

CONTRACTUAL AND DELICTUAL RESPONSIBILITY IN QUEBEC

THE REDISCOVERY OF CONTRACT

Daniel N. Mettarlin*

The determination of the borderline between contract and delict is among the most difficult of legal problems. The delictual responsibility of art. 1053 C.C. is by nature so broad as to encompass almost all of human activity, and certainly most situations envisaged by contract. Indeed, if one were forced to reduce our law to one phrase, it would be that "one must repair the damage caused by one's fault," or as Mazeaud has put it "Le principe . . . est l'une de ces grandes règles d'équité qui pourraient à elles seules résumer le droit tout entier".¹

Thus he who first approaches what Prosser has called the "Borderline of Tort and Contract" must feel as Maitland did on approaching the study of legal history:

"Such is the unity of all history that anyone who endeavors to tell a piece of it, must feel his first sentence tears a seamless unit."²

The Code has created a distinction between contract and delict; but how to give the differences flesh and blood in view of the encompassing generality of 1053, is nowhere to be found within its confines.

Art. 984 C.C. lists the four requisites to contractual formation.³ Once these prerequisites are met the contract is formed. The buyer and seller of property, the lessor and lessee of a premises, the train company and passenger, the doctor and patient, all fulfill these requirements in their relationships and so form a contract between them.

However the question arises as to what was agreed on, especially in view of the impossibility of foreseeing all future circumstances. Are such events as the collapse of a tenant's gallery or the failure of a doctor to maintain⁴ secrecy concerning his client's ailment, contractually or delictually oriented? Similarly are the accident occurring to a train passenger on his journey, the negligence of the doctor in treating a patient, or that of the barber in giving a haircut, within the scope of the contract, or simply delicts between persons who are bound by

*This is a chapter from a third-year essay, which won the Arnold Wainwright Prize for the best essay on the civil law topic. Mr. Mettarlin is presently continuing his studies in Toronto.

¹Mazeaud and Tunc, *Traité théorique et pratique de la responsabilité délictuelle et contractuelle* (1957) 5th ed., vol. 1, p. 16.

²Prosser, W., *Selected Topics on the Law of Contract and Tort* (1954), p. 380.

³Capacity, consent, object and lawful cause.

⁴*Vineberg v. Foster* (1903) 24 S.C. 258.

agreement on some other point (such as the lessor of a car who is run down by his lessee)?

The Quebec courts faced with the problem of determining the content of contract have unfortunately not viewed it as a general problem, but have decided without a system or guiding principle, whether each particular relationship is contractual or delictual. Each decision indicates "it is clear that the parties entered into a contract on this point or did not". Why it is clear, or on what basis the courts have decided, is not stated. The results have been a series of incompatible judgments, such that with each relationship brought before the courts one has no way of determining what the answer will be.

Let us first turn to the problem of transport. The customer buys a ticket, paying the price, or obliging himself to pay it in the future. In return the transporter (taxi, train, autobus) promises to bring him to his destination. If he does not pay the price, clearly he the traveller is contractually responsible; while if he does not arrive at his destination, through some fault of the company, the latter may be sued for breach of agreement.

Of course numerous events may occur during the trip, all of which have found their way into our courts. A collision or derailment may occur, causing injury to the passenger, or he may alight on an icy platform causing him to fall and injure himself; similarly he may be served poisoned food in the train dining room, or may be attacked by a drunken passenger. Are all these circumstances encompassed by the contractual relationship between the two, or are they outside it, in the delictual field?

A limited jurisprudence has held that the transporter contractually, has more than the limited duty to carry the passenger to his destination but that he must bring him there safely and soundly. In other words, these cases impose an obligation of result on the carrier, indicating that he is contractually responsible to the passenger for certain accidents and eventualities arising during the voyage.⁵

A similar decision was reached by Létourneau J. in *Daignault v. N.Y. Central Railway*:⁶

"Personnellement, j'incline vers cette théorie d'une responsabilité contractuelle chez le voiturier. Trop longtemps notre jurisprudence a paru hésitante et flottante à ce sujet . . . Car n'est-ce pas une obligation que contracte le voiturier à l'égard du voyageur, et cette obligation n'est-elle pas de rendre celui-ci à destination sain et sauf?"

The Superior Court in 1948 agreed:⁷

"Le demandeur avait fait un contrat de transport avec la défenderesse et elle est obligée de le rendre à destination sain et sauf."

⁵*McDonald v. Montreal Tramways Company* (1920) 28 R. de J. 533; *Carrier v. Canadian National Railway Company* [1942] S.C. 372.

⁶[1945] K.B. 457. Note Judge Barclay makes no comment on the matter.

⁷*Décary v. Taxis Jaunes Ltée.* [1948] S.C. at 240; see also *Dame Boucher v. Laporte* [1943] S.C. 36.

Again in 1957 the Superior Court reached a similar decision:

"Considérant qu'un conducteur d'autobus a envers ses voyageurs une obligation de sécurité . . . Considérant qu'en France la cour de cassation a, le 28 juin 1955, décidé que le fait d'un tiers n'exonère pas le gardien ou le débiteur d'une obligation contractuelle déterminée."⁸

However, these are isolated decisions amidst a wealth of cases which have imposed the most minimal contractual obligation on the carrier; namely, to simply provide the customer with a functioning vehicle; any accident that occurs during the carriage is considered as not envisaged by the parties and hence outside the contractual regime.⁹

The Queen's Bench has recently affirmed this long line of jurisprudence. In *Transport Urbain de Hull Ltée v. Dame Daly* the Court of Appeal,¹⁰ citing a long line of cases reversed the lower court which had held the relationship contractual.

Mr. Dennis, commenting on this case in the *McGill Law Journal*, declares:

"The reason why the courts have consistently applied the delictual regime of civil responsibility to the carriage of persons, and thus have required proof of fault or negligence of the carrier by the victim-passenger, has been the failure of the courts to accept the distinction between obligations of means and result."¹¹

Thus he feels that the courts, if they wish, could apply the obligation of means to the contractual relationship, achieving the same result as far as the burden of proof is concerned; that is, placing it on the plaintiff.¹²

However, I respectfully submit while this may have been the courts' reaction in a few cases,¹³ the courts of Quebec have, by and large, accepted this distinction discovered in 1925.¹⁴ And even if one argues they have not, I submit the real reason for the failure to include accidents to the passenger within the scope of contract may have been, in a few isolated instances, due to a fear of shifting the burden of proof, but in the main it has been caused by a refusal to expand the content of contract beyond what the courts have envisaged the "parties agreed to".

