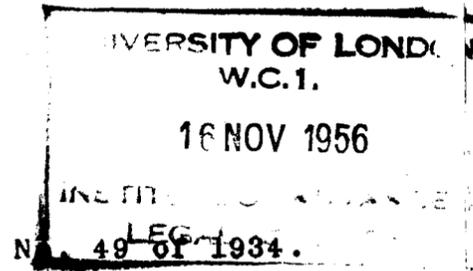


47, 1935

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APPELLANTS' CASE.

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE COURT OF KING'S BENCH OF THE PROVINCE
OF QUEBEC.

BETWEEN:

MADAME THOMAS POTVIN, as well personally
as in her capacity of tutrix and
ROSANNA POTVIN (Plaintiff) Petitioners.

- and -

THE GATINEAU ELECTRIC LIGHT COMPANY (LIMITED)
(Defendant) Respondents.

APPELLANTS' CASE.

Record.

1. This is an appeal in forma pauperis from the Judgment of the Court of King's Bench dated the 27th of April, 1934, affirming the judgment of the trial Judge of the 19th of January, 1933, which dismissed the Appellants' (Plaintiffs') action. In the Court of Appeal there was a difference of opinion; two of the five Judges being of opinion that the Appellants were entitled to succeed.

2. The action was brought by, and in the name of, the first named Appellant (the widow of Thomas Potvin) as well personally as in her capacity of tutrix to her three minor step-children, for \$30,000.00 damages arising out of the death of her late husband through electrocution by the Respondents' substation as hereinafter explained. One of the three children Rosanna became of age on the 23rd of May, 1934, and she is the second-named Appellant. Thomas Potvin in his

lifetime was a driver in the employ of the Canadian Pacific Express Company of Ottawa. He was 41 years of age.

3. On Saturday, the 31st August 1929, the said Thomas Potvin, hereinafter called the deceased, left Ottawa by train with three companions, and arrived at the railway station at Maniwaki, situated some 82 miles further North, in the County of Wright, Province of Quebec, about 8.30 p.m., where they were met by his brother-in-law, Théophile Renaud, who was to drive them to their destination in his automobile.

4. This destination was Grand Remous (Big Eddy), about 15 miles north of Maniwaki, where they were to spend the weekend and the following Monday, which was Labour Day, a Dominion Holiday.

5. As there was, at the time, a thunderstorm, with rain and lightning, the party took shelter for about twenty minutes at a garage in the vicinity of the Maniwaki railway station, to let the storm pass off, and did not start out for their automobile trip until nearly nine o'clock p.m. At that time, the storm was over, but it continued however to rain moderately. Driving from Maniwaki, they passed a village called "Bois-Franc", about 14 miles North, and reached the corner where a branch road to Montcerf turns off to the left, about an hour later.

6. Just beyond the corner, on the left hand side of the main road, there was a substation and transformer belonging to, and operated by, the Company-Respondent, where the high-power transmission lines of the Gatineau Power Company, carrying a current of 33,000 volts, were tapped and the current reduced in the said transformer t

2,200 volts for distribution to the Company-
Respondent's customers at Montcerf.

7. Photographs Exhibits P. 12 and P. 13 pp.10. and 10B show the front and side elevations of the rectangular wooden scaffolding containing the transformer; on each side of the front is a pole and upon these is a beam placed transversely; on this beam are fixed two perpendicular pieces of wood, upon each of which are insulators, high tension fuses and wires &c., the wires transmit electric current of 33,000 volts into the transformer below within the wooden scaffolding; the whole is called a sub-station and it is surrounded by a wire fence 7 feet high, the strands of which are 8 or 9 inches apart.

The transmitting wire marked X in Exhibit P. 12, with the apparatus above referred to, are more particularly referred to hereafter.

8. As the party approached the sub-station, a flickering light was observed which was produced by one of the high-tension fuses installed on the sub-station, 9 ft. 4 inches from the ground, which had exploded, broken and burnt out.

