1950
*Oct. 30, 31
*Nov. 1
1951
*Feb. 26

THE T. EATON CO. LIMITED OF CANADA (DEFENDANT) ..... APPELLANT;

AND

DAME LENA MOORE (PLAINTIFF) .....RESPONDENT.

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

Damage—Negligence—Bottle of liquid dropped on floor of store by customer—Second customer slipped and fell—Fall of bottle witnessed by clerk who advised caretaker but did not warn customers—Whether store liable—Whether warning within functions of clerk—Art. 1053, 1054 C.C.

The respondent, a customer in appellant's large departmental store in Montreal, fell on the floor after slipping on a patch of liquid substance which had been in a bottle accidentally dropped by another customer. The fall of the bottle was witnessed by a sales clerk in charge of the clock counter and engaged at the time in serving a client. The clerk immediately telephoned the caretaking department and then resumed his sale. Within three minutes of the phone call a caretaker was on the spot, but in the interval the accident had happened. The dismissal of the action by the trial judge was reversed by a majority in the Court of Appeal.

Held (Estey and Cartwright JJ. dissenting), that it was not the clerk's duty in the performance of the work for which he was employed to do more than what he did, and therefore the store was not liable under 1054 of the *Civil Code*. (*Curley* v. *Latreille* and *Moreau* v. *Labelle* applied).

Held also, (Estey and Cartwright JJ. dissenting), that no positive fault could be attributed to the store since it had fully provided for an elaborate and efficacious system to meet such emergencies.

Per Estey and Cartwright JJ. (dissenting): It was the clerk's duty during the short interval that he knew must elapse before the arrival of the caretaker to warn customers of the danger actually known to him and his failure to do so rendered the store responsible; but if, whether by reason of express instructions or the lack of instructions, this duty did not rest on the clerk, then the store was directly liable for its negligence in failing to provide for the warning of its customers during such interval.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), maintaining,

*PRESENT: Rinfret C.J. and Taschereau, Estey, Locke and Cartwright JJ.

(1) Q.R. [1949] K.B. 561.

McDougall J.A. dissenting, the action of the customer of a large departmental store who injured herself when she fell on the floor of the store.

W. B. Scott K.C. and P. M. Laing for the appellant.

F. P. Brais K.C. and A. J. Campbell K.C. for the respondent.

THE CHIEF JUSTICE:—The appellant owns and operates a large departmental store in Montreal. The building consists of ten floors with a total floor area open to the public of 646,380 square feet. In the operation of the store the appellant employs between 2,500 and 3,000 persons.

At about 11.00 a.m. on the morning of the 16th November, 1942, a store count disclosed that there were 1,283 members of the public in the premises. The number would be slightly larger around noon when the accident hereinafter mentioned happened.

Amongst the customers was the respondent, a nurse employed by the Department of Veterans Affairs, aged 56. She had come to the store to make some purchases and was walking on the ground floor, to leave by the St. Catherine and University Streets exit. She slipped and fell, thereby incurring injuries for which she claims compensation from the appellant. The cause of her fall was that she slipped on a patch of liquid substance of sticky appearance about six inches in diameter which was on the floor some twenty feet from the exit. The respondent described it as lotion and said it was very slippery. The presence of this substance was explained by the fact that half a minute, or a minute before the respondent fell, an unidentified woman, evidently a customer, had dropped a small bottle which broke on hitting the floor. The customer "merely turned around and looked at it and then scampered off on her way."

By pure chance the dropping of this bottle was noticed by Frank Bertrand, a sales clerk employed in the clock department of the appellant, and who was at the time actively engaged with a customer in selling clocks at his counter. He immediately picked up the house telephone and advised the caretaking department. The caretaking

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department signalled to O'Doherty, one of its staff, who was on the ground floor, by means of its system of signal lights and gongs installed throughout the store. He at once called the caretaking department by the house telephone and was instructed to go to the University and St. Catherine Streets exit. He took one minute to get there, arriving in about three minutes after Bertrand had put in his telephone call, but in the interval the accident had happened.

The respondent said both feet slipped from under her and she came down on the floor—no doubt heavily, because she was of unusual build, being five feet four inches in height and 220 pounds in weight.

Following the accident the appellant provided first aid and other treatment for the respondent. While she did not have to be hospitalized she was, however, unable to resume her duties and she was superannuated at the age of 57. This resulted in the reduction of her retirement pension to $747.50 per annum instead of the larger sum she would have received had she been able to continue her work to retirement age.

The learned trial Judge (Loranger J.) dismissed the action. The Court of King's Bench (Appeal Side) (1) reversed that judgment and assessed the total damages at $10,000. Counsel for the appellant stated that he raised no objection to this finding as to quantum and that the appeal was solely directed against the finding of the majority of the Court of King's Bench (Appeal Side) that the appellant was responsible for this unfortunate accident. Errol McDougall J. dissented in the Court of King's Bench (Appeal Side).

As stated by this Court in *Canadian National Railways Co.* v. *Lepage* (2):

> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

The learned trial judge found as a fact that

> Il n'y a aucune preuve de faute par omission, négligence ou incurie de la part de la défenderesse.

Moreover, even if the duty to act is shown, that duty exists only if the accident is foreseeable and, in turn, it must be foreseeable by a man of ordinary and reasonable

(1) Q.R. [1949] K.B. 561. (2) [1927] S.C.R. 575 at 578.

prudence. (*Ouellet* v. *Cloutier* (1); *L'Oeuvre des Terrains de Jeux de Québec* v. *Cannon* (2) per Rivard J.). It is absolutely certain that, upon the record, no positive fault resulting from negligence, or lack of foresight, could be imputed to the appellant. In the Court of King's Bench it was thought the latter could be held responsible on the ground of what they called *abstention fautive* by one judge, or *connaissance retardée* by another judge. But, if there had been omission, which would make the appellant liable, it can only be said that Bertrand did not desist from the selling of clocks, in which he was engaged at the time, and go out into the aisle and prevent the respondent from slipping on the substance on the floor. As for the *connaissance retardée* of the employer, it is proven, as found by the learned trial judge, that immediately the bottle of liquid fell upon the floor a signal was given to the caretaking department to come and take care of it, and the employees of that department answered the signal within a few moments, but the accident had already happened. As a matter of fact, upon the evidence, the respondent fell on the liquid any where between one-half a minute, or a minute, after the bottle had been dropped.

