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Ayoub et al. v. Bense & Beaupré, [1964] S.C.R. 448

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JOHN O'DONOGHUE*

TORT — NEGLIGENCE — STANDARD OF CARE IN USING VOLATILE SUBSTANCES

This was a case on appeal from the Court of Appeal of Ontario, which had affirmed a judgment of Aylen, J., The facts are outlined in the decision of Spence, J. in the Supreme Court of Canada thusly: Bense, an employee acting in the course of his duty, while draining the gasoline tank of an automobile preparatory to the removal of the tank, bumped into a light cord. The extension cord fell and when the light bulb (which was encased in the standard wire mesh protector) struck the bottom of the pit, there was a mild explosion. Flames enveloped the service station and caused damage to the adjacent property. On these basic facts the Court of Appeal and Aylen, J. had held that the defendants were not legally liable for the damage to the adjacent property. Since the reasons for judgment of the lower courts are not available, one must analyze the situation fully in order to assess the Supreme Court decision, which reversed the lower courts.

Section 1 of the *Accidental Fires Act*[1] reads:

> 1. No action shall be brought against any person in whose house or building or on whose land any fire accidentally begins, nor shall any recompense be made by him for any damage suffered thereby; but no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

In commenting on the *Accidental Fires Act,* Strong J. in *The Canada Southern Railway Co. v. Phelps*[2] said:

> The rule of *Rylands v. Fletcher* would be applicable equally to fire, and every person who built a fire in his house for ordinary domestic purposes would but for the enactment be bound at his peril to keep it safely, and liable to his neighbours for any damage which it might cause them, though no negligence could be imputed. It was only to mitigate this rule of law that the statute was passed, and it was not intended thereby to alter the law of liability for negligence.[3]

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1 R.S.O. 1960 c. 3.

2 (1884), 14 S.C.R. 132.

3 *Id.* at 145.

In view of the number of authorities which have interpreted the statute in such a manner that its exempting provisions apply only to fires accidentally begun and that one whose negligent conduct has initiated the fire is not entitled to rely on the statute,[4] one may assume that the main point of difference between the courts in this case is the standard of care that must be complied with before conduct is labelled 'negligent'.

Numerous authorities have described the standard of care exacted in the handling of volatile substances such as gasoline. In *Read v. Lyons*,[5] Lord MacMillan enunciated the following proposition:

> I think that he succeeded in showing that in the case of dangerous things and operations the law has recognized that a special responsibility exists to take care. But I do not think that it has ever been laid down that there is absolute liability apart from negligence where persons are injured in consequence of the use of such things or the conduct of such operations. In truth it is a mater of degree. Every activity in which man engages is fraught with some possible element of danger to others. Experience shows that even from acts apparently innocuous injury to others may result. The more dangerous the act the greater is the care that must be taken in performing it. This relates itself to the principle in the modern law of torts that liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result.[6]

This proposition of Lord MacMillan has been accepted in Canadian courts.[7] One may reasonably assume that the standard of care was known to the lower courts in the present case. However the Supreme Court of Canada stated that in the course of his conduct the defendant Bense did not live up to that degree of diligence exacted of him. How the court arrives at this conclusion is therefore the question, the answer to which must be the principle to be derived from this case, if it is to be employed as an authority in future cases.

It appears that what a court states with regard to the approach it has taken in any given instance may differ greatly from what that court actually does. In tort litigation, for example, the courts often state that they will examine the facts and determine whether or not the defendant has lived up to the requisite standard of care in his conduct. However, the writer senses that the court, which is legitimately interested in arbitrating the dispute between the two parties appearing before it, has generated a sympathy for one side or the other during the presentation of the evidence. This sympathy is generated as the facts emerge and the sympathy becomes a tendency towards a solution. However, when it comes to the point where the court must iterate a judgment there may well be a perplexity in the mind of the judge: Would the financial burden of a decision weigh

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4 *Cf. Port Coquitlam v. Wilson* [1923] S.C.R. 235; *United Motor Services v. Hutson* [1937] S.C.R. 294; *The Canada Southern Railway Co. v. Phelps* (1884), 14 S.C.R. 132; *Filliter v. Phippard* (1847), 11 Q.B. 347.

5 [1947] A.C. 156.

6 *Id.* at 172.

7 *Cf. United Motor Services v. Hutson, supra,* footnote 4; *Dokuchia v. Domansch* [1945] O.R. 141, at p. 145.

too heavily on the defendant? Would the burden on the defendant be incommensurate with the loss that the plaintiff has suffered? Is there any rule of law that precludes a finding for the plaintiff? Is there any social policy in this case which should be considered before liability is allocated? What are the ramifications of a decision for the plaintiff? These same considerations must also pass through the minds of those on the bench adjudicating an appeal from the trial decision. Surely the integrity of the legal institution would not be threatened by open admission that the facts control the law, that other than strictly legal principles are instrumental in the adjudication of cases.