This decision of the courts as to the contract of carriage is contrary to French law which, since 1911, has held that the carrier is under a contractual duty to transport his passenger safely and soundly to his destination, an expansion of

⁸*Rodrigue v. Autobus Lac Frontière Ltée* [1957] S.C. 152, at 153-4.

⁹The early leading case was *M.T. Co. v. Pistchick* (1926) 41 K.B. 324; *cf.*, also *Mtl. Tramways Co. v. Starkey* [1955] Q.B. 503; *Autobus Saguenay Inc. v. Dame Reverin* [1957] Q.B. 586; *MacIntyre v. Binder* (1938) 76 S.C. 6; *Gagné v. Godbout* [1946] S.C. 16; *Parent v. Cie. de Transport Provincial* [1947] S.C. 254; *Morgan v. Montreal Tramways Co.* [1954] S.C. 146; *Chevalier v. Monteith* [1956] S.C. 407.

¹⁰[1959] Q.B. 773; *cf.*, also *Lussier v. Marquis* [1960] Q.B. 23.

¹¹(1960) 7 *McGill L.J.* 73.

¹²*cf.*, "Discussion on burden of proof", *Ibid.* p. 75.

¹³*cf.*, *Desmeules v. Renaud* [1950] K.B. 659; and *Daignault v. N.Y. Central Railway* [1945] K.B. 457; *cf.*, also judgment of Rinfret J. in *Godbout v. Marchand* [1960] K.B. 1132, at 1136.

¹⁴*cf.*, *Rajotte v. X* (1936) 74 S.C. 369 as early as 1936; *cf.*, the cases which have imposed an obligation of result on the carrier.

the content of the contract of carriage which exceeds the content envisaged by the Quebec courts.¹⁵

Moreover, the majority of modern Quebec authors feel that the French law is correct on this point. Morin, writing in 1939, reached the conclusion that transport involves a contract to carry the passenger safely to his destination.¹⁶ Nadeau also concurs in this result:

"Les tribunaux ne devraient pas hésiter à reconnaître la nature contractuelle de cette faute . . . Une simple analyse du contrat formé, dans lequel on ne peut pas manquer de voir l'obligation, permettrait de conclure à la faute contractuelle."¹⁷

Prof. Crépeau writing in the 1960 *Revue du Barreau* reaches a similar conclusion.¹⁸ However, be this as it may, under jurisprudential Quebec law, the relationship is delictual. The present view may be summed up by *Desmeules v. Renaud* at p. 663.¹⁹

"Il y a beaucoup à dire en faveur de la responsabilité contractuelle du voiturier à l'endroit des personnes comme des choses mais il faut reconnaître que la jurisprudence qui exige la preuve d'une faute est fermement établie . . . Il me paraît bien difficile de demander aux tribunaux de mettre de côté une jurisprudence que l'on peut dire avoir été unanimement suivie depuis un si grand nombre d'années. Le revirement que suggère Me André Nadeau devrait au moins être l'œuvre du plus haut tribunal du pays. Je me demande s'il ne faudrait pas l'intervention du législateur."

The courts have held in numerous other relationships that the content of the contract does not extend beyond the most minimal possible obligations undertaken.

Thus in the case of a ski-tow operator it was held that he is not contractually responsible for accidents occurring to the skier, but following the decisions relating to transport, only the delictual field was open to the victim. In other words the operator only undertook to carry him to the top of the hill.²⁰

Similarly, a private school which provided supervised recreation was not held contractually responsible for an accident during a school bus trip.²¹

In an interesting case the Superior Court²² held the restaurateur who serves soup with a bone therein, delictually liable for damages to the customer. Presumably the only contractual relationship of the restaurateur is to provide the customer with the meal ordered, regardless of its condition. Any damage

¹⁵Cass. Civ. 21 Nov. 1911, (S.1912.1.73); cf., also Brun, "Rapports et domaines des responsabilités contractuelle et délictuelle" (1931), p. 207 for a discussion of French jurisprudence.

¹⁶Morin, *La responsabilité dans les transports. Premier Congrès International de l'Association Henri Capitant de 1939*.

¹⁷Nadeau, *Traité de Droit Civil de Québec* (1949), vol. 8, p. 145.

¹⁸Crépeau, "La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente" (1960) 20 R. du B. 433, at p. 438.

¹⁹*Supra*.

²⁰*Arvida Ski Club v. Boucher* [1952] K.B. 537. This reversed the decision of the lower court which found the operator responsible for a contractual obligation of result.

²¹*Les Cleres de Saint-Viateur de Montréal v. Charbonneau* [1958] Q.B. 390.

²²*Dubé v. Laurin* (1941) 79 S.C. 308.

that results due to the improperness of the food is unforeseen by the contract, and delictual. On the other hand the courts have, without giving any reason for so doing, extended the content of other contracts to include more than the minimal obligations found in transport and the restaurant trade.

The courts have continually held a cleaner liable for the damage caused to the goods entrusted to his care, imposing on him a contractual obligation of result.²³

The courts have also held that the barber or hairdresser who causes damage to his customer is contractually liable, having assumed a contractual obligation of care.

"Il me paraît évident que le barbier n'a commis ni délit ni quasi-délit mais qu'il agissait dans l'exécution d'un contrat qui lui donnait le droit et lui imposait l'obligation d'un homme soigneux . . . que même l'inhabileté dans l'exécution ne constitue pas un quasi-délit, mais un défaut d'exécution de contrat."²⁴

The courts have also held a Chartered Accountant contractually responsible,²⁵ and the Notary who does not take proper care of his client in drawing up a mortgage.²⁶

The courts have also found a contractual duty of supervision over sub-contractors on the part of the main contractor.²⁷

As far as medical responsibility is concerned, the courts have alternated between finding only a minimal contractual relationship on the part of the doctor²⁸ (of simply appearing when called), and of writing into the contract a contractual obligation of means on his part to effect a cure. However, one can find no logical reason in the decisions, for the alternation, or the preference of one philosophy to the other.