The learned trial judge treated the mishap as a pure accident resulting from the act of a third party, over whom the appellant had no control whatever. There were several obstacles in the way of the success of the respondent. First, the company itself cannot be saddled with any neglect in the matter. It had provided a complete and elaborate system of cleaning the floors under just some such circumstance.

Secondly, it had to be shown that Bertrand, upon whose alleged negligence the respondent relied for the maintenance of her claim, if he had himself attended to the cleaning of the patch of oil, would have been acting "in the performance of the work for which he was employed" (C.C., Article 1054). He did not belong to the caretaking department, whose duty it was to clean the floor. He was the clerk in charge of the clock counter. It was no part of his

(1) [1947] S.C.R. 521 at 527. (2) Q.R. [1940] 69 K.B. 112 at 114.

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work to attend to the cleaning up of this small patch of liquid on the floor, and it was so found by the learned trial judge, who stated:

Il n'avait rien à faire avec l'entretien des planchers.

In this case the learned trial judge rightly held that if any negligence can be attributed to Bertrand, at all events it was not in the performance of his work for the appellant.

Thirdly, as pointed out by McDougall J.:—

The time elapsed between the breaking of the bottle of lotion on the floor and the accident was so short as to militate strongly against the theory of negligence with which appellant was charged.

* * *

The two acts, fall and break of bottle and the fall of the respondent, were so closely related in time as to extrude or negative the factor of negligence . . .

* * *

No such immediate apprehension of danger could dictate any greater precautions at that time.

The patch of liquid on the floor was described as being about the diameter of one of the witnesses hands. It was not inherently dangerous; it did not constitute a concealed danger, but was visible and did not necessarily indicate the imminence or probability of an accident. Even if it had been Bertrand's duty to provide against the eventuality, such eventuality was unforeseeable.

Again quoting McDougall J.:—

It is, in my view, unreasonable to contend that the precaution must be instantaneous with the event causative of the accident. Time must elapse to transform what is normally a pure accident into actionable fault.

Reduced to its simplest form and in its present connotation, the test of negligence is not whether greater precautions might have been taken and the loss avoided, but whether ordinary precautions, those usual in the circumstances, were taken.

Here, the finding of fact in the Superior Court on that point was that the accident happened suddenly and almost at the same time as it was discovered that the liquid had spilled on the floor, and the orders to clean it up were given without delay.

In order to come to the conclusion that the appellant could be held responsible in the premises the learned judges of the Court of King's Bench (Appeal Side) referred to extracts from the works of commentators of the Civil Code. One of them puts it on what he calls *devoir moral,* thus

apparently assimilating the moral duty to the legal duty; but, of course, that is not the law of the Province of Quebec. Another writer states that the responsibility must be placed on those who can more easily sustain the loss, and again that is not the law of the Province of Quebec.

The proposition that the knowledge of imminence of danger might constitute a fault entailing responsibility if one neglects, or abstains, from acting, could hold only if there was the time and the means of preventing it, but, in this case, that is precisely what cannot be sustained on the facts as they were held, upon ample evidence, by the learned trial judge.

In addition to what is said above on that point, there are two considerations which must be taken into account. I cannot agree with the proposition that Bertrand, consistently with his duties towards his employer, should have immediately proceeded to the spot where the liquid had been spilt on the floor and leave on the counter, within the reach of a customer whom he did not know, valuable articles which he was then showing, with the risk that, during his absence, these articles might disappear. It was, in my mind, his paramount duty to remain, or at least, before doing anything else, to replace the articles on the shelves. In such a case, the very time required for doing so would have prevented him from arriving soon enough to bring any remedy in the circumstances.

Moreover, even the man in charge of the cleaning department, when he reached the so-called dangerous spot, found that he was not in a position to immediately make the cleaning. He had to provide for it temporarily by placing a piece of cardboard on the oily substance. It is not shown that Bertrand knew of the existence of this cardboard in the vicinity of the store where the cleaner took it.

The crux of the matter is that, in a given case, nobody can be found negligent for having failed to foresee absolutely every possible kind of happening. The law does not require more of any man than that he should have acted in a reasonable way.

As to the attempt to hold the company itself responsible, it was said that, if it cannot be attributed to anything

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that formed part of Bertrand's duty and the employer cannot be found liable on that account, there was failure on the part of the appellant to have instructed Bertrand, and presumably all other employees in the store, that when they saw something of this nature drop, which might be dangerous, they were to take immediate steps to protect customers from injury, which, in effect, is a contention that there was a negligent system. We have not in the Province of Quebec the distinction between the duty of the occupier towards an invitee and towards a licensee as illustrated by Willes, J. in *Indermaur* v. *Dames* (1), and where the latter judge says that the occupier is expected to "use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

It is also expressed in slightly different language by Lord Hailsham, L.C., in *Addie* v. *Dumbreck* (2), that to those "who are present by the invitation of the occupier . . .", the latter "has the duty of taking reasonable care that the premises are safe," which is resumed in Salmond on Torts, 10th Ed., at p. 280, that the duty is usually stated as "to take care to make the premises reasonably safe."

That statement, however, to my mind, expresses the utmost duty which an occupier owes to a customer under the law of the Province of Quebec. Nothing requires him to do anything beyond that; and he could not be held negligent for having failed to provide against any eventuality however impossible to imagine.

