La Compagnie d'Assurance Canadienne Nationale v. Marek Siemiatycki [1]

Howard B. Shaffer *

Article 1629 of the Quebec Civil Code provides that:

> "When loss by fire occurs in the premises leased, there is a legal presumption in favor of the lessor, that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary, he is answerable to the lessor for such loss."

What proof must the lessee make in order to rebut this legal presumption? Is it sufficient for him to establish that he acted in a prudent manner, taking all reasonable precautions to avert a fire, or must he go further and prove the cause of the fire so as to show that he was in no way implicated?

Facts and Decision

Plaintiff insurance company insured a building against fire in the name of the proprietor, who subsequently rented it to the defendant, Siemiatycki, by written lease. On April 2, 1960, during the term of the lease, a fire broke out in the leased premises at about 2:30 a.m., causing considerable damage to the property. Plaintiff company paid the proprietor $4,462.28 in virtue of the insurance contract, and obtained a transfer and subrogation in his rights against the defendant to the extent of the amount paid.

At trial, plaintiff invoked Art. 1629 C.C., pleading fault, negligence and imprudence on the part of the defendant or his employees or customers. Defendant disclaimed responsibility, replying that he and his employees had taken all reasonable precautions, and that an inquiry held on April 21, 1960 by the fire commissioner had established that the cause of the fire was unknown.

Mr. Justice G. B. Puddicombe, who heard the case in Superior Court, phrased the legal problem as follows:

> "The sole question for the Court is whether or not the presumption raised by Article 1629 of the Civil Code has been effectively rebutted by the defendant."

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* Of the Junior Board of Editors, McGill Law Journal, second year law student.

[1] An unreported judgment of the Superior Court of the District of Montreal, no. 522,317, 29 June 1964, Mr. Justice G. B. Puddicombe.

The learned judge held that the defendant had not rebutted the presumption. He conceded that the cause of the fire was unknown, and that the proof showed that the defendant had been "reasonably prudent... probably to the extent of *un bon père de famille*". Despite these findings, however, Mr. Justice Puddicombe held at page three of his judgement that:

> "The defendant contented himself with proving that he had acted as a reasonable man. I am of the opinion that he had also to prove that the fire could not have occurred by reason of his fault... He must... show that he had done nothing which could have caused the fire... This latter, in my view, he has totally failed to do. He has made no attempt to show what the cause of the fire was other than to say that it was unknown, which is insufficient."

The plaintiff company was awarded judgement for the sum of $4,462.28 against the defendant lessee.

Jurisprudence and Doctrine

The decision of Puddicombe J. conflicts with a long line of Quebec jurisprudence on this question, headed by a Supreme Court judgment in *Murphy v. Labbé*.[2] This jurisprudence is to the effect that:

> "The defendant need not prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force; it is sufficient for him to prove that he has used the object leased as a prudent administrator *(en bon père de famille)*, and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible."[3]

Quebec law commentators Mignault[4] and Snow[5] express agreement with the above viewpoint.

The opposing view taken by Mr. Justice Puddicombe finds precedent in two early decisions,[6] neither of which he cited. In another

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[2] (1897) 27 S.C.R. 126. See also: *Evans v. Skelton* 16 S.C.R. 637, *Jamieson v. Steele* Cas. Dig., 2 ed., 465 at 467, *Parent v. Potvin* (1895) 1 R.J. 387, *Klock v. Lindsay* (1898) 28 S.C.R. 453, *Ford v. Phillips* (1902) 22 S.C. 296, *Hunt v. Beetham* (1904) 10 R.J. 536, *Henry v. Ward* (1918) 28 B.R. 159, *Fox Film Corp. Ltd. v. Moreau* (1923) 61 S.C. 536, *Clermont v. Charlebois* (1924) 37 B.R. 151, *Valois v. Caromel* (1926) 64 S.C. 319, *Potvin v. De Bechard* [1946] R.L. 1, *Fleury v. Légaré* [1947] S.C. 259, *Mailhot v. Loranger* [1949] B.R. 814 at 820, *Yorkshire Insurance Company Ltd. v. Gabriel* [1964] S.C. 347 at 349.

[3] *Fox Film Corp. Ltd. v. Moreau, supra*, p. 536 (Rinfret, J.).

[4] *Droit Civil Canadien*, vol. 7, pp. 306-307.

[5] *Law of Landlord and Tenant*, 3rd. ed., 1934, pp. 305-306.

[6] *Séminaire de Québec v. Poitras* (1875) 1 Q.L.R. 185, and *Bélanger v. McCarthy*, 19 L.C.J. 181.

case,[7] Mr. Justice Taschereau cited with approval the judgment of the *Seminaire de Québec* case that the lessee, in order to rebut the presumption of Art. 1629 C.C., must go beyond proving he acted prudently to show how the fire originated and that it was without fault on his part. Faribault[8] criticizes the *Murphy v. Labbé* and *Fox Film Corp. Ltd. v. Moreau* decisions[9] and seems to share the opinion of Puddicombe J. The preponderance of opinion in Quebec remains, however, that the lessee need not prove the cause of the fire but need establish that he acted *"en bon père de famille"* with no fault in any way attributable to him, in order to overcome the legal presumption of Art. 1629 C.C.

Critique of Judgment

The decision of Puddicombe J. departs from an apparently well-established body of jurisprudence. Despite the fact that, in theory, Quebec does not accept the Common Law doctrine of *stare decisis*, the present case does not seem urgent enough to warrant a definitive rejection of accepted doctrine. Moreover, the decision may be objected to on grounds that it contradicts Art. 1629 C.C. and leads to an impossible situation.

