CASE and COMMENT

TRANSPORT URBAIN DE HULL LTÉE v. DAME DALY

Responsibility—Carrier—Passenger falling after alighting from bus—Article 1675 C.C. not applicable.

by Michael Dennis*

In this recent decision[1] the Court of Queen's Bench has held once again that the provisions of art. 1675 C.C., making carriers liable for goods entrusted to them, do not apply to the carriage of persons; rather, carriers of persons are liable under art. 1053 C.C., the delictual regime of civil responsibility. This comment is not concerned with that part of the judgment, rendered by Mr. Justice Hyde, which was based on the facts of the case, but rather with the court's acceptance of art. 1053 C.C. as the basis of liability of carriers of persons, an inconsistent attitude of the Court of Appeal in the light of recent decisions by this same court in the field of medical liability.

From the facts, it appears that plaintiff-respondent slipped and fell after alighting from one of appelant-defendant's buses and broke her hip, injured her back, and suffered some permanent incapacity. In the meantime, the bus had gone on its way and plaintiff was unable to identify it or its driver who, as Hyde J. points out, "presumably would not have been aware of her fall."[2] Plaintiff alleged defendant's responsibility for failure to sand the street or remove the ice therefrom, pleading in particular the defendant's obligation to maintain the street under the terms of its contract with the city. Upon an examination of this contract, however, Hyde J. found that the obligations of defendant to facilitate vehicular traffic could in no way be construed as an undertaking of defendant to maintain the streets for pedestrian traffic.

The trial judge maintained plaintiff's action not on the foregoing contract as claimed by plaintiff but on two other grounds: first, that defendant failed in its contractual obligation as carrier to deliver its passengers to a place which did not present any danger (à un endroit ne présentant pas de danger) and, second, that the chauffeur was at fault for failing to stop the bus sufficiently close to the traffic island to permit plaintiff to disembark thereon without her being obliged to step out into the street. The Court of Appeal, reversing the lower court's decision, disposed of the first ground by citing a line of cases which has asserted that the liability of a public carrier of persons is delictual and not contractual; in this case, plaintiff failed to establish fault or negligence

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[1][1959] Q.B. 773, Reversing the decision of the Superior Court (unreported).

[2]*Ibid.* at p. 774.

on the part of defendant or its employees. With regard to the second ground, plaintiff by her own admission testified that the traffic island was "mounded with snow". Hyde J. therefore concluded:

> It may be possible to imagine circumstances in which a carrier could be found at fault for the manner in which it disembarked one of its passengers but this is not one. The fact is that plaintiff was not injured getting off the bus, it was in walking away from the place where she had got off after the bus had left that she slipped and fell and, having no responsibility to maintain the streets for pedestrian traffic, it is impossible under the circumstances to attach liability upon defendant.[3]

Although one may well agree with the decision of this case on the merits, nevertheless the court's approach to the relationship of carriers and their passengers well affords reexamination in the light of recent decisions of the Court of Queen's Bench, applying the distinction between obligation of means (*obligation générale de prudence et diligence*) and obligation of result (*obligation déterminée*). Although this distinction has been applied thus far in cases of medical liability only[4], it is contended that it should equally apply in all fields of contractual responsibility.

In refuting the responsibility of carriers of persons under the contractual regime (arts. 1065, 1071 *et seq.* C.C.) Hyde J. draws support from the Supreme Court of Canada in *Canadian Pacific Railway Company v. Chalifoux*[5] and from the Court of Appeal decisions of *Daignault v. New York Central Railway Company*[6] and *Desmeules v. Renaud*[7]. This line of cases has established consistent jurisprudence applying the delictual regime (arts. 1053 *et seq.* C.C.) of civil responsibility where carriers and passengers are concerned. These cases refute any extension of art. 1675 C.C.[8] where passengers are concerned. Gagné J. in the *Desmeules* case summarizes this view:

> 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 fermément établie dans cette province et depuis longtemps, comme le reconnaît, d'ailleurs, le savant avocat de la demanderesse. La distinction que l'on qualifie de difficile et peu logique, tous uos tribunaux l'ont trouvée dans le texte de l'art. 1675 C.C.[9]

The reason why the courts have consistently applied the delictual regime of civil responsibility to 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 obligations of result. Chief Justice Létourneau in the *Daignault* case justifies the standard reliance on the delictual regime with the misconceived theory that the contractual regime imposes a more onerous burden of proof on the carrier:

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[3] *Ibid.* at p. 776.

