GODBOUT (Defendant-Appellant) v. MARCHAND (Plaintiff-Respondent)[1]

Responsabilité—Médecin—Faute délictuelle—"Tort" personnel—Droit au procès par jury—C.C. Art. 1053—C.P. Art. 421

Robert Lefcort*

In recent years the Court of Queen's Bench has taken a close look at the field of medical liability in Quebec.[2] The result of this has been to affirm that a contractual relationship exists between a doctor and his patient based on the application of the distinction between obligations of "means" and obligations of "result". Although it was recognized as early as 1900 that the relationship of a doctor to his patient was based on contract,[3] the courts continued to apply the delictual régime of responsibility in medical cases based on art. 1053 C.C. It was only in 1957 in *X v. Mellen* and again in 1960 in *G. v. C. and de Coster* that our courts recognized the contractual régime of civil responsibility in medical cases. This view was again followed in *Dufresne v. X*[4] concerning the liability of a dentist towards his patient. From these recent decisions, it appears safe to conclude that a new line of jurisprudence may be building up in Quebec to firmly place medical liability under the contractual régime of civil responsibility.

Perhaps most important are the practical consequences and implications which flow from this change in attitude regarding medical liability. For example, with reference to prescription, Mr. Justice Casey remarked in *G. v. C. and de Coster*:

> "It is now accepted that the relationship between a surgeon and his patient is contractual with the result that actions such as the one now under consideration are subject to prescription by thirty years."[5]

If the surgeon's fault had been considered delictual, the one year prescription of art. 2260 (2) would have applied. In another case, in reference to damages, Mr. Justice Pager commented:

> "Etant donné que la faute de laquelle découlent les dommages subis par la demanderesse est d'ordre contractuelle, l'art. 1056(c) ne peut recevoir d'application en la présente cause, quelle que soit l'interprétation qu'on lui donne."[6]

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*Of the Junior Board of Editors, McGill Law Journal; second year law student.

[1][1960] Q.B. 1132.

[2]*X v. Mellen* [1957] Q.B. 389; *G. v. C. and de Coster* [1960] Q.B. 161.

[3]*Griffith v. Harwood* [1900] B.R. 229, Mr. J. Lacoste.

[4][1961] S.C. 119, at 133.

[5]*G. v. C.* [1960] Q.B. 161, at 164.

[6]*Dufresne v. X* [1961] S.C. 119, at 133-134.

The case of *Godbout v. Marchand* raises still another practical problem which perhaps has not been fully considered by the Court of Queen's Bench. In brief, it is the problem concerning the relationship between the contractual and delictual régimes of civil responsibility and the possibility of "cumul" or, as the courts seem to call it, "option" between the two.

The facts in *Godbout v. Marchand* are as follows:

In September of 1957, plaintiff engaged the services of the defendant doctor who proceeded to give him a sedative by means of an injection in his left arm. This was apparently given instead of an oral sedative. As a result of the injection, plaintiff suffered injury to his upper left arm and was unable to earn a living. Consequently, he sued the defendant for damages and instituted a motion in the Superior Court to have the case placed on the role of jury trials according to art. 421 C.P.:

> "A trial by jury may be had . . . in all actions for the recovery of damages resulting from personal wrongs or from offences or quasi-offences against moveable property."

The Superior Court granted plaintiff's motion and from this decision defendant appealed. The Court of Queen's Bench affirmed the decision of the lower court.

Thus the court held that according to art. 421 C.P. a claim for damages by a patient against his doctor can be tried before a jury. In holding this, it was also added that although the relationship of a doctor to a patient is contractual, the plaintiff may sue in delict too. It is submitted that the holding of the court in allowing the jury trial is essentially correct as will be shown later. In reaching their decision, however, Mr. Justice Hyde and Mr. Justice Rinfret have indicated that the responsibility of a doctor to his patient while being contractual may also be delictual. Therefore they feel that the plaintiff has in his favour an option or cumul between the two régimes of responsibility. According to Mr. Justice Hyde:

> ". . . even though the relationship between a doctor and his patient be contractual, that does not exclude the possibility that the doctor in discharging his duties may be guilty of delictual fault, which may also be contractual, although the reverse may not be true."[7]

