

DAME PILON v. MARION, KNAPP ET LES HÉRITIERS DE
JULIEN BELLEMARRE

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The British North America Act, in distributing legislative powers, authorizes the Parliament of Canada to enact legislation in relation to all matters except those coming within the sixteen enumerated Classes of Subjects assigned to the provincial legislatures.¹ "For greater Certainty, but not so as to restrict the Generality of the foregoing", the authority of Parliament extends to all matters coming within certain enumerated classes of subjects. It is apparent that the Canadian Constitution does not distribute entire fields of law but rather a power to legislate on "matters" which "come within" specific classes of subjects or within the federal residue. Consequently the Parliament of Canada and the legislature of the Province of Quebec may each enact an *intra vires* law in the same field, both of which may apply to the same factual circumstances.

This situation may arise in the field of Aeronautics in cases of responsibility resulting from airplane crashes. Jurisdiction over Aeronautics has been conferred on the Parliament of Canada as an exercise of its general power under section 91 to legislate for the Peace, Order and Good Government of Canada.² The provincial legislatures have enacted laws on civil responsibility under their authority to legislate in relation to matters coming within Property and Civil Rights in the Province. The problems that arise in this area may be illustrated with reference to *Dame Pilon v. Marion, Knapp et les Héritiers de Julien Bellemarre*, a recent decision of the Superior Court³ in Quebec, which unfortunately ignored the constitutional issue on which the very foundation of the judgment depended.

In this case a pilot and three gratuitous passengers departed in a small aircraft for a fishing trip into the Laurentians. During what appears to have been an attempted landing on a small lake before

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¹ The British North America Act, 1867, 30 and 31, Victoria, c. 3, sections 91 and 92.

² *Johannesson v. The Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292, approving the obiter dictum expressed in *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

³ An unreported judgment of the Superior Court of the District of Montreal — C.S., Montreal, no. 490,918, 8 May, 1963. Mr. Justice R. Brossard.

they reached their destination, the plane crashed killing all its occupants. The wife of one of the passengers instituted an action against the heirs of the pilot, Julien Bellemarre, and the co-owners of the plane, Mr. Marion and Mr. Knapp.

Plaintiff alleged that the accident was caused by defendants' fault, negligence, imprudence and general want of skill. Against the heirs of the pilot she made the following allegations in her declaration:

"a) Avoir conduit et piloté ledit aéronef de façon négligente, imprudente, et incompétente, constituant un danger pour la vie des personnes occupant ledit aéronef y compris ledit Jacques L'Heureux, époux de la demanderesse.

b) Avoir violé les dispositions de la loi sur l'aéronautique et les règlements de l'air édictés sous l'empire de ladite loi."

Specifically she alleged that the weight of the passengers and equipment exceeded the maximum allowed by the regulations, that the plane had been flown at a prohibited altitude, and that the pilot had flown in climatic and atmospheric conditions which were themselves not only prohibited by the air regulations but which constituted an act without regard to the elementary rules of prudence. Against Marion and Knapp she alleged the failure to maintain the equipment in good condition and:

"f) Avoir négligé d'assurer audit aéronef les standards de navigabilité requis par la loi et par les règlements édictés sous l'empire de ladite loi de l'aéronautique."

Indirect evidence as to the cause of the crash was placed before the court by an expert witness who had investigated the accident for the Minister of Transport. From an examination of the scene of the mishap he observed that surrounding trees were untouched, that imprints of the pontoons were made in the ground, and that the pontoons were compressed upwards. From these facts he concluded that the plane had been inverted and at a 70° rate of descent just prior to the impact. It was his view that there had been a loss of control of the aircraft. He had been unable to find any evidence of malfunction of controls or of the aircraft itself after a thorough investigation. Moreover, he discovered that the cables which cause the ascent or descent of the aircraft were still intact. It was his opinion that the loss of control was due to the pilot.