9. After having passed the sub-station, Theophile Renaud, the brother-in-law of the deceased, met an acquaintance driving a horsed vehicle in the opposite direction, who called out to him in passing: and, as Renaud had not been able to understand what was wanted, he stopped and backed his car about fifty feet to a point almost opposite the sub-station, where he halted his car in the middle of the road, facing North.

10. Renaud, the driver, then descended from the car and walked back to the corner of the Montcerf road, where he entered into conversation with his ac-

quaintance. Renaud, having been sitting at the wheel on the left side of the car, had got out of his automobile on that side, and walked down the road between it and the sub-station to the corner of Montcerf Road. His position is indicated on the sketch (Esquisse) P.16, p.10D.

11. Taking advantage of the stop, the deceased got out of the car, apparently to relieve himself. Two of his companions, Joseph Curry and Patrick Carey, also got out but the third, Albert White, remained sitting in the rear seat. The deceased who had been sitting in front with the driver Renaud, got out of the automobile on the right side, passed around the front of the car and along the left-hand side between the car and the sub-station to the back of the car, near to the sub-station, which stood on the highway, a few feet to the left of the said motor car, on the edge of a slight depression of the road. There was no danger sign on the sub-station, although one was put up shortly afterwards. At that time, except for the above mentioned flickering light, it was dark.

12. The Plaintiff's (now Appellant's) case was that the deceased was near the wire fence enclosing the transformer, when the flickering light in question increased suddenly in intensity, became blinding and dazzling, made a loud report like a gun-shot or the rumbling noise of an air-plane, accompanied by a long flash, a "langue de feu", about six feet in length which was zig-zagging towards the deceased, who was violently pitched into the ditch, (which was immediately adjacent to and in front of the sub-station

and about two feet deep), after having been electrocuted, receiving burns on his legs, his hands, his face and his head, and inside his mouth.

13. The deceased's companions rushed immediately to his assistance, lifted him from the ditch to the roadway, and attempted to revive him by artificial respiration. He recovered consciousness for a short time, was taken first to a neighbouring house, that of a Mr. Wilson, then to his mother-in-law's house and then to his home in Ottawa, and he ultimately died in hospital on the 11th of September, 1929, from the effects of his injuries.

p.2. 14. The first Appellant, personally and as tutrix for the minor children, instituted the present action on the 10th September, 1930, alleging in her declaration that the Company-Respondent owned and operated the transformer and pole carrying high tension wires, the equipment of which, situated a few feet only off a public highway, was totally defective, insuring no protection; that, owing to this defective equipment, the deceased received near the transformer an electric shock, as a result of which he died; that the Company-Respondent was solely responsible on account of its gross fault and negligence; and demanding \$30,000 damages, being \$15,000 for herself and \$15,000 for her three minor children. (Although the Declaration stated that the transformer and equipment were situated a few feet off the public highway, it was proved and admitted that the structure was in fact actually on the highway).

p.3,1.24 15. The Respondent, after traversing the allegations of the declaration, pleaded specially that the

deceased while under the influence of drink had climbed up the sub-station, had touched or interfered with the apparatus, and had been the sole cause of his accident. It was suggested at the trial that both the deceased and the rest of the party were under the influence of drink, but the suggestion failed.

16. The first named Appellant joined issue upon Respondent's statement of Defence.

17. That the case of the defence was that the deceased climbed up the front portion of the structure containing the transformer, wires, etc., that he had pushed his feet on to the meshes of the wire trellis fence surrounding the structure, and placed his hands on a transverse piece of wood; and that his face or head then came into contact with the wire carrying the 33,000 volts, at a point marked X on Exhibit P.12, and that he so received the shock; and that his head and body had drawn an arc of flame, put by the Defence as being 2 to 4 feet long and not 6. The reasons given by the Defence for the current continuing after the fuse had burned was that the bottle which contained the fuse and some liquid, carbon-tetrachloride, had been broken in the storm which had occurred an hour before the accident. There was however a lightning conductor immediately adjacent to the fuse, "paratonnerre a l'électricité" and it either was or was not capable of averting the consequences of a flash of lightning.

p.215, 1.27

p.215, 1.37

If the conductor was effective then there was some other unexplained defect.