Such an admission would obviate the need for the court to strain to align the facts presented in evidence in such a way that the facts may logically support the conclusion arrived at by the court. One observes that a court will dwell at length on seemingly inconsequential details attempting to distinguish authorities cited by counsel which are virtually *pari materia.* In a close case such as the present one, much ingenuity and imagination are often required. In the judgment of Spence, J. in the Supreme Court of Canada, one notices a compilation of acts of negligence:

1. To hang the lamp as insecurely as it must have been hung under the circumstances was an act of negligence.
2. To lower the gas can to the floor of the pit and allow the drops to fall some six feet from the bottom of the car to the funnel as it sat on the top of the can or perhaps to the top of the can apart from the funnel, was an act of negligence in view of the rapid vaporization of drops of gas.
3. To so remove the funnel from the top of the gas can as it sat on the floor of the pit as to permit the droplets which remained in the funnel to fall upon the top of the can is an act of negligence.
4. Having permitted the drops to fall the six feet from the opening in the gas tank to the top of the can, and also to fall from the funnel to the can when the funnel was removed, and to fail to wipe off the can immediately was an act of negligence.
5. Failure to move the lamp back from its insecure hanging place to a safer position on the border of the pit before he attempted to move around in the confined space carrying the heavy can was an act of negligence.
6. Having failed to remove the lamp from its insecure hanging place, the defendant was negligent in that he permitted himself to bump into the vulnerable hanging lamp and cause the lamp to fall, the cord pulling the lamp so that it struck the top of the gas can.[8]

If the Supreme Court had to manipulate the facts to this extent it is understandable that the lower courts in this instance were unable to label the conduct of the defendant mechanic as negligent. Spence, J. recognizes this shortcoming in the analysis and adds:

> It is true that the acts individually are of a very small degree, but that combination of acts resulted in the damage accruing to the plaintiffs' properties and resulted from the fact that the operation in which the defendant Bense was engaged was one where any small piece of negli- might have disastrous effects.[9]

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[8] [1964] S.C.R. 448, at 455.
[9] *Id.* at 457.

In this case the lower courts might logically have stated that since the equipment was the proper type employed in the circumstances that it would not be negligent to use it in the usual manner. Spence, J. however, rejects this notion and states that nothing particularly hinges on the type of equipment used but states that it was the improper use of the equipment which resulted in the damage. Distinctions such as this lead to the conclusion that many considerations extra-legal in their origin have a tremendous influence on the interpretation of factual data in the formulation of an opinion.

Do the authorities support the opinion of the Supreme Court? In *United Motor Services v. Hutson,*[10] the Supreme Court of Canada held the defendant responsible on somewhat similar facts. The defendant in that case was in possession of a building under lease from the plaintiff who had erected it for use as an auto service garage and for the sale of auto parts. While the defendant's employees (on a hot day when the doors and windows were open) were cleaning a cement floor of the building, using gasoline, scraping and scrubbing with oakite heated in a tank on the ground floor by means of a gas jet under the tank, and washing the floor off with water from a hose, an explosion occurred and fire damaged the building. The exact cause of the ignition was unknown. Expert witnesses for the plaintiff testified that gasoline when vaporized was dangerous and that, given the proper proportions of air and gas vapour, ignition might occur or be caused by a naked flame, an electric spark or a hot body. Witnesses for the defendant testified that in such cleaning it was customary to use gas and scrapers and brushes and to wash the floor off with water. The court found that the evidence fell short of proving that it was the usual practice to clean such an area as that in question under the conditions that existed that day. Some would argue that the present case is an illogical extension of the principle enunciated in *United Motor Services v. Hutson,*[11] while others would assert that the decision was predictable as a natural outcome on the facts in view of the current policy of the courts. The significance of the case under review is, the writer suggests, that the Supreme Court is politely informing the lower courts that defendants must be held to a stricter than ever standard of care before they will be exonerated from liabilty for damage that has been initiated by their conduct. This attitude of 'plaintiff favouritism' has been exhibited in many recent decisions of the Supreme Court.[12]

It would also seem from the minimal character of the negligence found in this case that the Supreme Court is eviscerating the *Accidental Fires Act*[13] and is returning to the rule enunciated in *Rylands v. Fletcher.*[14] It would be difficult to conceive of a fire which better accommodates the description "accidentally begins".

10 [1937] S.C.R. 294.
11 *Ibid.*
12 For example, see *Co-operators' Insurance Association v. Kearney* 48 D.L.R. (2d) 1.
13 *Supra,* footnote 1.
14 (1868) L.R. 3 H.L. 330.