CASE AND COMMENT

RAINVILLE AUTOMOBILE LTD. v. DAME PRIMIANO

NEGLIGENCE — FATAL ACCIDENTS — WHETHER CONTRIBUTORY NEGLIGENCE CAN BE INVOKED IN AN ACTION UNDER ARTICLE 1056 C.C.

In the case of *Rainville Automobile Ltd. v. Dame Angelantonio Primiano*[1] the Supreme Court of Canada was called upon for the second time[2] to answer the question whether, in an action under art. 1056 C.C., contributory negligence on the part of the victim can be set up against the claimants so as to limit the defendant's liability. The facts of the case are simple and were not disputed by the parties. An employee of Rainville Automobile Ltd., while driving a truck in Montreal, struck and fatally injured the husband of the plaintiff-respondent, who was walking in the street. Despite the fact that the defendant-appellant did not succeed in clearing himself of the presumption of s. 53(2) of the Motor Vehicle Act,[3] the victim was also at fault for carelessly walking in the street.

Plaintiff's action was dismissed in the Superior Court. On appeal, the Court of Queen's Bench reversed the trial court's decision and ordered Rainville Automobile Ltd. to pay damages to the victim's wife.[4] However, the Court found contributory negligence on the part of the victim and reduced the amount of damages accordingly. The plaintiff-respondent, suing under art. 1056 C.C., made the standard plea in actions of this type — that the right granted under art. 1056 C.C. was:

> ...un recours indépendant ,personnel, et individuel à chacune des personnes qui y sont mentionnées, qui réclament non pas comme héritiers légaux, mais parce que le droit leur est conféré en vertu de cet article.

The main issue of this case is: What is the nature of the right of action granted under art. 1056 C.C.? If the right is admitted to be independant and personal to the persons mentioned in the article, can the contributory negligence of the victim be invoked to modify the amount of damages claimed? The Supreme Court answered this question in the affirmative. In its judgment the Court found it necessary to deal with a second problem, arising from art. 1106 C.C. which states:

> The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

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[1][1958] S.C.R. 416.

[2]*Price v. Roy* (1899), 29 S.C.R. 494.

[3]R.S.Q. 1941 ch. 142 s. 53(2): Whenever loss or damages is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

[4][1957] Q.B. 163.

If both the victim and the defendant were parties involved in the quasi-offence, can the defendant be sued jointly and severally for the entire amount of damages? The Supreme Court gave a negative answer to this question.

Since *Price v. Roy*,[5] the Superior courts of Quebec applied the doctrine of contributory negligence, whenever it seemed equitable, in actions under art. 1056 C.C. However, the theory behind the application was never discussed, and finally in 1939 a mild reaction took place in the Quebec courts. Surveyer J. summed up the situation in *Vineberg v. Larocque*,[6] when he said:

> ...jusqu'à 1939 l'indemnité accordée à ceux qui réclamaient en vertue de l'art. 1056 C.C. était réductible en raison de la faute commune de la victime. Mais depuis cette époque, deux jugements du regretté juge E.M. McDougall, alors juge à la Cour supérieur: *Adams v. Weir, C.S.M. 171726*, et *Ryan v. Bardonnex;* un 'obiter dictum' du même juge alors juge à la Cour d'appel dans le *Roi v. Savard;* un jugement de M. le juge Loranger, doyen des juges de la Province, *Lair v. Laporte* et un article de M. Guy Favreau dans la Canadian Bar Review nous forcent a remettre la question à l'étude.

In *Lair v. Laporte*[7] the plaintiff's wife was struck and killed, as she walked along the side of the road, by an automobile driven by the defendant. Loranger J. said at page 288:

> ...l'action est intentée en vertu de l'art. 1056 C.C. par le conjoint et les enfants de la victime, pour des dommages résultant de la mort de la victime; peu importe la faute de la victime, les demandeurs ne la représentant pas, ne penvent être responsables de la faute qu'elle aurait commettre.

