1930
*Oct. 28.
*Nov. 3.

DUFRESNE CONSTRUCTION COMPANY (DEFENDANT) ..... APPELLANT;

AND

J. PRUDENT MORIN (PLAINTIFF) ..... RESPONDENT.

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

Workmen's Compensation Act—Inexcusable fault—Ordinary meaning—Liability of master and employer—Work with risk of injury—Duty of the employer—Art. 105 C.C.—Workmen's Compensation, R.S.Q., 1925, c. 274, s. 6.

When a workman is employed at work which subjects him to risk of injury, it is the imperative duty of the employer to impart instruction to him as to the proper preventive measures to be taken, and as to the best means of seeking medical aid immediately after the accident. The failure of the employer to do so is a fault, and a fault without excuse.

In the statutory phrase "inexcusable fault" contained in section 6 of the Quebec *Workmen's Compensation Act*, the word "inexcusable" is not a juridical term of art or a word to which any special technical significance can attach. It must therefore be applied in its ordinary sense as determined by the common usage, in light, of course, of the context in which it occurs, and of the subject matter of the statute. It is no part of the function of the courts to restrict or fix its meaning by paraphrases derived from text writers or other sources. "Each case must be judged from its own facts." *Montreal Tramways Co.* v. *Savignac* ([1920] A.C. 408).

The general rule as to the employer's responsibility, laid down by article 1054 C.C., governs the application of section 6: the "inexcusable fault" of a servant or workman, "in the performance of the work in which he is employed," within the meaning of article 1054, is imputable to the employer. *Montreal Tramways Co.* v. *Savignac* ([1920] A.C. 408) foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Desaulniers J. and maintaining the incidental demand of the respondent.

The facts of the case and the questions at issue are stated in the judgment now reported.

J. C. H. Dussault K.C. for the appellant.

L. A. Pouliot K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Cannon JJ.

The judgment of the court was delivered by

DUFF J.—On the 11th of October, 1926, the respondent was engaged by the appellants to work in a compressed air caisson. He was quite without experience in such work; but after undergoing the usual medical examination by the appellants' doctor, he was set to work with a gang of caisson men and continued to work through the whole of an eight hour shift, from four o'clock in the afternoon till twelve midnight, minus an interval of about half an hour. At the end of this shift, on coming into the open air, he felt ill and made the comparatively short journey to his home with a good deal of difficulty. His illness became progressively more distressing during the night, and in the morning he called in the appellants' doctor, who placed him in hospital and applied the treatment usual in such cases, but with little or no beneficial effect. The respondent is a man of thirty-four and it has been found by the courts below that his illness produced a permanent total disability.

The action was based upon the *Workmen's Compensation Act*, in force at the time, R.S.Q., 1925, c. 274. By that statute, persons suffering injuries in consequence of accident happening by reason of or in the course of their work as workmen or employees engaged in certain specified occupations (which include that in which the plaintiff was employed), are entitled to compensation according to the provisions of the statute. The maximum capital of the grant or annuity, to which a person is entitled under the Act, is, save in one case, $3,000. The exceptional case is provided for in section 6 in these words:—

> The court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it, if it was due to the inexcusable fault of the employer.

At the trial the appellants admitted their liability for the maximum sum of $3,000; but denied their responsibility under section 6, as for "inexcusable fault." The court of first instance rejected the claim of the respondent under this latter head, and this judgment was reversed by the Court of King's Bench, which maintained the larger claim, and, upon that basis, awarded an additional indemnity of $7,000.

