tablishing that he acted within the usual trade practices and so exercised *all reasonable means*. In this respect the judgment indicates a valuable approach in determining a somewhat more objective view of what constitutes *all reasonable means*.

CLIVE V. ALLEN*

SAINT-PIERRE and ANOTHER v. McCARTHY

RESPONSIBILITY — SHOOTING BY CHILDREN — THIRD PARTY WOUNDED BY CARTRIDGES BOUGHT FROM TWO MERCHANTS — FAULT OF BOTH — SOLIDARITY — BURDEN OF PROOF — ARTICLES 1053, 1106 C.C.

After ninety years of jurisprudence on the mysteries of art. 1053 of the Civil Code of Quebec, it is of great interest to realize that once again the courts of the province have been required to make an even closer study of the provisions of that celebrated article, which reads:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

The interest of the case under discussion[1] arises from an extraordinary series of events in which two persons committed similar faults which, though separate, distinct, and different in point of time, depended on each other to set up the situation from which the damage complained of could only have resulted. The problem before the court was whether or not these individuals could be held jointly and severally liable for the damages caused by their manifestly imprudent and negligent, but disassociated, acts under art. 1106.[2]

The defendants were merchants in the town of Princeville. In separate transactions they sold to a group of boys, all under fourteen years of age, two boxes of cartridges. The boys left the village to go into the country where they spent some time in rifle practice; when they had nearly exhausted their supply of shells, they returned to the town where they continued their shooting on the property of the plaintiff's neighbour. The last of these cartridges, when fired, penetrated the fence and seriously wounded the plaintiff's minor daughter.

The plaintiff urged in his action against the defendants that in selling the cartridges to these boys, they had committed a gross imprudence which had resulted in the accident. By way of answer the defendants argued against the plaintiff that:

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[1][1957] Q.B. 421. Appeal from the judgment of the Superior Court (Athabaska) rendered by Mr. Justice Edge (May 27, 1955) maintaining the action. Appeal dismissed.

[2]Art. 1106 reads: "The obligations arising from the common offence or quasi-offence of two or more persons is joint and several."

1) the action should be maintained against only one of the defendants; that is to say, against that single merchant who had sold the box of shells which had contained that one last fired;
2) while each of the defendants had committed an act which was in law a fault, their acts, the two sales, were separate and distinct, and therefore only one, the sale of the box which contained the last cartridge, led to the accident sued upon;
3) therefore art. 1106 does not apply in this case;
4) further, if the plaintiff wishes to succeed against the guilty defendant, he has the burden of identifying that merchant who sold the box containing the shell which, when fired, injured the plaintiff's daughter.[3]

Mr. Justice Casey summed up the pith of these contentions when he said:[4]

> This reasoning is based on an assumption of fact, that the only fault having any causal relationship with the accident was that committed when this *particular*[5] cartridge was sold, and if this premise be conceded then the judgment *a quo* cannot stand.

The problem divides itself easily into two parts: one of law: did each defendant commit a fault? and one of fact: if each committed a fault, did it require both faults to bring about the accident? With regard to the question of law it must be determined whether the defendants committed a fault in selling the cartridges to boys under fourteen years of age. We cannot but agree with Casey J. when he says, "it is self-evident that defendants were grossly imprudent in selling cartridges to these young boys".[6] Their fault is clearly established under art. 1053:[7] they could have imagined or should have been able to imagine the sort of accident which did occur. As the Chief Justice said:

> Les défendeurs n'ont pas été poursuivis pour avoir pris part aux exercices de tir à la carabine auxquels participait un groupe de jeunes enfants. Il leur est reproché d'avoir, en vendant sans la moindre précaution ou diligence à des enfants de moins de quatorze ans, des cartouches à balles alors qu'ils ne pouvaient ignorer, ne pas prévoir, qu'elles serviraient à la charge d'armes à feu, à un tir à la carabine, été imprudents, négligents, posé délictueux...[8]

It is clear, therefore, that rather than the burden being on the plaintiff to show which merchant sold the box with the offending shell, the defendants, in order to exculpate themselves, had to show that the accident could not have been reasonably foreseen and that in selling the shells there had been no imprudence or negligence.