18. The trial took place on the 17th, 18th, 19th and 20th days of May, 1932, before the Superior Court

at Hull, presided over by Mr. Justice A. Trahan, who rendered judgment on the 19th January, 1933, dismissing the action with costs.

19. Articles 1053 and 1054 of the Civil Code, so far as material, are as follows:-

Art. 1053. 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.

Art. 1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care.

x x x x x

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

It was laid down by their Lordships of the Privy Council in the cases of Quebec Ry. Light Heat & Power Co. v. Vandry, (1920) A.C. 662, and City of Montreal v. Watt & Scott Ltd. (1922) 2 A.C. 555, that the effect of Art. 1054 is to impose on the controller of any thing an absolute liability for any damage done by the thing, irrespective of any question of "faute" or negligence on his part, unless he establishes that he was unable to prevent by reasonable means the act which caused damage.

20. Mr. Justice Trahan based his judgment on the following, among other, grounds:-

(A) That, as the declaration set up specific grounds of negligence, without categorically alleging that the accident was caused by "things" which were under

the care and control of the Company-Respondent, the action was based solely on Article 1053, and that the Plaintiff could not, under the circumstances, avail herself or have the benefit of Article 1054;

(B) That, in any event, if the deceased's death was caused by a "thing" in the care of the Company-Respondent, that "thing" was the transformer and its equipment, which, being attached to the soil, constituted immoveable property, and that the provisions of Article 1054 applied only in the case of damage caused by moveable things. His Lordship, therefore, treated the action as one solely under Article 1053, and stated that the transformer and its equipment were not defective, but that the temporary conditions were due to the electric storm which had shortly preceded the accident;

(C) That the burning of the fuse constituted a fortuitous event or "vis major" which Respondent could properly invoke as a defence, (although, it must respectfully be pointed out, this was not alleged in the statement of defence);

(D) That the transformer had been constructed according to the latest rules of workmanship, and that there was not any more danger in approaching it than in touching the wire fence surrounding it;

(E) That, in any event, the deceased came into contact with the overcharged wires, or approached so near them that he received a shock by his own fault, as he must necessarily have attempted to climb the wire fence surrounding the transformer in order to approach the live wires near enough to receive a shock;

(F) That the absence of a danger sign on the transformer did not constitute a defect;

(G) That the accident in question was unexplainable

if the deceased had not come in contact with a live wire;

(H) That, in order to succeed, the Plaintiff had the burden cast on her of proving Respondent's negligence directly and affirmatively.

21. The first appellant appealed from this judgment to the Court of King's Bench, in Montreal, the appeal being heard on March 24th, 1934, by Chief Justice Tellier, and Justices Bernier, Rivard, Létourneau and Hall.

22. Judgment was rendered on the 27th April, 1934, dismissing the appeal, (Justices Bernier and Létourneau dissenting, and being in favour of reversing the trial Court judgment and allowing \$12,000.00 to the first appellant, being \$6,000.00 for herself personally, and \$6,000.00 for the three children).

23. The five judges of the Court of Appeal, however, dissented from the trial Judge on the main grounds on which he had dismissed the action, except on the question of the deceased having brought about the accident by his own fault, on which they were divided three to two.