[4] *X. v. Mellen* [1957] Q.B. 389; *G. v. C. and DeCoster* [1960] Q.B. 161.

[5] (1894) 22 S.C.R. 721.

[6] [1945] K.B. 457.

[7] [1950] K.B. 659.

[8] Art. 1675 C.C.: "Carriers are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself."

[9] [1950] K.B. 659 at p. 663.

> Ceci, il va sans dire, devait améliorer la situation de la demanderesse quant au fardeau de la preuve. Car alors que pour une responsabilité délictuelle (1053 C.C.) tout ce fardeau incombe à la victime, la loi veut (1070 et s. C.C.) qu'au cas d'une obligation contractuelle, ce soit *à priori* au débiteur de cette obligation à répondre des dommages, sauf à s'en exonérer toutefois à raison d'une cause étrangère: force majeure, cas fortuit, ou faute de la victime.[10]

But if the distinction between obligations of means and of result is applied, the burden of proof will not depend upon whether the action is taken under contract or delict, but rather upon the *nature* of the obligation in issue (*i.e.* whether it is one of means or of result).

An obligation of means is one whereby the debtor undertakes to use all reasonable care and diligence to effect a result desired by the parties; to establish a breach of such obligation, the creditor must prove the existence of that obligation (art. 1203 C.C.), that damage has been sustained by him, and that such damage was caused by the fault or negligence of the debtor. The debtor, by mere proof of absence of fault, *i.e.*, that reasonable care was taken, will exonerate himself of liability. In cases where the cause of the damage is unknown, the creditor sustains the loss without indemnification.

An obligation of result, on the other hand, is one whereby the debtor undertakes to effect, in essence guarantees, a specific result so that any breach of it, irrespective of fault, will render the debtor liable in damages. Mere proof of the existence of the obligation and damages sustained by the creditor due to its inexecution renders the debtor liable unless he can prove *chose étrangère*, *force majeure*, *cas fortuit*, or fault of the creditor. Proof of absence of fault will not suffice; in cases where the cause of damage is unknown, the debtor is bound to indemnify the creditor.

From this distinction it is clear that the burden of proof varies with the nature of the obligation, independent of contractual or delictual regimes. Nevertheless, in the *Daignault* case, Létourneau C.J. had concluded that, in effect, all obligations under the delictual regime are obligations of means and all obligations under the contractual regime are obligations of result. Perhaps this conclusion is derived from the fact that art. 1053 C.C. is a classic example of an obligation of means and contractual obligations of delivery or payment or indemnification are obligations of result, so that Létourneau C.J. sees arts. 1065, 1070, *et seq.* C.C. as necessarily governing obligations of result. Yet an examination of these articles shows that no such conclusion is valid.

Art. 1065 C.C. provides, in part, that, "every obligation renders the debtor liable in damages in case of a breach of it on his part." Art. 1203 C.C., paragraph one, provides that, "the party who claims the performance of an obligation must prove it." Therefore the creditor must in all cases establish the existence of the obligation and the breach of it. In the case of an obligation of means, proof of damages alone will not establish a breach of the obligation, but further proof of the debtor's fault and a causal connection to the damages suffered must be established. In the case of an obligation of result, proof of

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[10] [1945] K B. 457 at p. 464.

damages suffered establishes the breach of the obligation. Then, in both cases, the burden shifts and the provisions of arts. 1071 and 1072 C.C. apply, and accordingly, "the debtor is liable to pay damages in all cases in which he fails to establish that the inexecution of the obligation proceeds from a cause which cannot be imputed to him, although there be no bad faith on his part."[11] In the case of an obligation of means, if the debtor establishes that he is free from fault, then the inexecution cannot have been due to a cause which can be imputed to him as there is no breach of an obligation of means without fault or negligence on the part of the debtor. But in the case of an obligation of result, the fault of the debtor is irrelevant and the debtor must establish *chose étrangère*. Thus "the debtor is not liable to pay damages when the inexecution of the obligation is caused by a fortuitous event or by irresistible force, without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract."[12]

