Trottier v. J.L. Lefebvre Ltée: Fault or Risk as Basis of Employer Liability?

The onerous obligation of an employer to protect his employees from any foreseeable accidents in the course of their duties was emphasized in the recent majority judgment of the Supreme Court of Canada in *Trottier* v. *J.L. Lefebvre Ltée.*[1]

In that case Trottier, who was 17 years old at the time of the accident, had been employed by the respondent butcher for seventeen months. His duties included mincing meat, which involved placing meat on a table and pushing it into a hole in the center of the table with an instrument known as a "rammer". The mincing apparatus into which the meat was pushed was composed of grinders and knives.

The table in question measured five feet in height, only slightly lower than Trottier himself, who stood five feet, six inches. As a result, Trottier could not see into the hole which contained the mincing apparatus. The lighting in the room where he worked was inadequate.

Trottier had been instructed how to operate the machine. He had been told that he was only to use the rammer to push the meat into the hole, and that it would be dangerous to do otherwise since sharp instruments were positioned at the bottom of the hole.

On the day of the accident, Trottier was alone in the room mincing meat. When he had completed mincing one supply, he left the machine to obtain more meat from the storage cupboard. Although it was his normal practice to turn the machine off when it was not in use, on this occasion he did not. When he returned from the storage room, he could not locate the rammer. Thinking it might be in the hole, he put his right hand in to see if it was there. His hand came into contact with the grinders, and it was only by reaching across the table to disengage the machine that he was able to remove it. As a result of the accident, three fingers were amputated, and seven subsequent surgical operations were required.

In the Superior Court,[2] Puddicombe J. maintained the action in damages for personal injuries and awarded a sum of $24,812.50. He found the respondent liable under both articles 1053 and 1054(1)

[1] [1973] S.C.R. 609, 31 D.L.R. (3d) 707.
[2] C.S.M. 663, 114 (unreported).

C.C. (damage caused by a thing). The negligence under article 1053 C.C. was based upon a number of findings of fault: poor lighting; the height of the table in relation to Trottier; the distance of the operating switch from the front of the table and the resulting difficulty in reaching it; inadequate instructions given to Trottier; and the absence of a protective device around the table containing the mincing apparatus. Article 1054(1) C.C. was said to apply because the machine was a thing under the care and control of the defendant.

The Quebec Court of Appeal unanimously reversed the judgment of Puddicombe J. and completely exonerated the defendant.[3] The claim based on article 1054(1) C.C. was disposed of as the damage was not caused by *le fait autonome de la chose,* but rather by some act of human intervention.[4] In addition, the court found that no liability could attach under article 1053 C.C. and instead attributed the accident entirely to the fault of the victim in inserting his hand into the hole containing the grinder.

The appeal taken against the judgment of the Court of Appeal was maintained by the majority in the Supreme Court of Canada.[5] The Court was unanimous in the view that article 1054(1) C.C. did not apply,[6] but differed as to the actual cause of the accident.

Pigeon J., speaking for the majority, found that both the victim and his employer had been negligent: Trottier in putting his hand in the hole when the machine was operating "when he could not have been unaware of the risk he was running in doing so"; and the respondent company by reason of the unusual height of the mincer and the small size of the rammer, which could easily fit into the opening leading to the mincing apparatus.[7] Applying the test stated by Galipeault J.A. in *Trust Général du Canada* v. *St. Jacques*[8] that «*C'est le devoir des patrons de protéger les ouvriers contre leur imprudence, leur négligence, leur faiblesse et leur inhabilité*», Pigeon J. added that

> It is not enough to say that the employee could have avoided an accident by being vigilant and attentive, regardless of the danger which the installation

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[3] [1970] C.A. 711; only a summary of the judgment is reported. The Court consisted of Rinfret, Owen, and Turgeon JJ.A.

[4] See on this point Crépeau, *Liability for Damages Caused by Things* (1962) 40 Can. Bar Rev. 222.

[5] *Supra,* f.n.1. The majority was comprised of Judson, Pigeon, and Laskin JJ. (as the latter then was), while Fauteux C.J. and Abbott J. dissented.

[6] *Ibid., per* Fauteux C.J. at 612 and 709, and *per* Pigeon J. at 616 and 712.

[7] *Ibid.,* 619 and 713-14.

