
BETWEEN:

CANADA STEAMSHIP LINES LIMITED, ... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1946
Nov. 7, 8, 12
1948
Nov. 3

Crown—Petition of Right—Negligence—Lease—No exemption from liability when damage caused by gross negligence of servants of respondent.

Held: That a clause in a lease providing "That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time

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brought, placed, made or being upon the said land, the said platform or in the said shed", leased by Respondent to Suppliant, does not exempt Respondent from responsibility for the damages suffered by Suppliant as a consequence of a fire which destroyed the shed or warehouse in question and its contents, such fire having been caused by the gross negligence of officers and servants of Respondent while acting within the scope of their duty or employment.

PETITION OF RIGHT by Suppliant claiming damages from Respondent for loss of goods due to the alleged negligence of officers or servants of Respondent acting within the scope of their duty or employment.

The action was tried before the Honourable Mr. Justice Angers at Montreal.

Hazen Hansard, K.C. and *Geo. Montgomery, Jr.* for suppliant.

F. P. Brais, K.C. and *O. J. Campbell* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J. now (November 3, 1948) delivered the following judgment:

By its petition of right the suppliant seeks to recover from His Majesty the King the sum of $42,367.47 representing the price and value of goods, wares and merchandise destroyed by fire on May 5, 1944, in a shed belonging to the respondent and leased by the latter to the suppliant, situate on the westerly side of St. Gabriel Basin No. 1 of the Lachine Canal, in the City of Montreal, the said fire and the loss of the suppliant's said goods, wares and merchandise having allegedly been caused by the fault, negligence, imprudence and want of skill of the respondent's employees and servants acting within the scope of their duties and employment and in the performance of the work for which they were employed.

[The learned Judge here refers to the pleadings and continues:]

An admission as to damages, signed by counsel for suppliant and counsel for respondent, dated March 10, 1947, was put in evidence; it reads thus:

Without admission of liability and under reserve of all other defences to the principal action, the Parties hereto, by the undersigned, their respective Attorneys of Record, admit that the damages sustained by

and caused to the Suppliant as a result of the fire which occurred on or about May 5, 1944, in the shed described in paragraph 1 of the Petition of Right herein amount to the sum of $40,713.72 being the value of or extent to which goods, wares and merchandise, the property of Suppliant, as described in the said Petition of Right, were destroyed or damaged in the said fire.

The case is governed by paragraph (*c*) of subsection 1 of section 19 of the Exchequer Court Act (R.S.C. 1927, chap. 34). The relevant part of section 19 is worded as follows:

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) .....
>
> (*b*) .....
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

[The learned Judge here reviews the evidence and continues:]

It is idle to note that the evidence discloses gross negligence by officers or servants of the Crown while acting within the scope of their duties and employment. Particularly the depositions of Mitchell and Newill, independent and disinterested witnesses, are categorical and cogent and they have not been contradicted.

The respondent seeks to free himself of responsibility in virtue of clause 7 of the lease. Before dealing with this aspect of the case I wish to say a word about the plea of *vis major*.

This means is raised in paragraph 7 of the statement of defence:

> If the damage was caused by a thing under the care of an employee of the Crown . . . the circumstances were such that it was impossible by reasonable means to prevent the act which caused the damage.

This claim does not seem to me tenable. Counsel for respondent rightly abstained from putting it forward. I shall now endeavour to determine the bearing of clause 7 of the lease.

Authors distinguish between contractual responsibility and that arising from an offence or quasi-offence. This distinction seems to me immaterial in the present case seeing that both contractual responsibility and responsibility resulting of a quasi-offence exist simultaneously, the

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first consisting in the failure of the lessor to give to the lessee peaceable enjoyment of the thing during the continuance of the lease (article 1612 C.C.) and the second in the negligence of officers and servants of the Crown while acting within the scope of their duties and employment.

Regarding the contractual responsibility the position of the lessor and the lessee is clear and it does not require a lengthy statement.

In the preamble of the lease we find, among others, the following provisions:

THIS INDENTURE .....

WITNESSETH that the Lessor, in consideration of the rents, covenants, provisoes and conditions hereinafter reserved and contained, hath demised and leased, and, by these presents, doth demise and lease unto the Lessee—(here follows a description of the thing leased, which it is useless to reproduce)—

TOGETHER with the right and privilege to occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the Lessee, the whole of St. Gabriel Shed No. 1, so called.

TO HAVE and TO HOLD the said land and rights and privileges unto the Lessee, from and after the first day of May, one thousand nine hundred and forty, for a term or period of twelve years and then fully to be complete and ended.

The following paragraph, dealing with the rent, is irrelevant and the one defining certain terms included in the lease has no materiality herein.