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The question of substance is whether or not "inexcusable fault" has been established. It is not disputed that the respondent's disability is the result of "caisson disease," a term applied to groups of morbid changes met with among caisson workers, and divers working in diving dress. Compressed air caissons are employed in the construction of bridge foundations, and the foundations of other structures in water bearing strata. A shaft and air lock afford access and exit for men and materials; and the air pressure is varied according to the head of water. In order to exclude water, this pressure, in subaqueous work, is increased by one atmosphere (or 15 lbs. per square inch) for every thirty feet or so (or $\frac{1}{2}$ lb. for every foot) of submergence below the surface. Exposure to such pressures may be followed by symptoms of various kinds, including pains in muscles and joints ("bends"), deafness, embarrassed breathing, vomiting, by paralysis and even by death. These symptoms do not appear while the pressure continues, but only after it has been removed; the generally accepted theory being that they are due to the effervescence of gases absorbed in the body fluids during exposure to pressure. When the pressure is suddenly released, gas is liberated in bubbles throughout the body. Set free in the spinal cord, these bubbles may give rise to partial paralysis, or, in the heart, to stoppage of the circulation. But if the pressure is relieved gradually, they are not formed as a rule, because the gas comes out of solution slowly, and is removed by the lungs. The evidence shews that some people are not fit subjects for these experiences, and any condition of body which may seriously impede the activity of the organs in eliminating, during the process of decompression, the gases absorbed, constitutes a disqualification. Where, on decompression, any symptom occurs indicating that elimination has not been completely effected, the subject ought to be immediately recompressed and the pressure withdrawn at a more gradual rate. If applied immediately on the appearance of the symptoms, this treatment is commonly effectual.

The respondent charged "inexcusable fault" in two respects. First, he alleged that decompression was effected too rapidly. Secondly, he averred that the appellants had

been grossly negligent in failing to instruct him as to the risks attendant upon the work he was employed to do, and as to the necessity, in the event of untoward symptoms supervening, of resorting immediately to medical assistance; and moreover, that provision was not made at the works themselves for prompt medical attention.

As to the first of these allegations, the Court of King's Bench found in favour of the respondent, and undeniably there is much to be adduced, in support of that finding, from the evidence. On the other hand, the learned trial judge did not reach the same conclusion. His opinion is expressed in these words:—

Considérant que la preuve ne démontre pas, de toute évidence, que le demandeur soit sorti de la chambre d'air comprimé en moins de cinq minutes, le soir de l'accident;

Considérant que la sortie des travailleurs de la chambre à décompression semble bien s'être faite le soir de l'accident, dans les mêmes conditions préalablement établies par les ingénieurs de la compagnie défenderesse.

It is not necessary, as will appear, to pass upon the question whether or not, in view of these findings, the decision on this point of the Court of King's Bench ought to be disturbed.

As to the second charge, the learned trial judge has found as follows:—

Considérant que bien que la défenderesse ait commis une faute en ne donnant pas au demandeur des instructions complètes sur les moyens de diminuer autant que possible, les risques inhérents à son genre de travail, cette faute n'est cependant pas inexcusable au sens de la loi et de la jurisprudence.

The pertinent *considérants* in the judgment of the Court of King's Bench are these:—

Considérant qu'il appert par la preuve que l'appelant récemment venu de la campagne pour avoir de l'ouvrage, n'avait aucune connaissance du travail qui lui a été assigné; que l'intimée s'est complètement chargée de l'appelant qui a été entre ses mains un automate se laissant entièrement conduire par elle; que pour se rendre à la chambre de travail du caisson où il y avait une pression atmosphérique de 19 à 20 livres, l'appelant passait par une pièce appelée chambre d'équilibre où l'intimée faisait la compression pour préparer l'appelant à la pression de la chambre de travail et que pour en revenir, il passait dans la même pièce où se faisait la décompression, avant de rendre l'appelant à l'air libre; que l'appelant ne soupçonnait en aucune façon la nécessité de cette préparation physique nécessaire pour faire son travail ou pouvoir le quitter sans danger; qu'il ne connaissait rien des conséquences que ces procédés de compression et de décompression et des inconvénients et dangers qui pouvaient en résulter, ni du traitement auquel il fallait recourir au cas qu'il en résulterait quelque lésion; que le jour même qu'il a commencé le travail en quittant