24. The five judges of the Court of Appeal, contrary to the trial judge's opinion, were unanimous in deciding:-

(a) that the allegation of acts of negligence and carelessness in Appellant's declaration did not debar her from benefiting from, and taking advantage of, Article 1054 of the Civil Code, if the evidence showed that the accident happened by reason of a "thing" under the care and control of Defendant, and if there was, as in this case, a general allegation of fault;

(b) That the death of the deceased was in truth caused by a "thing" which the Respondent had under its care and control, the burden of proof being cast on the Respondent;

(c) That, as a matter of fact, it was neither Article 1053 nor Article 1055 which applied in this case, but solely Article 1054, and that, consequently, there was a legal presumption of fault and liability against the Respondent, from which it could relieve itself only by proving affirmatively, fortuitous event, "vis major" or fault of the victim;

(d) That Article 1054 applied not only to moveable things, but also to immoveables;

(e) That the defence of fortuitous event or "vis major" was not open to Respondent, not having been alleged or raised in its plea, but nevertheless that the fact that the fuse was broken by the storm was sufficient to exonerate the Respondent from any charge of negligence consisting in defects in the equipment.

25. Notwithstanding that the Appellate Court were unanimous in deciding that Article 1054 applied, the majority of the Court, however, concluded that the Respondent had established that it was unable to prevent the damage and so had brought itself within the exculpatory clause of Article 1054; and they concluded, on evidence which Your Petitioners submit was purely speculative and conjectural, that the deceased must have climbed up the transformer and brought himself into contact with the fuse.

26. The two judges who dissented, Justices Bernier and Létourneau, were of opinion that the Respondent had not succeeded in discharging the burden of proof of showing that it was unable to prevent the damage, or that the deceased had committed any fault. Mr. Justice Bernier agreed with Mr. Justice Létourneau and added reasons.

27. Mr. Justice Hall, one of the majority judges, in giving his reasons for coming to the conclusion that the deceased had deliberately approached the burning fuse, and, to reach a position of danger, must have climbed up on the wire fence, based his belief:-

(a) On the negative and (hearsay) evidence of J. S. Parker and Lionel Bonhomme, respectively General Manager and Local Manager of the Respondent Company, and Walter Cluffe, Superintendent of Power of the Ottawa Electric Company, none of whom had seen the accident, but who had based their evidence purely on hypothesis and conjecture;

(b) On the fact that the witness White, who was in the rear seat of the motor car, had seen the deceased being pitched backward and falling back into the ditch and that, when he fell back, his feet were two feet from the ground;

(c) That a witness for the defence, one Levasseur, an undertaker and bailiff, said that on getting down from a car in which he and Renaud (Plaintiff's witness) had been to fetch a doctor he Levasseur out of curiosity had asked Renaud how the accident had happened; that Renaud said that the deceased had got on to the pole and there was a tongue of fire three or four feet in length which struck him on the head and had thrown him to the ground; that another of the Defendants' witnesses, Riel, a repairer in the Defendants' employ, who has been partially deaf for 15 or 20 years and could neither read nor write, the next day after the accident, after repairing the fuse, went to Renaud's house where the deceased, still alive and conscious, had been

P.188, 1.8.

P.188, 1.10.

P.201, 1.36
et seq.

P.209,L.44

P.202.

taken, that his (Riel's) brother, who died before the trial, asked the deceased how the accident had happened, and that Renaud said that the deceased had set out to extinguish the fire - i.e. the burning fuse -, saying that his father was a fireman, and that he was going to extinguish it: that he had mounted the fence, set out to go there and he had fallen down backwards; that Renaud had said to deceased "Don't go there it is dangerous": that his (Riel's) brother was not there (apparently during the alleged conversation); and that he reported the conversation to Mr. Bonhomme the local District Manager. Mr. Bonhomme in his evidence said that he had made a note of what Riel reported having done at the sub-station and at Renaud's house, and that he had again read the notes before giving his evidence, but he did not produce or refer to any notes or say anything as to the alleged conversation between Riel and Renaud.