One can but speculate how far the suggested duty of the occupier is to be carried. Can it be held that the operator of a department or chain store should be required to instruct all of his employees that, if they see someone drop something over which customers may stumble or upon which they may slip, they are at once to take steps to warn people of the danger—and, in the present case, not a certain danger? And, if so, does it apply to clerks working at nearby counters, truckers employed in bringing goods into the store and to all employees who may see the occurrence or its results?

(1) (1866) L.R. 1 C.P. 274. (2) [1929] A.C. 358 at 364.

The evidence is clear that the liquid was colourless, so that it would have been impossible for Bertrand to know that the contents were oily; though he undoubtedly learned that when he took up the injured woman. If the liquid was not oily, it might be no more dangerous than if water was present on the floor. Are the employees to take prompt steps to protect customers, even though what has been dropped does not appear to them to be dangerous, or are they to be required to immediately take steps to prevent anybody stumbling or falling upon anything that has been dropped?

The trial judge did not consider that there was any negligence on the part of the Eaton Company, so that obviously he considered the precautions they had taken, by maintaining the caretaking department and the system of signalling when there was a mishap, reasonable precautions by the employer. I cannot bring myself to think that this finding of fact should be disturbed and that the contrary view should prevail. The extent of the duty of the employer should not be carried further.

In the premises, I wish to express my complete agreement with what was stated by McDougall J. in the extracts which I have quoted above. Whichever view is taken of the special circumstances in which the accident happened, I would say that the element of time is here decisive against the admission of the Respondent's claim against the Appellant.

In the case of *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), both Duff J. (as he then was) and Mignault J. drew attention to the fact that the doctrine of the moral duty or that the negligence should fall upon the proprietor because he enjoys the profits arising from his enterprise are considerations which may have found favour among the legal writers in France, but they stated they did not think that considerations derived from this mode of reasoning can legitimately be applied in controlling the interpretation or the application of the text under discussion (to wit C.C. Article 1054).

For the several reasons enumerated; because no positive fault can be attributed to the company itself; because it

(1) [1923] S.C.R. 414 at 417, 427.

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had fully provided for an elaborate and sufficient system to meet such emergencies; because it was not Bertrand's duty in the performance of the work for which he was employed to look after the cleaning of the floor (*Moreau* v. *Labelle* (1); *Curley* v. *Latreille* (2); because even assuming that Bertrand had a moral duty, which is not admitted, such duty cannot be assimilated to legal duty towards the respondent; because the time elapsed between the breaking of the bottle and the accident was so short that, even granting the existence of a legal duty, there cannot be negligence on Bertrand's part; because the theory of the modern French writers does not form part of the law of the Province of Quebec (*The Governor, etc.* v. *Vaillancourt supra*), the appeal should be allowed with costs both here and in the Court of King's Bench (Appeal Side), and the judgment of the Superior Court restored.

The judgment of Taschereau and Locke JJ. was delivered by Taschereau, J.:—Pour réussir dans la présente action, la demanderesse-intimée devait nécessairement établir qu'il appartenait à l'employé Bertrand de la protéger contre l'accident dont elle a été la victime, ou alternativement, que l'appelante n'a pas pris les précautions nécessaires pour empêcher les dommages qu'elle a subis.

Bertrand, un commis vendeur au rayon des horloges, près de l'endroit où l'accident est survenu, a bien vu une bouteille, qu'une tierce personne venait d'acheter, tomber sur le plancher du magasin à rayons dont l'appelante est propriétaire, et réalisant qu'un accident pouvait arriver, avertit aussitôt les autorités, et demanda qu'on envoie quelqu'un pour enlever ce liquide huileux. Environ une minute plus tard, l'intimée qui se dirigeait vers la sortie de la rue Université, glissa sur cette flaque d'huile et fut sérieusement blessée. Deux minutes après, un nettoyeur préposé à cette fin couvrit cette flaque d'huile d'un carton placé derrière le comptoir voisin, et s'en retourna chercher les instruments nécessaires pour nettoyer le plancher.

C'est la prétention de l'intimée que Bertrand a commis une faute d'omission, qui engage la responsabilité de son employeur, en négligeant d'alerter les clients du danger que présentait cette flaque d'huile glissante.

(1) [1933] S.C.R. 201. (2) (1920) 60 Can. S.C.R. 131.

Il est certain que la faute d'omission peut engendrer la responsabilité, mais il faut que la négligence d'agir corresponde à un devoir d'agir (*C.N.R.* v. *Lepage* (1)). Ce devoir cependant doit être basé sur une obligation légale, et ne doit pas reposer uniquement sur l'altruisme ou le dévouement, que souvent la charité commande envers le prochain. (Colin et Capitant, Droit Civil, Français, 10ème Ed., p. 221). Négliger de prendre les précautions requises que prendrait un homme prudent, qui a l'obligation d'agir dans des conditions identiques, constituerait cette faute d'omission. Mais pour que le maître soit responsable de l'omission de son serviteur, il y a deux conditions impératives qui sont requises. Il faut que le préposé ait commis une faute, et il faut qu'il l'ait commise dans l'exercice de ses fonctions. (Code Civil, 1054) (Colin et Capitant, *supra,* page 257).

La première de ces propositions est élémentaire. Le délit ou le quasi-délit du préposé est évidemment une condition préalable à la responsabilité que la loi impose au maître, et comme conséquence de ce principe, il résulte que le maître ou le commettant, a un recours contre son employé coupable qui est l'auteur du fait dommageable, et qu'évidemment, la victime elle-même, peut réclamer de l'employé les dommages qu'elle a subis. (Colin et Capitant, *supra,* à la page 257). Comme le disent Planiol et Ripert, (Droit Civil, "Les Obligations" Vol. 1, page 883, No. 652).