In France medical responsibility was originally delictual, as it was felt too great a burden of proof would be placed on the doctor, thus discouraging medical advances. However, aided by the notion that the burden of proof shifted not according to the source of the obligation but according to its nature (*i.e.* means or result), the French courts reversed themselves, and from 1936 on have held the relationship contractual.²⁹

Many Quebec cases have held the doctor liable contractually, only for the most minimal duties. Any accidents due to lack of skill during the exercise of his profession are held delictual.

²³*Corbeille v. \$1 Cleaners* (1937) 75 S.C. 193; *Bachand v. Birs* (1921) 31 K.B. 365; *Gincherau v. Wright* (1924) 36 K.B. 150; and *Bourget v. Aita* [1947] S.C. 25.

²⁴*Mabking v. Robitaille* 51 S.C. 17, at p. 19. Cf., also *Robillard v. Merineau* (1939) 77 S.C. 503.

²⁵*Guardian Ins. Co. of Canada v. Sharp* [1941] S.C.R. 164.

²⁶*Lalonde v. X* (1936) 74 S.C. 164. Traditionally though he has been held delictually liable. Cf., *Nadeau, op. cit.*, p. 259.

²⁷*El-Ser Construction Ltd. v. Newton Construction* [1945] K.B. 529.

²⁸Indeed of most professional responsibility.

²⁹Cass. Civ. 20 mai 1936, (D.1936.I.88).

"Quant à la responsabilité du médecin elle est déterminée par l'art. 1053 . . . Le principe de l'art. 1053 et 1382 C.N. s'applique à ceux qui exercent une profession libérale telle que l'art de guérir."³⁰

Similarly in *Fafard v. Gervais* it was held, admittedly in an *obiter dictum*:

"Considérant que la responsabilité édictée par l'art. 1053 C.C. s'applique aux hommes de profession, médecins, dentistes, avocats."³¹

Recently in *Munro v. Pauly*³² it was held that while the French law has changed, Quebec courts have traditionally held medical responsibility delictual, and it was not for the Superior Court to change the law.

However, in spite of this decision, there is a strong tradition in Quebec for holding the relationship contractual.

In *Griffith v. Harwood*³³ the doctor was held contractually liable for his lack of skill, and the defendant's plea that the action was prescribed by one year (art. 2261 C.C.) was dismissed.

Similarly in *Rajotte v. X* the Superior Court held the relationship contractual, quoting the French jurisprudence and doctrinal opinion, and the Harwood case.³⁴ However, the higher courts refused to adjudicate on this point.

In 1939 Létourneau J. indicated:

"Il y a aujourd'hui tendance apparente en France à voir une responsabilité contractuelle dans ce cas des services du médecin, non seulement comme autrefois pour le service—même du médecin . . . l'obligation du médecin ne serait pas de guérir, mais tout au plus de donner des soins assidus éclairés et prudents . . . Obligation de moyens et non de résultat."³⁵

Within the last three years there has been a marked tendency on the part of the Queen's Bench to find the relationship contractual. In *X v. Mellen*, Bissonnette J. indicates:

"Qu'un lien contractuel se soit établi entre le père de l'enfant et le chirurgien, ceci ne peut souffrir de doute . . . un contrat de soins professionnels."³⁶

A similar decision was reached by the same court in 1960:

"It is now accepted that the relationship between a surgeon and patient is contractual with the result that actions such as the one now under discussion are subject to prescription by thirty years."³⁷

³⁰*Caron v. Gagnon* (1930) 68 S.C. 155, at pp. 156-7. Similar decisions are rendered in *Vachon v. Moffett* (1911) 40 S.C. 166, where a veterinary was held delictually liable; *Pincovsky v. Tessier* (1930) 36 R.L. 327 (dentist); *Bouillon v. Poiré* (1937) 63 K.B. 1; *Casavant v. Dr. X* (1939) 77 S.C. 447; *St. Onge v. Bernier* 70 S.C. 205 (dentist).

³¹*Fafard v. Gervais* [1948] S.C. 128, at p. 129; *cf.*, also [1942] *Revue du Barreau* 412.

³²[1956] R.L. 359.

³³(1900) 9 K.B. 297.

³⁴(1936) 74 S.C. 369; *cf.*, also *Bordier v. S.* (1934) 72 S.C. 316.

³⁵*Nelligan v. Clément* (1939) 67 K.B. 328. Note that there are several cases in which the courts have not indicated their preferences except to state that the burden of proof is on the plaintiff. In view of the possibility of option, and the fact that in contract or delict the burden would be the same, one cannot definitely say that these decisions dismiss contractual responsibility. Such are *Elder v. King* [1957] Q.B. 87 and *Royal Victoria Hospital v. Ducharme* (1943) 69 K.B. 162.

³⁶[1957] Q.B. 389, at p. 408.

³⁷*G. v. C.* [1960] Q.B. 161, at p. 164.

Justices Taschereau, Pratte, Galipeault, and Choquette all agree, the latter quoting *Rajotte v. X* with approval.³⁸

The recent decision of *Godbout v. Marchand*³⁹ also considered the problem. However, the determination of the relationship was *obiter* since the main point was decided on another issue. Taschereau J. who, as we have noted, favours the contractual relationship, did not discuss the point. Hyde J. at page 1134, indicated that the relationship is contractual, although allowing option. Rinfret J. seems to indicate that the relationship can be contractual (allowing option) but also indicates that the relationships between the two can be other than contractual. However he lays down no rule as to when the relationship should be contractual or delictual.

Thus it would appear that a majority of the judges on the Queen's Bench who have committed themselves on the subject seem to favour an extended contractual content. This appears to be the dominant trend in Quebec jurisprudence.