From an examination of the relevant articles of the code governing the contractual regime of civil responsibility, it appears that both obligations of means and of result conform to the specific provisions of law. The burden of proof varies according to the nature of the obligation within the structure of arts. 1065, 1071 *et seq.* C.C.

There is unanimity of opinion among theorists that the basis for liability in contract and in delict is uniform. However, the legislators have provided a practical division by enacting separate rules for the contractual and delictual regimes. Differences such as in matters of prescription[13], jurisdiction of the court[14], conflict of laws[15], quantum of damages awarded[16], joint and several liability[17], liability for damages caused by others[18], to name a few, create an important practical division between actions in contract and actions in delict. So when the courts allow an action to be brought in delict for the breach of a contractual obligation the purpose of the legislators in providing separate rules is defeated. Furthermore, it cannot be the intention of the legislators that the creditor should be free to choose the set of rules which best suits his action. Thus, if the courts continue to hold that the liability of carriers of persons is delictual, and a contract of carriage exists between the parties, and the action concerns the breach of an obligation assumed under that contract, then there is a paradox and inconsistency in our law as interpreted by the courts. The courts have recently considered the liability of doctors within the proper

[11]Art. 1071 C.C.

[12]Art. 1072 C.C.

[13]Arts. 2242, 2258, 2260, 2261, 2262 C.C.

[14]Arts. 94 et seq. C.P.

[15]Arts. 6, 7, 8 C.C.

[16]Art. 1074 C.C.; *Regent Taxi & Transport Company v. La Congregation des Petits Frères de Marie* [1929] S.C.R. 650 at p. 682.

[17]Arts. 1105, 1106 C.C.

[18]Arts. 1028, 1054 para. 7 C.C.

framework of the contractual relationship between doctor and patient; similar appraisal must be accorded to other contractual relationships, including the carriage of persons.

In considering the relationship between the carrier and its passengers one must ascertain the nature of the contractual bond and identify the obligations which may be considered a part of that contract. First of all, in order that there be a contract, the four requisites of art. 984 C.C. must be present. The Civil Code provides specific provisions for certain contracts to which recourse must be had. In the case of the contract of carriage the Code provides an obligation of result respecting the liability of carriers for loss or damage of things entrusted to them.[19] No similar provision exists regarding the carrier's liability in respect of passengers. But there is undoubtedly a contract, express or implied, whereby the carrier undertakes to convey the passenger from one place to another and the passenger undertakes to pay the fare. In France, the Cour de Cassation has recognized the contractual liability of carriers of persons since 1911.[20] But there still remains the problem of determining the content of such contract. M. Henri Mazeaud provides a valid solution:

> Il est incontestable que le transporteur s'engage, dans le contrat, à conduire le voyageur d'un point à un autre. Mais s'engage-t-il à lui assurer la sécurité au cours de ce transport? Toute la question est là. Le gros argument des partisans de la négative consiste à opposer le voyageur aux marchandises. Ces dernières sont remises au transporteur, qui peut en faire ce qu'il veut: là où il les mettra, elles resteront et, s'il s'agit d'animaux, il pourra les assujettir pour empêcher leurs mouvements. Au contraire, le voyageur conserve sa liberté d'action; il va et vient librement dans les gares, les wagons, les automobiles, etc. Sans doute une différence sensible existe entre le transport de choses et le transport de personnes; mais cette différence, qui ne va pas d'ailleurs jusqu'à laisser toute liberté au voyageur (obligation de traverser par les passages souterrains, de ne pas descendre en marche, etc.) n'a point d'incidence sur la nature de la responsabilité; que le transporteur ne puisse pas s'y prendre de la même manière pour assurer la sécurité des personnes et celles des marchandises, certes; mais qu'il s'engage à donner la sécurité aux unes et aux autres, voilà qui est non moins évident. Sans doute, au moment où le contrat a été passé, le transporteur savait, comme le savait aussi le transporté, qu'un accident pourrait se produire; mais nul n'ignore quand il contracte que l'autre partie peut ne pas exécuter son obligation.[21]