The lease then contains the following conditions:

AND FURTHER AGREED by and between the said parties hereto that these Presents are made . . . subject to the covenants, provisoes, conditions and reservations hereinafter set forth . . . namely:—

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

8. That the Lessor will, at all times during the currency of this Lease, at His own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

Article 1641 C.C. enacts:

The lessee has a right of action in the ordinary course of law, or by summary proceeding as provided in the Code of Civil Procedure:

1.....

2.....

3. To recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee.

The action brought by the suppliant, as far as the procedure is concerned, seems to me justified by the third clause of article 1641 C.C.

The cause of action having arisen in the Province of Quebec, the lease must be interpreted and the rights and obligations issuing therefrom determined according to the law of that province: *The Queen* v. *Filion* (1); *The Queen* v. *Grenier* (2); *The King* v. *Armstrong* (3); *The King* v. *Desrosiers* (4); *National Dock and Dredging Corporation Ltd.* (5).

If it were not for clause 7 of the lease, the contractual responsibility of the lessor would, in my opinion, be indisputable.

Clause 7 of the lease stipulating that the lessee shall not have any claim or demand against the lessor for damage or injury of any nature to the shed, motor or other vehicles, materials, supplies, goods, articles, effects or things being at any time in the said shed is, in Canada and particularly in the Province of Quebec, acknowledged as valid.

Before the decision of the Supreme Court in the case of *The Glengoil Steamship Co. et al.* v. *Pilkington et al.* (6), the clause of irresponsibility contained in a contract was not favourably considered by the judges of the Province of Quebec: *Samuel* v. *Edmondstone et al.* (7); *Huston* v. *Grand Trunk Railway Co.* (8) and (sub-nom. *Grand Trunk Railway Co. and Mountain & Huston*) (9); *Drainville* v. *Canadian Pacific Railway Co.* (10); *Rendell* v. *Black Diamond Steamship Co.* (11); *Gracie* v. *Canada Shipping Co.* (12).

Since the decision of the Supreme Court in the case of *The Glengoil Steamship Co. et al.* v. *Pilkington et al.*, the

(1) (1894) 24 S.C.R 482.
(2) (1899) 30 S.C R. 42.
(3) (1908) 40 S.C.R. 229.
(4) (1908) 41 S.C.R. 71, 78.
(5) (1929) Ex. C.R. 40, 42.
(6) (1897) 28 S.C.R. 146.
(7) (1857) 1 L.C J. 89.
(8) (1859) 3 L.C.J. 269.
(9) (1860) 6 L.C.J. 173.
(10) (1902) R.J.Q. 22 S.C. 480.
(11) (1895) R.J.Q. 8 S.C. 442 & (1896) 10 S.C. 257.
(12) (1895) R.J.Q. 8 S.C. 472.

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doctrine that a stipulation of irresponsibility is not contrary to public order is generally admitted by the authors and the Courts: *Canadian National Railway Co.* v. *Cité de Montréal* (1); *Canadian Northern Quebec Railway Co.* v. *Argenteuil Lumber Co.* (2); *Furness, Withy and Co. Ltd.* v. *Vipond* (3); Perrault, Des stipulations de non-responsabilité, no 79 et s.

Does the stipulation of irresponsibility apply in cases of gross negligence of officers or servants of the Crown? This is the question which must be solved. A brief review of the doctrine and of the precedents seem to me expedient.

With respect to negligence generally, see Sourdat, Traité de la responsabilité, 5th edition, vol. 1, Nos. 668, 670 and 680.

Lalou, in his Traité de la responsabilité civile, defining "faute lourde" or gross negligence, writes (p. 280):

415—8° — *Faute lourde.* A première vue la notion de faute lourde paraît assez simple. On pourrait dire avec les jurisconsultes romains qu'elle consiste dans "le fait de n'avoir pas compris et de n'avoir pas prévu ce que tout le monde aurait compris et prévu" ou avec Pothier, comme nous le rappelions supra, n° 415-2° "dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires". Mais cette notion est plus difficile à dégager quand on recherche s'il y a identité entre la faute lourde d'une part et des fautes autrement qualifiées (faute volontaire, faute inexcusable, faute intentionnelle).

La faute volontaire n'est pas nécessairement une faute lourde, pas plus qu'une faute inexcusable ne s'identifie nécessairement avec une faute lourde. Nous venons de nous expliquer sur ces nuances. Reste à distinguer la faute lourde de la faute intentionnelle. Celle-ci apparaît plus grave que celle-là; car il peut y avoir faute lourde sans mauvaise foi de son auteur, c'est-à-dire sans que celui-ci ait voulu les conséquences dommageables de l'acte ou de l'omission.

