nor a necessary element of the contract.

In the present case there was common fault. The boy was negligent in disobeying orders. His actions were inexcusable for a boy of his age who, scarcely knowing how to swim, knew or should have known the danger of jumping in deep water. A child of tender years could be forgiven such stupidity and lack of judgment but not a mature adolescent. *O'Brien v. A.G. of Quebec,* [1961] S.C.R. 184, referred to.

As to the camp authorities, they were equally at fault. The councillors' failure to maintain the proper vigilance which was required by the playing of this dangerous game, was a contributory factor to this unfortunate accident.

Per Locke J., dissenting: The water fight was not a dangerous game and the boys were perfectly safe so long as they followed orders and remained in the boats, whether they could swim or not. The fatality which occurred resulted not from the game itself but from the deliberate act of the boy in disobeying the councillors. The boy was not a child of 7 or 8 years of age who might be expected to be heedless and perhaps disregard instructions, but on the contrary he was old enough to understand the risk he assumed in disregarding the requests of the councillors. In so far as the action was based in contract and alleged that the defendant school had agreed to ensure the safety of the boy, it must fail since no such obligation was assumed. In so far as the matter was based on art. 1053 of the *Civil Code,* the position was similar to the common law doctrine as stated in *Cook v. Midland Great Western Railway,* [1909] A.C. 234. In the circumstances of this case there was no liability upon the defendant school, since the direct and proximate cause of the accident was the deliberate act of the boy in disobeying.

It would be exceedingly unfortunate if those public-spirited and charitable people who organize these summer camps for the purpose of giving an outing to poor children or to children who pay merely a nominal amount, were to be held responsible for such mishaps to boys of 14 or 15 years of age who act in defiance of their instructions.

APPEAL and cross-appeal from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing in part a decision of Charbonneau J. Appeal and cross-appeal dismissed, Locke J. dissenting.

A. Villeneuve, for the plaintiffs, appellants.

L. P. de Grandpré, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

TASCHEREAU J.:—Dans le cours de l'année 1955, M. et Mme Dominique Grieco, demandeurs dans la présente cause, décidèrent d'envoyer leur fils Joseph, élève à l'Externat Classique Ste-Croix, passer trois semaines au camp de vacances de cette institution, défenderesse-intimée. Ce camp est situé au Lac Provost à St-Donat, comté de Terrebonne, et le prix fut déterminé à $10 par semaine. Il est arrivé que le 4 juillet, quelques jours après le début des vacances, le jeune Joseph se noya au Lac Lajoie, situé non loin du camp principal, où une excursion avait été organisée.

Comme conséquence de ce malheureux accident, dont leur fils fut la victime, les demandeurs-appelants ont réclamé de l'intimée la somme de $22,061. L'honorable Juge Charbonneau de la Cour supérieure a fait reposer la faute sur l'intimée, et l'a condamnée à payer la somme de $6,129.06. La Cour du banc de la reine[1], MM. les Juges Hyde et Owen dissidents, a partiellement accueilli l'appel, a conclu qu'il y avait faute contributive, a partagé la responsabilité, a modifié le jugement, et a réduit à $3,109.53 le montant de l'indemnité. MM. les Juges Hyde et Owen auraient rejeté l'appel et confirmé le jugement de la Cour supérieure.

Cette excursion au Lac Lajoie avait évidemment été organisée avec l'assentiment des autorités du camp, et elle était sous la surveillance de trois moniteurs: Jacques Gougeon, âgé de 17 ans, qui était en charge de l'expédition; Michel Côté, âgé de 19 ans, remplissait les fonctions d'assistant, et un troisième du nom de Pierre Belleau exerçait également la surveillance sur ces adolescents dont les âges variaient de 14 à 15 ans.

Le groupe, composé d'environ une douzaine d'écoliers, partit du Lac Provost dans trois chaloupes pour se rendre au Lac Lajoie qui est relié par une rivière, et situé à quelques milles de distance. Lorsque les excursionnistes furent

[1] [1961] Que. Q.B. 363.