He then proceeds to allow plaintiff a jury trial on the basis that a personal wrong was committed, hence art. 421 C.P. applies. Mr. Justice Rinfret then considers the defendant's defence against the motion. Essentially the defendant's claim was that since the relationship of care between a doctor and patient is contractual, therefore no jury trial may be had in this case since art. 421 C.P. allows this only ". . . in actions for the recovery of damages resulting from personal wrongs or from offences or quasi-offences against moveable property". According to defendant, the damages here are due to a breach of contractual responsibility and are not covered by the article which refers only to offences. His conclusion follows that no jury trial can take place. Mr. Justice Rinfret then refutes defendant's claim as follows: he quotes Professor Paul-A. Crépeau

[7][1960] Q.B. 1132, at 1134.

writing in 1956 that Quebec courts should place medical responsibility on its true ground, *i.e.* contractual responsibility,[8] but he says:

> "la jurisprudence québécoise ne semble pas avoir évolué dans le sens que souhaitait M. Crépeau."[9]

He then refers to *X v. Mellen* and M. le juge Bissonnette who allowed both the contractual and the delictual recourse.[10] He also refers to *G. v. C. and de Coster* and says that the declaration in this case probably contained allegations to support a claim on the delictual as well as the contractual régime as it was certain that the action was tried before a jury. In brief, his view indicates that cases between doctors and patients can be based on contract or on delict or on both.[11] In *Godbout v. Marchand* he concludes: "le demandeur a clairement et indiscutablement fait option en faveur d'un recours délictuel", and, therefore, he can have a jury trial as he must prove a fault "grossière et une négligence étrangère au contrat."[12]

In summary, the opinions expressed in *Godbout v. Marchand* tend to show that in medical liability cases, both the contractual and the delictual régimes of responsibility may apply and that a victim, when taking action, is free to use either or both at his option. Two comments may be made here. It is respectfully submitted that firstly, the consideration of "option" was not necessary for the decision in the case and, secondly, that this use of "option" or "cumul" is a dangerous principle to admit in our law.

As to the first comment, it is suggested that in a medical liability case, the régime of responsibility should not have any effect on the victim's right to a jury trial. Art. 421 C.P. clearly allows a jury trial in " . . . all actions for the recovery of damages resulting from personal wrongs (torts personnels) or from offences or quasi-offences against moveable property." From the words of the article does it not appear that a personal wrong may result from either a contractual or a delictual fault and, in both cases, is not the victim entitled to a trial by jury? Such is the view expressed by M. le juge Jean in *Talbot v. Lavigne*[13] and supported by Prof. Crépeau[14]:

> "La motion des demandeurs-requérants est basée sur l'art. 421 du code de procédure civile . . .
>
> "Le défendeur soumet que seules les dommages à la personne ou aux biens résultant de délits ou quasi-délits sont susceptibles du procès par jury. Mais, à mon avis, ce n'est pas ainsi qu'il faut lire l'art. 421 du code de procédure civile. Lorsqu'il s'agit de torts personnels, le procès par jury peut avoir lieu pour le recouvrement de dommages en résultant quelle que soit

[8]Crépeau, Paul-A., *La Responsabilité du Médecin et de l'Etablissement Hospitalier* (1956), Montreal, at p. 197.

[9][1960] B.R. 1132, at 1136.

[10][1957] Q.B. 389, at 416.

[11][1960] B.R. 1132, at 1137.

[12][1960] B.R. 1132, at 1137.

[13]*Talbot v. Lavigne* [1959] P.R. 200.

[14]P. A. Crépeau, "La Responsabilité Médicale et Hospitalière dans la jurisprudence québécoise récente" (1960) 20 *R. du B.* 433, at 451.

> la faute. S'il s'agit de dommages à la propriété mobilière, seules les poursuites basées sur une faute délictuelle ou quasi-délictuelle sont susceptibles d'être soumises au jury. Le texte de l'article ne prête à aucune ambiguité."[15]

It is submitted that this view is the one which ought to prevail in interpreting art. 421 C.C.P. as regards medical liability cases, and the question of "option" need not be considered. Plaintiff should be able to have a jury trial no matter what régime of responsibility applies when a personal wrong has been committed.