Cette discrimination entre la faute lourde et la faute intentionnelle commande logiquement une conséquence: la discrimination de la faute lourde et du dol. Contre cette discrimination il ne peut être fait qu'une objection tirée de l'adage: *culpa lata dolo aequiparatur,* règle traditionnelle qui s'expliquerait par cette idée que l'intention de causer le dommage peut rarement être prouvée directement; qu'elle ne peut s'induire que de l'existence d'une faute lourde; que, de plus, le fait de causer un dommage consciemment et non intentionnellement peut difficilement être distingué du dol proprement dit; qu'enfin il est le plus souvent impossible de savoir si la faute lourde est consciente ou non (V. Planiol, Ripert et Esmein, Traité pratique de droit civil français, t. VI, n° 409).

Sans doute la faute lourde peut valoir à titre de présomption de fait du dol; mais il n'est pas possible, sauf disposition formelle, de l'ériger en présomption légale, alors surtout que l'article 2268 c. civ. édicte la pré-

(1) (1927) R.J.Q. 43 K.B. 409.
(2) (1919) R.J.Q. 28 K.B. 408, 413
(3) (1916) R.J.Q. 25 K.B. 325 & (1916) 54 S.C.R. 521.

somption contraire de bonne foi. Il y a, en effet, une différence essentielle entre la faute lourde et le dol, différence qui tient à ce que ce dernier suppose nécessairement un élément intentionnel que la faute lourde ne suppose pas (V. Lecompte, La Responsabilité du plaideur envers son adversaire en matière civile et commerciale, *Revue critique de législation et de jurisprudence* 1938, p. 513 et suiv.).

Boutaud, in his work Des clauses de non-responsabilité et de l'assurance de la responsabilité des fautes, discussing the validity of the clause of irresponsibility and its applications, makes the following comments (p. 225):

129. ...Le débiteur, qui stipule qu'il ne devra pas de dommages-intérêts pour les fautes même lourdes qu'il pourra commettre dans l'exécution de son contrat, reste obligé. Sa responsabilité est restreinte; mais l'exécution de son obligation peut être poursuivie en justice.

Further on, under the heading Exposé de la doctrine et de la jurisprudence, the author adds (p. 232):

133. ...La théorie des auteurs, qui se sont occupés de la question à un point de vue général, se résume dans ces quelques idées: la clause de non-responsabilité est valable, en tant qu'elle s'applique à la faute contractuelle. Elle a pour effet d'exonérer le débiteur de sa faute légère. Mais la faute lourde est en général assimilée au dol et oblige toujours son auteur à payer des dommages intérêts, malgré la convention de non-responsabilité. L'exonération de la faute délictuelle est assez généralement considérée comme contraire à l'ordre public. Il y a d'ailleurs sur tous ces points des divergences importantes.

Savatier, in his Traité de la responsabilité civile, dealing with the same question, expresses a similar opinion (p. 251, No. 662); I deem it apposite to quote the second clause of this paragraph:

662. *Clauses excluant la responsabilité contractuelle du fait des préposés.*—Cependant, la jurisprudence est hésitante. Elle n'est pas, non plus, fixée sur le point de savoir si l'on doit assimiler, en matière contractuelle, la faute lourde ou le dol du préposé, à la faute lourde ou au dol du commettant, de manière à exclure, quand ils se présentent, le jeu des clauses d'irresponsabilité. Nous pensions que les raisons qui interdisent au débiteur lui-même de pouvoir s'exonérer contractuellement de son propre dol ou de sa propre faute lourde (V. supra, nº 660) ne sauraient être étendues au dol ou à la faute lourde du préposé. En stipulant la non-garantie de la faute lourde ou du dol de ses préposés, le débiteur, en effet, n'aboutit pas à la négation de sa propre obligation, pourvu qu'il ne puisse se permettre ainsi une véritable incurie dans la surveillance de ses préposés.

In their Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle Henri and Léon Mazeau set forth the following remarks (p. 778):

2585. *Faute intentionnelle et faute lourde.*—Et d'abord les clauses de responsabiilté contractuelle atténuée sont-elles, comme les clauses de non-responsabilité, prohibées pour fautes dolosives ou lourdes?

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Sans aucun doute pour le dol. S'il n'est pas possible qu'un débiteur ait la faculté de ne pas exécuter l'obligation qu'il a souscrite, il n'est pas plus admissible qu'il puisse à son gré limiter cette obligation. Malgré la clause de responsabilité atténuée, le dol engage donc l'entière responsabilité du débiteur.