The action was maintained against the heirs for \$87,044.50, but dismissed in favour of the co-proprietors as there was no *lien de préposition* between them and the pilot. Mr. Justice Brossard rejected as unproven the allegations of violations of the Aeronautics Regulations.

"La Cour écarte immédiatement comme n'ayant été nullement prouvés les reproches de négligence découlant de prétendue violation de la Loi sur l'aéronautique et les règlements de l'air, de surcharge illégale de l'appareil, de vol à altitude prohibée par les règlements, du mauvais état de réparations et de fonctionnement de l'avion et de son inaptitude au vol."⁴

The court found the pilot at fault due to the presumptions of fact flowing from the evidence established against him under the authority of articles 1238 and 1242 of the Civil Code.⁵ In describing the juridical character of airplane transport, Mr. Justice Brossard said that it is identical to transport by automobile and consequently:

"S'appliquant donc à la responsabilité envers les passagers découlant d'un accident d'avion les mêmes règles de droit et de jurisprudence que celles qui réglementent la responsabilité envers les passagers découlant d'un accident de véhicule moteur."⁶

In the context of responsibility for damage resulting from airplane accidents, a basic issue lying behind the judgment is to determine the effect of laws enacted by both the Parliament of Canada and the Legislature of Quebec in the field. If the Aeronautics Regulations overlap the provisions on civil responsibility in the Civil Code, the regulations would predominate; if there is no conflict the two *intra vires* laws must be applied to the factual situation. Is a breach of a regulation sufficient to engage the responsibility of the author of the damage, or failing the violation or existence of a particular regulation is the general civil law sufficient for responsibility? In addition the question arises as to whether Aeronautics Regulations may be regarded as specific instances of the civil law rules of prudence, and whether their application is juridically identical to that of the provisions of the Highway Code.⁷

Possible conflict arises in the determination of a duty which has been violated. In Quebec article 1053 C.C. sets out the general rule that all persons who are capable of discerning right from wrong are responsible for the damage caused by their fault. To establish that a person was at fault, it must be proved that he had an obligation which he failed to perform. Article 1053 C.C. itself may be regarded as imposing a general duty upon capable persons to take reasonable care in dealings with their neighbours. However, the Aeronautics Regulations impose certain express obligations on the owner and pilot of an aircraft. If an airplane crashes, causing the death of a

⁴ *Ibid.*, p. 22.

⁵ Art. 1238. Presumptions are either established by law or arise from facts which are left to the discretion of the courts. Art. 1242. Presumptions not established by law are left to the discretion and judgment of the court.

⁶ *Op. cit.*, at p. 5.

⁷ R.S.Q. 1941, Ch. 142, as amended.

gratuitous passenger, it is important to know whether a breach of a Federal regulation or a breach of the general obligation of care must be proved in order to establish liability.

It is a principle of constitutional law that if the laws of the two spheres conflict, the Federal law will predominate. As expressed by Lord Sankey:

"... there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."⁸

Thus it is necessary to determine whether or not these laws meet. To decide this question one must look at the general effect of the Aeronautics Regulations of which the contraventions alleged in this case are a part. The Aeronautics Act empowers the minister to make regulations for the safe and proper navigation of aircraft in Canada.⁹ The scope of the Act was summed up by Chief Justice Rinfret of the Supreme Court as follows:

"The *Aeronautics Act*... makes it the duty of the minister 'to supervise all matters connected with aeronautics... to prescribe aerial routes... to prepare such regulations as may be considered necessary for the control or operation of aeronautics in Canada... and for the control or operation of aircraft registered in Canada wherever such aircraft may be... for the licensing of navigation and the regulation of all aerodromes and airstations, etc.'" ¹⁰

The Act also provides a sanction for the breach of these regulatory duties.¹¹

The Regulations operate in respect of all aircraft in Canada, and set out safety and airworthiness provisions and rules concerning flights and weather conditions. They deal with the matters which were invoked by the plaintiff, weight maximums, minimum altitudes, and climatic conditions for flights. However, the provisions are of a general regulatory character and there are no sections directly dealing with rights of indemnification for damage suffered in airplane crashes. Section 515, however, closely resembles our article 1053 C.C.:

"No aircraft shall be operated in such a negligent or reckless manner as to endanger or be likely to endanger the life or property of any person."¹²

⁸ *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*, [1907] A.C. 65 at p. 68, Lord Dunedin.

