IN THE MATTER OF THE PETITION OF RIGHT OF

ANTOINE GIRARD, OF THE CITY OF QUEBEC, MECHANIC, ACTING IN HIS QUALITY OF TUTOR DULY APPOINTED TO ANTONIO GIRARD, OF THE SAME PLACE, A MINOR OF FOURTEEN YEARS, SUPPLIANT;

1916
March 17.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Crown's servant—Accident—Proximate cause—Infringement of instructions—Liability.

G., a boy aged 13, but who represented himself as being older, was employed on a folding machine in a Government arsenal. He was given a position at the back of the machine with special instructions to watch the same and, if a charger should be ejected, to immediately notify the operator to stop the machine. On the occasion of the accident, G. while at his post observed that a charger had jumped out and fallen into the machine. He called out to the operator to stop the machine, and instead of leaving the operator to remove the charger with his hook, he himself negligently placed his hand in the machine to remove it. By special instructions known to G., the duty of removing the charger devolved on the operator alone who was provided with a hook for that purpose. Shortly afterwards, the operator having asked whether it was all right, an answer came from behind repeating the words "all right" and the machine was started again. G. had his finger caught in the machine and so badly damaged that it had to be amputated.

Held, that the petition would not lie as the accident was not attributable to the negligence of any office or servant of the Crown while acting within the scope of his duties or employment under sec. 20 of the *Exchequer Court Act*, nor did it happen to G. while he was engaged in the discharge of his duties as defined by his instructions. The proximate or effective cause of the accident was the act of G. himself in doing something which he knew was not his duty and the risk of which he voluntarily accepted.

PETITION OF RIGHT for damages arising out of an accident to a workman while employed in the Dominion Arsenal in the City of Quebec.

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The facts are stated in the reasons for judgment.

February 24th and March 3rd, 1916.

The case now came on for hearing before the Honourable MR. JUSTICE AUDETTE, at Quebec.

A. Fitzpatrick, for the suppliant, argued that Girard, a mere boy, was placed at work with specific instructions. The operator in charge of the machine could not see him. There could not be any *faute commune* in any way. The Civil Code of this Province applies to the Crown. Anything coming under Articles 1053 and 1054 applies to the Crown. I submit that the *Factories Act* applies. It is a *primâ facie* case of negligence. An employer for obvious reasons employs a minor. He does not pay him as high wages as a more competent man of 18 or 21. He could employ a boy and pay him less, and that is what was apparently done in this case. The *Factories Act* will be found in the Quebec *Revised Statutes* for 1909, section 3829. In subsection 7, the word "child" means a boy under 14 years of age.

By sec. 3833 in establishments classified by the Governor in Council as dangerous, the ages of employees shall not be under 16 for boys and 18 for girls. I produce an order-in-council passed on the 27th March, 1902, which states in the list of places as dangerous, that the stamping of sheet metals is dangerous employment.

My contention is that if the Crown comes under Articles 1053 or 1054 of the C.C.P.Q., the *Factories Act* applies. It is undoubted law when the employer does not comply with the *Factories Act*, that is to say, when he employs a minor, or when he does not protect his machinery, there is a *prima facie* case against him. Under the Civil Code it would be negligence.

If Articles 1053 and 1054 C.C.P.Q. apply, then the *Factories Act* applies; and if the *Factories Act* applies, it has been held there is a *primâ facie* case of negligence. (1).

The rule of common employment does not apply to the Province of Quebec.

On the question of the employee's knowledge of the risk, see *Montreal Park and Island Railway v. McDougall.* (2) *Ross v. Langlois* (3). *Lariviere v. Girouard* (4).

C. Smith, for the respondent, argued that if the suppliant had obeyed his instructions, the accident would not have happened. It is his disobedience which is the determining cause of the accident. The onus to prove negligence is on the suppliant, and he has failed to do that. It is true Girard was not 14 years old when he was first engaged, but he did state that he was over 14 years at the time of his engagement. However, his age is not the determining cause of the accident, the cause of the accident being the failure of Girard to comply with his instructions.

AUDETTE, J., now March 17th, 1916,. delivered judgment.