Quant à la faute lourde, les mêmes raisons que pour les clauses de non-responsabilité commandent de la présumer dolosive jusqu'à preuve contraire. La jurisprudence, après avoir hésité, applique, aux clauses de responsabilité atténuée, comme aux clauses de non-responsabilité, son système d'assimilation totale de la faute lourde au dol; elle écarte donc les clauses de responsabilité atténuée au cas de faute lourde du débiteur.

Josserand, in his work entitled Cours de droit civil positif français, at page 252, makes these observations:

472. *Clauses élisives ou limitatives de responsabilité.*—De prime abord, apparaît la possibilité d'une distinction entre le délit et le quasi-délit. Il serait intolérable qu'on pût stipuler l'irresponsabilité à raison de ses fautes intentionnelles; une telle clause serait exclusive de toute responsabilité et de toute moralité; elle irait à l'encontre des bonnes mœurs et de l'ordre public; il est d'ailleurs douteux qu'il se trouve jamais une personne qui, saine d'esprit, consente à se mettre ainsi à la discrétion d'autrui. Mais il faut se rappeler que la *faute lourde* est traditionnellement assimilée au *dol*; elle comporte donc le même traitement; contre la faute intentionnelle et contre la faute lourde, *toute réserve conventionnelle est impuissante;* et il faut en dire autant du dol et de la faute lourde des préposés: un commettant, un mandant ne pourraient pas, à l'aide d'une clause de non-responsabilité, se mettre à l'abri de la responsabilité de droit que l'article 1384 fait peser sur eux; en toute occurrence, le dol et la faute lourde sont générateurs de responsabilité dans les termes mêmes de la loi.

Planiol et Ripert, in their Traité élémentaire de droit civil, dealing with agreements relating to negligence, after pointing out that the principle that the debtor may exonerate himself from the consequences of his negligence is admitted (Dalloz Répert., v° Obligation, n° 686), state that "il a été jugé que cette clause d'exonération n'est pas valable pour la faute lourde (Cass., 15 mars 1876 D. 76.1.449, S. 76.1.337)". The authors add that "la faute lourde" or gross negligence is "traditionnellement assimilée au dol"... and that "par suite on doit en être responsable d'une manière tout aussi absolue".

Planiol et Ripert add that this is the principle supported by Labbé in his note under the decision reported in Sirey, but observe that "cette assimilation de la faute lourde et du dol a été quelquefois contestée (Sainctelette, Responsabilité et garantie, n° 11)".

Colin et Capitant, in their treatise Cours élémentaire de droit civil français, 7th edition, vol. 2, share the same

opinion. On page 76, under the heading "Clauses exonérant le contractant de sa responsabilité au cas d'inexécution de son obligation", we find the following remarks:

85. Est-il permis au contractant de stipuler qu'il ne sera pas responsable de l'inexécution de son obligation dans le cas où cette inexécution proviendrait d'une cause qui lui est imputable?

After having noted that one must not confuse this question with that of the insurance against negligences which one may make and having said a few words on the subject, the authors continue:

Cette observation faite, revenons donc à notre question. Tout d'abord, il est bien évident qu'un débiteur ne peut pas à l'avance s'exonérer des conséquences d'une inexécution qui proviendrait de sa mauvaise volonté, ou de son dol. Cela reviendrait en effet à lui reconnaître la faculté de ne pas exécuter son obligation. Or, aux termes de l'article 1174, toute obligation est nulle lorsqu'elle a été contractée sous une condition protestative de la part de celui qui s'oblige.

On admet d'autre part qu'un débiteur ne peut pas davantage stipuler qu'il ne sera pas responsable de sa faute lourde, car il est un minimum de soin qu'il faut nécessairement apporter à l'exécution de ses obligations. C'est le cas d'appliquer le vieil adage *Culpa lata aequiparatur dolo.* (Civ. 5 mars 1876, D.P. 1876.1.449; S. 1876.1.337, note de M. Labbé; Req, 15 mai 1923, D.P. 1925.1.15, S. 1924.1.81, note de M. Henri Rousseau).

Demogue, in his Traité des obligations adopts the opinion that public order demands the exclusion of gross negligence from an exculpatory clause.

In volume 5 of his treatise, we find these commentaries (p. 461):

L'ordre public fera également exclure la faute lourde. La solution contraire serait admise si l'exclusion du dol s'expliquait par une idée de condition protestative, bien que cette opinion n'ait été soutenue qu'avec hésitation, en disant que la faute lourde fait présumer le dol.

La majorité des auteurs admettent d'ailleurs la clause d'irresponsabilité, sauf dol ou faute lourde, du moins pour la responsabilité contractuelle, car ils excluent souvent l'exonération en matiére délictuelle.