P.218, 1.41

- (d) That the next morning, Riel had observed that the strands of wire fencing were depressed as though some one had rested his weight on them;
- (e) That the deceased had burns on the legs, hands, face, feet and inside his mouth;
- (f) That technical evidence was given by the Defence to the effect that the fuse with a liquid used as an automatic switch was contained in a glass cylinder: normally if the glass cylinder did not break the fuse would burn and in case of an overload caused in operation of transmission to the station or by lightning the current would cease but with the glass broken (the glass was broken and it was assumed it had been broken in the storm about an hour before the accident) while the fuse was burning the current continued into the

transformer: that current sometimes escapes, called
stray current, but not from the Respondents' sub-station:
that the Respondents' transformer within the structure
pp.243-245. was grounded by a wire, and the wire fence was also
grounded 10 or 11 inches in the ground: that the
latter was not the best way of grounding the fence,
the best way would be more expensive, namely, to put
p.257 1.23 a large plate in the ground: if the deceased had been
standing on wet ground and the trellis surround fence
p.263. had been charged with electricity he would have received
a shock: that no current could or did escape from the
wires or transformer: that the wiring of the trellis
surround fence was not charged: that deceased must
p.225 1.45. have climbed the fence, placed his head below the fuse
in front of the current-charged wire, and received a
shock, and that at the same time his head drew an arc of
flame 2 or 3 feet in length from the burning fuse: that
p.253 1.30 the arc might be extended to three or four feet per-
haps: that they did not get many chances to try that
out: and it was hard to say and was only a guess: that
he (J.S.Parker, General Manager of the Respondent
Company), had never seen one: that he did not know
p.31 whether the wires leading to the transformer were
insulated or not but that it would make very little
difference.

It is here proper to point out that the "flame"
p.226 1.20. of about 6 feet in length, spoken to by the Plaintiffs'
p.253 1.30 witnesses was referred to by the Defendants' witnesses
as an arc of from two to four feet in length: the
p.224, 1.21. height of the burnt fuse from the ground was 9 feet
4 inches and the height from the ground of the lowest
portion of the wire carrying the current from the
p.224, L.1. direction of the burnt fuse into the transformer was

P.227,L.46.

8 feet 6 inches. The deceased was 5 feet 6 inches in height. The maximum height of the spot on the wire trellis where he was supposed by Defendant to have stood was 4 feet.

(g) That the deceased's companions, and the persons who came to his assistance, continued with perfect safety to walk about the locality between the car and the sub-station, while the fuse was still burning.

p.138 L.20.
p.140 l. 7.
p.141 l.12.
p.147 l.30.

28. It is pointed out (a) that with regard to witness White's declaration that, when he saw the deceased being pushed back from the transformer two feet above ground, Mr. Justice Hall failed to take into account the fact that, at that moment, the deceased, who had just received the shock, was right on top of the ditch or depression which was exactly two feet deep;

(b) That, as regards the assertion of Levasseur and Riel that Renaud had told them that the deceased had climbed either the pole or the fence, that was purely hearsay evidence, and, anyway, that statement had been denied in toto by Renaud, who stated that, at the time of the accident, he was talking to another man on the Montcerf Road and had his back turned to the transformer and, therefore, was not in a position to see, and, still less, to say, whether or not the deceased had climbed up. White had not seen the deceased climbing the transformer. Neither had Carey or Curry, and the witness Wilson, not one of the party, who was standing at his window at the time of the accident, and was then looking towards the transformer, says that he saw no one climbing it.

p.118, L.11
et seq.

(c) That, as regards the statement of Riel about

the bending of the strands of wire, his evidence, as a matter of fact, is that the last time that he had been at the transformer before visiting the site after the accident was two or three weeks prior to the accident and he could not say when the wires became bent; that the round was made once every summer to see if the line was in order, and if there was something not correct they were obliged to return. Mr. Justice Hall said that at the moment of falling Potvin's feet were two feet from the ground which, he said, showed that he must have climbed something, probably the fence, to reach that height and that there was some slight corroboration of that view in the statement that the next morning Bonhomme (mistake for Riel) observed that the strands of the wire were depressed as though someone had in fact rested his weight on them. (d) As to the statement of Riel that Renaud had told him that the deceased had stated, when approaching the transformer, that his father was a fireman and that he knew how to put out a fire, it was not only denied by Renaud, but every one of the three other companions denied having ever heard any such remarks, although they were closely cross-examined on that point at the trial; (e) That, as regards the burns, the fact of the deceased having burns on the hands, legs, face, feet and in the mouth, would not be cogent evidence that he had climbed up the fence; it was equally consistent with the flash 6 feet long coming down from the fuse having struck and electrocuted him. As Dr. J.P. Bondfield, who attended him, says:- "A burn produced by electricity frequently produces perforations; these were noticed in the feet and so were suggestive

p.198, 1.30
p.199.