⁹ *Aeronautics Act*, R.S.C. 1952, ch. 2, section 4, subsection 1.

¹⁰ *Op. cit.*, Footnote 2, Rinfret, C.J. at p. 303.

¹¹ *Op. cit.*, section 4, subsection 3. "Every person who violates the provisions of a regulation is guilty of an offense and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both fine and imprisonment."

¹² *Air Regulations*, P.C. 1954 — 1821 of 23 November, 1954, sec. 515, Statutory Orders and Regulations Consolidation, 1955, vol. 1, p. 15.

It seems, however, that the purpose of this section is to prevent negligent and reckless flying *per se* by providing for an administrative punitive sanction. On the other hand for article 1053 C.C. to apply, the negligent act must have caused damage. Under the present regulatory scheme¹³ it appears that the two laws come close but do not actually conflict. It is established in Canadian law that the provincial law of responsibility or negligence applies to damage

¹³ Can the Parliament of Canada validly enact a law concerning civil claims arising from airplane crashes under its general authority in relation to aeronautics? In support of the argument that it could one may cite the *Carriage by Air Act* (R.S.C. 1952, ch. 45), which was an enactment of the terms of the Warsaw Convention by the Canadian Parliament applying to international flights, and which includes sections on claims arising from airplane accidents (articles 17 to 30). It has been suggested that it lies well within the legislative competence of Parliament in relation to aeronautics to enact laws respecting liability in tort in connection with or arising from aeronautical operations (Thurlow, J. in *Schwella v. The Queen and the Hydro-Electric Power Commission of Ontario*, [1957] Ex. C.R. 226 at p. 233). Mr. Justice Kellock expressed the view in the Supreme Court, that: "Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive." (*Johannesson v. The Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292, at p. 311). In opposition to this view Mr. Justice McFarland's statement in the Ontario Supreme Court may be quoted: "In my opinion, the principle is quite clearly established that Dominion legislation cannot trespass upon or create any civil right in the province." (*Gordon v. Imperial Tobacco Sales Co.*, [1939] 2 D.L.R. 27 at p. 30). It may be emphasized that the whole field of law relating to aeronautics was not given to the Parliament of Canada, but only that over which the provincial legislatures were not empowered to legislate by virtue of section 92 of the B.N.A. Act. Thus laws effecting aeronautics may validly fall within section 92 for one aspect and within section 91 for another purpose or aspect, and a Federal law relating to responsibility could be *ultra vires* as an enactment on a provincial aspect of aeronautics and not merely ancillary legislation. Mr. Justice Wurtelle in a case concerning Federal Railway Legislation (*MacDonald v. Riordan*, (1899) 8 B.R. 555) suggested a distinction: While Parliament has the right to legislate for the principal object, which is to construct and operate a railway, this authority cannot extend to and affect the rights of parties who are not employees of the railway company as to obligations of which they are creditors under provincial law. He states that: "Any powers that the parliament might attempt to confer which might relate to or in any way affect the rights of such third parties would be an infringement of the exclusive power of the provincial legislature to make laws respecting property and civil rights in the province and would therefore be unconstitutional and without effect. In keeping within these bounds the respective legislative powers of the parliament and of the provincial legislatures are adjusted and reconciled and due effect is given to the legislation of both." (p. 573). This argument could equally well be applied to aeronautics and the authority of the Canadian Parliament to make laws in relation to the civil rights of persons other than the owner or pilot of an aircraft.

actions resulting from airplane accidents.¹⁴ Mr. Justice Montague emphasized this principle in a decision of the Court of King's Bench in Manitoba.