Article 1629 C.C. provides that the presumption that a fire in leased premises "was caused by the fault of the lessee" may be rebutted if the lessee "proves the contrary."[10] Strictly speaking, the contrary or converse of the proposition that the fire was caused by the fault of the lessee is that the fire was *not* caused by the fault of the lessee. Hence to establish the converse proposition, the lessee need only prove that he was not at fault. If he can successfully dissociate himself from fault he will have rebutted the presumption without having to make any proof of the cause of the fire. It now may be objected that the lessee cannot really exonerate himself from causing a fire unless he proves the cause

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[7] *Evans v. Skelton, supra,* at p. 659.

[8] *Traité de Droit Civil du Québec,* vol. 12, pp. 177-179.

[9] *Op. cit., supra.*

[10] There is an apparent discrepancy in the wording of the English and French versions of Art. 1629 C.C. In the English version, the pronoun "it" in the clause "that it was caused by the fault of the lessee", refers not to the fire, but to "loss by fire". Thus the English version alludes to the cause, not of the fire itself, but of something quite different in ordinary usage, viz. "loss by fire". In the French version, *"qu'il a été causé"* refers clearly to *"l'incendie"* and not to *"perte par incendie"*. This writer has, for present purposes, resolved the discrepancy in favor of the French version (see Art. 2615 C.C.), but submits that an amendment seems in order to avoid possible misinterpretations.

of it and shows that he was in no way at fault as regards that cause. This objection, however, leads to an impossibility where, as in this case, the cause of the fire is unknown.

The legal presumption raised by Art. 1629 C.C. against the lessee is, according to the very words of the article, rebuttable or *juris tantum*.[11] According to Mr. Justice Puddicombe's decision that the lessee, to exculpate himself, must prove the cause of the fire, it follows that every time that the cause of the fire is unknown, the lessee will be unable to rebut the presumption. Thus in many cases a *juris tantum* or rebuttable legal presumption will have been converted in effect into a presumption which is irrebuttable or *juris et de jure*.[12] It is submitted that this result opposes not only the spirit of our jurisprudence, but also the very terms and import of Art. 1629 C.C. In the absence of any provision to that effect, the legislature, it is submitted, could not have intended to place upon the lessee's shoulders the impossible burden of proving the cause of a fire, which has been proved to be unknown.[13] The lessee's burden must therefore be that he prove he was in no way at fault, whether or not the cause of the fire be known and proved.

General Considerations and Conclusions

In general, the presumption in favor of the lessor as exemplified by 1629 C.C., is losing the importance it once had. It seems to have originated in times when fire insurance was unknown in order to protect the lessor against loss by fire of his leased premises. The Roman law used it and the French adopted it;[14] but the English, who early developed the contract of insurance, never accepted this legal presumption.[15] Our codifiers in Quebec adopted the presumption from French law, but our Art. 1629 C.C. is much wider in scope than its counterpart in Art. 1733 C.N.[16] The opinion is current that the modern fire insurance contract affords the lessor the protection formerly secured only by the legal presumption in

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[11] Faribault, *op cit.*, p. 178.

[12] Art. 1239 C.C. distinguishes formally between rebuttable and irrebuttable legal presumptions.

[13] In this case a fire commissioner's inquiry concluded that the cause of the fire was unknown.

[14] Art. 1733 C.N.

[15] Girouard, J. in *Murphy v. Labbé, supra*, at p. 137 gives a learned discussion of the history of the presumption in Art. 1629 C.C.

[16] *Traders General Insurance Co. v. Jobin* [1956] B.R. 788, at p. 792. (Gagné, J.).

his favor.[17] Furthermore, this presumption is not of public order; it may be, and often is, set aside by an express clause in the lease.[18]

It is also evident that in many cases it is difficult or impossible to ascertain the cause of a fire, therefore difficult to attribute causal fault with precision. In such cases the presumption works hardship upon the lessee. To a much greater extent than in 1866, when Art. 1629 C.C. came into force, premises now leased, such as commercial buildings and apartment dwellings, are large and complex. With the widespread use of electricity and electrical equipment there arises the probability of fires caused by defective wiring, for which a tenant may not be at all responsible.

Finally, it is submitted that fault involves the breach of a pre-existing obligation. Art. 1626 C.C. obliges the lessee:

> "1. To use the thing leased as a prudent administrator, for the purposes only for which it is designed and according to the terms and intention of the lease;..."

The writer submits that Art. 1626 C.C. sets up the standard of behavior by proof of which the lessee should be held to have rebutted the presumption of his fault in Art. 1629 C.C.[19]

In the light of these considerations, the decision of Puddicombe J. in this case seems unwarranted, and it is submitted with respect that the law is that which is held by the majority of our jurisprudence, namely that in order to overcome the presumption that loss by fire in leased premises was caused by his fault, the lessee need not prove the cause of the fire; it is sufficient for him to prove he acted *"en bon père de famille"* and that the fire occurred with no fault attributable to him or to persons for whose acts he is responsible.

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[17] Snow, *op. cit.*, p. 306.

[18] The express waiver of the legal presumption in favor of the lessor may also be made effective as regards the latter's insurance company which becomes subrogated in his rights. The lessor may subscribe to a policy of fire insurance designed to cover the risks of such waiver. Although the presumption be waived, a trader occupying commercial premises as lessee may be well advised to insure himself against claims of the proprietor or adjacent lessees as a result of fire caused by his fault. (See *Assurances*, Jan. 1964, no. 4, pp. 221-222).

[19] Savatier, *Cours de droit civil*, 1944, vol. 2, no. 352, p. 172, calls the lessee's obligation an *"obligation de moyens"*, which allows the *"débiteur d'échapper ainsi à toute responsabilité par la preuve de sa diligence"*.