> Pour que le commettant soit responsable, il faut non seulement que l'acte soit illicite mais encore que le *préposé* soit responsable *personnellement* du dommage qu'il cause.

La responsabilité de l'employé est délictuelle, celle du maître repose sur la loi, deux sources différentes d'obligations (C.C. 983).

En second lieu, il faut que l'employé ait commis le fait dommageable *dans l'exercice des fonctions* auxquelles il est employé. Comme le dit Mazaud, Vol. 1, "Responsabilité Civile," 4ème Ed., à la page 835:

> Si l'on consulte les travaux préparatoires du Code Civil, l'hésitation n'est pas permise; Dès que le dommage a été causé non plus "dans l'exercice des fonctions" mais seulement "à l'occasion des fonctions," le commettant ne doit pas être déclaré responsable.

(1) [1927] S.C.R. 578.

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On ne peut en effet faire reposer la responsabilité du maître sur le fait que l'omission ou l'acte fautif se serait produit dans le temps et le lieu du service. Il faut nécessairement un rapport entre la faute et la fonction du service, un lien qui rattache la faute à l'exécution du mandat confié au préposé. (Mazaud, Vol. 1, 4ème Ed., page 839).

Le commettant répond donc des actes fautifs que le préposé a commis pour atteindre le but de ses fonctions, même si les actes sont le fruit d'un abus des fonctions pour lesquelles il est employé. (Savatier, "Traité de la Responsabilité Civile," Vol. 1, page 427) (Colin et Capitant, Vol. 2, 10ème Ed., page 258). Dans le cas contraire, le commettant n'encourra aucune responsabilité. C'est la doctrine acceptée non seulement par les auteurs, mais également par cette Cour dans *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), où Sir Lyman Duff dit ce qui suit:

> *Le fait dommageable* must be something done in the execution of the servant's functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions,* then by the plain words of the text responsibility rests upon the employer. *Whether that is so or not in a particular case must, I think, always be in substance a question of fact,* and although in cases lying near the borderline decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule.

De plus, dans *Curley* v. *Latreille* (2), M. le Juge Mignault à la page 175, s'exprime dans les termes suivants:

> Etant donné que l'interprétation stricte s'impose en cette matière, je ne puis me convaincre que le texte de notre article nous autorise à accueillir toutes les solutions que je viens d'indiquer. Ainsi, dans la province de Québec, le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés,* ou, pour citer la version anglaise de l'article 1054 C.C., *in the performance of the work for which they are employed.* Ceci me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions, si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions. Il peut souvent être difficile de déterminer si le fait dommageable est accompli dans l'exécution des fonctions ou seulement à leur occasion, mais s'il appert réellement que ce fait n'a pas été accompli dans l'exécution des fonctions du domestique ou ouvrier, nous nous trouvons en dehors de notre texte.

(1) [1923] S.C.R. 416. (2) (1920) 60 Can. S.C.R. 131.

Enfin, dans *Moreau* v. *Labelle* (1), M. le Juge Rinfret dit ce qui suit:

> Ils font sentir d'une manière très nette l'erreur qui assimilerait au délit commis dans *l'exécution des fonctions du préposé* le délit commis *pendant le temps* de ces fonctions.

Bertrand, par faute, négligence ou inhabileté, a-t-il commis un quasi-délit qui le rendrait personnellement responsable sous l'empire de l'article 1053 C.C., et qui en conséquence, obligerait l'appelante en vertu de 1054 C.C.? S'il a commis une faute d'omission en négligeant de prévenir l'intimée d'un danger imminent, était-ce au cours de l'exercice des fonctions auxquelles il était employé?

Avec déférence, je dois répondre dans la négative à ces deux questions. Bertrand, préposé au comptoir de la vente des horloges, n'avait pas l'obligation légale d'avertir l'intimée qu'une tierce personne, en quittant le magasin, avait échappé cette bouteille d'huile graisseuse. L'exécution du mandat qui lui avait été confié n'avait aucune relation avec la sécurité des clients, et je ne vois pas comment on pourrait lui imputer une faute par suite d'une omission, alors que ni la loi ni les termes de son emploi ne l'obligeaient à agir. Je ne doute pas du sort qui aurait été reservé à une action intentée contre Bertrand, ou aux autres vendeurs, témoins de l'accident, pour leur réclamer personnellement des dommages à cause de cette prétendue omission. C'est avec raison, évidemment, qu'ils auraient répondu que cette action ne repose sur aucun fondement juridique, vu qu'ils n'avaient aucun devoir vis-à-vis l'intimée. Et pourtant, cette responsabilité quasi-délictuelle de Bertrand est essentielle à la responsabilité légale de l'appelante. Ce serait exprimer des vues contraires à celles des auteurs et de la jurisprudence que j'ai cités, que d'étendre la portée de l'article 1054, et de lui faire dire que "l'exécution des fonctions" de Bertrand, comprend dans le cas qui nous occupe, non seulement la vente des horloges, mais également la surveillance de la sécurité des clients.

L'intimée a soumis comme alternative que si Bertrand n'a pas commis de faute, la responsabilité de l'appelante est tout de même engagée comme résultat de sa négligence à prendre les soins raisonnables et les mesures nécessaires pour prévenir les accidents de ce genre.

(1) [1933] S.C.R. 201 at 210.