Surprisingly enough, very few Quebec authors have expressed a personal opinion on the matter, only Prof. Crépeau, indicating that he favours a contractual liability.⁴⁰

The determination of contractual content by the courts and the authors appears to be arrived at, in my opinion, most arbitrarily.⁴¹

Thus the carrier and ski-tow operator have been held delictually liable for their lack of care, while the barber is contractually liable for his lack of care; the restaurateur has no contractual liability towards his patrons for dangerously prepared food while the cleaner of rugs may be held contractually responsible for his carelessness; the private school has a delictual obligation of supervision towards its pupils; the contractor a contractual one as regards his subcontractor in favour of other subcontractors.

How then can we determine where the contractual field ends and the delictual begins? The courts and the Code have answered, "Include only those obligations to which the parties have agreed, since the contract is based on free will of the parties, upon the meeting of minds. Whatever is not AGREED TO is part of delictual responsibility."

However this is to answer the problem by posing it another way. For the problem now is, "What is agreed to?" Is the doctor agreeing to simply treat the patient, to bring all the skill at his disposal to cure him, or promising to cure him? Similarly, is the ski-tow operator promising simply to provide a functioning apparatus at the skier's disposal, to use all his skill in lifting him to the top of the hill, or to carry him to the top with no accidents? And

³⁸*Supra.*

³⁹[1960] Q.B. 1132.

⁴⁰Crépeau, P., *La responsabilité civile du médecin et de l'établissement hospitalier*, (1956).

⁴¹For example there can be no reason why Nadeau considers the obligations of skill towards the passenger by the carrier to be contractual and accepts that of the doctor as delictual.

secondly, for what circumstances are these debtors promising these duties. It is evident that the parties cannot foresee all accidents and eventualities. In which circumstances have they consented to act with care and which are outside the realm of their agreement?

There are then two problems involved in the determination of the content of contract. Firstly, what situations does the agreement cover; that is, for which circumstances and duties will the debtor be responsible. Does the contract of medical care envisage a duty on the part of the doctor to maintain secrecy in regard to his patient's ailment? Does the contract of lease and hire of a workman's services contain the obligation on the part of the employer to prevent work accidents? Is there in the contract of carriage, the duty on the part of the carrier to prevent damage to the passenger caused by unruly customers or concessionaries (*e.g.* newspaper vendors on board)? Similarly, is the accident to a boarding school's pupils, while on a bus tour provided by the school, part of the contract of education?

Once one has determined the circumstances for which a debtor will be responsible, then one must determine what care the debtor has promised to carry out these obligations.

The terminology of obligations of "means and result" has often blurred the duality of the problem. For one must do more than determine whether the carrier has an obligation of means or result; one must decide to which situation these obligations apply. For once it has been said that the carrier is under an obligation of result in his duties, it does not tell us what these duties are. Thus, we are faced with the problem: was an obligation consented to or imposed in regard to a certain event, and if so, what degree of care is necessary to carry it out? We must not only discover whether the care promised is of means or result, but to what circumstances these duties of care apply.⁴²

To proclaim that the "intention of the parties" answers the problem is an extremely unsatisfactory, and indeed illogical, principle, which has somehow become enshrined in the legal cant.

Firstly, in many areas, the courts are dealing with circumstances entirely unforeseen by the parties at the time of the contract. As to who will bear the responsibility for these unimagined circumstances there is no agreement; *e.g.* the traveller's being struck, by an unruly fellow passenger in the course of the voyage, or the doctor in the midst of an appendectomy negligently removing another diseased organ which must be extracted.

Secondly, the so-called intention of the parties is often but a euphemism for a personal preference rationalized in legal terminology. Thus the carrier will maintain he promised only reasonable care in transporting his passenger,

⁴²I have indicated in a previous chapter that an obligation of result may be viewed as a promise of care greater than that of means, *i.e.* the debtor promising all that is humanly possible, being exonerated only by acts beyond his control (*force majeure*) or if prevented by the creditor himself, through the latter's fault.

(*i.e.* an obligation of means) while the latter will maintain that the train company undertook to ensure his safe arrival (an obligation of result). If there ever was a conscious meeting of minds on this point it would be lost in a flood of mutual recriminations.

While I shall discuss the inadequacy of the "intent of the parties" as a determinant for contractual content at greater length, suffice it to say that from the above examples, it is clear that the courts cannot glibly maintain the pursuit of a common intent which is either non-existent or impossible to discover.

What therefore is needed is a comprehensive meaningful theory to enable the courts to deduce rationally the content of all contracts; a theory which will consistently apply to all contractual situations, (whether of medicine, carriage, dry-cleaning, etc. . .) and to which the courts may turn when circumstances causing damage are unforeseen, or not adequately envisaged by the contract.

Two legal theories have been evolved *albeit* in other jurisdictions which provide a ready explanation of the tendency of our courts either to give a minimal content to contractual obligations, or to expand the content of the contract to a wider sphere. While of foreign origin, the reasoning of these theories is applicable to Quebec as a means of comprehending the Quebec courts' dual and inconsistent reaction to the problem of contractual content.

The problem of the content of contract appeared early in common law, and the ferryman who overloaded his boat causing damage to the passenger, the negligent surgeon, smith and barber are all to be found in early English jurisprudence. At first almost all responsibility was held to be in tort, for the false representation of trade. However, as soon as the idea of the "assumpsit" or undertaking was developed, the unfulfilled contract became the real foundation of many actions, and the problem of what Prosser has called the "Borderline between Tort and Contract" arose.

However the common law soon made a distinction between what is called misfeasance and nonfeasance. If the doctor acted negligently in the performance of his duty this would be "misfeasance", or a negligent performance. However if he did not come at all, then there would be a complete non-performance, or non-feasance. In other words when the defendant did something more than remain inactive he would be liable in tort,⁴³ all positive acts resulting in damages being delictual. Thus one might say that the Quebec courts in finding the carrier or doctor delictually liable for his lack of skill for accidents have been finding him guilty of a misfeasance, which they have declared brings actions only in delict. They have drawn the line for contractual obligations at

⁴³I do not wish to discuss the common law as such. I am only drawing on it to obtain a *concept* which I find useful in explaining the trend towards minimal contractual obligations in Quebec Law. It should be again emphasized that I am attempting to find a rational approach to the determination of the content of contract, other than the mere meaningless statement that one is following the consent or will of the parties.

complete non-performance of the obligation. Once he undertakes it and by his positive actions causes injury he is liable in tort.⁴⁴

As indicated there is another line of jurisprudence and doctrinal opinion, which has extended the content of contractual obligations. Again the courts have indicated they are following the consent of the parties, but as I have pointed out this is really no explanation. The courts are writing obligations into the contract, based in this case, largely on social policy; that is they are basing their determination of what "was agreed to," on what they feel society should demand of the parties.