In *Ryan v. Bardonnex*[8] plaintiff sued the defendant driver for striking and killing her husband as he crossed the street. McDougall J. said at page 267:

> The plaintiff's action rests upon the provisions of art. 1056 C.C. and is entirely personal to her. It is thus inappropriate for the defendant to urge through counsel that, if the defendant is to be held liable, the claim must be reduced because of the alleged contributory fault of the deceased...

In both these cases there was no proof of the contributory negligence of the victim; so that the interpretations placed by these decisions on art. 1056 C.C. where *is* contributory negligence of the victim are "obiter dicta". Nevertheless, they represent a reasoned statement of the doctrine. In *le Roi v. Savard*,[9] McDougall J. in another "obiter", repeated his views expressed in *Ryan v. Bardonnex*, but at the same time mentioned that this problem could only be settled by a higher tribunal.

The Judicial Committee of the Privy Council, in three decisions, pronounced itself upon the personal and independant nature of the right granted under art. 1056 C.C.[10] Despite the fact that contributory negligence was never an

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[5]*Supra.*

[6][1950] Q.B. 1.

[7][1944] R.L. 286.

[8][1941], 79 S.C. 266.

[9][1944] K.B. 328.

[10]*Robinson v. C.P.R.* [1892] A.C. 481 at p. 487, *Miller v. G.T.R.* [1906] A.C. 187 at p. 191, *C.P.R. v. Parent* [1917] A.C. 195 at p. 200.

issue in any of these cases the words of Lord Watson in *Robinson v. Canadian Pacific Railway Co.*[11] show that the approach taken in *Lair v. Laporte* and *Ryan v. Bardonnex* was not entirely an innovation:

> ... the Code distinctly specifies certain conditions affecting the right of action competent to the deceased, which are also to operate as a bar against any suit at the instance of his widow and his descendant or ascendant relations after his death... and, according to a well-known canon of construction, it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relations

In delivering the judgment of the Supreme Court in the *Rainville Automobile* case, Taschereau J. has given the first reasoned application of the doctrine of contributory negligence to art. 1056 C.C. Since this doctrine does not flow directly from the Code article itself it has been necessary for the learned judge to argue negatively. The basic premise of his argument seems to be that the doctrine of contributory negligence has been positively incorporated into the law of civil responsibility in Quebec, via the medium of jurisprudence, and hence, it is only necessary to refute any arguments against its application. He does not attempt to justify its existence *per se,* but merely says at page 422:

> Cette solution me paraît juste, et découle bien, me semble-t-il, des principes fondamentaux du droit qui nous régit.

Taschereau J., dealing with the problem of the nature of the right in art. 1056 C.C., draws his conclusions by examining the Civil Code itself. It is arts. 1053 to 1055 inclusive that lay down the general theory of obligation flowing from delicts or quasi-delicts. Art. 1056 C.C. is subordinate to these general articles because it presupposes the existence of a delict or quasi-delict by a person held legally responsible. The main purpose of this article is to give the widow, ascendants or descendants, who are not the legal heirs of the victim, an independant right to recover damages if the victim himself is unable to do so before he dies. Art. 1056 C.C. was never meant to change or modify the general theory of delictual responsibility found in art. 1053 C.C. If an insane person commits a delict he is not responsible under art. 1053 C.C., and it seems both obvious and logical that he cannot be held responsible under art. 1056 C.C. despite the independant and personal nature of the right granted in that article.

It has been suggested that there is a relationship between art. 1056 C.C. and the articles of the Code dealing with alimentary support.[12] Undoubtedly these articles influence the courts in their appreciation of the amount of damages to be awarded, but it would be straining the point to say that art. 1056 C.C. is a corollory of the articles on alimentary support.

The Supreme Court tacitly admits that the doctrine of contributory negligence, although not expressly indicated anywhere in the Civil Code, is still a part

[11] *Supra,* at p. 488.
[12] Arts. 166, 168, 169 C.C.

of the law of Quebec and is applied through the medium of art. 1053 and 1054 C.C., when it says:

> L'art. 1056 ne mentionne pas, il est vrai, la faute contributive, mais cette absence se retrouve également aux arts. 1053 et 1054 et on ne saurait donc en tirer un argument.