The suppliant, in his quality of tutor to his minor son, Antonio, brought this petition of right to recover the sum of $6,420. which he claims as damages, arising out of the loss of the index finger of the said Antonio Girard's right hand, resulting from the unsafe and

(1) See *Caron v. The Standard Shirt Co.*, Q.R. 28, S.C., 211. *Belanger v. Cie. Desjardins*, Q. R. 29 S.C. 1. *Kirk v. Canada Paint Co.*, Q. R. 29 S.C. 500. *Desrosiers v. St. Lawrence Furniture Co.*, 4 Q.R. 27 S.C. 73. *Grignon v. Chambly Manuf. Co.*, 7 R.J. 125. *Gibbons v. Skelton*, 7 R.J. 232. *Martel v. Ross*, Q.R. 16 S.C. 118. *Ibbotson v. Trevethick*, Q.R. 4 S.C. 318. *Lamoureaux v. Fournier*, 33 S.C.R. 675. 21 *Halsbury's Laws of Eng.*, p. 366.
(2) 36 S.C.R. 1.
(3) 36 S.C.R., 1.
(4) M.L.R., 1 Q.B. 280.

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defective condition of a piece of machinery, and from the negligence of a fellow workman in the course of their employment in the Dominion Arsenal, in the City of Quebec, a public work of Canada.

Counsel for the suppliant, in the course of the trial, withdrew the claim for $420. for medical attendance, as having been wholly paid by the Crown. It was also admitted that Girard was paid his wages from the time of the accident up to the 9th January, 1915, when he left the Arsenal.

The accident happened on the 9th September, 1914, and the petition of right was filed in this Court on the 9th November, 1915,—that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears, from Exhibit No. 2, that the petition of right was, under the provisions of sec. 4 of *The Petition of Right Act* (R.S. 1906, Ch. 142), left with the Secretary of State on the 9th day of August, 1915. Following the numerous decisions of this Court upon the question, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of Art., 2224, C.C.P.Q.—See *Saindon v. The King*. (1.)

Briefly stated, freed from numerous and unnecessary details, the accident happened under the following circumstances:—

On the evening of the 9th September, 1914, the night shift of the men employed at the Dominion Arsenal, at Quebec, began work at about 6.30 p.m. One young Ruel resumed his work on No. 2 folding machine, shown on the photograph filed herein as exhibit "A." Ruel at that time was employed in making what is called "chargers." To manufacture

(1) 15 Ex. C.R. 305.

a charger three operations are necessary. The first one gives him in the result, the perforated plate marked Exhibit "D"; the second operation produces Exhibit "C"; and the third and last operation gives Exhibit "B".

Now when a new *block* or *die* was being used in that machine with respect to the third operation, the "charger" was so much pressed against the block, that when working its way out of the block and coming to the end thereof, it would at times jump, instead of falling directly in the box marked "D", underneath the machine. When a charger would thus jump it was liable to fall in the bed of the machinery of the folding instrument, and was thus liable to block or break the machine.

On the day in question Morin, who was in charge of the plant at the Arsenal at the time, watched the folding machine for a while, and then at about 7 o'clock, in the evening, he placed Antonio Girard, sitting on a box, at the back of the folding machine, with specific instructions to watch the machine and see if any charger would jump, and when any did jump to tell Ruel to stop the machine; and that Ruel, *who had a wire hook would remove them.* Morin further contends he told Girard that he had nothing to do with the machine, and that he forbade him to put his hands in or upon the machine. All of this was done, it will be noticed, not to protect any employee from any imminent danger but solely to protect the machine and to prevent the blocking of the same.

After the folding machine, had that evening been in operation for about one hour and a half and when,—it is well to notice,—Girard was at his post behind the machine; but engaged in talking with both young Gagne and Thibault,—one "charger" jumped and fell

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into the machine. Then Girard called out to Ruel, who was the operator, to stop the machine and it was immediately stopped. Ruel had a wire hook for the very purpose of removing the charger; but Girard, who was behind the machine and whom Ruel could not see, came to the machine, in direct contravention to his orders, placed his hand in it and started to remove the charger. Shortly after the order to stop had come Ruel asked if it was "All right," and some one answered: "All right." He then set his machine anew in operation, when Girard, who still had his hand in the machine, had the index finger of the right hand so badly cut, that it had to be amputated.