"Disputes and disagreements do come up, and the law of contract may thus be viewed as an attempt to determine the rights and duties of the parties under circumstances that were not anticipated in the same way . . . One can say that the court's adjudication supplemented the original contract as a method of distributing gains and losses."⁴⁵

The approach of writing into contracts obligations according to the social needs and theories of the time has found much approval in France.

At the turn of the century with growing French industrialization, it was found that the *Code Napoléon*, drafted for an agricultural country, placed too great a burden of proof on the victim of industrial accidents, allowing the employer to escape, too often, from responsibility. Thus French authors looked for ways to insure greater protection to the workman. One of the means was an attempt to broaden the contract of lease and hire to include an obligation of security on the part of the employer; in other words, the employer, by hiring the employee, promised him protection against work accidents (an obligation of result, involving more than the promise of necessary care which would not have shifted the burden of proof).

The courts however declared that there was no evidence of such an agreement or meeting of minds on the subject, especially as the employer could justly proclaim that he had no such intention of making such a contract, that is, covering work accidents. However the theory had been formulated, that it was possible to have a content of contracts greater than mere non-feasance, and

⁴⁴A similar theory has been proposed by Savatier who views every contract as containing a benefit, which is the content of the contract. A delict may be envisaged as a prejudice suffered other than the loss of benefit envisaged by the contract. This theory is somewhat similar to the common law one, and it is interesting to note Cardozo J.'s judgment in *H.R. Mook Co. v. Rensselaer Water Co.* 247 N.Y. 160:

"If the conduct has gone forward to such a state that inaction would result not negatively merely in withholding a benefit but positively or actively in working an injury . . ."

However Savatier's answer is to me only another way of stating the problem. What is the benefit envisaged by the contract; e.g. of the carrier? Is it to carry one to one's destination, to provide the facilities to carry (*i.e.* begin to carry) or to carry with all reasonable care?

The common law theory is more useful, since while Savatier envisages the withholding of a nebulous benefit, nonfeasance involves the complete nonperformance, negative acts rather than positive poor performance. One can foresee, of course, difficulties in applying this theory as indeed *any* theory to the spectrum of possibilities that may occur in life, but it is a useful framework on which to hang the tendency of Quebec courts to see no more than minimal undertakings in contract.

⁴⁵Holmes, *The Common Law* (1881) p. 222.

in 1911 the obligation of security found its way into the contract of transport,⁴⁶ the court holding that the carrier undertook to transport the passenger safely and soundly to his destination and was responsible for all damages *en route*, not beyond its control.⁴⁷

That this is a socially possible, and indeed even laudable decision is not arguable; indeed one could even maintain that it is logically deductable from the contract of carriage. However, one cannot rationalize such a decision as resulting from the will of the parties. One can only explain it as being a policy decision on the part of the courts.

"C'est par un acte d'autorité qu'elle a fait pénétrer, dans le contrat de transport, l'obligation de sécurité."⁴⁸

Or as Planiol, who is very critical of this trend, points out, it is to

"entrer dans le domaine des suppositions gratuites et faire l'arbitraire juridique."⁴⁹

In France this policy of reading clauses into the contract is quite pronounced, however it should be realized that it does not emanate from the will of the parties, but rather from the will of the judge.

Thus, we are still faced with the main problem of the selection of a rule which will lead us to a consistent and rational determination of the extent of contractual obligations. The continual references to the so-called intent of the parties are meaningless unless one develops some rule to determine what obligations not mentioned in the contract the parties have consented to or may be presumed to have consented to.

The dominant view in Quebec law envisages only a consent to, or foresight of minimal contractual obligations.⁵⁰ Contracts, as a course of damages, consist

⁴⁶Cass. Civ., 21 Nov. 1911, (S.1912.1.73).

⁴⁷It will be seen we are concerned with two problems which the terminology of means and results tends to obscure. Firstly, for what circumstances or duties is the debtor bound by the contract. Secondly, what degree of care (means or result) must be taken in preventing them or carrying them out; *i.e.* what circumstances are envisaged and what degree of care promised for them?

⁴⁸Brun, *Rapports et Domaines des Responsabilités Contractuelle et Délictuelle* (1931), p. 207.

⁴⁹Quoted in Brun at p. 207, *op. cit.*:

It is interesting to note that his criticism of the French courts' attitude has been on the grounds that the parties did not consent to such an obligation. Thus for example, in a criticism of decisions imposing an obligation of security on the head of an institution for accidents to his pupils Planiol says:

"There is in these decisions of condemnation an abuse of the idea of contractual responsibility. One should not find such responsibility except where there exists an obligation of warranty voluntarily assumed . . . it is certain that a person does not intend to undertake upon himself the burden of accidents which may happen to his co-contractor by the fact alone that he has the obligation to permit him to perform an act of whatever kind."

I think that Planiol's criticism misses the mark. He is saying the parties never agreed, and the courts are saying that we feel this is the obligation which society demands of them. They are talking on two different levels. The carrier does not agree to carry safely and soundly, nor the doctor to use care. The courts impose these obligations, and if they are going to rationalize it as consent, then Planiol's criticisms are valid, but they are then valid of the whole trend of French jurisprudence since 1911 and not simply of a few which Planiol feels go too far.

⁵⁰Note the statement of Letourneau J. in *Aero Insurance Co. v. Curtis-Reid* (1933) 55 K.B. 421, where he held that in a contract of lease and hire the collapse of the building is not stipulated for; it is an eventuality unforeseen in the contract. Cf., also *Vineberg v. Foster*, *supra*.

only of *complete* non-performance, or non-feasance, and not misfeasance. A rational doctrine of contractual content can be built on such a premise, by which the parties are presumed to consent only to non-feasance, any positive acts causing damage leading to delictual responsibility being outside the realm of intent. Such an approach would result in a consistent judicial attitude, enabling each party to know exactly what duties he has obliged himself to perform and what consequences flow from his failure to live up to his contract; e.g. what damages are payable, where the action will be taken against him, how long he may be held accountable.