[8] (1931) 50 B.R. 18, 22; aff'd. [1931] S.C.R. 711.

> he was required to work otherwise represented. An employer must avoid anything which tends to increase the risk of accident.[8a]

He concluded that the respondent company was two-thirds at fault and awarded damages in the amount of $16,514.67.

In his dissenting judgment, Fauteux C.J. invoked two grounds for maintaining the judgment of the Court of Appeal. First, he could not justify intervention by the Supreme Court on an interpretation of the facts that the Court of Appeal had seen fit to reverse. Second, while not disputing that an employer is obliged to avoid exposing his employees to dangerous situations, Fauteux C.J. adopted the view of Pratte J.A. in *Procureur Général de la Province de Québec* v. *Monette*[9] in which he stated that the employer's duty did not extend to protecting an employee from his own carelessness, or foreseeing that an employee would ignore recommendations of caution where means of protection from danger had been supplied. This analysis is best summarized by the remark of Pratte J.A. that,

> Le maître est tenu de prévoir, comme un bon père de famille, mais on ne peut exiger de lui qu'il ait le don de divination.[10]

On this basis Fauteux C.J. found that the employer had fulfilled his obligation to the appellant, and that the cause of the accident rested with Trottier.[11]

There is no doubt that the Court of Appeal and all the judges of the Supreme Court were correct in rejecting any finding of liability based on damage caused by a thing.[12] The machine in question was operated by the victim and in fact was functioning normally at the time of the accident. Clearly, no autonomous act of the machine was involved.

The dispute in the Supreme Court was centered not on the question of whether or not a duty existed, but rather on the limitations of the duty. In the particular circumstances of employer-employee liability the question is really one of foreseeability; that is, what measures should an employer take to protect his employees from foreseeable dangers?[13] Considering the problem in this light,

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[8a] *Supra,* f.n.1, 618 and 713.

[9] [1955] B.R. 66, 71-2.

[10] *Ibid.,* 72.

[11] *Supra,* f.n.1 at 613-14 and 709-10.

[12] *Supra,* f.n.4. See also Baudoin, *La Responsabilité Civile Délictuelle* (1973), 265-76; and Nadeau, *Traité Pratique de la Responsabilité Civile Délictuelle* (1971), 416-19.

[13] See for example *Procureur Général de la Province de Québec* v. *Monette, supra,* f.n.9; *Canadian Shade Tree Service* v. *Diabo et Uxor* [1961] B.R. 501, 502; and *Duquette* v. *Boucher* [1958] R.L. 367, where Brossard J., then of the

it is submitted that the preferable position is that adopted by Fauteux C.J., who took the view that to hold the respondent company liable would be tantamount to requiring it to protect its employees against every conceivable damage, no matter how remote.

The Supreme Court has previously considered the issue of foreseeability of damages, and it is surprising that reference was not made to these decisions. In *Ouellet* v. *Cloutier*,[14] the Court considered whether a farmer should have been held responsible for injuries sustained by a 10 year old boy who had come onto the premises to assist in the farmer's thrashing operations. The boy was injured when he tried to stop a thrashing machine that had already been disengaged. In exonerating the farmer from liability, Taschereau J. (as he then was) said:

> La loi n'exige pas qu'un homme prévoie tout ce qui est *possible*. On doit se prémunir contre un danger à condition que celui-ci soit assez *probable*, qu'il entre ainsi dans la catégorie des éventualités normalement prévisibles. Exiger davantage et prétendre que l'homme prudent doive prévoir toute possibilité quelque vague qu'elle puisse être, rendrait impossible toute activité pratique.[15]

Similar reasoning is to be found in the notes of Rinfret C.J. and Taschereau J. in *T. Eaton Company Ltd.* v. *Moore*.[16] A woman customer in Eaton's department store had slipped on a liquid substance which had been in a bottle accidently dropped by another customer. A clerk who had witnessed the bottle breaking immediately called the maintenance staff, who arrived on the scene within three minutes. The accident had occurred in the interim. The majority of the Court absolved the company of responsibility, and Rinfret C.J. said:

> 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.[17]

Even though these principles of civil responsibility under article 1053 C.C. are of general application, it appears that in this case, the Court was inclined to require a more rigid degree of foreseeability. Was it foreseeable as *probable* or *possible* that this employee would:

Superior Court, said at 372-73:

> Ainsi donc, même si l'employeur n'est pas l'assureur de son employé contre les imprudences imprévisibles dont ce dernier peut se rendre coupable, il n'en retient pas moins l'obligation suivante: fournir les moyens de protection réquis pour protéger son employé même contre les imprudences prévisibles dont ce dernier peut se rendre coupable.