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rendus au Lac Lajoie, ils revêtirent leurs costumes de bain, et il fut décidé, pour l'amusement des élèves, que deux chaloupes se rendraient au large, à environ 100 ou 150 pieds de la rive où il y aurait une petite bataille navale en miniature. Ce jeu consistait à se lancer de l'eau d'une chaloupe à l'autre à l'aide des rames. Dans l'une de ces chaloupes, avec quelques élèves, se trouvait le moniteur en charge Jacques Gougeon, et dans l'autre, son assistant Pierre Belleau. Le troisième groupe resta sur la plage, sous la surveillance de l'assistant Michel Côté.

Une défense formelle fut faite aux occupants des chaloupes de plonger à l'eau au cours de cet exercice, mais il est arrivé qu'en désobéissance de cet ordre, Joseph Grieco se jeta en dehors de la chaloupe où il se trouvait. Il se tint suspendu durant quelques instants à l'arrière de l'embarcation, donna quelques coups de brasse, et revint de nouveau à quelques reprises s'accrocher à la chaloupe. Durant ce temps, Belleau, le surveillant de cette embarcation, avait lui-même plongé dans le lac. Bon nageur, il prenait plaisir à aller près de l'embarcation des adversaires, où il les arrosait avec l'aide d'une canette métallique qu'il remplissait d'eau.

Il aperçut Grieco qui était à l'eau, lui ordonna à plusieurs reprises de retourner dans la chaloupe, mais apparemment, il n'insista pas davantage. L'endroit où se trouvait le jeune Grieco, à cause de la disposition des embarcations, ne pouvait être vu de Gougeon. Grieco décida cependant de nager plus loin, de s'éloigner de la chaloupe, mais évidemment, ses forces l'abandonnèrent, et il se noya malgré les efforts de Gougeon et de Belleau pour le sauver.

Les appelants basent leur réclamation sur les plans contractuel et quasi-délictuel. Il est vrai qu'à l'invitation de l'intimée, ils ont consenti à ce que leur fils, moyennant $30, séjournât trois semaines à cette colonie de vacances. Mais, je suis clairement d'accord avec la Cour du banc de la reine, qui a vu entre les appelants et l'intimée non pas une relation contractuelle mais bien quasi-délictuelle. La responsabilité de l'intimée doit reposer sur une faute prouvée ou présumée, suivant les dispositions des arts. 1053 et 1054 du *Code Civil* de la province.

Mais je crois qu'il faut nécessairement éliminer la faute présumée, car les directeurs des *colonies de vacances* ne sont pas des instituteurs au sens de l'art. 1054, sur qui pèse la présomption de la loi. C'est 1053 C.C. qui doit régir les relations des parties en cause.

L'article 1054 C.C., para. 5, dit que l'instituteur est responsable du dommage causé par ses élèves, et cette disposition de la loi crée une présomption, et pour s'en libérer, le défendeur doit prouver qu'il n'a pu empêcher le fait qui a causé le dommage. En France, malgré que l'art. 1384 C.N. soit quelque peu différent de notre art. 1054 C.C., il a tout de même été décidé que l'opinion dominante en doctrine est à l'effet que l'art. 1384, 6e alinéa, qui prévoit à la responsabilité des instituteurs, ne soit pas applicable aux *colonies de vacances,* patronages, ou autres institutions charitables, car ils n'ont pas pour mission de donner l'instruction aux enfants qu'ils reçoivent. La Cour de Cassation, dans un arrêt rendu le 15 décembre 1936 (Gazette du Palais 1937, 1.255), a décidé qu'il est donc nécessaire d'établir à la charge soit du directeur de l'œuvre, soit de ses préposés, une faute dans le sens de l'art. 1382 C.N. (notre art. 1053 C.C.), et cette faute doit avoir une relation directe de cause à effet avec l'accident. *Vide* également un arrêt de la Cour de Paris du 26 novembre 1932 (Gaz. Pal. 1933, 1.335) et Savatier «Traité de Responsabilité Civile», vol. 1, 2e éd., n° 136.