However, there has been a strong doctrinal and evolving judicial trend to follow present-day French law in expanding the content of contract. Moreover much of the expansion of contract has been to my mind unfortunately without a rational *a priori* principle, such as non-feasance. This extension of contract had involved two "approaches." The first of these is theoretically based on the consent of the parties, its proponents indicating that "it is clear" that the parties intended more than mere nonfeasance, without stating the principle on which they base themselves; the result to my mind is pure arbitrariness.

Thus, for example, Bissonnette J. in *X v. Mellen* states:

"qu'un lien contractuel se soit établi entre le père de l'enfant et le chirurgien, ceci ne peut souffrir de doute . . . En effet, dès que le patient pénètre dans le cabinet de consultation du médecin, prend naissance entre celui-ci et le malade, par lui-même ou pour lui-même, un contrat de soins professionnels."⁶¹

or as Nadeau points out:

"Une simple analyse du contrat formé, dans lequel on ne peut manquer de voir l'obligation de transporter la personne saine et sauve à destination."⁶²

Both appear, with all due respect, to misstate the problem. That there is a contract between doctor and patient and carrier and passenger, there is no doubt. As to what obligations they contain, there is the greatest of doubt, and both Bissonnette and Nadeau fail to give any principle for their determination. Indeed Nadeau can later accept the delictual nature of the doctor's duties of skill for accidents with no difficulty, the result of a lack of a guiding principle.

The second approach, prevalent in France, has been the determination of contractual content by the means of social policy. This approach may be seen in the early efforts of French theorists to include contractual obligations of security against industrial accidents, in the contract of the lease and hire of services, and in the efforts of such Quebec authors as Morin⁶³ to write into the contract of the carriage of persons an obligation of result, with regard to accidents during the course of the voyage. Such proponents of contractual expansion argued that the delictual recourse places too great a burden upon the damaged victim, offering him but a poor recompense. Hence they feel the contract should be expanded, depending on social exigencies.

⁶¹[1957] Q.B. 408-9.

⁶²Nadeau, at p. 145, *op. cit.*

⁶³Morin, *op. cit.*, p. 32.

However, the determination of the content of a contract based on social *desiderata* has almost insurmountable obstacles.

Firstly, as a solution of social problems, it is of limited applicability. The classicists believed that the burden of proof shifted with the origin of an obligation, *i.e.* whether it was contractual, or delictual; we have come to believe that the burden of proof shifts rather with the nature of the duty, *i.e.* whether it is of means or of result. Thus one might say that while earlier theorists viewed all contractual obligations as being of result, we, in greater harmony with the Code,⁵⁴ envisage numerous contractual obligations of means, whereby the burden of proof is still placed upon the victim. Thus there would appear to be *no social reasons whatsoever*, why the obligation of a doctor, or hairdresser, etc. . . , should be contractual or delictual. It is obvious that social policy cannot provide a comprehensive basis for contractual expansion, but only the incentive.

Moreover from a theoretical point of view the question of social policy does appear to be irrelevant to the problems of a contractual-delictual delimitation. The division of obligations into those of means and result has tended to blur the dual nature of contractual obligations. The party to a contract promises two things. Firstly, he undertakes certain duties of care (means or result), but these are undertaken only in regard to certain circumstances, actions and eventualities. The problem of determining the content of contract is largely a problem of determining to what circumstances the duties of care apply, and then, what amount of care was promised. Surely social policy cannot determine whether a contract will cover the numerous circumstances that may arise between the two parties. It is only after one decides that such circumstances are to be contractually oriented that social policy may play a role in determining whether the contractual obligations undertaken are to be of means or result, *e.g.* social policy cannot determine whether a contract will cover the numerous circumstances that may arise between two parties.

Lastly, if one did, in spite of the above difficulties, decide to allow the judge to determine on the basis of social *desiderata*, as he views them, which of a myriad of circumstances would be contractually envisaged, and which delictually oriented, one could see that the entire field of responsibility would be opened to the Cybella of confusion and chaos. Neither the parties, nor society, nor even the judges themselves would have a basis of determining the extent and consequences of their obligations until a judge had spoken and even then this decision would be subject to personal preferences of another.

While one should not be blind to the extent of judge-made law in our society, surely one should not make such a practice a basic principle of our legal system. Let the legislature enact social legislation, and let the judge apply principles which lead to certainty.

⁵⁴Thus the Code speaks of contractual obligations of means on the part of the mandator, lessee, deposittee and many others. *Cf.*, arts. 1710, 1626 and 1802.

As I have noted above there are, of course, strong and impelling social arguments for an expansion of contract. Since delictual obligations of care, with the exception of those imposed by art. 1055 C.C., are always of means, the shift of the burden of proof for many accidents onto their perpetrator, or onto those who have the facts more readily at their disposal, can only be achieved by the legislator (*e.g.* through the Workmen's Compensation Act) or by making such duties, obligations of result. This latter goal can only be achieved by an expansion of contract, which I feel is a social necessity.

However, while social imperatives may provide the incentive for such an expansion, the expansion itself must be based on legal wisdom, and not on the abdication thereof, through the apotheosis of social policy. For it is only judicial wisdom which will provide the social neutrality of legal principles, transcend particular viewpoints and temporary interests and provide an adjudication process both neutral in its ideology and logical in its application.

A NEW APPROACH

Such a principal may be found in examining the nature of the contract and particularly, the *social position assumed* by the parties to the contract. One might say that each contracting party by entering into the agreement assumes a broad social position *vis-à-vis* the other party, from which events and consequences flow. Thus the doctor towards his patient assumes the position of someone who is going to take certain steps to cure him. If, as a result of this position, certain accidents occur, I maintain that these accidents flowing from the general contractual position assumed by the doctor, (*i.e.* the nature of the contract of medical care) are contractual. Similarly the carrier, ski-tow and carnival operator have assumed the position of carrying the passenger in a public conveyance. Accidents resulting therefrom are part of the contractual relationship⁵⁵ flowing from the position of transporting passengers.