See Dalloz, R.P. Vol. 10, p. 366, No. 244; D.P. 1876. 1.449.

Perrault, in his work Des stipulations de non-responsabilité, paragraphs 175 and 176, annotates the decisions of the Courts of the Province of Quebec and of the Supreme Court of Canada on the subject. It seems to me expedient to quote paragraph 176, which summarizes clearly and precisely the jurisprudence since the decision of the Supreme Court in the case of Glengoil Steamship Company v. Pilkington:

176. Avant la décision de *Glengoil SS. Co.* v. *Pilkington,* notre Cour d'appel avait toujours déclaré nulles les Clauses de non-responsabilité.

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Faut-il suivre encore de nos jours cette jurisprudence? L'hon. juge MacDougall, en 1936, dans la cause citée plus haut (74 C.S., p. 451, à la page 455) semble être d'avis que l'on ne peut pas s'exonérer de sa responsabilité délictuelle due à son fait personnel. Cette théorie doit-elle être admise?

Je crois que l'on peut s'autoriser des principes posés par la Cour suprême dans *Glengoil SS. Co., Regina* v. *Grenier,* par la Cour d'appel dans *Canadian Northern Ry. Co.* v. *Argenteuil Lumber Co.* pour ne plus suivre l'ancienne jurisprudence de la Cour d'appel, celle d'avant 1898. Lorsque la responsabilité délictuelle d'une personne est encourue par un quasi-délit, qui ne constitue ni une faute lourde, ni une négligence grossière, nous croyons qu'elle peut être repoussée par une clause de non-responsabilité, sans qu'il faille distinguer s'il s'agit d'une faute du débiteur ou de son employé.

Il n'y a rien de contraire à l'ordre public dans le fait de se prémunir contre une distraction possible, ou un manque d'habileté.

.....

Nous ne voyons rien de contraire à l'ordre public dans cette solution, théorique il est vrai, du problème. Il nous semble que les conventions d'irresponsabilité délictuelle, quand il s'agit du fait personnel, devraient être tenues pour valides en autant qu'il s'agit de fautes involontaires et légères.

L'appréciation du degré de la faute variera suivant les circonstances. Ce sera au tribunal à décider si la faute *involontaire, personnelle,* est assez légère pour qu'on puisse s'en exonérer par une convention.

In the case of *Brasell* v. *La Compagnie du Grand Tronc* (1), the head-note contains the following statements:

Jugé: 1. Une compagnie de chemin de fer sur la ligne de laquelle circulent les voitures d'une compagnie de chars dortoirs, peut invoquer, à l'encontre de l'action dirigée contre elle à raison d'un accident, par un employé de la compagnie de chars dortoirs, un contrat par lequel celle-ci a stipulé immunité, pour elle et pour la compagnie de chemin de fer, de tout accident que l'employé pourrait éprouver dans l'exercice de ses fonctions, lorsque ce contrat a été fait en vertu d'une convention intervenue entre les deux compagnies. Art. 1028, 1029 C.C.

2. Cependant ce contrat n'aura pas l'effet de libérer la compagnie de chemin de fer, lorsque l'accident est arrivé par sa faute ou négligence grossières, mais il incombe à l'employé lié par ce contrat de prouver cette faute ou négligence. Art. 1676 C.C. et 51-52 Vic. (Can.), ch. 29, art. 246.

Pagnuelo, J., in his judgment, after making some comments on certain decision of French tribunals, on the opinions of some authors (Nouveau Denisart, Pardessus et Troplong) and the judgments in Rendell v. The Black Diamond Steamship Co. (ubi supra); Gracie v. Canada Shipping Co. (ubi supra), *The Great North Western Telegraph Co.* v. *Laurance* (2), *Grand Trunk Railway Co.* v. *Vogel* (3) and *Western & Atlantic Railway Co.* v. *Bishop* (4), sets forth these observations (p. 159):

(1) (1897) R.J.Q. 11 S.C. 150.
(2) (1892) R.J.Q. 1 Q.B. 1.
(3) (1885) 11 S.C.R. 612.
(4) (1873) 50 Georgia Rep. 465.

Ce raisonnement a le défaut de restreindre la liberté des contrats à une négligence constituant un crime. Il faut aller plus loin et dire que personne ne peut stipuler l'immunité pour sa faute lourde ou grossière, ni les corporations publiques, ni les individus; peu importe la nature du contrat et les personnes qui contractent; cette convention serait nulle dans son essence comme contraire à l'ordre public.