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La preuve a révélé que l'appelante a organisé dans son immeuble un système élaboré de nettoyage pour prévoir les éventualités telles que celle qui a été la cause de l'accident dans le présent litige. Ce système a été reconnu comme efficace par le juge au procès, et sur ce point, je m'accorde avec lui. Mais, évidemment, il est impossible de prévoir tous les accidents et de les prévenir. Il y aura toujours des accidents dommageables, qui cependant n'engendreront la responsabilité de personne. La loi demande que le propriétaire d'un immeuble agisse avec une prudence raisonnable. Ainsi, dans *L'œuvre des Terrains de Jeux de Québec* v. *Cannon* (1), M. le Juge Rivard s'exprime de la façon suivante à la page 114:

> Le plus sûr critère de la faute, dans des conditions données, c'est le défaut de cette prudence et de cette attention moyennes qui marquent la conduite d'un bon père de famille; en d'autres termes, c'est l'absence des soins ordinaires qu'un homme diligent devrait fournir dans les mêmes conditions. Or, cette somme de soins varie suivant les circonstances, toujours diverses, de temps, de lieux et de personnes.

Dans *Massé* v. *Gilbert* (2), M. le Juge Létourneau dit ce qui suit:

> De sorte que tout ce que la Cour doit se demander, c'est si l'intimé Gilbert, en cette occasion et eu égard à la situation des lieux, a bien pris le soin et les précautions qu'eut pris un propriétaire prudent et diligent; si oui, l'on peut dire qu'un propriétaire prudent et diligent n'eut rien fait de plus, rien fait de mieux pour éviter ce qui est arrivé, l'intimé doit être exonéré en appel comme il l'a été en première instance; . . .

Mais, ajoute l'intimée, même si le service de nettoyage était efficace et prompt, l'appelante aurait dû donner à tous ses employés les instructions qui s'imposaient pour prévenir tout accident de ce genre. Comme dans le cas de service de nettoyage défectueux, la responsabilité de l'appelante serait fondée alors, non sur l'article 1054 C.C., mais bien sur l'article 1053 C.C. Il s'agirait alors clairement d'un cas où la faute de l'appelante doit nécessairement être prouvée. La théorie du risque est inconnue dans la province de Québec, et la faute sous l'article 1053, est toujours la base de la responsabilité.

Comme je viens de le signaler, il y avait un service d'alarme perfectionné, permettant d'avertir les préposés aux divers services, pour qu'ils répondent à l'appel le plus rapidement possible. Au moment de l'accident, c'est

(1) Q.R. [1940] 69 K.B. 112. (2) Q.R. [1942] K.B. 181.

au moyen de ce système que le signal a été donné, et qu'un employé s'est rendu sur les lieux en quelques minutes pour faire disparaître la cause de tout danger. L'intimée cependant exige davantage et prétend qu'en outre, les 2,500 employés de l'appelante préposés au service des comptoirs, auraient dû également être chargés de veiller à la sécurité des clients, et qu'à leurs fonctions normales auraient dû s'ajouter celles, déjà confiées par la direction de la maison, à un groupe d'employés pourtant jugés compétents et efficaces par le juge de première instance.

Le service existant n'était peut-être pas le meilleur, et il ne fait pas de doute qu'il n'était pas suffisant pour prévenir tous les accidents. Le système idéal proposé par l'intimée aurait peut-être été plus efficace, mais l'appelante aurait été tenue de répondre à des exigences que la loi ne requiert pas. On ne peut demander en effet à l'appelante d'assigner tous ses employés à la sécurité des clients, quand dans une entreprise comme la sienne, les tâches doivent être nécessairement réparties. Les principes qui régissent cette cause doivent, il me semble, être ceux auxquels est assujettie la responsabilité des municipalités, dans la province de Québec, qui ont l'obligation d'entretenir leurs trottoirs durant la saison d'hiver. Dans ce dernier cas, comme dans celui qui nous occupe, demander plus que la prudence et la diligence raisonnables, plus que le soin vigilant d'un bon père de famille, serait exiger un degré d'excellence, un niveau ou un standard élevé de perfection bien au-dessus de la norme reconnue de la responsabilité juridique, et qui, comme cette Cour l'a dit dans *Ouellet* v. *Cloutier* (1), rendraient impossible toute activité pratique.

Je ne puis me convaincre que la Compagnie appelante n'a pas fait preuve de la prudence et de la diligence requises, et il n'a été nullement démontré que son service de nettoyage était défectueux, ou qu'il y ait eu des lenteurs à répondre à l'appel téléphonique de Bertrand.

Pour toutes ces raisons, je suis d'avis que l'appel doit être maintenu et l'action de la demanderesse-intimée rejetée avec dépens de toutes les cours.

ESTEY J. (dissenting):—The respondent's claim for damages suffered when she fell while a customer in the

(1) [1947] S.C.R. 521 at 526.

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appellant's store was dismissed at trial. Upon appeal, the Court of King's Bench (1) reversed this dismissal (Mr. Justice McDougall dissenting) and directed judgment in her favour for $10,000.

The respondent, a nurse 56 years of age, on the morning of November 16, 1942, was a customer at the appellant's department store in the City of Montreal. At about 11:45 she approached the exit to University Street and, because of the presence on the main floor of a gooey, sticky liquid, she slipped and fell, sustaining the injuries for which damages are here claimed. The area covered by the liquid was about six inches in diameter upon a floor of Italian marble called travertine. Many customers were coming and going along that point on the main floor. The presence of this liquid was due to a handbag, carried by a woman also leaving the department store, coming open and a bottle of lotion dropping therefrom and breaking upon the floor. Bertrand, a clerk in charge of the clock counter about 2½ yards from where the bottle fell, was serving a customer when he observed the bottle break and the lotion spread upon the floor. The lotion appeared to him to be a gooey, sticky substance. The respondent herself described it as "very slippery," "white, transparent" and "the same colour . . . as the floor." The woman carrying the handbag did not stop and Bertrand, apprehensive lest some person might fall because of the presence of the liquid, telephoned the caretaking department to come and "pick it up." The latter department, through its signal system, communicated with O'Doherty, an employee of that department, who was then near the rear of the main floor, and he arrived at the spot, as Bertrand estimated, in about three minutes from the time he telephoned. O'Doherty, as he had not been given any particulars, came "to investigate the trouble" and "immediately put a few cartons on the spot," which he obtained at Bertrand's clock section, just as a "precaution . . . because of the possibility of slipping." Bertrand himself continued waiting upon his customer and within about a half to a minute from the time he telephoned the respondent slipped and fell.