Pour donner suite à cette décision de la Cour de Cassation, *supra,* l'art. 1384 du Code français a été amendé le 5 avril 1937, et on y a ajouté le paragraphe suivant:

> En ce qui concerne les instituteurs, les fautes, imprudences ou négligences invoquées contre eux comme ayant causé le fait dommageable, devront être prouvées, conformément au droit commun, par le demandeur à l'instance.

Il s'ensuit qu'en ce qui concerne les instituteurs, la loi française n'est pas semblable à la nôtre actuellement. Mais quand l'arrêt a été rendu, il y avait similarité. Il ressort donc de la doctrine française et de la décision de la plus haute Cour de la République, que la responsabilité des colonies de vacances ne doit pas reposer sur le plan contractuel, qu'aucune présomption n'existe contre leurs directeurs, mais qu'il faut prouver la faute qu'ils auraient pu commettre, suivant l'art. 1382 C.N. ou 1053 C.C. Je m'accorde avec

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cet enseignement et cette jurisprudence, et je suis d'opinion que dans le cas qui nous occupe, la faute de l'intimée n'est pas présumée mais qu'elle doit être prouvée.

Pour souligner davantage la différence qui existe entre les instituteurs et les directeurs de colonies de vacances, on peut s'inspirer de l'art. 245 C.C. qui donne, parce qu'il est délégué par le père ou la mère, un droit de correction à ceux à qui l'éducation d'un enfant est confiée. On ne pourrait sérieusement prétendre que les directeurs de colonies de vacances peuvent exercer ce même droit de correction.

Il est certain qu'à l'origine, il y a eu entente entre les parties, une convention en vertu de laquelle les demandeurs ont confié pour trois semaines leur fils à l'intimée. Ceci ne signifie pas que cette entente comporte une obligation de sécurité de la part de l'Externat Classique, et le contrat intervenu ne fait pas naître chez l'intimée une obligation de rendre l'enfant dans l'état où il l'a reçu, et ne crée pas à sa charge une présomption de responsabilité en cas d'accident. L'obligation de sécurité n'est pas un élément essentiel ni nécessaire au contrat, et c'est au droit commun de l'art. 1053 relatif à la responsabilité quasi-délictuelle qu'il faut s'en tenir. C'est ce qu'a décidé la Cour d'Appel de Lyon le 18 juillet 1928. *Vide* également Douai, 27 novembre 1933; Trib. de Nîmes, 25 janvier 1939; Trib. de Lyon, 21 décembre 1929.

L'intimée a bien contracté l'obligation de nourrir, de loger le jeune Grieco, mais rien ne répugne à l'esprit légal, qu'au cours de l'exécution d'une obligation contractuelle, à défaut d'entente préalable, naisse une obligation quasi-délictuelle. C'est, je crois, ce qui est arrivé dans le cas qui nous occupe.

Cette action repose évidemment sur l'art. 1056 C.C. qui veut que dans tous les cas où la partie, contre qui le délit ou le quasi-délit a été commis, décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, *ses ascendants* et ses descendants ont, pendant l'année seulement à compter du décès, le droit de poursuivre celui qui en est l'auteur ou ses représentants, pour les dommages-intérêts résultant de tel décès. Ici, ce sont les parents qui ont institué l'action pour réclamer des dommages qui leur résultent du décès de leur enfant. Il ne fait pas de doute que, s'il y a faute commune, il faut tenir compte de la faute de la victime dans l'octroi des dommages aux personnes lésées par sa mort. Les ascendants ne peuvent recevoir plus que la

personne décédée aurait pu recevoir elle-même, si elle eut exercé son recours en son vivant. La faute de la victime n'est pas étrangère au montant des dommages qui peuvent être accordés. *Rainville Automobile v. Primario*[1].