"Lorsqu'en vertu d'un contrat quelqu'un reçoit la puissance de travail d'un homme, comment concevoir que ce ne soit pas également en vertu d'un contrat qu'il s'engage à prendre toute les précautions nécessaires pour réduire au minimum les risques inhérents aux tâches auxquelles il l'emploiera."⁵⁶

Similarly, the restaurateur undertakes the position of preparing and serving food to his customer. It is obvious that as a result of his preparation, illness is a logical possibility and eventuality, and hence poisoning resulting from poorly prepared food is a consequence envisaged by the contract; *i.e.* flows from the social position agreed to by the restaurateur through the medium of his contract.

A recent case involving the serving of food is instructive along these lines. The employee of a restaurant serving the food in a rather extravagant manner injured the plaintiff. Clearly the restaurant had undertaken to *serve* the food

⁵⁵It will be noted I am not discussing who will bear the risk for these accidents, or what degree of care is necessary. I am simply stating that resulting from the nature of the contract, or social position assumed by the parties certain accidents will flow.

⁵⁶Mazeaud, *op. cit.*, at 201.

to the plaintiff by its contract, and accidents resulting therefrom are contractually envisaged.

Should the waiter have caused the damage while serving another client, the relationship should have been delictual, since the accident occurred not from a relationship assumed *vis-à-vis* the client, but from a relationship assumed with another party, to which the client would be a third party. A distinction must be made between the general social position of the restaurateur and his particular status *vis-à-vis* his contractor.

Obviously the question of social position is not without difficulty. Its determination in borderline cases would depend on two factors. First, a determination of the CONSENT to a social position *vis-à-vis* a particular person,⁵⁷ and secondly the interpretation by the courts, of certain terms and concepts.

In the case of the children's camp, clearly the camp has undertaken the social position of providing amusement and recreation, and accidents resulting from let us say a poorly driven bus on a conducted tour, flow from this assumed contractual position.

However, what is the situation of the boarding school? It undertakes to provide for the education of the child as well as room and board, and some athletic activity. Accidents resulting therefrom are contractual. However, should a supervised bus trip take place, would this be contractual or delictual? This would depend upon the meaning the court gave to the word education; *i.e.* would it include educational visits to another city, or would this be considered an extra recreation not part of education, and hence the basic social position of the school. In this latter case the problem would be: Had the parties expressly consented to assume this obligation accessory to the social position of the parties? This would be a problem of the express consent, and the existence of accessory obligations which I will now discuss.

A theoretical difficulty in the solution outlined above lies in certain accessory obligations not being part of consensual social position but resulting unilaterally from the relationship of the parties; *e.g.* the hotel keeper in the country will often meet his clients at the station and drive them to the hotel; or the private school will provide a tour of the city which results in injury to the children entrusted in its care, or the landlord will install an elevator in the building which collapses, or the ski-tow serving hot chocolate at the bottom of the hill gratis, poisons a skier.

The problem is not as difficult as it first seems. For in many cases there is no contract, no *juris vinculum*; (*e.g.* as in benevolent transport,⁵⁸ which the courts have held to be governed by art. 1053 C.C.).

⁵⁷Thus the doctor, who undertakes to perform a specific operation; *e.g.* appendectomy, and discovering another ailment, removes the diseased ovaries, should be held delictually liable for accidents resulting from any treatment for that disease, unless the other party *consented* to it. The social position clearly consented to was to cure a diseased appendix, not diseased ovaries. *E. v. M.* (1939) 77 S.C. 298.

⁵⁸*Cf.*, *McLean v. Pettigrew* [1945] S.C.R. 62.

One cannot imagine the guest of the hotel suing the hotel for not picking him up at the station, or the parent suing the school for not properly entertaining his son. Thus the problem here does not appear to be one of content of the obligation, but the very existence, as part of contract, of this accessory obligation itself. In other words, what is involved is the problem of whether there has been consent to this obligation, or whether it is merely a gratuity performed on the part of the hotel. Thus, should the hotel in its brochure indicate that included in the price of the room will be transportation to and from the station, it may be assumed to have consented to such a contractual obligation with the customer. Otherwise, we are in the field not of contract but of delict. Thus the courts must decide, is one of the prerequisites of art. 984; *i.e.* consent present, and has the party indeed consented to the extra obligations. *These obligations are not part of the general posture or status created by the contract.* They are more or less a gratuitous service added on,⁵⁹ unless explicitly made part of the contract.

Thus the owner or supervisor of a boarding school would be responsible for accidents happening to children if they flow from recreational activities, *i.e.* assuming the court does not define them as educative, only if these are expressly agreed on by the parties, otherwise they are gratuitous unilateral acts whose performance cannot be demanded by the parent, and which are within the delictual regime.

The idea of contractual consequences flowing from the social relationships assumed by the parties has, I believe, a measure of support in the civil code in art. 1024, an article whose full implications have rarely been discussed.⁶⁰

Art. 1013 *et seq.* in the chapter on the interpretation of contracts deal with expressed but unclear contractual provisions. Art. 1024 on the other hand deals with the interpretation of contracts when the parties remain completely silent. I believe that a reasonable interpretation of art. 1024 will indicate this is a general article applying to all contracts, which will enable the expansion of contractual content to take place. The scope of art. 1024 C.C. depends on whether one uses the French or English translation of the article. According to the English version of art. 1024,

"The obligation of a contract extends not only to what is expressed in it but also to all the consequences which, by equity, usage or law are incident to the contract, according to its nature."

This version of art. 1024 places the emphasis on the words equity, usage and law which appear to apply to contract when the parties are silent. However, the French version adds another source, namely the "nature of the contract",

⁵⁹A problem would arise in the cases where a customer knew of the extra service, and this was the reason for his signing the contract. Such knowledge would be personal and there being no exteriorization of it, it is a meeting of minds, not expressed, and hence not valid.

⁶⁰Dennis, M., (1960) 7 McGill L.J. 73.

or as I have expressed it, the social position assumed by the parties which makes it differ from any other agreement.

"Les obligations d'un contrat s'étendent non seulement à ce qui y est exprimé, mais encore à toutes les conséquences qui en découlent, d'après sa nature et suivant l'équité, l'usage ou la loi."