p.206, 1.36

p.300.

p.202.1.2.

p. 264, 1.4.

of electric burns". Those burns found in different parts of the deceased's body do not necessarily establish the position he was in at the time of the accident or that he had ever touched or interfered with any live part of the transformer: It simply proves, it is submitted, that his body with his feet on a thoroughly soaked soil proved a good conductor for the 6 feet flash which was zig-zagging in his direction and for the 33,000 volts which passed through him; that Walter Cluffe, Superintendent of power of the Ottawa Electric Company, called for the Defendants, said that he had never seen a sub-station that reduced a current of 33,000 volts on a highway; if he were installing one, he would not put it on a roadway.

p. 11.

(f) That, in view of the fact that the Court of Appeal had unanimously declared that Article 1054 applied, the technical evidence offered by the respondent, which was negative evidence, would not of necessity relieve the Respondent of liability even if it proved up to the hilt that the transformer and all its apparatus connected therewith were in first class condition or the latest model of workmanship. That, as a matter of fact, shortly after the accident, the Respondent petitioned the Quebec Public Service Commission to move the transformer off the road and install it on private ground; Mr. J. N. Archambault, engineer for that Commission, made an inspection of the transformer and of the locality, and, in a report which was filed as Exhibit P.17, he recommended that the sub-station be placed on private ground, or that, if kept on the public highway, it be placed on a platform located at a

minimum height of 12 feet above the ground, that no live parts of the substation be at less than 15 feet above ground, and that warning signs be placed on the structure, that the sub-station be installed in accordance with modern practice and in such manner as to be safe for the public and employees, and the transformer be grounded and protected by proper equipment. His recommendations were adopted in an order of the Quebec Public Service Commission dated January 6th, 1930;

(g) And, finally, as regards Mr. Justice Hall's opinion that the deceased's companions had helped him in the ditch and had continued with perfect safety to walk about the locality between the car and the substation, while the fuse was still burning, the inferences sought to be drawn therefrom are, it is submitted, of no value in discharging the Respondent.

29. The appellants submit that the appeal should be allowed and the judgments of the Court of King's Bench dated the 27th of April 1934 and of the Superior Court dated the 19th January 1933 should be set aside and reversed and that judgment should be entered for the appellants for such amount as may be found by the Superior Court or otherwise ascertained for the following amongst other

R E A S O N S

1. Because the onus was upon the Respondent Company to establish that it was unable to prevent the act which caused the damage and it has not discharged that onus.
2. Because it was not proved that the injury was caused by the fault of the victim, the deceased.
3. Because neither fortuitous event nor vis major was pleaded nor did the evidence prove either.

4. Because the reasons of the minority of the Judges of the Court of King's Bench are to be preferred to those of the majority.

5. Because the judgments of the Courts below are wrong.

D. N. PRITT.

HORACE DOUGLAS.

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT
OF KING'S BENCH (APPEAL SIDE)
SITTING AT THE CITY OF MONTREAL
IN THE PROVINCE OF QUEBEC AND
DOMINION OF CANADA.

BETWEEN:

MADAME THOMAS POTVIN
(Plaintiff) Appellant

- and -

THE GATINEAU ELECTRIC LIGHT
COMPANY (LIMITED)
(Defendants) Respondent

APPELLANT'S CASE.

LAWRENCE JONES & CO.,
Lloyd's Building,
London, E.C.3.