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le chantier, l'appelant sentit un malaise qui est allé s'accentuant et que c'est avec peine qu'il a pu gagner son domicile; qu'il a passé la nuit dans des souffrances atroces et que ce n'est que le matin vers 7 heures qu'un camarade ayant notifié la compagnie de l'état de l'appelant, le médecin est venu chercher l'appelant pour le mettre à l'hôpital où il a subi le traitement de la récompression mais, sans succès, parce qu'il était tardif;

Considérant que le travail assigné à l'appelant se faisait dans des conditions anormales dans un caisson, à une profondeur de 40 pieds sous l'eau et sous une pression atmosphérique de 19 à 20 livres; que ce travail, par sa nature, présentait un danger considérable et continu aussi bien durant le trajet pour parvenir à la chambre de travail que pour en revenir par suite de la transition de l'air libre à l'air comprimé par le procédé de la compression et surtout de l'air comprimé à l'air libre par le procédé de la décompression.

Considérant que le seul traitement connu pour les maladies engendrées par l'air comprimé et les lésions qui peuvent en résulter est la recompression suivie d'une lente décompression, qu'une condition essentielle du succès est le recours immédiat à ce traitement et qu'à cette fin, l'intimée avait sur son chantier un hôpital sous la surveillance continuelle d'un médecin; qu'elle prétend avoir mis dans une salle réservée aux ouvriers un avis que l'appelant n'a pu connaître, les avertissant que lorsqu'ils sentiraient un malaise même en dehors de l'ouvrage, d'appeler le médecin de la compagnie et de prendre une voiture à ses dépens.

Considérant que c'était l'impérieux devoir de l'intimée de prendre tous les moyens que la science et l'expérience pourvaient suggérer pour protéger l'appelant contre tout accident possible, qu'il lui incombait de mettre l'appelant au courant des conditions dans lesquelles son travail se faisait, des conséquences possibles de ce travail sur la santé et surtout du traitement immédiat auquel il fallait recourir, que l'intimée s'est volontairement abstenue de l'accomplissement de ce devoir sans justification ni excuse et qu'il apparaît aussi par la preuve que la décompression au sortir du travail de l'appelant s'est faite trop rapidement et qu'il y a lieu de croire qu'en recourant au traitement approprié en temps opportun la marche du mal aurait été arrêtée et que l'appelant eut été guéri;

Considérant que, dans les circonstances, l'intimée a commis une faute inexcusable.

The reasons given by the majority of the Court of King's Bench shew that in their view both faults charged were proved, and that each of the faults, so established, constituted, in itself, "une faute inexcusable," within the statute.

The evidence shews that the risk of injury depends upon a number of factors: the intensity of the pressure, the duration of the exposure, the age of the workman and his physical condition in a variety of respects. By the practice of the appellants, each workman undergoes a medical examination before he is accepted as an employee. Nevertheless, there is evidence, which I regard as satisfactory, that no such examination can be considered an entirely reliable test of the fitness of the subject. Therefore, it is

not surprising to find that, at all events, in some quarters, a practice prevails by which a workman is not accepted as qualified, until his suitability has been proved by experience. Sometimes, the workman is subjected to a compression test in a hospital lock; and this it appears was at one time the practice of the appellants, a practice which was abandoned, because, according to the doctor's evidence, it frightened the men. In other works it is the rule not to permit an inexperienced hand to serve more than half a full shift without a second medical examination. No such precautions were observed by the appellants.

It was not disputed that no workman should be subjected to the risks attending caisson workers, in ignorance of the nature of those risks, or of the necessity of seeking medical aid immediately on the appearance of unpromising symptoms. Nor can it be successfully disputed that no instruction in these matters was given to the respondent or that he was ignorant in respect of them; nor again, that, had he been properly instructed, the character of his symptoms must have apprised him of the necessity of seeking medical aid immediately; nor, once more, if he had applied to the appellants' doctor and the usual procedure had been followed, that his chances of escaping the injuries from which he now suffers, would have been greatly increased; the evidence establishes in my view the probability that he would have escaped.