The question of option or cumul between the régimes of responsibility requires a closer examination. The word "cumul" seems to have two applications in our law—only one of which is justifiable. The justifiable cumul is that which is allowed by art. 87 C.C.P.:

> "Several causes of action may be joined in the same suit, provided they are not incompatible or contradictory, that they seek condemnations of a like nature, that their joinder is not prohibited by some express provision, and that they are susceptible of the same mode of trial,"

and expressed by the jurisprudence.[16]

On the other hand, the unjustifiable "cumul" appears to be that which is expressed by the term "option". It is this form of cumul which seems to have been allowed in *Godbout v. Marchand* as well as in *X v. Mellen*. Mr. Justice Bissonnette remarks in the latter case:

> "On peut donc conclure que le demandeur, réclamant réparation du préjudice que lui a causé son médecin, doit recourir au régime contractuel, s'il existe un contrat, et que la jurisprudence lui permet de cumuler le recours délictuel."[17]

Thus, our courts have used cumul to say that even if the contractual régime of responsibility applies (*i.e.* a doctor commits a breach of an obligation arising from a valid contract), the plaintiff may still invoke the delictual régime as well. In short, it seems that our courts have favoured the principle of option and have allowed the creditor of a contractual obligation of care to take advantage of the two régimes of civil responsibility at once, selecting from each of them what is best for him. This state of affairs set out in *X v. Mellen* and apparently re-affirmed in *Godbout v. Marchand* seems to have been in the law of Quebec for a considerable time.[18] According to Nadeau:

> "Nos tribunaux se prononcent indiscutablement en faveur du cumul."[19]

In spite of this, it is respectfully submitted that such a principle is contrary to our civil law. It was apparently rejected by Pager, J. in *Dufresne v. X* by

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[15][1959] P.R. 200, at 201.

[16]Recent examples: *Green* et al *v. Elmhurst Dairy Ltd.* [1953] Q.B. 85; *Levesque v. Malinosky & Gagné* [1956] Q.B. 351.

[17]*X v. Mellen* [1957] Q.B. 389, at 412.

[18]*Granger v. Muir* (1910) 38 C.S. 68, at 75.

M. le juge Lafontaine:

". . . les demandeurs peuvent invoquer à la fois, la responsabilité délictuelle et la responsabilité contractuelle des défendeurs."

". . . la partie lésée invoque la cause de responsabilité la plus avantageuse . . .".

[19]Nadeau, *Traité de droit civil du Québec*, Vol. 8 No. 44, p. 26.

his refusal to apply art. 1056 (c) to damages due to a breach of contract and also by several Canadian and French authors.

Professor P. Azard has remarked:

> ". . . la jurisprudence canadienne admet en effet d'une manière général le cumul des deux responsabilités."[20]

But he also adds:

> "Il ne faut pas se leurrer; il s'agit surtout pour le juge d'éviter une rupture trop brusque et apparente dans la jurisprudence—dont la position illogique ne lui échappe pas."[21]

Professor Crépeau concludes:

> "On ne saurait admettre une solution qui, laissant le défendeur à la complète merci du demandeur, permet à celui-ci, tantôt de se placer sur le terrain contractuel, tantôt de faire fi des dispositions législatives édictées précisément pour le cas d'inexécution d'un contrat, sous le prétexte que le recours en responsabilité délictuelle lui est plus favorable. Le législateur a prévu des modalités différentes, suivant que la faute est contractuelle ou extra-contractuelle. Permettre au demandeur d'écarter, par le truchement du cumul, celles qui lui sont moins favorables, c'est violer l'esprit du Code Civil et sanctionner l'arbitraire."[22]

In France, the authors agree with Professors Crépeau and Azard. According to Démogue:

> ". . . il y a dans le droit des pays latins une distinction entre la responsabilité contractuel et la responsabilité délictuelle . . . Dans le cas où il s'agit d'exécution d'un contrat, la responsabilité contractuelle pourrait être invoquée."[23]

He further adds:

> ". . . Le Code ayant dans des titres différents reconnu deux responsabilités avec leurs physionomies propres, on ne peut pas dire que l'un des plaideurs pourra, à défaut de règles de l'une assez favorables pour lui, invoquer celles de l'autre".[24]

It is submitted that this view should apply to Quebec law as well.

The Mazeaud brothers agree with the authors already cited in opposing "option":

> "On parle du "cumul" des responsabilités délictuelle et contractuelle."[25]
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> "Encore n'est-il pas toujours exact de parler d'option . . .?"[26]
>
> "On ne peut donc tenir compte que des arrêts rendus dans des procès où il y avait un intérêt pratique à accorder ou refuser l'option au créancier. Leur examen démontre que la jurisprudence, si elle est encore divisée, affirme aujourd'hui de plus en plus nettement le principe de non-cumul."[27]

Finally, Martine is of a similar opinion:

> ". . . la victime peut avoir un grand intérêt à choisir entre les deux responsabilités et à invoquer le système le plus favorable."[28]

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[20]Azard, P., *L'Evolution Actuelle de la Responsabilité Médicale au Canada* (1958), Revue Internationale de droit comparé, p. 23-24.