Trudel, Langelier and Crépeau all view the nature of the contract as an important source of contractual obligations,

"On est d'abord frappé par l'absence de distinction entre tel ou tel contrat. Toute convention est soumise à l'art. 1024 C.C.: l'équité, la loi, l'usage et la nature de l'engagement servent toujours de compléments . . . Plus encore l'art. 1024 C.C. est le principe premier de l'interprétation contractuelle."⁶¹

and again at p. 342: "A la lettre des stipulations s'ajoute tout ce qui en découle d'après leur nature, l'équité, l'usage et la loi."⁶²

However, it should be realized that both Trudel and Langelier (unlike Crépeau), do not give this phrase the wide meaning I would extend to it. Indeed I have been unable to find any jurisprudence so interpreting it.⁶³

Thus I believe the Code offers support to the theory that from the social position assumed and created by the contract and the parties, certain consequences flow logically and naturally, which form part of the contractual relationship.

Once one has decided that the consequences flowing from the nature or social position assumed by the party, with his co-contractor, are to be dealt with contractually, the question then arises: what is the debtor's responsibility for those events, resulting from his having voluntarily assented to or assumed a certain social position?

Whether the parties be strangers or bound by contract, once the debtor can cause damage to another, it is his duty to take precautions of a reasonable nature to prevent this damage from occurring. In other words, I would write into all contracts a duty of care or an obligation of means.⁶⁴

As far as the obligation of result is concerned, this is largely a matter of social policy in each contract, and it becomes difficult to see as a matter of legal

⁶¹Trudel, *Traité de Droit Civil de Québec*, vol. 7, pp. 338-9. Cf., also F. Langelier, *Cours de Droit Civil*, vol. 3, p. 415.

⁶²The concept of obligations flowing from the nature of the contract is also envisaged by art. 1612 C.C.:

"The lessor is obliged by the nature of the contract":

1. To deliver to the lessee the thing leased.
2. To maintain the thing in a fair condition for the use for which it has been leased.
3. To give peaceable enjoyment of the thing leased during the continuance of the lease.

⁶³There are but a handful of cases on art. 1024 C.C., mostly dealing with usage.

⁶⁴Even if one does not accept the social argument that every contract contains an obligation of means, one might write in this obligation to most contracts as resulting from the nature of the agreement. Thus the business man or professional in entering into contract, holds out a certain skill in his calling, *i.e.* he promises to execute with the skill and care which he has held out to the other by his position in society.

principal when a person should be obliged to merely take reasonable care and when he should go beyond and ensure a result. The answer depends obviously on one's social views, exemplified by the following statement of Mazeaud's, in considering whether the obligation of the employer in the contract of lease and hire should be to take care to prevent accidents to his workmen or to guarantee precautions against accidents.

"Il semble incontestable en effet que l'employeur a l'obligation de prendre toutes les précautions utiles pour assurer autant que possible la sécurité de son employé et l'on ne voit pas pourquoi cette obligation, bien que résultant de la loi et des principes généraux du droit, ne s'insérerait pas dans le contrat autant que l'obligation de transporteur. Lorsqu'en vertu d'un contrat quelqu'un reçoit la puissance de travail, d'un homme comment, concevoir que ce ne soit pas également en vertu d'un contrat qu'il s'engage à prendre toutes les précautions nécessaires pour réduire au minimum les risques inhérents aux tâches auxquelles il l'emploiera."⁶⁵

Traditionally in France the courts have determined on the grounds of modern social and economic philosophies, whether the circumstances bringing contractual responsibility into play involve obligations of means or result. I am not convinced that this is the proper role for the courts, but rather that the legislature should deal with such matters. Thus, for example, should it be found that railroad accidents are too manifold, Parliament should impose obligations of result to limit them. This demands sociological and economic studies—a task better suited to the law makers. However, if the courts are to impose it themselves quasi-legislatively, they should do so with restraint. Means is the basic obligation of our law and result should be only imposed with the greatest of care.

There is but one area where I feel the courts may justifiably declare an obligation to be one of result without the legislator, and that is where the burden of proof is too difficult on the plaintiff, since the defendant may have all the facts and technical knowledge and the plaintiff may, at great difficulty and expense, have to discover facts easily hidden. In such cases the courts are justified in saying that the burden will be on the defendant; in other words, that the obligation is one of result. This, I feel, is a matter upon which the courts may decide; otherwise they should await the decision of the legislator.

In conclusion, I may state that what I have attempted to arrive at is a principle for a rational approach to a determination of contractual content. I have attempted to give a rationale to the minimal content often given to Quebec contracts by borrowing on the common law distinction between non-feasance and misfeasance. However, I feel not only is it logical to extend the content of contract (which has been done in France and for which there are important advocates in Quebec among the authors and the jurisprudence) but that if one wishes to impose more obligations of result, which will become of greater necessity in society, only an expansion of contract — one based on legal principles — can achieve this social end. However I feel much of the extension has been done either with complete and contradictory arbitrariness (often resulting from a mistaken assimilation of the problem of when a contract

⁶⁵Mazeaud, *op. cit.*, at 201.

is formed to its content,)⁶⁶ or in the name of social policy, which I believe to be a pernicious doctrine.

I believe that the social position of the parties or nature of the contract reinforced by the French version of art. 1024 will provide such a valid principle. The so-called "consent of the parties" cannot determine the extent of the obligations undertaken by them, for it is obvious that the parties do not, or cannot consent to all the consequences which might occur.

Where consent can play a valid role is in determining the social positions consented to by the parties *vis-à-vis* one another.⁶⁷ Such a theory would give a legitimate role to consent, a consent which can be determined RATIONALLY by the courts.

Once the social position of the parties is determined then the consequences and accidents flowing from their assumed social relationships may be considered as being inherent in the basic position they have assumed contractually and hence viewed as part of the contractual relationship.

⁶⁶*Cf.*, Bisscnette J. in *X v. Mellen*, *supra*.

⁶⁷The determination of the social position of the parties, created by their consent is not without its borderline or penumbral problems. However, I have tried to indicate a rational solution to these based on consent and rational definition.