The appellant's is a large department store in which a count made at 11:00 o'clock upon the morning in question

(1) Q.R. [1949] K.B. 561.

disclosed 1,283 customers upon the premises. Forty-five minutes later the respondent, one of many customers passing to and from the busy University Street entrance of that store, as already stated, slipped and fell. In these circumstances the respondent did not see the liquid upon the floor and it is not suggested in this appeal that she should have. No fault is, therefore, attributed to the respondent.

Art. 1053 of the Quebec Civil Code reads:

Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté.	Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

The duty under art. 1053 upon those who invite others to come upon their premises for business purposes has been discussed in *The Quebec Liquor Commission* v. *Moore* (1); *C.N.R.* v. *Lepage* (2); and, among others in the Quebec courts, *L'Œuvre des Terrains de Jeux de Québec* v. *Cannon ès qual* (3); *Caza* v. *Paroissiaux et al* (4); *Desjardins* v. *The Gatineau Power Company* (5); *Brownstein* v. *Barnett* (6).

Sir Lyman Duff (later C.J.), in *The Quebec Liquor Commission* v. *Moore supra,* at p. 548 stated:

> I should be sorry indeed to think that the scope of Art. 1053 C.C. could be so restricted as to exclude the responsibility of occupiers of business premises for failure to give warning of traps known by them to exist, exposing persons invited by them to enter the premises for the purposes of their business to injury in consequence thereof.

and further at p. 549:

> I have the greatest difficulty in assuming that Art. 1053 C.C. does not contemplate as an act of negligence involving fault an invitation to customers by a shopkeeper who is aware that on entering his shop they will, if not warned, be exposed to serious risk of grave injury, without a suspicion of the existence of it, and who presents this invitation without any warning as to the existence of the risk. I cannot but think that to state the proposition is sufficient.

That the appellant corporation under art. 1053, as interpreted by the foregoing authorities, owed a duty to take reasonable care that the respondent should not be exposed to danger or peril known to the appellant, the

(1) [1924] S.C.R. 540.
(2) [1927] S.C.R. 575.
(3) Q.R. [1940] 69 K.B. 112.
(4) (1935) 41 R. de J. 70.
(5) Q.R. (1936) 74 S.C. 205.
(6) Q.R. (1939) 77 S.C. 23.

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existence of which, in the exercise of reasonable care, would not be known to her, has been accepted by all of the learned judges in the courts below and the appellant, upon the hearing of this appeal, has not contended otherwise. There has been a difference of opinion in the application of this principle to the circumstances here present.

That the lotion upon the floor, where so many people were walking, constituted such a peril as would, under the authorities, be classified as a trap, is not seriously disputed. Bertrand himself realized immediately the possibility of someone slipping thereon and telephoned the caretaking department, as he explained, to prevent such an accident as suffered by the respondent. Carmichael, the manager of the caretaking department, said he would have put sawdust upon it, of which there was a quantity "in containers at convenient locations." He had himself under like "circumstances placed a piece of furniture over things like that." O'Doherty, who arrived to clean it up, said it was "grease or oil or something on the floor" and he "immediately put a few cartons on the spot" which he obtained from Bertrand's clock section.

The presence of this lotion upon the floor in that crowded portion of the store made the premises at that point unsafe and immediately the appellant became aware thereof its duty under art. 1053 required that it take reasonable steps to protect its customers from possible injury. The appellant contends that it knew thereof only when Carmichael's department received the telephone call from Bertrand and as a consequence it acted promptly and effectively, thereby performing the duty imposed upon it by law. The respondent, on the other hand, contends that it was, in the circumstances, a part of Bertrand's duty to take reasonable steps to protect customers and, therefore, his knowledge was that of the appellant. It is not suggested that Bertrand was under a duty to remove the lotion, but that it was his duty to take steps to warn the customers by some reasonable measure such as covering the spot to prevent their stepping thereon.

Art. 1054, in part, provides:

Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés.	Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

The knowledge which Bertrand acquired in the performance of the work for which he was employed would be imputed to and become the knowledge of the employer. It is, therefore, important to ascertain if Bertrand was required, in the performance of the work for which he was employed, to take reasonable steps to protect the customers from injury.

The appellant contends that Bertrand was a clock salesman and he had no duty, in the circumstances, to protect customers or, if he did have a duty, he discharged that when he telephoned the caretaking department. The evidence does establish that as a salesman he was in charge of the clock counter, but it does not specify his duties as such. Whatever instructions he may have been given at the time of or throughout his employment are not disclosed in the record except that it is conceded he was given no instructions with respect to any duty he owed toward customers. In fact, he stated that upon this occasion his conduct was

> Just based on common sense. I took the initiative. I didn't want an accident to happen. I just 'phoned the caretaker to clean it.

The absence of instruction to the employee is not conclusive. In *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), the master was held liable, though no relevant instructions had been given by the employer. In that case Sir Lyman Duff (later C.J.), referring to art. 1054, stated at p. 416:

> If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within l'exécution des fonctions, then by the plain words of the text responsibility rests upon the employer.

It is impossible, in any practical sense, for an employer in the position of the appellant to provide instructions to its sales staff that would cover every conceivable circum-

(1) [1923] S.C.R. 414.