In the problem of fact causality had to be proved by the plaintiff. Had the sale of the box with that last cartridge in it been an isolated event in the series of actions which took place that day (which it was not), then the situation, on

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[3]It is almost needless to add that this onus was not, indeed could not, be discharged.

[4]P. 422.

[5]Italics supplied.

[6]P. 423.

[7]Reference was made, however, to art. 88 of the Criminal Code (art. 126 in the former code) which reads: "Everyone who sells, barters, gives, lends, transfers or delivers a firearm, air-gun, or air-pistol or ammunition therefor to a person under the age of fourteen years who does not have a valid permit in Form 45 is guilty of an offence punishable on summary conviction." This section supports the contention that the sale of the cartridges to persons under the age of fourteen is *prima facie* an imprudence.

[8]P. 424.

the rest of the facts, as they otherwise are, would have been quite different: the boys would have exhausted their supply of shells in the country and returned to the town with empty, harmless rifles. But two boxes of shells were sold; it required these two sales to make the accident possible. In short, the relationship of cause and effect is established. Therefore one cannot say that the merchant who sold the box with the last cartridge in it should be responsible alone; rather, we must ask whether "either or both of the defendants had made it possible for this particular boy to wound the victim."[9] And upon the facts as they were, then, the two separate sales were necessary to place the boys in a position where the accident was possible and the damage done. In other words, if each defendant committed a fault, which contention has been established, then both faults were, cumulatively, required to bring about the damages suffered. The faults of the defendants were equivalent.

> ...the shot fired was not a detached incident; it was one of many related acts which, linked in an unbroken chain, culminated in the wounding of the little girl.[10]

The alternative burden of the defendants, therefore, was to show that the same accident would have occurred had only one box of shells been sold.

In a dissenting judgment, Mr. Justice Martincau took exception with the reasoning on the facts and the conclusion drawn from them. The learned judge maintained that the uncertain fact in issue — that is to say, "par quel marchand fut vendue la cartouche dont la balle blessa la jeune McCarthy"[11] — was sufficient to destroy the chain of causality and lead him to the conclusion that the faults of the defendants were entirely distinct from each other. At page 428 he says:

> ...il me semble impossible de déduire de la preuve que les défendeurs ont commis "des fautes communes et indivisibles" parce qu'elle démontre sans contradiction possible qu'une boîte de cartouches a été achetée au magasin d'un défendeur et une, à celui de l'autre, que chacun d'eux ignorait la vente faite par l'autre et que ces ventes n'étaient nullement le résultat d'une entreprise commune aux deux... Je ne crois pas non plus qu'il soit possible de dire que la faute commise par chacun des défendeurs "a concouru à produire l'entier dommage", parce que la preuve n'établissant pas la provenance de la seule balle qui blessa la jeune McCarthy, le lien de casualité entre la vente de cartouches faite par chacun des défendeurs et le préjudice subi par celle-ci fait défaut.

If this hypothesis were accepted, one could say, as Mr. Justice Casey points out,[12] that Mazcaud's thought was applieable:

> Condamner deux ou plusieurs personnes dont l'une seulement est responsable, sans qu'il soit possible de déterminer laquelle, aurait bien pour résultat d'atteindre sûrement le coupable, mais aussi de condamner sûrement un innocent.[13]

But here Mazeaud is considering another situation: where one of a group commits a fault that leads to damage or where each of the group commits a fault of which only one leads to the damage. In this case, on the other hand,

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[9]P. 423.

[10]*Ante.*

[11]P. 427.

[12]P. 422.

[13]Mazeaud, L., Les fautes collectives (1956), 16 R. du B. 405, at 410.