[14] [1947] S.C.R. 521.

[15] *Ibid.*, 526.

[16] [1951] S.C.R. 470.

[17] *Ibid.*, 475.

a) not switch off the mincing apparatus, as was his custom, before leaving to get more meat to mince; b) place his hand in the opening of the operating machine which he knew contained sharp knives that could seriously injure him; and c) ignore the instructions and warnings of his employer about the dangers of the machine? The answer, it is submitted, is that such events when considered cumulatively can only be classified as possibly foreseeable rather than probably foreseeable. Quite apart from considerations such as the height of the table and the dim lighting, which admittedly were omissions on the part of the employer (but surely not the decisive cause of the accident), what could the employer have done that would have prevented this employee from doing what he did? The answer is not a simple one and, it is submitted, will not be found in the notes of Pigeon J.[18]

When one considers that the intensity of the obligation of a *bon père de famille*[19] is that of diligence or means, it is difficult to reconcile the majority view in the instant case with this standard. Even though the unhappy accident suffered by Trottier is one that would evoke the sympathy of any court, the stark fact remains that there is little in the way of fault that could have been attributed to the employer, especially when the very criteria established by the Supreme Court itself is applied.[20] Yet a conclusion inconsistent with these principles was reached.

On what basis can this conclusion be explained? Perhaps the majority took the view that judicial expression ought to be given to the no-fault principle embodied in the *Workmen's Compensation Act*,[21] even though it is apparent this employer was not subject to the Act. Or perhaps the majority decided to apply the risk theory of civil responsibility, which has not however been expressly accepted as part of the Civil Law of Quebec.[22]

The risk theory eliminates the need for fault; that is, a breach of duty on the part of the defendant is not necessary. The French author Boris Starck explains the notion in the following way:

> [Selon cette théorie] le fondement de la responsabilité civile se trouverait dans l'idée de *risque*: il est normal, et même conforme à la règle morale,

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[18] For instances where liability between the employer and the employee has been apportioned on an equal basis, see, for example, *Boutin* v. *Bernard* [1958] C.S. 555; *Duquette* v. *Boucher*, *supra*, f.n.13; *Gemme* v. *Gemme* [1959] C.S. 419.

[19] The employer in these situations is most frequently said to be obliged to act as a *bon père de famille*.

[20] *Supra*, f.ns. 16 and 18.

[21] R.S.Q. 1964, c.159.

[22] Nadeau, *supra*, f.n.12, 44.

> que celui qui a le *profit* d'une activité supporte en contrepartie la *charge* des dommages qui en découlent: *Ubi emolumentum ibi onus* (là où il y a le *gain*, il y a aussi la *charge*).
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> Il n'est donc pas nécessaire de prouver, ni même de présumer, la faute du responsable. Celui-ci doit réparer *parce qu'il a le profit de son activité.* La victime n'a qu'une seule preuve à faire: que le dommage subi résulte de l'activité du défendeur.[23]

It would certainly seem that the facts in *Trottier* v. *J.L. Lefebvre Ltée*[24] and the outcome of the case are more consistent with the risk theory than with fault. Here was an employer, whose goal was profit, whose employee suffered damages in the performance of his duties. No proof beyond the foregoing would have been required.

Instead, using the accepted fault principle, the majority of the Supreme Court appeared to be groping to find some "fault" for which it could hold the defendant largely responsible. In so doing, it was prepared to impose an onerous liability on rather shaky grounds. Until the Court decides to forthrightly consider and justify the application of the theory of risk in cases of civil responsibility, it is to be hoped it will pay closer attention to whether the "faults" it finds are real or imagined.

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[23] Starck, *Droit Civil*: *Obligations* (1972), 28, para.44; see also Baudouin, *supra*, f.n.12, 44; and Nadeau, *supra*, f.n.12, 43-4.

[24] *Supra*, f.n.1.

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