Je crois qu'il y a eu faute commune dans le cas qui nous est soumis. Le jeune Grieco a commis un geste imprudent. Nouvel arrivé à ce camp, et sachant à peine nager, malgré la défense répétée de ne pas plonger à l'eau, il s'est jeté dans le lac, et a refusé d'écouter et d'obéir aux ordres qui lui ont été donnés de retourner au canot. Son acte a été spontané, et je dirai même qu'il est inexcusable de sa part. Agé de 14 ans et 11 mois, ce jeune savait ou devait savoir le danger qu'il y avait de se lancer ainsi dans l'eau profonde. On pardonnerait cette étourderie, ce manque de réflexion et de jugement, à un enfant en bas âge, mais non pas à un adolescent mûri, qui peut parfaitement réaliser le danger de poser un acte tel qu'il l'a fait. *O'Brien v. Procureur Général de la Province de Québec*[2].

Quant à l'Externat, je crois qu'il doit aussi supporter sa part de négligence et de responsabilité. Ses moniteurs, évidemment, n'ont pas fait preuve de la vigilance nécessaire dans l'occasion. Belleau, au lieu de rester dans la chaloupe avec ceux dont il avait le garde, s'en est éloigné à la nage, et n'a pas vu à ce que les instructions qu'il a données à Grieco de retourner à la chaloupe fussent suivies. Gougeon, myope, voyant à peine à dix pieds de distance, lorsqu'il a entendu les cris, a entrepris d'aider Belleau qu'il ne reconnaissait pas, au lieu de se diriger pour porter secours à Grieco qui calait dans le lac. Le jeu que l'on pratiquait était assez dangereux, et aussi fallait-il exercer la plus grande surveillance possible. Je crois que ceci n'a pas été fait et que ce manque de soin a contribué à ce malheureux accident.

Je crois donc que la Cour du banc de la reine a bien jugé lorsqu'elle a statué qu'il y a eu faute contributive dans une proportion de 50%.

L'appelant demande de rétablir le jugement du juge au procès qui a attribué la totalité de la faute à l'intimée. Mais, cette dernière a produit un contre-appel prétendant qu'elle doit être complètement exonérée, et dans l'alternative que le montant des dommages soit réduit. Je ne crois pas qu'il

[1] [1958] S.C.R. 416. [2] [1961] S.C.R. 184.

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y ait lieu d'intervenir pour changer l'évaluation de ces dommages faite par la Cour supérieure et la Cour du banc de la reine. Comme j'en viens à la conclusion qu'il y a eu faute commune, l'appel de même que le contre-appel doivent être rejetés.

Cependant, comme le succès est divisé, je crois qu'il ne devrait pas y avoir d'ordonnance quant aux frais devant cette Cour, ni sur l'appel principal ni sur le contre-appel.

LOCKE J. (*dissenting*):—Unless the liability which has been imposed upon the respondent in the present matter is either dependent upon or affected by the terms of the arrangement made between the boy's father and the respondent, the issue to be decided is one that is of importance throughout Canada. There are vacation camps similar to that operated by the respondent in the year 1955 provided during the summer months in all parts of Canada by various religious, charitable and other public-spirited organizations, for the purpose of giving children who live in cities a holiday in the woods, near lakes or rivers. In some of these a nominal amount is paid towards the upkeep of the camp, as was done in the present case by the appellant Dominique Grieco—in others the expenses are met by public subscription where the parents are unable to pay anything towards giving their children such an outing. In such camps there are invariably older boys and young men interested in such charitable work who serve as camp leaders or assistants, generally gratuitously, and who supervise the camp activities, teach the children to swim and to look after themselves in the woods. If the liability of such organizations in respect of activities of this nature is as it has been found to be in the courts of Quebec, it is in the public interest that this Court should declare and define it. If the liability is imposed by arts. 1053 and 1054 of the *Civil Code,* the liability at common law is, in my opinion, the same.