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stance. It has, therefore, been recognized that there are well known attributes of certain positions, such as that of salesman, which both the employers and the public have a right to expect the incumbent will perform. It is, in this regard, the duty of the salesman to be courteous and concerned for the comfort, convenience and safety of the customers upon the premises. An owner selling clocks as Bertrand was would be at fault within the meaning of art. 1053 if he did not take reasonable steps to prevent a customer from sitting upon a chair, stepping upon a trap door or a portion of the floor he knew to be unsafe. Bertrand, as a salesman employed by the appellant-owner, was under the same duty. It was one of the attributes of that position. In fact the evidence of the senior employees called on behalf of the appellant would support that view.

It is suggested that the employees of the caretaking department (two of whom patrolled the ground floor in question while the foreman and assistant foreman had to "keep their eye on the conditions throughout the store") were charged with the protection of the customers against injury from a situation such as created by this lotion. It is the duty of the employees of that department to remove the cause of the danger, but it cannot be suggested, upon the evidence, that these employees, few in number, of all the employees in this large department store, alone have a duty to warn customers of the danger.

Counsel for the appellant stressed the presence in the store of a system under which the cleaning department would be immediately communicated with by any employee who became aware of a situation such as that created by this lotion. This communication is made through the telephones placed here and there throughout the store. Bertrand used the telephone at his counter and the employees in the cleaning department acted promptly and effectively. An employee who did not telephone would be remiss in his duty and his failure to do so would not be excused upon his statement that he had not been instructed. Bertrand's statement that in telephoning to the cleaning department he took the initiative and acted upon his own common sense does not detract from the fact that in doing so he was performing the duty

that, in the circumstances, must be regarded as an essential attribute of his position. It is just the type of conduct that an employer has a right to expect of his responsible employees without specific instructions.

We are, in this case, concerned primarily with the vital and inevitable time that must elapse between the employee becoming aware of the danger and the removal thereof by the cleaning department. Throughout the whole of that period, which may be of short or substantial duration, the danger exists and the customers are exposed thereto. The appellant's position is that, though a salesman in charge of a counter is not only aware of the danger but fully conscious of the possibility of a customer suffering an injury, that salesman has no duty to warn the customers. The duties of a salesman such as Bertrand arise out of his position as a representative of the employer in selling and dealing with customers. The employer puts him forward to conduct business on his behalf and as if he were conducting the business himself.

An employer in the position of Bertrand and with his knowledge of this danger would not have performed his duty to his customers in merely telephoning the cleaning department. His plain duty would have been to immediately take reasonable steps to warn his customers of that danger.

The duty upon the employer's salesman is, in such circumstances, no less. It is part of his duty to be concerned for the care and safety of the customers. Specific instructions to that effect are not necessary. That duty would, by the very nature of his employment, as already stated, be an essential attribute. The law imposes that duty upon the employer to be discharged by either himself or his agent and where injury results from negligent omission of the performance of that duty the liability rests upon the employer. Where, as here, the employer is a limited company, the duty can only be discharged through its agents. A salesman in charge of a counter is such an agent. That it did not give specific instructions to do so, but took it for granted, as it had a right to do, that such

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a salesman would perform that duty, does not alter its liability in the event of non-performance on the part of the employee.

It is negligence on the part of a salesman in the position of Bertrand to observe a dangerous condition, telephone the cleaning department and still allow the danger to persist, when reasonable conduct on his part would either minimize or entirely eliminate that danger. The time between Bertrand's telephoning and the respondent's fall was estimated to be a minute to a minute and a half. In some circumstances that might well be too short a time, but in this particular case it is not contended that Bertrand did not have time in which to take the necessary precautions to warn the customers of this danger before the respondent fell. In not doing so he failed to perform that duty which his position required of him and his failure in that regard was a direct cause of the injury.

It is pointed out that any act on Bertrand's part to provide a reasonable guard or notice would require that he "desist from the selling of clocks in which he was engaged at the time." That the selling of clocks should supersede the protection of customers from imminent danger by a clerk who had the means at his hand to protect these customers is a suggestion that cannot be accepted. Bertrand left the customer to telephone and also to assist the respondent after she had fallen. A very short space of time would have been sufficient for him to place cartons from his counter, a chair or some other appropriate warning over the lotion and it would have avoided the accident and his conduct would have been well understood and probably appreciated by the customer he was serving.

There are cases where the danger is created unbeknown to the occupier of the premises. In that event the occupier has a reasonable time to become aware thereof. Once, however, he knows of the existence of the danger he must proceed at once with reasonable steps to protect his business guests. In this case the appellant knew immediately of the danger through Bertrand, who had at his counter the means which his position required should be used to protect the respondent and other customers.

There are other employees, possibly salesmen, whose knowledge of a danger such as this could not be attributed

to the appellant. Bertrand, however, was the salesman in charge of the nearby clock counter when he saw the danger and appreciated the possibility of injury. His duty, as above indicated, cannot be restricted to customers upon whom he was waiting, but would include those within a reasonable distance of his counter. The danger here created was within a few feet of his counter. Such knowledge, acquired by so responsible a salesman, must be attributed to the appellant. Bertrand had at his hand the means the use of which would have guarded and thereby warned the customers of the danger until such time as the employees of the caretaking department might remove it. His falure to take these reasonable steps constituted a fault in the sense indicated by My Lord the Chief Justice (then Rinfret J.) in *C.N.R.* v. *Lepage* (1).

> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

Counsel for the appellant contended that the majority of the learned judges in the Court of King's Bench based their decision upon the modern French construction of art. 1384 of the Code Napoléon, under which liability is predicated upon what has been described as a social responsibility or, as stated by Anglin J. (later C.J.):

> There is no doubt that the tendency in recent years of the French courts and the text writers has been to hold the master answerable for any wrong committed by his servant while in his employment, unless the act complained of be wholly foreign to his functions as servant. They hold the master liable if the servant's act be in any way connected with his employment.

Curley v. *Latreille* (2).

