faute a été prouvée sous l'article 1053, elle est également nécessairement prouvée sous l'article 53 de cette loi, puisque cet article crée une présomption de faute contre le défendeur.

En conclusion, nous pouvons déduire de l'étude de ce cas un principe de droit d'une extrême importance, à savoir que les dispositions de l'article 1054 ne constituent pas une exception à celles de l'article 1053. Il existe deux responsabilités différentes, l'une reposant sur l'acte même de la personne qui a causé le dommage (art. 1053), l'autre sur la faute commise dans la garde d'un mineur (art. 1054). L'option entre ces deux recours semblerait donc être théoriquement possible.

JEAN-LOUIS BAUDOUIN*

PREVOST ET DUPONT CONSTRUCTION LIMITED v. H. BOUTHILIER

RESPONSIBILITY — FIRE — CAUSED BY A SALAMANDER LEFT BURNING AT THE SPECIFIC REQUEST OF ONE OF THE OFFICIALS OF THE PLAINTIFF — PRESUMPTION — *Probative inference* — *Reasonable Means* — ARTICLES 1053-1054 C. C.

Article 1054 of the Quebec Civil Code considers the delictual responsibility of a person for damages arising through the fault of persons under his control or the fault of things under his care.[1] The scope and import of this article today is largely the result of jurisprudence of the past sixty years. The recent decision of the Quebec Superior Court in *Prévost et Dupont Construction Ltd.* v. *H. Bouthilier*[2] affords an opportunity to review the present judicial interpretation of this important aspect of civil responsibility.

The facts of the case present no problems. The company-plaintiff sought from the defendants the sum of $4,624.95 for damages resulting from a fire for which the latter were alleged to have been responsible. The plaintiff-company had subcontracted to the defendants the plastering of a building which the company was erecting. On December 19th, 1951, the defendants, upon the specific

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[1]Paragraphs one and six of article 1054 cover those aspects of particular importance for this discussion. They are:

par. 1: "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;"

par. 6: "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 caused the damage."

[2][1957] R. L. 479.

instructions of one of the officials of the plaintiff, left salamanders burning in various rooms of the building which had been plastered earlier in the day. That afternoon, before the workmen had left, Dupont and Bouthilier examined the salamanders and took all the precautions necessary to prevent a fire. During the evening Bouthilier returned and found the salamanders to be in a satisfactory condition. Early next morning a fire broke out, causing the damage which gave rise to the action.

The plaintiff alleged that it was the salamander in the room where the fire started that caused the fire and the presumption of responsibility provided for by article 1054 was invoked. This provision declares that:

> "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."

It was submitted by the plaintiff that the defendants could not benefit from the *exculpatory clause*[3] of the article as they had not established that they had employed *all reasonable means* to prevent the fire.

The defendants replied that the proof did not justify the conclusion that the salamander had caused the fire. To employ the presumption of article 1054 it is necessary, they contended, that the plaintiff establish a causal connection between the thing, i.e. salamander, and the damage; this had not been done.

With regard to the necessity for a causal connection, Montpetit J. said:

> "J'accepte volontiers que cet article impose à la demanderesse l'obligation préalable de prouver ce lien de causalité.
> "Mais il me semble... qu'il y a une forte présomption... que c'est la salamandre, ou plutôt les charbons allumés qu'elle contenait et qui ont dû s'en échapper, qui ont provoqué le feu."[4]

In the absence of positive proof he adopted the deduction of *probative inference* to justify a causal connection.[5]

The Court then considered the application of the principle of responsibility under article 1054. The plaintiff alleged that the defendants had not taken *all reasonable means* as the salamander had not been extinguished upon inspection in the evening. The plaintiff also submitted that there should have been a watchman placed in the building to look after the salamanders.

In order better to understand these submissions it is necessary to consider the jurisprudential development of delictual responsibility under article 1054. Nadeau, in his extensive work on the subject,[6] has broken down this develop-

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[3]The *exculpatory clause* is the term usually applied to paragraph six of article 1954, cited in fn. 1.