The declaration alleges that the boy Joseph Grieco, the son of the appellants, was a scholar in the college carried on by the respondent, aged 14 years and 11 months; that the pupils were invited to go to a vacation camp to be operated by the respondent at Lake Provost for which they would be required to pay $10. per week and that the boy went to the camp for three weeks, paying this amount. It was further said that the parents were advised that there

would be three priests at the camp to exercise surveillance over the children. Various allegations of negligence and "imprudence" were made on the part of the respondent and its officials, these including, *inter alia,* the fact that there were not three priests to supervise the children, that those supervising the children were inexperienced monitors and that they were not qualified in life saving and that the defendant should have seen that the children were accompanied by an adult.

Paragraph 8(*o*) of the declaration reads:

> La défenderesse était garante de la sécurité des enfants confiés à ses soins et à sa surveillance et elle a manqué à cette obligation de sécurité pour les raisons plus haut mentionnées.

The invitation referred to was given in a circular dated March 31, 1955, and referred to a previous letter which was not put in evidence but which was said to have given information of the establishment of a camp for the pupils of the college. The circular stated that the camp would provide an adventure for the students, that the boys who attended would be part of a well organized party "where there is team work, leaders, responsibilities" and that this was the great characteristic of the camp, and that the boys would take part in it and have responsibilities. The activities of the camp were described as religious, sports, including swimming and excursions, lectures and other social activities. It was said further that the camp grounds offered all kinds of possibilities for play and that the beach located nearby did not present any danger for swimmers (ce qui n'empêche pas la surveillance des moniteurs). The weekly payment of $10. covered food, lodging in tents and all of the facilities of the camp.

As described in the evidence the camp appears to have been well organized. Father Fagnan, a teacher in the college, was the director of the camp: in his temporary absence at the time of the accident Father Leonard was in charge. The "chef du camp" or camp leader was Claude Lalonde who had had a lengthy experience in that capacity in various similar camps in Quebec and who directed the camp activities. He was assisted by his brother Jacques Lalonde, a theological student aged 20 years who, similarly, had had several years' experience in such work. They were assisted

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by various older boys referred to as monitors, these including Jacques Gougeon then 17 years of age, described as a student, Michel Côté aged 19 years, a telephone technician, and by some younger boys including the witness Belleau. There is no indication that a third priest was present in the camp but nothing turns upon this.

One of the activities carried on under the direction of the two Lalondes was giving lessons in swimming and Jacques Lalonde was teaching the beginners, these including the boy Joseph Grieco. The evidence does not disclose whether the boy had any previous lessons in swimming but, as the evidence later disclosed, he was able to swim at least a short distance.

Joseph Grieco had finished his first year in classics at the college and, according to his father, was a studious boy who passed his evenings in study and who intended to qualify eventually as a doctor. The course which the boy was taking at the college included French grammar, authors and composition, Latin grammar and vocabulary, English grammar and vocabulary, ancient history, geography, mathematics, botany and zoology. The reports of the examinations upon which he had written from the Faculty of Arts of the University of Montreal for the term preceding his death were excellent, and those from the college itself were equally good. There is nothing in the evidence except his unfortunate actions at the time he lost his life which indicates that he was other than a sensible and dependable boy who might be counted upon to exercise due care for his own safety.

The excursion was discussed on the evening preceding the accident by Father Fagnan, the two Lalondes and the monitors. The plan was to go in three row boats to an adjoining lake some two miles distant. On arriving there some of the boys decided to remain on the shore with Côté, the others embarked in two of the boats which were of sturdy construction and proceeded a distance variously estimated as from 50 to 100 ft. from shore. There the boys engaged in what may be described as a water fight, throwing or splashing water on each other with the oars and with metal containers of some sort.