In the case of *Lavoie* v. *Lesage* (1), one of the reasons put forward by Pratte, J., in his judgment reads thus (p. 151):

Considérant que si, par l'acquiescement du demandeur, cette déclaration du défendeur équivaut à une clause de non-responsabilité faisant partie du contrat intervenu entre le demandeur et le défendeur, cette clause doit être considérée comme ne visant que la responsabilité contractuelle du débiteur; qu'en effet, en l'absence de preuve au contraire, on ne peut présumer que les parties au contrat, lorsqu'elles ont convenu sur ce point, aient envisagé d'autres relations juridiques que celles découlant du contrat qu'elles formaient, et que par conséquent, la clause d'exonération précitée n'a d'autre effet que d'affranchir le débiteur de l'obligation de prouver que s'il n'a pu rendre la chose dont il avait la garde la cause en est à un cas fortuit ou à une force majeure, et n'enlève pas au créancier le droit de réclamer des dommages-intérêts s'il peut prouver la faute du débiteur; que même si la clause d'exonération précitée pouvait libérer le débiteur de certaine responsabilité quasi-délictuelle elle serait sans effet sur la responsabilité découlant de sa faute lourde.

In the case of *Les Commissaires du Havre de Québec* v. *Swift Canadian Co.* (2), the summary of the judgment of the Court of King's Bench, reversing the judgment of the Superior Court, contains this paragraph:

...3. Dans un contrat d'entreposage, la clause d'exonération de responsabilité est valide en tant qu'elle s'applique à la faute contractuelle. Elle libère le débiteur de la faute légère, mais non de la faute lourde ni de la faute délictuelle.

In the case of *Conway* v. *Canadian Transfer Company Limited* (3), the judgment of Tait, C.J., contains the following statement (p. 67):

Considering that the special condition of said receipt, limiting the liability of the said defendant to a sum of $50, even in case of gross negligence, is a special condition within the meaning of the article 1676 C.C., which cannot avail defendant, if the loss was occasioned by its gross negligence as the court finds was the case here.

In the case of *Aga Heat (Canada) Limited and Brockville Hotel Company Limited* (4), the head-note, fairly comprehensive, reads in part as follows:

Appellant agreed to deliver and erect certain cooking equipment in the kitchen of respondent's hotel and for that purpose to remove a range

(1) (1939) R.J.Q. 77 S.C. 150.
(2) (1929) R J Q. 47 K.B. 118.
(3) (1911) 17 R.L., n.s., 60.
(4) (1945) S.C.R. 184.

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and canopy. To remove the canopy it was necessary to sever two ducts leading therefrom to a main duct, and appellant's man in charge of the work engaged a workman to do the cutting with an oxy-acetylene torch. It was intended to cut the two ducts near the canopy, but respondent's hotel manager expressed his wish that, for the sake of appearance, they be cut near the main duct (which involved no more labour) and appellant's man in charge agreed that this be done. The hotel manager then left the kitchen. While the workman was using the torch, oil and grease which had accumulated in the main duct caught fire, resulting in a fire which damaged the hotel.

Held: affirming judgment of the Court of Appeal for Ontario, (1944) O.R. 273, that appellant was liable to respondent in damages.

In the judgment of Justices Taschereau and Estey, delivered by the latter, are the following remarks, clear and precise, which I believe convenient to quote (p. 189):

Under the terms of the contract the Aga Heat (Canada) Limited had expressly agreed to complete the removal of "range and canopy" and to install the equipment they had sold. In all this they were pursuing their usual course of business. Mr. Craig on behalf of the appellants inspected the premises, examining particularly the canopy as to the presence of grease because he appreciated the possibility of fire. Mr. Craig employed Henry & Company who in their business use oxy-acetylene torches. Mr. Henry discussed the fire hazard, and as a result fire extinguishers were obtained. Moreover the company, in its letter of January 6, 1939, described the canopy as "a harbour for dirt and grease", and referred to the ventilator fan. The evidence refers to the cleaning of the ducts from time to time. Here and there throughout the ducts dirt and grease would be expected particularly by those familiar with the equipment. Notwithstanding all this, when it was decided to cut the lead ducts close to the main duct, no questions were asked and no precautions were taken and they proceeded forthwith to use the oxy-acetylene torch.

The appellant, as was its right under the contract, had selected this oxy-acetylene torch, which in operation generates a heat of over 6,000 degrees and sends out quantities of sparks. The operation of this torch in such circumstances as we have in this case creates a possibility of fire and requires on the part of those operating it that reasonable precautions should be taken to avoid fire. In this case there were no precautions taken at or near the point of severance and, in my opinion, the duty to do so rested upon the appellants who had undertaken the work, provided the equipment, and employed the men. The respondents on their part had a right to regard the appellants as competent both to do their work and to take reasonable precautions that the premises would not be injured as a consequence of their failure to do so. The Nautilus Steamship Co. Ltd. *v.* David and William Henderson & Co. Ltd., 1919 Sess. Cas. 605; H. & C. Grayson Ltd. *v.* Ellerman Line Ltd., (1920) A.C. 466; The Pass of Ballater, (1942) P. 112; Honeywill & Stein Ltd. *v.* Larkin Bros. Ltd., (1934) 1 K.B. 191.