[4]At p. 481.

[5]*Insurance Co. of North America* v. *Picard*, 9 I. L. R. 67.

[6]*La responsabilité civile délictuelle et quasi-délictuelle, Traité de droit civil du Québec* (1949), vol. 8.

ment into four stages.[7] It is within this framework that the historical development will now be considered.

Until 1905 the plaintiff, in an action for damages caused by a thing under the control of another, had to allege and prove the fault of the proprietor under article 1053. Even injuries suffered by workmen in the course of their employment were decided by the courts in this light.[8] In addition, it was necessary to establish a *lien de causalité* between the defendant and the accident; if the cause was unknown the plaintiff lost his action.[9]

In 1905, the Privy Council, in *McArthur* v. *Dominion Cartridge Co.*,[10] established a new principle. The action arose out of injuries suffered by an employee, McArthur, as the result of the explosion of a machine at which he was working and which was used in the production of cartridges. It was proven that the machine, designed by the company superintendent, had occasionally handled the cartridges incorrectly. In the Superior Court the jury found that the explosion occurred through the neglect of the respondent in supplying suitable machinery and taking necessary precautions. This verdict was maintained in the Court of Appeal. When brought to the Supreme Court of Canada, however, the action was dismissed; the Court expressed the traditional view and maintained the appeal on the grounds that there was no exact proof of the fault which caused the injury. The Privy Council rejected the latter view and said that while certain cases may require conclusive proof of the fault which caused the injury it is not necessary where the accident is the work of a moment and its origin and cause are not susceptible of detection.[11] The Privy Council thus suggested that there was no necessity to prove a fault which undoubtedly caused the injury; it was sufficient to prove facts from which it might reasonably be concluded that fault existed and that a causal connection between the damage and the fault existed.

Four years later the Supreme Court of Canada considered *The Shawinigan Carbide Co.* v. *Doucet*.[12] The respondent, in an action to recover damages for injuries suffered as the result of an industrial accident, established that a furnace at which he was working exploded and severely injured him. The Superior Court decided in his favor on the basis that the furnace was under the control

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[7]Perrault, in his report to the *Premier Congrès International de l'Association Henri Capitant*, Montréal, says, at page 480:

> "L'on peut diviser en trois périodes l'interprétation qui s'est faite, dans la province de Québec, de la responsabilité rattachée aux choses qu'une personne a sous sa garde: 1°—de 1860 à l'année 1909; 2°—de l'année 1909 à l'année 1922; 3°—de 1922 à nos jours."

[8]*Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S. C. R. 595; *Campbell* v. *St. Lawrence Refining Co.* (1885) M. L. R., 1 Q.B. 294.

[9]*Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S. C. R. 595.

[10][1905] A. C. 72.

[11]*Ibid*, at p. 77:

> "... it can harly be applicable when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course."

[12](1909), 42 S. C. R. 281.

of the company. The Court of Revision decided that the furnace was under the control of the respondent and for him to recover damages he would have to establish fault on the company's part, which he had not done. In the Court of King's Bench the majority view was that the fault was presumed by law since the furnace was under the care of the company. In the Supreme Court, Fitzpatrick C. J. was of the opinion that the furnace was under the care of the appellant; utilizing the furnace to its profit, the company must be responsible for any risk created to its benefit—*risque créé*. The test, he said, is whether the thing is under the care of the person or not.[13] If it is under his care the person is responsible for the machine in the performance of its work.[14] For a person to be exonerated from this liability he would have to prove a fortuitous event or *cause majeure,* or the fault of the victim. In the absence of such proof, the sole fact that the thing was under the care of a person would make him responsible.

In 1920, ushering in the third period, the Privy Council handed down a far-reaching decision in *Quebec Railway, Light, Heat, and Power Company Limited* v. *Vandry and others.*[15] Prior to this decision our courts had applied article 1054 only to those responsible for damages caused by persons under their control, and not to those responsible for damages caused by *things* under their care. Thus, the *exculpatory clause* was applied only to those persons, (except, of course, masters and employers), who had persons, and not things, under their care. In the *Vandry* case the *exculpatory clause* was extended to the guardian of a thing. The guardian of a thing which had caused damage could only rebut the presumption of responsibility by proving a fortuitous event or *cause majeure,* or a cause not imputable to him. It was insufficient to establish that the person charged with the care did not commit any fault or that the fault was unknown.