Art. 1384 of the Code Napoléon corresponds to art. 1054 of the Civil Code, but the language of the latter is different in important respects from that of the former and has been construed not to support liability upon such a basis. This was emphasized in *Curley* v. *Latreille supra*; *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (3); and *Moreau* v. *Labelle* (4). Mignault J. in the Vaillancourt case at p. 427 stated:

> Je suis encore du même avis, et il ne me semble pas inutile de le dire encore à raison de certaines solutions de la jurisprudence française

(1) [1927] S.C.R. 575 at 578.
(2) (1920) 60 Can. S.C.R. 131. at 143.
(3) [1923] S.C.R. 414.
(4) [1933] S.C.R. 201.

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qu'on a invoquées pour donner à l'article 1054 C.C., quant à la responsabilité des maîtres et commettants, une interprétation extensive qu'il ne comporte pas dans mon opinion. Il faut bien reconnaître que la jurisprudence française a pris depuis quelques années une orientation qui l'écarte de plus en plus de la doctrine traditionnelle. Elle admet de nouvelles théories en matière de responsabilité civile, comme l'abus du droit, l'enrichissement sans cause et la responsabilité des irresponsables, enfants en bas âge et insensés (Planiol t. 2, no. 878). On peut même dire qu'elle tend à faire abstraction de la faute et à la remplacer par la conception du risque. Mais n'oublions pas que nous avons un code dont le texte doit nous servir de règle, et que si les opinions des auteurs et les décisions de la jurisprudence française ne peuvent se concilier avec ce texte, c'est le texte et non pas ces opinions et ces décisions que nous devons suivre. Je ne serais certainement pas partisan d'une interprétation de notre code qui en ferait prévaloir la lettre sur l'esprit, mais quand le texte est clair et sans équivoque on n'a pas besoin de chercher ailleurs.

The formal judgment in the Court of King's Bench quoted from the reasons of the learned trial judge:

C'est un pur accident dont la Demanderesse doit subir les conséquences, vu qu'il lui est impossible d'en rechercher l'auteur et encore moins d'en attribuer la responsabilité à la Défenderesse. Il n'y a aucune preuve de faute par omission, négligence ou incurie de la part de la Défenderesse.

and then set out that the lotion constituted a danger or trap from which the appellant was under a duty to protect respondent, that Bertrand had failed in his duty to do so and his failure must be attributed to the absence of instructions on the part of the appellant. The failure to give these instructions constituted a breach of duty to the respondent and, therefore, the appellant was liable. The formal judgment, therefore, does not support the contention of counsel for the appellant and, moreover, Mr. Justice Bissonnette, who quotes more extensively from the French authors, states near the end of his judgment:

La seule proposition légale que j'ai voulu soutenir, c'est que la connaissance et l'imminence d'un danger, lorsqu'il y a temps utile et moyen efficace pour y parer, constituant une faute pouvant engendrer responsabilité si l'on néglige ou s'abstient d'agir. Et ce principe, en outre de la doctrine que j'ai citée, me paraît conforme à la jurisprudence de nos Cours, même de celles qui sont autorisées à juger selon la Common law.

If Bertrand had not a duty to warn the respondent as I have above indicated, then I am in agreement with the view expressed by my brother Cartwright, under which the appellant is liable, apart from any question of vicarious liability, for its own negligence in failing to properly instruct its employees, as he has indicated.

The appeal should be dismissed with costs.

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CARTWRIGHT J. (dissenting):—For the reasons given by my brother Estey I agree with the conclusion at which he has arrived.

As he has pointed out, it is established by authority, and indeed was not questioned before us, that the appellant owed a duty to the respondent, as a customer in the store, to take reasonable care that she should not be exposed to unusual danger of which it knew or ought to have known.

The colourless and slippery lotion upon the travertine floor constituted an unusual danger and was the cause of the injury of which the respondent complains. The appellant, being a corporation, could have knowledge of this danger and could take such steps as might be reasonably necessary to protect its customers only through its servants or employees.

The appellant had provided a department whose duty it was to keep the store in a condition of cleanliness and safety and to remove dangers which might from time to time arise. The evidence indicates that this department operated efficiently and in the case at bar actually removed the source of danger within a few minutes after its creation. It is clear from the evidence, however, that in case of a danger arising suddenly and fortuitously, as happened in this case, the members of the cleaning department were dependent on the employees in the vicinity of such danger to notify them of its existence. In a store so large and serving so many customers as that of the appellant it is reasonable to suppose that such dangers would from time to time arise and this probability was recognized by the appellant, as is evidenced, amongst other things, by its installation of a system permitting prompt communication with the members of the cleaning staff. It is also clear that in the case of such a danger arising there would inevitably be an interval of time between the summoning of the members of the cleaning department and their arrival. In my opinion the appellant's duty to protect its customers from unusual danger was not discharged by setting in motion a system, however efficient, designed for the removal of the danger. It was, I think, part of its duty to warn the customers during the interval of time mentioned above which must necessarily elapse before the danger could be removed.

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It appears to me that the appellant is upon the horns of a dilemma. If, as my brother Estey holds, it was part of the duty of employees such as Bertrand to notify the members of the cleaning department and, pending their arrival, to warn customers of the danger, it is clear that Bertrand failed to perform the latter of such duties and the appellant would be responsible for his failure. If on the other hand the arrangements between the appellant and Bertrand (whether resulting from express instructions or from lack of instructions) were such that these duties did not rest upon him then I think that the appellant was negligent in failing to make reasonable provision for the warning of its customers of an unusual danger during the interval between the time of its obtaining knowledge of such danger and the time of its removal, and the appellant would be liable to the respondent not vicariously for the negligence of its employee but directly for its own negligence in failing to properly instruct its employees.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Scott, Hugessen, Macklaier, Chisholm, Smith & Davis.*

Solicitors for the respondent: *Brais, Campbell & Mercier.*