See also *Canadian National Railway Co.* v. *Canada Steamship Lines Limited* (1).

(1) (1948) O.R. 311, 325.

The case of *Insurance Company of North America* v. *Louis Picard & Company Inc.* (1) relied upon by counsel for suppliants Copping, Cunningham & Wells Limited and W. H. Taylor Limited, is not legally pertinent, if it is otherwise interesting on account of the similarity of the facts, the damages claimed therein having arisen from a fire caused by the use of oxy-acetylene torch, with which the defendant was piercing holes in a steel beam.

The stipulation of irresponsibility must be interpreted strictly: *Watson* v. *Dame Philips* (2) and the authorities cited in note 1 at the bottom of the page; *Allen* v. *The Canadian Pacific Railway Co.* (3).

I examined carefully the works of the outstanding English authors, who deal with the questions of negligence and tort; unfortunately, they offer no assistance for the solution of the problem with which we are faced. They refer to gross negligence, sometimes setting it aside as not distinguishable from common negligence and sometimes attempting to define it, but they make no commentaries on the validity of the stipulation of irresponsibility in that respect. This silence on a so important matter is, to say the least, strange.

Clerk & Lindsell on torts, 10th edition, which is, as far as I know, the most recent work, express the following opinion (p. 344):

> Though there are no degrees of negligence, obviously the degree of care which would be exercised by a reasonable and prudent man will vary with the circumstances. Therefore, the expression "gross negligence", though inaccurate and possibly misleading, is a convenient phrase to express the idea that the degree of care required of the defendant was small. These degrees of care, however, it is impossible to define or classify, for they are infinite in number, each special set of circumstances requiring its own particular degree; so that an exhaustive catalogue of the various degrees of care would be a simple enumeration of all the decided cases. It is in each case practically a question of fact for the jury whether the proper degree of care has been taken.

The authors then cite a few cases of negligence, which I do not think necessary to analyse. Further on they make the following observations (p. 349):

> The existence of a duty to take care provides the really difficult problem of the tort of negligence. As the subject has grown up over a long period and without initial definition, it is practically impossible to be scientifically accurate, more particularly because the existence of a duty has been frequently confused with the degree of care. The matter

(1) (1942) 9 Insurance Law Reporter, 67.
(2) (1924) R J.Q. 62 S C. 448.
(3) (1910) 10 Can. Ry. Cas. 424.

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has been further complicated by the subject of remoteness of damage which has a definite bearing upon this topic. In fact the problem has two clearly distinct aspects: first, whether the circumstances give rise to the duty, and secondly, whether the duty is owed by the defendant to the plaintiff. It is necessary that both these questions should be answered in the affirmative before any cause of action exists, but usually in answering the first the second affirmative automatically follows. Therefore, the first will be considered as exhaustively as space and authorities permit.

It may be convenient here to call attention to the fact that the expression "negligent act" should be used with the greatest caution. An act may constitute negligence in law only provided that the other element of damage to a person to whom a duty of care is owed exist. Even if this duty is established, it remains a question of fact for the jury and not a question of law for the Judge.

In Beven's Negligence in Law, 4th edition, vol. 1, we find these commentaries (p. 25):

Now it is beyond question that the term "gross negligence" has been used by many Judges—as, for instance, by Lord Chelmsford in Moffatt *v.* Bateman ((1869), L.R. 3 P.C. 115, 122). But there he uses it merely as a convenient colloquialism; for he speaks of "gross negligence—a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another responsible." Such use of the term is analogous to the use by other Judges of the term "degrees of negligence"—as, for instance, by Lindley, L.J., in Cornish *v.* Accident Insurance Co. ((1889), 23 Q.B.D. 453, 457), where when he says "but there are degrees of negligence" he clearly does not intend to assert that negligence is divisible into "ordinary", "slight", and "gross", but intends merely to point out that there are—as there obviously are—degrees in the "absence of care according to the circumstances" which constitutes negligence (See per Montague Smith, J., in Grill *v.* General Iron Screw Collier Co. (1866) L.J.C.P. 321, at p. 331), and in many cases the Judges have refused to recognize any distinction in law between "negligence" and "gross negligence", and have, as will be seen, used the two terms as practically interchangeable.