It was found by the learned trial judge, and his finding accepted on appeal, that before leaving the shore the boys were warned by Gougeon that they were not to get out of

the boats. The water at the place where the game was carried on was some 12 or 15 ft. deep. The game itself was described by the learned trial judge as very dangerous, an opinion which, with respect, I do not share. So long as the boys remained in the boats they were perfectly safe and the fatality which occurred did not result from the game itself but from the deliberate act of Joseph Grieco in disobeying the requests of the monitor and those of the witness Belleau, getting out of the boat and swimming in the immediate vicinity.

There were some 12 boys who engaged in this game, 6 in each of the two boats. Gougeon was in one boat and took part in the game. Joseph Grieco was in the other boat where a boy of 15, Jacques Belleau, who described himself as "second de patrouille", was present. Both Gougeon and Belleau were good swimmers. According to Belleau, the two boats were some 50 ft. from the bank and during the progress of the game he plunged in to the water and when he was seen to do this by Gougeon the latter ordered him back in to the boat. At or about this time Belleau saw young Grieco in the water at the back of their boat, in a position where the latter would not be visible to Gougeon in the other boat. Grieco was then holding on to the boat and not swimming. Belleau asked Grieco to get back into the boat and the latter said that he would not get far behind the boat and would be careful. Belleau says that he warned him several times without effect. Shortly thereafter Grieco, who apparently was able to swim a short distance, was seen some 12 or 15 ft. from the boat, obviously in difficulty. Belleau who had returned to the boat plunged in and Gougeon plunged from the other boat and went to the boy's rescue. In spite of Gougeon's best efforts he was unable to save Grieco. The latter, as is unfortunately so often the case, became panic stricken and seized Gougeon around the neck, impeding his efforts, and three times the two sank below the surface. The boys remaining in the boats were apparently unable to render any assistance and Côté, who was on the shore, did not assist saying that he was not a good enough swimmer to help in such rescue work.

Much emphasis was laid at the trial upon the fact that Gougeon was short sighted and had taken off his glasses while the water fight was in progress. Without his glasses he said that he could see the boy in the water from his boat

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and that he was in distress but that he could not identify him. This circumstance did not, however, contribute to the accident since young Grieco had entered the water at the stern of the row boat where he was obscured from view and, presumably, the time taken for his swimming from the rear of the boat to the point where he was in difficulty would be a matter of moments.

Gougeon was described by Father Fagnan as a well qualified swimmer and both Claude and Jacques Lalonde were of the same opinion, the latter saying that Gougeon was a better swimmer than he was. He had taken what were described as some Red Cross lessons in life saving but it was not contended that he had any particular qualifications in this respect, other than that of being a good swimmer. Gougeon had not only told the boys before they left the bank that they were not to go into the water but repeated this when they were at the scene where the game was carried on and Joseph Grieco's action in getting out of the boat was a deliberate refusal to follow what can only be described as a request.

With great respect for the contrary opinion of the learned trial judge and of the Court of Appeal[1], I consider that there is no liability upon the respondent in these circumstances. The cardinal error, in my opinion, has been in considering the case as if the unfortunate boy had been a child of 7 or 8 years of age who might well be expected to be heedless and perhaps to disregard the instructions given to him by the monitor. Entirely different considerations apply where, as in the present case, the boy was nearly 15 years of age who might properly be expected to understand the risk he assumed in disregarding the requests made by Gougeon and Belleau.

The boys invited to this camp were apparently carefully selected by the college authorities. Speaking of this, Father Fagnan said that:

> Le camp s'adressait aux étudiants de notre collège d'un certain âge, surtout les élèves d'éléments latins, syntaxe surtout ou de classes plus avancées, mais pas tellement vieux d'âge.