"But there is, apparently, no fundamental principle arising from aviation, which has not been previously laid down and in the absence of any statute, I hold that the rules of law relating to the operation of aircraft in general are the rules relating to negligence, and cannot see that they are distinguishable from those which relate to land vehicles, perhaps more closely, to motor vehicles. The ordinary rules of negligence and due care obtain."¹⁵

If liability for fault may be established under provincial law, what then is the function of the Aeronautics Regulations? When both laws validly exist in the field and apply to one situation, their scope and operation in the determination of responsibility must still be ascertained.

Under the Civil Law of Quebec fault is the breach of a pre-existing obligation, whether it is a precise, determined duty or a general obligation of prudence and diligence.¹⁶ When a determined obligation is breached, fault lies in the inexecution itself. But if a general obligation of care is violated, proof of negligence or imprudence is required to establish fault.¹⁷ The courts are authorized to apply the general rule of care to the particular circumstances under consideration.

A determined legal duty is a rule resulting from a law or a regulation which clearly establishes an obligation to do or not to do something.¹⁸ Though there may be another sanction for the violation of such a provision, a person may be found civilly responsible for damage resulting from its breach.¹⁹ This is recognized even when the legislation or regulation is enacted by the Parliament of Canada.²⁰ This principle exists in the common law provinces²¹ and has its roots in

¹⁴ *Malone v. Trans-Canada Airlines*, 53 C.R.T.C. 402, at p. 403, Urquhart, J., and *Turgeon v. Quebec Airways Ltd.*; *McFarlane v. Quebec Airways Ltd.*, 48 R.J. 396 at p. 427, Greenshields, J., in the Superior Court.

¹⁵ *McInnery v. McDougall*, [1938] 1 D.L.R. 22 at p. 28. He reiterated this point in *Galer v. Wings Ltd.*, [1939], 1 D.L.R. 13 at p. 14, as follows: "Unless and until, therefore, statutory provision is made to the contrary in Canada, common law principles must guide the courts in dealing with cases which arise in transport by air."

¹⁶ H., L. & J. Mazeaud, *Leçons de Droit Civil*, (1956), Vol. II, at p. 367.

¹⁷ *Ibid.*

¹⁸ R. Savatier, *Traité de la Responsabilité Civil en Droit Français*, (1939), Vol. I, p. 8.

¹⁹ *Blais v. P. L. Lortie, Ltée*, (1925), 63 C.S. 63, Lemieux, J.; *Drury v. Lambert*, (1941), 71 B.R. 336, Tellier, J.

²⁰ *Frechette v. Canadian National Railways Company*, 1948 R.L. 141.

²¹ *Connell v. Olsen*, [1933] 3 D.L.R. 419; *Falsetto v. Brown* [1933] 3 D.L.R. 545; *Swartz Bros. Ltd. v. Wills*, [1935] 3 D.L.R. 277; "The Negligent Action and the Legislature", MacDonald, V.C., (1935) 13 Can. Bar Rev. 535, at p. 540.

English law where an action in damages is permitted for an injury flowing from the breach of a statutory duty.²² Mr. V. C. Richardson of Manitoba, writing on aeronautics, points out that "the present tendency seems to be to treat the statutory provisions governing other forms of transportation as creating civil rights."²³ Breaches of aeronautics regulations have been regarded in a similar light.²⁴

The establishment of the breach of a regulation will not be sufficient in itself to engage the author's responsibility for the damage. In the determination of responsibility under article 1053 C.C. an essential element is "un rapport de causalite" between the damage and the fault or violated obligation, as a person cannot be held responsible for a prejudice suffered by another if it did not result from the violation of his obligation. This principle is illustrated in the field of aeronautics in a common law jurisdiction by *McInnery v. McDougall*²⁵ where the Manitoba King's Bench held that the breach of a regulation requiring the pilot to cut off the dual controls did not itself constitute negligence, which was established, however, because the defendant's acts and skill did not measure up to the standard of a reasonable man.