At page 30 the author adds:

The subject of gross negligence was discussed in Cashill *v.* Wright ((1857), 6 E. & B. 891, 899, as to which see Newman *v.* Bourne & Hollingsworth (1915), 36 T.L.R. 209), where misdirection was alleged in telling the jury to find for the plaintiff unless they were of opinion that he had been guilty of gross negligence; and the Queen's Bench made a rule absolute for a new trial. There Erle, J., said: "It does not appear that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*" (See Taylor *v.* Russell, (1891) 1 Ch. 8, judgment

of Kay, J., and post, Estoppel). But after saying this he went on, "We think that the rule of law resulting from all the authorities is that in a case like the present (in which an innkeeper was sued for the loss of the watch, etc., of a guest which the guest had left on the dressing-table of a bedroom when he went to bed leaving the bedroom door ajar) the goods remain in the charge of the innkeeper and the protection of the inn so as to make the innkeeper *liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way that the loss would not have happened if the guest had used the ordinary care that a prudent man may reasonably be expected to have taken under the circumstances.*"

Underhill, in his book A Summary of the law of torts, 15th edition, lays down the following principles (p. 156):

It will be observed that negligence may consist in either misfeasance, i.e. doing that which a prudent and reasonable man would not do; or in nonfeasance, i.e. omitting to do something which a prudent and reasonable man would do. *Negligence is judged by the standard of prudence of an ordinary reasonable man,* and if a person does something which one of ordinary intelligence and prudence would not do or omits some precaution which one of the ordinary intelligence and prudence would take, he is negligent, although he may himself think it legitimate to do that thing or unnecessary to take that precaution. And although an act which is in accord with general and approved practice cannot usually be condemned as negligent, even if subsequent experience may prove that some additional precaution is necessary, yet sometimes the general practice itself falls short of the standard of care which would be exercised by a man of ordinary prudence, in which case it is no defence for the defendant to say that he has followed that practice.

Later he adds (p. 177):

(1) In the case of articles and substances dangerous in themselves, such as loaded firearms, poisons, explosives, inflammable gases, and other things, *ejusdem generis,* there is a duty imposed on those who control, deliver or otherwise send them forth to take precautions to secure the person and property of others from injury and damage thereby.

In Salmond's Law of Torts, under the general heading Negligence, we find the following comments (p. 29):

1. *Negligence and wrongful intent distinguished.*—In the law of torts negligence has two meanings: (1) an independent tort, with which we shall deal in its place; (2) a mode of committing some other torts. It is with the latter that we are now concerned. In this latter sense negligence is carelessness. In some cases either negligence or wrongful intent is required by law as a condition of liability. Each consists in a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, and therefore does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, and therefore does not refrain from the act notwithstanding the risk that they may happen. The careless man is he who does not care—who is not anxious or not sufficiently anxious that his activities shall not be the cause of loss to others. The

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wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot also have caused it negligently, and vice versa.

The author's remarks under the titles The Duty of Care (p. 430) and The Standard of Care (p. 436) may also be consulted with benefit.

In the case of *Giblin* v. *McMullen* (1), Lord Chelmsford, who delivered the judgment of the Judicial Committee of the Privy Council, speaking of gross negligence, makes the following observations, which are in the same sense as those of the authors herein above quoted (p. 336):

> Did the Plaintiff, then, give any evidence of the Bank having been guilty of that degree of negligence which renders a gratuitous Bailee liable for the loss of property deposited with him?
>
> From the time of *Lord Holt's* celebrated judgment in Coggs *v.* Bernard (Ld. Raym. 909), in which he classified and distinguished the different degrees of negligence for which the different kinds of Bailees are answerable, the negligence which must be established against a gratuitous Bailee has been called "gross negligence". This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a Bailee of this class. At last, Lord *Cranworth* (then Baron *Rolfe*), in the case of Wilson *v.* Brett (11 M. & W. 113), objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet". And this critical observation has been since approved of by other eminent Judges.

As previously stated, it is established beyond doubt that the fire, which destroyed the shed or warehouse in question and its contents, was caused by the gross negligence of officers and servants of the Crown while acting within the scope of their duties or employment.

After carefully perusing the doctrine set forth by the authors, French and Canadian, and adopted by the Courts of the Province of Quebec and the Supreme Court of Canada, with respect to the bearing of the excupaltory clause in the lease Exhibit A in the case of gross negligence, I have reached the conclusion that this clause does not exempt the respondent from his responsibility in connection with the damages suffered by the suppliant as a consequence of the fire.

There will be judgment in favour of suppliant against respondent for the sum of $40,713.72 and costs.

Judgment accordingly.

(1) (1867-1869) L.R. 2 P.C. 317.