Privy Council Appeal No. 49 *of* 1934.

Madame Thomas Potvin and another - - - - - - *Appellants*

v.

The Gatineau Electric Light Company (Limited) - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1935.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD RUSSELL OF KILLOWEN.
LORD ALNESS.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ATKIN.]

Their Lordships do not require to hear Counsel for the respondents.

This is an appeal *in forma pauperis* from a judgment of the Court of King's Bench of Quebec confirming the judgment of the trial Judge, which dismissed the plaintiffs' action.

The action is brought by the widow of the deceased man, Potvin, in respect of injury alleged to have been caused to him which caused his death, arising out of his contact in some way or other with a transformer of the defendant Company, which was on the highway in the place where the deceased man, together with four companions, was proceeding with a view to a holiday.

It is a most unfortunate accident, and it certainly must be considered a piece of very bad luck that this man and his companions happened to stop just opposite this particular transformer, which their Lordships cannot help saying had no business to be on the highway at all, but which now fortunately has been removed.

However, it was a transformer which was there for the purpose of transforming a current of 33,000 volts to a current of 2,200 volts for the purposes of the district. The transformer was fenced up to a height of seven feet from the ground by a wire trellis, which was right round it, but some

of the apparatus at a distance of nine feet from the ground overhung the actual trellis.

The position was that this man and his companions were proceeding by night along this highway; their car had passed the transformer when the driver met a friend who was passing in a horse-drawn cart, and desired to speak to him. He stopped and backed the car opposite the transformer. Then the driver got out in order to talk with his friend, who at this time had proceeded along to the cross-roads not very many feet away from the particular spot. All the occupants of the car got out except one man, White, and in a short time there was a noise and a flash, and the deceased man, Potvin, was found lying apparently in the ditch which existed there between the actual formed road and the transformer. He was badly burned. He was eventually taken to hospital, and, after some weeks, he died.

The action is brought against the defendants, the electricity authority, on a cause of action based on Articles 1053 and 1054 of the Civil Code of Quebec. Article 1053 is : " 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." Article 1054 is : " 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 he has under his care." This transformer was a thing which the defendants had under their care and they are responsible for damage caused by that thing, with this exception, and this is an agreed exception, that they are not responsible if the damage was, in fact, caused by the fault of the injured person. The onus of establishing that fault, it is agreed, is upon the defendants. So that the only question that the learned judges had to determine in this case was whether or not the defendants had discharged the onus which was upon them of establishing that the injury to the deceased person arose by his fault.

There are concurrent findings in the Courts below that the injury was caused by the fault of the deceased man. The trial judge found, and the majority of the Appellate Court agreed, that the injury was caused by the man having climbed up the trellis work that was surrounding this transformer, and having got himself either into such close proximity to the current that an arc was created, or by actually touching the live wire. The only question, therefore, there being concurrent findings, that arises is whether or not there was any evidence upon which the Courts could reasonably have come to that conclusion.

Mr. Douglas, who has said everything that could be said here on behalf of his clients, has urged before us that there was no such evidence, and, indeed he is fortified by the two dissenting judgments in the Court of Appeal. Nevertheless, their Lordships are of opinion that it is clear that

there was evidence here upon which the learned judges could come to the conclusion they did. In the first place, there was expert evidence that this machine was in such a condition that in fact electricity could not escape from it unless somebody had done just the thing which this deceased did; that is to say, had climbed the trellis and had got into contact himself, or sufficiently close to be equivalent with contact, with the live wire. It is true that as the deceased and his companions passed they found that there was a fuse which was not in its normal condition. The fuse normally was contained in a bottle which had a liquid; the bottle was broken and the liquid had escaped; but the fuse was still in existence, and, in fact, sizzling and it was showing a light; indeed, their Lordships think there is very little doubt that once you assume the man was in fact climbing the trellis, you assume his idea in climbing the trellis was for the purpose of somehow or other dealing with the light, which he apparently thought was abnormal; but the fact that the fuse was still in existence and had not been fused—in other words, had not been burned out—indicates that the machine was operating properly, and that the current was being properly conducted into the transformer. However, there was the evidence to begin with, that the machine was in order, and that such an accident as this would not happen without some interference by the person who might be injured by it.

Then there was the direct evidence of one of the witnesses, White, the man who did remain in the car. Their Lordships think it is sufficient to read the extract from his evidence which was relied on in the judgment of Mr. Justice Hall, with which their Lordships find themselves in almost complete agreement. White said : " There was a blue flash that came on—Potvin appeared to be two feet off the ground and falling back towards the ditch, and right from where that light was it was like a zigzag right at his head as he was falling." The learned Judge construed that evidence, and, it appears to their Lordships, construed it quite reasonably that White saw Potvin falling from a height on to the ground, from at least a height of two feet, and, if he was falling from a height of two feet on to the ground, there is no place from which he could have been falling, except from this fence. It was suggested that meant his feet were two feet from the bottom of the ditch, and that he was seen falling into that. But that does not appear to their Lordships to be the true meaning of the evidence, and, in any case, it was a question for the trial judge and the other judges as to what the effect of that evidence was, and they undoubtedly came to the conclusion that it meant what their Lordships have said it meant, that he was falling from a height of two feet on to the level ground.

In addition to that, there is this evidence about the flash seen round about the head, and the nature of the injuries that he received was such that it fits in precisely with

the suggestion made, namely, that he came to this sad end by reason of his head having been in very close proximity to the live wire.

In addition to that, on the next day, when the trellis was examined, it was found that the wires had been bent up to a height of about from two to four feet at the spot which was immediately beneath. Although, of course, inasmuch as the fence had not been examined within the last fortnight that bending of the wires may have existed before, still it is a state of things which is completely consistent with the suggestion which is made as to how this accident arose.

As has been said, their Lordships are in almost complete accord with the judgment of Mr. Justice Hall. The reason that some reservation should be made is this: It appears to their Lordships that both he and the trial judge did attach too much importance to what appears to have been hearsay evidence as to statements which are said to have been made by Potvin as to what he was going to do, and that he was a fireman's son, and that he was the person who would be able to put that light right; but the majority of the Court do not appear to have acted upon that evidence. In their Lordships' opinion, it can be completely disregarded; yet the weight of the evidence is overwhelming in favour of the view which has been accepted by both Courts.

In these circumstances, it appears to their Lordships that the Courts found upon evidence which was open to them that the defendants had discharged the onus that was upon them of proving that the injury was caused by the fault of the injured person. If that is so, the action must fail. Their Lordships think that is the true view of the position, and that the appellant has not disclosed any ground for reversing the decision which has been thus arrived at by the two Courts in Quebec.

For these reasons their Lordships are of the opinion that the appeal must be dismissed, and they will humbly advise His Majesty accordingly.

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In the Privy Council.

MADAME THOMAS POTVIN AND ANOTHER

v.

THE GATINEAU ELECTRIC LIGHT COMPANY (LIMITED).

DELIVERED BY LORD ATKIN.

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