He considered that they had made a judicious selection of the boys after consulting the principals, the school masters and certain professors, to find out if the boys were of a good disposition and would adapt themselves to camp life.

[1] [1961] Que. Q.B. 363.

Claude Lalonde had been chosen by the authorities of the college and was considered to be well qualified for the position of camp leader. Gougeon had had experience at the college as the leader of a troup of scouts and was deemed suitable to act as a monitor.

The average age of the boys was 14 or 15 years and the patrol leaders were chosen from among these boys and they worked under the four monitors who averaged 17 or 18 years of age. Jacques Lalonde, speaking of his previous experience with boys of this age, said:

Q. Quelle expérience antérieure aviez-vous?

A. Tout d'abord plusieurs expériences dans les camps scouts depuis ma méthode.

Q. Ça veut dire quel âge?

A. Quinze ans, quatorze ans. Alors, ensuite j'ai été un été comme moniteur à Louisbourg dans un orphelinat, un autre été, après ma belle-lettres, moniteur à l'orphelinat d'Huberdeau. Ensuite j'ai fait des camps scouts spécialisés, le camp Radisson, spécialisé pour les assistants chefs et j'ai été aussi chef scout pendant deux ans avant d'aller au camp Esca.

Q. Au cours de vos expériences dans différents camps, avez-vous vu des enfants de quatorze à quinze ans avec certaines responsabilités à l'endroit de leurs compagnons?

A. Oui, par exemple, dans une troupe scoute les C.P. ont cet âge-là ordinairement. Les chefs de patrouilles, ils n'ont pas la responsabilité d'un moniteur, il y a tout le temps un assistant ou un chef qui est responsable.

Claude Lalonde said that it was a practice in other such camps to place boys of this age in charge of younger children as assistant to the camp leader.

It is a matter of common knowledge that boys of this age all over Canada engage in hunting and fishing expeditions, unaccompanied, and that they constantly carry fire arms. It is only in the case of children under 14 years of age that s. 88 of the *Criminal Code* requires that they obtain a permit in the prescribed form. This would appear to indicate that boys of this age are regarded by the authorities as being responsible and safely to be entrusted with weapons. These activities are carried on on marshes, lakes and rivers all over the country by such boys in canoes, row boats and other such craft, and it is perhaps needless to say, without supervision.

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In the judgment delivered by Mr. Justice Taschereau in the Court of Queen's Bench, dealing with this aspect of the matter, he said in part:

Le premier Juge a-t-il cependant raison de dire que la défenderesse doit être aussi tenue responsable parce que:

> Connaissant le peu d'expérience de cet enfant il était de toute imprudence de . . . et de lui avoir fourni l'occasion de se mettre à l'eau à un endroit trop profond pour sa capacité. . . . La désobéissance et l'étourderie d'un enfant sont choses qui étaient prévisibles et qui, en fait, étaient prévues; et c'est justement pour cela qu'on leur assigne des surveillants.

J'aurais été enclin à admettre la proposition du premier Juge s'il se fut agi d'un enfant de 7 à 8 ans parce que l'expérience démontre qu'à ce bas âge, un jeune garçon n'a pas toujours la maturité suffisante pour connaître le danger et l'éviter. Toutefois, tel n'est pas le cas d'un élève de quinze ans, qui a l'avantage de faire un cours classique et qui est, par conséquent, encore plus mûri que le sont normalement ceux de son âge.

Je crois donc que les autorités pouvaient et devaient faire confiance au jeune Grieco, qu'elles n'avaient aucune raison de croire que celui-ci se jetterait à l'eau malgré la défense qui lui en avait été faite, et que la noyade qui en a été la conséquence est le résultat d'un acte qui n'était ni probable ni prévisible.

Having said this, however, the learned judge concurred in the opinion of the majority of the Court that there was some fault on the part of the respondent, a conclusion with which I must respectfully disagree.