Since contributory negligence is applied under art. 1053 C.C., and since art. 1056 C.C. is not meant to modify the general principle of art. 1053 C.C. but is modified by that very article itself, therefore, in an action under art. 1056 C.C. contributory negligence on the part of the victim can be set up against the claimants.

Taschereau J. approaches the second problem, that created by the wording of art. 1106 C.C., in a very fundamental manner when he says at page 423:

> La solidarité ne peut exister en vertu de l'art. 1106 que s'il y a concours de faute.

In other words, joint and several liability in a damage action can only exist where there is *cooperation of legal fault.* And it follows logically that in an accident case there is no cooperation between victim and defendant, otherwise it would not be an accident. To have the required cooperation it is obvious that two or more persons committing an offence towards the same third party would be necessary. In the present case, the victim committed no legal wrong by being in the middle of the street at the time the driver hit him, and hence was not a party to the "common offence or quasi-offence" of art. 1106 C.C. Therefore, the defendant, being responsible for the acts of his employee who committed the "legal fault" by striking the victim, remains the sole debtor of the obligation arising from the quasi-delict. It seems logical to conclude that since the notion of joint and several liability presupposes the existence of two or more debtors, this theory cannot be invoked in the present case where there is 'de facto' only one debtor extant. It is interesting to note that Surveyer J. in *Vineberg v. Larocque* agrees with Taschereau J. as to the impossibility of applying art. 1106 C.C. to an action under art. 1056 C.C., however, he gives no reasons for this impossibility.

The Supreme Court, after showing that the defendant cannot be sued jointly and severally, goes one step further. Even if the defendant were forced to pay the entire amount of damages, he could not bring an "action récursoire" against the estate of the victim since the victim has caused no damage to the defendant in the sense of art. 1053 C.C. Thus it would appear that Mr. Guy Favreau's comment on the case of *Lair v. Laporte*[13] is incorrect.

The decision rendered by the Supreme Court, in the present case, seems to be based upon the doctrine of equity rather than upon any principle of law found in the Civil Code. Any other solution of the two issues raised in this case, would have led to results incompatible with other articles of the Civil Code.

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[13](1946), 23 Can. Bar Rev. 156: The defendant can then turn to the heirs of the deceased and claim from them an amount corresponding to the victim's portion of the fault.

To admit the joint and several liability of the defendant and the victim under art. 1106 C.C. would mean that the persons qualified by art. 1056 C.C. could sue the heirs of the victim for the entire amount of damages. This would imply that the deceased had a legal duty to keep himself alive, and not to be negligent. The fallibility of applying art. 1106 C.C. to accident cases of such type is quite apparent.

To look at the literal meaning of art. 1056 C.C., by separating it from its context of responsibility and to give an absolute interpretation of the independant and personal nature of the right, would lead to illogical and unjust results. Firstly, it would be illogical to allow those people qualified under art. 1056 C.C. to recover damages if the victim were totally responsible for the accident. Secondly, of the heirs of the victim, suing under art. 1053 C.C., are to have the amount of damages reduced because of the contributory negligence of the victim, is it logical that a relation, not an heir, suing under art. 1056 C.C., should be able to recover all damages? To say that the right of art. 1056 C.C. is absolute, would be unjust according to the rest of the Civil Code. A person is only responsible for damage caused by his own fault, and to force him to pay all damages, in a case such as this, would mean that he was paying for another person's fault.

It is interesting to note that Taschereau J. has found the solution to these problems by examining the Civil Code itself. He did not rely on any of the authors, or upon any outside source other than previous court decisions. Whether the learned judge did this by choice, or by necessity because of lack of sources, is not difficult to say. The only jurisprudence in Quebec dealing with the doctrine of contributory negligence is judge-made law. The determination of the issues, in this case, is once again an example of the creative role of the judiciary. The solution arrived at, although not derived directly from the Code, coincides logically and equitably with arts. 1053 to 1055 C.C., and has finally put art. 1056 C.C. in its true perspective.

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