Having thus related the salient facts of the accident, the next question which presents itself is, what was the proximate, the determining cause of this accident?

As a prelude thereto, however, it is well to state the suppliant to succeed must bring the present case within the ambit of sec. 20 of *The Exchequer Court Act*, and find:—1st., A public work; 2nd, An officer of the Crown who has been negligent when acting within the scope of his duties and employment; and, 3rd, That the accident was the result of such negligence.

It is admitted that the Arsenal, at Quebec, is a public work. Now, has there been any such negligence on behalf of an officer of the Crown, from which the accident resulted?

It must obviously be found that had the suppliant complied with his instructions that no accident would have happened. The proximate and determining cause of the accident is clearly the result of his disobedience because he had been derelict in the performance of his duty. The act upon which the risk of injury attended and from which the injury sustained

resulted, was clearly done outside the scope of his employment by Girard who suffered the injury. *C. P. R. v. Frechette* (1). Whatever negligence could be charged here against any employee of the Crown, could not be an *incuria dans locum injuria;* since the negligence which determined the accident was that of Girard. His own negligence was the sole effective cause of the injury he sustained. His duty or his work had been clearly assigned to him, guarding him against the danger of putting his hands in the machine and it was voluntarily that he encountered the danger whereby he sustained the injury complained of.

If the injury is occasioned outside the sphere of the duties of the employee, the infliction of injury does not raise a duty.

In *Herbert v. Samuel Fox & Co.*, (2), decided by the House of Lords, where an employee whose duty had been assigned to walk in front of the wagons when being shunted, and who instead of so walking in front of them, sat on the front buffer of the leading wagon, and while so placed fell and was injured,—it was held that the accident did not arise "out of" the employment, and that the employee by his conduct had exposed himself to a risk, which by express prohibition, was placed outside the sphere of his employment and he was not therefore entitled to compensation. See also *Jebb v. Chadwick*, (3).

In the present case it is clearly when Girard was acting outside the scope of his duties or employment, when he was transgresssing his instructions by disobedience, that the accident happened and he therefore cannot recover.

It is further contended that Girard was 13 years of age at the time of the accident, and that he should not,

(1) (1915) A.C. 880. (2) (1915) 2, K.B. 81.
(3) (1915) 2 K.B. 94.

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under secs. 3829 and 3833 (R.S.Q., 1909) have been employed in the Arsenal. The present case, if at all affected by the Provincial Statutes, a matter unnecessary to decide here, could only come under sec. 2 of sec. 3833, and as the evidence establishes that when he was engaged, Girard was astute enough to give his age to foreman Redding as 14, he cannot now invoke his own turpitude. After having done so, he cannot turn around and say, I deceived you when I told you I was only 13, and you should not have employed me. No,—he who seeks equity must come into Court with clean hands.

Girard is a well developed youth, and not so young, or of such tender age or inexperience, as being unable to understand his instructions and the danger of putting his hand in the machine; and it is not beyond the proportion of his age to exact from him such care and diligence as was required to allow him to understand his instructions. Specific easy work was assigned to him, the scope of his employment was clearly defined and resided in the obedience to the express command of his employer.

At the time of the accident he was engaged in conversation with two other young employees, and when he got up from his box and went to the machine and extracted the charger therefrom, he was acting beyong the scope of his employment.

Ruel says he received the order to resume the operation of his machine and that the words "all right" came from behind the machine where the three boys were; but he could not say who said so. The three boys denied having said it. Even Girard goes as far as that. However, witness Gagne says he is certain some one cried " All right," in answer to Ruel as to whether he should start his machine again; but

he says he did not say so and he does not know who did it. Thibault says he did not speak. The most interested to deny having said it is the suppliant and it is established some one said it.

I regret to have to come to the conclusion that Girard was the unfortunate victim of his own negligence and disobedience to his orders and instructions, and that he has no legal claim against the Crown since the latter has done him no legal wrong. No negligence on behalf of an officer of the Crown from which the accident resulted has been proved or established.

The suppliant is therefore not entitled to any portion of the relief sought herein and the petition of right is dismissed.

Judgment accordingly.

Solicitor for the suppliant: *A. Fitzpatrick.*

Solicitor for the respondent: *C. Smith.*