In so far as the action is based in contract and alleges that the respondent agreed to ensure the safety of the boy, it must fail since no such obligation was assumed by the respondent in the offer hereinbefore mentioned which, when accepted by the boy's father, presumably became the alleged contract.

In so far as the matter is based on arts. 1053 and 1054 of the *Civil Code,* in order to disclose a cause of action for *quasi* delict or negligence it is necessary that it be shown that there was a duty owing to the boy and a breach of that duty resulting in damage. As pointed out by Barclay J.A. in *Bisson v. Les Commissaires d'École de St-Georges*[1], referring to an earlier decision by Létourneau J. in *L'Oeuvre des Terrains de Jeux de Québec v. Cannon*[2], the position under art. 1053 is similar to the common law doctrine as stated by Lord Macnaghten in *Cook v. Midland Great Western Railway*[3].

[1] [1950] Que. K.B. 775 at 785. [2] (1940), 69 Que. K B. 112, 119.
[3] [1909] A.C. 229 at 234.

It is quite impossible, in my opinion, in the absence of a contract to that effect to sustain a contention that the respondent was an insurer of the safety of this boy. Unless, therefore, the respondent was under an obligation to provide monitors skilled in life saving and capable of rescuing boys who, in defiance of the request and warnings of those in charge, persisted in attempting to swim in deep water, there can, in my opinion, be no liability in the present case.

The game of splashing water from one boat to another was not in itself dangerous. The boys were perfectly safe if they followed instructions and remained in the boats, whether or not they could swim. It was not the nature of the game that caused the unfortunate accident since there is nothing in the record to show that Joseph Grieco either fell or was pushed from the boat. All the evidence indicates that his action in climbing over the stern of the boat and getting into the water was deliberate and done in such a way that Gougeon, the monitor in the other boat, would not see him. These boys were not, as small children are in relation to a school master, subject to the orders of the monitor but Gougeon had requested that they should not leave the boats, and Belleau when he saw Grieco at the stern of the boat asked him to get into it and warned him of the danger. In spite of this he persisted in the course which unhappily resulted in the loss of his life.

Thus the direct and proximate cause of the accident was the deliberate act of the boy and, accordingly, in my opinion there is no basis for the action.

We have not been referred to any decided cases in the courts of Quebec or elsewhere where liability has been found in circumstances such as exist in the present matter. Claims for damage due to lack of supervision of children by those having them over their control are more often found in actions against school authorities such as in *Camkin v. Bishop*[1], and in the recent case of *Schade v. Winnipeg School District*[2]. In the first of these cases the action was brought against a school and the head master alleging a breach of the duty of supervision imposed at common law where a boy 14½ years of age was injured by the negligent act of a playmate. The Court of Appeal was unanimous in finding that there was no liability. In *Schade's* case the duty

[1] [1941] 2 All E.R. 713.
[2] (1959), 66 Man. R. 335, 19 D.L.R. (2d) 299.

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of supervision was imposed by the *Public Schools Act* of Manitoba and the boy, 13 years of age, was injured in the course of a game of baseball upon the school property by coming in contact with a stake which was driven in the ground in the outfield, where it was plainly visible. The report of this case contains a valuable collection of the authorities by Chief Justice Williams who found that there was no liability.

Apart from the present case, it would be exceedingly unfortunate, in my view, if those public-spirited and charitable people who organize these summer camps for the purpose of giving an outing to poor children or to children who pay merely a nominal amount towards the expense of the camp, should be under any such liability as has been found in the present case. To so hold would tend to prevent the carrying on of such camps since if those operating them are to be held responsible for such mishaps to boys 14 or 15 years of age who act in defiance of their instructions, it would, I think, discourage these charitable activities, to the great detriment of a large number of children throughout Canada.

I would dismiss this appeal, allow the cross-appeal and direct that judgment be entered dismissing the action, with costs throughout if they are demanded.

Appeal and cross-appeal dismissed without costs, LOCKE J. *dissenting.*

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