[21]*Ibid.* p. 23-24.

[22]Crépeau, P. A., *La Responsabilité Civile du Médecin et de l'Etablissement Hospitalier* (1956), Montréal, p. 118.

[23]Demogue, R. [1923] Rev. trim. de droit civil, Vol. 22, p. 645 at 651.

[24]Demogue, R., *op. cit.*, p. 652.

[25]Mazeaud, H. and L. and Tunc, A., *Traité Théorique et Pratique de la Responsabilité Civile* (1957), 5th ed., Vol. I, No. 174, p. 224.

[26]Mazeaud and Tunc, *op. cit.*, No. 174, p. 226.

[27]Mazeaud and Tunc, *op. cit.*, No. 189, p. 242.

[28]Martine, Ed. N., *L'Option entre la Responsabilité Contractuelle et la Responsabilité Délictuelle* (1957), p. 19-20.

BUT

"Les conséquences du cumul sont par trop contraires à nos principes pour qu'on y ait sérieusement songé."[29]

"Nous pouvons conclure, sans aucun doute possible, à la condamnation de l'option."[30]

In the Canadian jurisprudence Mr. Justice Brodeur, dissenting in *Ross v. Dunstall and Emery*,[31] criticized the use of option, while Mr. Justice Mignault approved of it in this specific case. There he allowed an action *ex delicto* in favour of one of the parties although the relations between them were contractual, but he does not appear to have assented to "option" as a general proposition for he points out: "Very much depends on the circumstances of each particular case."[32] In the Court of Queen's Bench, Mr. Justice St. Jacques refused to approve of option:

"Les art. 1053 et 1054 C.C. ne peuvent, non plus avoir aucune application dans le cas actuel. D'abord, les relations entre les parties étaient régies par un contrat déterminant les droits et les obligations de chacune d'elles."[33]

Another case also appears uncertain as regards the use of option,[34] but, nevertheless, it was allowed. In *Godbout v. Marchand*, however, option was allowed to justify the granting of a motion for a trial by jury which might have otherwise been disallowed. Although considerable doctrine opposes the idea of cumul or option, Nadeau summarizes:

"Notre jurisprudence suit maintenant l'arrêt Ross et reconnaît le cumul des responsabilités délictuelle et contractuelle."[35]

While this has been the case and our courts have recognized the principle of cumul or option, it is respectfully submitted that this idea ought not to apply in medical cases.

In France:

"La responsabilité du médecin résultant de l'inexécution d'un contrat de soins ne peut donc être, en droit français, qu'une responsabilité contractuelle."[36]

Since our code is similar to that of France in that it treats contractual and delictual responsibility in different places, the above view appears applicable to Quebec law as well.

Furthermore, the idea of option, "est contraire à la fois du principe de la liberté de la force obligatoire des conventions et à l'esprit du droit civil des obligations."[37] On this point it is suggested that a fault cannot be both contractual and delictual at the same time. If it is contractual, the law provides

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[29]Martine, *op. cit.*, p. 20.

[30]Martine, *op. cit.*, p. 199.

[31]*Ross v. Dunstall and Emery* (1922) 62 S.C.R. 393, at 406 and 409.

[32](1922) 62 S.C.R. 393, at 422.

[33]*McColl Frontenac Oil Co. Ltd. v. Vezina* [1949] K.B. 588, St. Jacques, J., at p. 600.

[34]M. *Botner Reg'd. v. National Harbours Board* [1949] C.S. 273, Smith, J., at p. 275.

[35]Nadeau, *op. cit.* No. 46, p. 28.

[36]Crépeau, P. A., *op. cit.* note 22, p. 78.

[37]Crépeau, P. A., *op. cit.* note 22, p. 88-89.

procedures for the victim to take action. He should not be able to abandon these at will and thereby dispense with the contract simply because other rules are more favourable to him. This would seem to amount to an almost unilateral resiliation of the contract by the victim which would be contrary to art. 1022 C.C. Such an implication appears to flow from the idea of option.

In rendering the decision in *Godbout v. Marchand*, the court, in maintaining plaintiff's motion for a trial by jury, assented to the idea of cumul or option. It is respectfully submitted that the decision could have been reached by a closer reading of art. 421 C.P. as suggested. As a result, the court would have avoided giving its approval to an apparently unjustifiable cumul or option in our law.