Dr. Riopelle attempted to account for the absence of instructions and to justify his failure to give any, on the ground that they were unnecessary; because, he said, all the workmen were fully informed as to these matters; knowledge of them was, so to speak, in the air.

This unfortunately is an excuse which cannot be accepted. As I have said, the evidence leaves no doubt that there are cases where the weakness or idiosyncrasy of the workman unfitting him for exposure to the ordinary risks of such work, is not revealed upon the preliminary examination. No further test is provided for by the practice of the appellants. The necessity ought therefore to have been apparent of making sure that proper preventive measures would be applied in cases which should prove to be exceptional; and, since the practice of the appellants was to

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leave it to each workman to take care of himself, it was imperative that he should know what to do and when to do it. There was therefore a rigorous duty to impart instruction. To trust to the chance of this knowledge being gained from some fellow workman was simply to leave the duty unperformed. The evidence, indeed, does not leave us in doubt upon this point; the only fellow workman, who became aware of the respondent's condition, made light of it.

Unnecessarily and knowingly to expose the respondent, as the appellants did, to the risks adverted to above, without putting him in possession of the knowledge that would have enabled him to take effectual prophylactic measures, was a fault, and a fault without excuse. It is difficult, short of conduct involving deliberate intention to injure, to think of a plainer case.

The answer of the appellants, the answer in point of substance, to the case thus made against them, is twofold.

First, it is said that the respondent and his wife were informed by a fellow workman, at half-past two in the morning of the necessity of having the respondent sent to the appellants' hospital; but that there was unnecessary delay in calling a taxi, and that, in consequence, he did not reach the hospital until after seven. The evidence makes it clear beyond dispute that the workman in question, Cadorette, did not at all appreciate the gravity of the risk the respondent was running in not having him taken immediately to the hospital. Cadorette says most explicitly that he made light of the respondent's sufferings, as I have mentioned above. Indeed, the attitude of Cadorette is significant as indicating that the appellants' workmen did not realize the necessity of resorting promptly to preventive measures on the appearance of suspicious symptoms.

Secondly, it is said that the phrase "inexcusable fault" connotes, not indeed an intention to commit a wrong, but an element of intention, of voluntary conduct, as well as an appreciation of the danger which such conduct may entrain. Without expressing any opinion upon the point whether, applying such a standard, the appellants have succeeded in this court in acquitting themselves of "inexcusable fault," it seems necessary to observe that in the

statutory phrase the word "inexcusable" is not a juridical term of art or a word to which any special technical significance can attach. It must therefore be applied in its ordinary sense as determined by the common usage, in light, of course, of the context in which it occurs, and of the subject matter of the statute. It is no part of the function of the courts to restrict or fix its meaning by paraphrases derived from text writers or other sources. In *Montreal Tramways Co.* v. *Savignac* (1), Lord Cave, delivering the judgment of the Privy Council, said:

It is unnecessary and probably undesirable to attempt a definition of the expression "inexcusable fault." Each case must be judged from its own facts.

It is perhaps desirable to take notice of an argument addressed to us touching the responsibility of the appellants under section 6 in respect of an "inexcusable fault" of an employee. The decision of the Privy Council above referred to (see especially the observations of Lord Cave at pages 413 to 415), precludes controversy upon this point. The general rule of responsibility laid down by article 1054 C.C. governs the application of section 6:

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work in which they are employed.

The "inexcusable fault" of a servant or workman "in the performance of the work in which he is employed," within the meaning of article 1054 C.C., is imputable to the employer.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Godin, Dussault & Cadotte.*

Solicitors for the respondent: *Pouliot & Nadeau.*

(1) [1920] A.C. 408, at 413.