Two years later, the effect of the *Vandry* case was attenuated by the Privy Council's judgment in *The City of Montreal* v. *Watt and Scott.*[16] This decision said that there did not have to be an absolute inability on the part of the person charged with the care of a thing to prevent the act. As Lord Dunedin said:

> "The only addition to the views expressed in *Vandry's Case,* which was not necessary there but is necessary here, is that in their Lordships' view 'unable to prevent the damage complained of' means unable by reasonable means. It does not denote an absolute inability."[17]

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[13] *Ibid,* at p. 285:

"Le principe de responsabilité établie par cet article est l'idée de garde."

[14] *Ibid,* at p. 288:

"Je ne puis non plus interpréter les... mots... dans le sens que celui qui a la garde ou le soin d'une chose n'est responsable des dommages qu'au cas où l'on prouve que l'accident résulte ou peut résulter d'un défaut de construction dans l'objet, ou du fait de son fonctionnement.

"La partie prétendue responsable peut n'avoir ni la connaissance du défaut de construction, ni le moyen de s'en rendre compte; mais, si elle en a le soin et la garde, alors, d'après les termes de l'article, elle est responsable des dommages causés par la chose dont elle a la garde."

[15] [1920] A. C. 662.

[16] [1922] 2 A. C. 555.

[17] *Ibid,* at p. 563.

This was an important qualification which the Privy Council added to article 1054, and one which has had, and will continue to have, consequential results.

Since the *Watt and Scott* case in 1922 there has been no notable departure from the line of reasoning used by the Privy Council then. This seems to be the tenor of our present jurisprudence. A recent decision of the Supreme Court of Canada affirms this.[18] Thus, a person who is charged with the care of things can only avoid liability for damage caused by them if he establishes that he was unable, by reasonable means, to prevent the occurrence which caused the damage. He does not have to prove that he was completely incapable of preventing the act.

In the light of this historical analysis it is now possible to consider the judgment of the Superior Court in *Prévost et Dupont Construction Ltd.* v. *H. Bouthilier.*

The question to be answered is this: did the defendants take all reasonable means to prevent the outbreak of the fire? If they did then they are not responsible for the damage caused; if they did not then they are responsible. But just what constitutes *all reasonable means*? The plaintiff claimed that for the defendants to have taken all reasonable means they would have had to extinguish the salamanders upon inspecting them in the evening. The plaintiff further submitted that as the defendants knew of the fire danger they should have placed a watchman in the building.

Montpetit J., in his decision, said that the salamanders had been used at the request of the plaintiff, and that the defendants would have violated an agreement if they had put them out. There is no doubt, he said, that the possibility of fire existed, but such a possibility was known to both parties and that is why they employed all reasonable means to prevent such an occurrence. To require a watchman placed in the building would be going beyond the concept of *all reasonable means.*

The judgment seems sound. The question of what *all reasonable means* includes is, of course, a question of fact and, as such, liable to a subjective approach. But, upon the facts presented, this seems a prudent verdict. If it had been established by the plaintiff that trade practices in the construction industry were otherwise, the resulting decision might have been different. If the plaintiff had established, for example, that it was the usual procedure to always leave someone to watch the salamanders, or that the salamanders were usually extinguished when there was no one in the vicinity of them, then there would have been, in all probability, a very different verdict. But such practices were not suggested and it is very unlikely that such practices exist.

While the judgment does not mention the matter it nevertheless does not seem unjustifiable to suggest that in similar instances trade practices may well determine whether or not *all reasonable means* were taken. Thus, the person responsible for the care of a thing would be able to exculpate himself by es-

[18] *Alain* v. *Hardy,* [1951] S. C. R. 540.