In France the courts have held that the carrier has a contractual obligation to deliver its passengers "sain et sauf à destination". The Cour de Cassation in so deciding changed the obligation of the carrier from one of means (under the delictual regime) to a contractual obligation of result.[22] Thus the liability of the carrier of persons in France is analogous to art. 1675 C.C. relating to goods in Quebec. But our courts have continually shown their reluctance to accept such an approach. It does not follow, however, that the courts of Quebec

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[19]Art. 1675 C.C.

[20]S. 1912, I. 73 and note Lyon Caen, D. 1913; I. 249 and note Sarrot. The Cour de Cassation held that, "L'exécution du contrat de transport comporte, en effet, pour le transporteur, l'obligation de conduire le voyageur sain et sauf à destination." (S. 1912, I. 73).

[21]Premier Congrès International de l'Association Henri Capitant pour la culture juridique française, Québec et Montréal, 1939, pp. 336, 337.

[22]"Le contrat de transport implique nécessairement pour le voiturier l'obligation de livrer à destination le voyageur dans l'état dans lequel il l'a reçu, c'est-à-dire sain et sauf. Par cela seul que cette obligation n'est pas exécutée, le voiturier est responsable." (Note, Sarrot, D. 1913, I. 249 at p. 254).

must adopt the same conclusion. The creation of the obligation "de livrer sain et sauf à destination" is a discretionary policy decision of the Cour de Cassation acting as quasi-legislator. The courts of Quebec have decided that a carrier will not be held liable without proof of fault. But such an obligation of means can equally be implied in the contract of carriage. Art. 1024 C.C. provides that "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."[23] The courts may, without altering the nature of the obligation, bring the obligation of carriers of persons properly within the contractual relationship. One may imply that the carrier undertakes to exercise all reasonable care and diligence in the conveyance of its passengers, which is nothing more than stating affirmatively what is implied in art. 1053 C.C., the sanction which the courts now invoke. The difference is that the courts will be considering what is the breach of a contractual obligation within the contractual regime of civil responsibility and the particular set of rules which apply thereto.

The notion that the relationship between carrier and passenger be considered within the framework of the contract has been considered by M. André Nadeau, who advocates adopting the solution arrived at by the courts of France:

> Un revirement de jurisprudence serait à souhaiter à propos de la faute du transporteur de personnes; les tribunaux ne devraient pas hésiter à reconnaître la nature contractuelle de cette faute. Il ne serait même pas nécessaire, à notre avis, de recourir à l'art. 1675 C. civ. 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, permettrait de conclure à la faute contractuelle, à laquelle pourrait se soustraire le débiteur à l'aide des art. 1071 et s. C. civ.[24]

But the courts of Quebec have long considered the nature of the liability of the carrier in delict, *i.e.*, an obligation of means. Gagné J. answers M. Nadeau:

> 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 même s'il ne faudrait pas l'intervention du législateur.[25]

Again the failure of the courts to apply the distinction between obligations of means and result is shown. Gagné J. feels, as does the court in the present case, that placing the liability of the carrier within the contractual regime will alter the nature of that liability. What this comment has attempted to point out is that, having regard to the *nature* of the obligation itself, and applying the distinction between means and result, the liability of the public carrier can and should fall within the bounds of that contract of carriage, and without changing the nature of liability.

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[23]The French wording of art. 1024 C.C. clearly provides that contractual obligations may be implied in a contract according to its nature: "Les obligations d'un contrat s'étendent non seulement à ce qui y est exprimé, mais encore à toutes les conséquences qui découlent, d'après sa nature et suivant l'équité, l'usage ou la loi."

[24]Traité de Droit Civil du Québec, vol. 8, p. 145.

[25][1950] K.B. 659 at p. 663.