If there is a situation which is not covered by a regulation, the plaintiff may then prove fault by showing that the author of the damages did not take ordinary and reasonable precautions in the performance of his act.²⁶ Certainly, as in the case under consideration, if the plaintiff fails to prove alleged breaches of regulations but discharges the burden of establishing negligence, his claim is valid in law. Moreover, the mere obedience to a rule of law does not exonerate a defendant if he has acted negligently.²⁷ Thus civil responsibility covers the field and may be invoked with or without regulatory violations. Similarly with respect to railway legislation, corporations remain subject to the civil law even though both Federal and Provincial laws occupy the field.²⁸ Mr. Justice Letourneau expressed this view in the Quebec Court of Appeal:

"Je reconnais qu'une compagnie de chemin de fer puisse être condamnée en dommages non seulement si elle a violé l'une des dispositions statutaires

²² *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*, [1934] A.C. 1; *Monk v. Warbey*, [1935] 1 K.B. 75.

²³ "Canadian Law of Civil Aviation", Richardson, V.C., K.C., L.L.B., Winnipeg, 53 C.R.T.C. 321, at p. 339.

²⁴ *Dame Béliveau v. Les Héritiers de Letiecq*, [1961] R.L. 513, Ouimet, J.

²⁵ *Op. cit.*, see also *Rockland Airways v. Miller*, [1959] 19 D.L.R. 2d 683, Ontario High Court, Schatz, J.

²⁶ Savatier, *op. cit.*, at p. 17; Aubry et Rau, *Cours de Droit Civil Français*, 6th Edition, Vol. IV, (1951), p. 427.

²⁷ *Audet v. Central Vermont Ry. Inc.*, 54 C.R.T.C. 171.

²⁸ *Grenier v. C.N.R.* (1929). 35 R.L. n.s. 166 (S.C.), Archer, J.

qui la regissent, mais encore à raison d'une négligence ou imprudence de droit commun."²⁹

The effect of specific obligations in determining fault is not to replace the general duty implied in our code but to help ascertain if an individual is negligent, by enunciating a specific rule of prudence applying to a particular situation.

Although few sources express the underlying reasoning for this application of the Aeronautics Regulations, nevertheless the effect of these regulations may be determined by the following factors. Since they do not cover the same ground as article 1053 of the Civil Code the authorities indicate that the ordinary rules of responsibility in the province apply. The civil law approach treats regulations as specific duties which may assist in determining or themselves determine fault; but they do not limit the scope of article 1053 C.C. which remains to cover the entire field of delictual civil responsibility. Moreover this treatment of Federal regulations does not conflict with the Common Law approach displayed in aeronautics cases.

Thus the remarks of Brossard, J.³⁰ that the legal rules relating to air transport are identical with those relating to transportation by motor vehicle are correct, when assessed with regard to the function and effect of specific regulations in establishing fault. There is as well both judicial and doctrinal support for his opinions.³¹ Consequently even though plaintiff failed to prove alleged violations of the Air Regulations she could still rely on the general duty of care implicit in article 1053 C.C. Though the decision correctly applied the law imposing an obligation on the pilot of the aircraft, it is regretted that the learned trial judge failed to fully motivate this application. This is particularly unfortunate as a thorough explanation of the law at this time would be of great value in the rapidly expanding field of aeronautics.

²⁹ *Frchette v. C.N.R.*, *op. cit.*, at p. 148.

³⁰ *Op. cit.*, at p. 4: "Quant aux relations juridiques qui s'établissent entre le transporteur de passagers et ses passagers, le transport par avion ne diffère pas du transport par véhicule moteur; aucun texte de loi ne permet de faire cette distinction..."

³¹ *McInnery v. McDougall*, *op. cit.*; *Richardson*, *op. cit.*; A. Nadeau, *Traité de Droit Civil du Québec*, Vol. VIII, p. 91.