each defendant did something in law which is a fault and both these faults were necessary to bring about the accident. It may be concluded, therefore, that these *similar* (not *common*) faults may give rise to the application of art. 1106, condemning the defendants jointly and severally.

Because the damage resulting from a fault must exist between the author and the victim, the application of art. 1053 usually involves an imputation of the fault concerned to a *particular* person. With regard to this case, the person of the victim was clear but that of the author of the fault was not; on these grounds Martineau J. decided to uphold the appeal. In the opinion of that learned judge, this failure to ascribe the *causa* to one of the two merchants was sufficient to break the chain of events and required that the trial condemnation of responsibility *in solidum* be rejected. But on this set of extraordinary facts, the Chief Justice and Casey J. saw that a fresh look at art. 1053 was necessary. In their view the identification of a particular person was not only impossible but, perhaps, needless. The equally distinct but identically negligent and imprudent acts were, in effect, considered as one fault; the attempted differentiations between each merchant/act (sic) did not remove the necessity of determining common responsibility between them for the production of the damage. The Court of Appeal has, then, given us a new *coup d'œil* on this well-known article establishing civil responsibility and its companion, art. 1106. Their judgment in favour of the plaintiff and dismissing the appeal was exigible in equity and justified in law.[14]

J. E. C. BRIERLEY*

LA VILLE DE DORVAL v. DROUIN

INJUNCTION — PRINCIPAL DEMAND OF INJUNCTION — ART. 957 (3) C.C.P — BALANCE OF CONVENIENCE — INJUNCTIONS INTERLOCUTORY TO A PRINCIPAL DEMAND OF INJUNCTION.

In the case of *La Ville de Dorval* v. *Drouin*[1] the Court of Appeal once more has had to consider the significance of the puzzling amendment to art. 957 C.P. Il will be recalled that in virtue of the Act of 1953-54, 2-3 Eliz. II, c. 27, s. 11, the following addition was made to that article:

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[14]The preceding jurisprudence has never quite touched upon the point at issue in this case. Such a case, although helpful, was cited by Galipeault, C.J., at page 425: *The Grand Trunk Railway Co.* v. *Cité de Montréal* (1918), 57 S.C.R. 268 held: "There may be joint and several responsibility of two different parties for the consequences of an accident caused by the independant acts of negligence committed by both *at the same time* and contributing directly to the accident." (Italics supplied). However, the independent acts of the two merchants in the case under comment were *not* committed by both at the same time.

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[1][1957] Q.B. 838.

(957. Any judge of the Superior Court may grant an interlocutory order of injunction in any of the following cases:)

3. Without the issue of a writ of summons, in the case of sub-paragraphs *a* and *b* of paragraph I, if at the time the plaintiff has no other recourse to exercise than an injunction. The application for injunction shall then itself constitute a suit.

The issue of an interlocutory order of injunction in such circumstances shall not deprive the petitioner of the right to obtain later the issue of a writ of summons, to exercise any other ground of action subsequent to his petition for an interlocutory injunction.

Paragraph I of art. 957 C.P. enables a judge to grant an interlocutory order of injunction

1. At the time of issuing the writ of summons:

a. Whenever it appears by the petition that the plaintiff is entitled to the relief demanded, and that such relief consists, in whole or in part, in restraining the commission or continuance of any act or operation, either for a limited period or perpetually;

b. Whenever the commission or continuance of any act or operation would produce waste, or would produce great or irreparable injury.

The effect of the amendment has been discussed in at least four recent judgments.[2] The upshot of these decisions was that the amendment had created, not an absolute right to a principal demand of injunction, but a restricted remedy predicated upon two conditions:

1. the unavailability of any "other recourse" at the time, *and*
2. that the injunction should aim at restraining the commission or continuation of any act of a nature to produce great or irreparable injury.

The writer elsewhere[3] has drawn attention to the vagueness of the first requirement and to the possible consequences of including — illogically — a *principal* demand of injunction among *interlocutory* or *provisional* remedies. The case under discussion lends some support to this criticism. It also throws light on unexplored aspects of the new injunction.

The litigation in the *Drouin* case arose out of the unauthorized use by the city of Dorval of a drain pipe (built for temporary purposes by a contractor) as an outlet for the municipal sewer network of defendant, with resulting pollution of the waters of Lake St. Louis adjacent to plaintiff's residence and the emission of foul odors during occasional periods of low water. From the facts it appeared that the pipe was not adequate for the purposes to which it was put by the City of Dorval and that defendant had not obtained from the Provincial Bureau of Health the authorization required in such cases by the *Provincial Health Act*.[4] Drouin, taking advantage of the provisions of the third paragraph

[2]*Raymond et al* v. *Miron et al,* [1957] Q.B. 571; *Guaranteed Pure Milk* v. *Patry,* [1957] Q.B. 54; *Champlain Oil Products Ltd.* v. *Beaudin,* [1956] P.R. 270; *Segal* v. *P. Caplan Construction Co. Ltd and Partridge Realty Co.,* C.S.M. No. 3891164 (unreported).

[3]*Raymond et al.* v. *Miron et al.,* case and comment, (1958) 4 McGill L.J. 88, esp. at pp. 99 *et seq.*

[4]R.S.Q. 1941, c. 183, s. 57.

of art. 957 C.P., petitioned directly for a permanent injunction ordering defendant to refrain from using the drain pipe at all. The petition was not and need not be accessory to an action in damages. The injunction was granted by the Superior Court, which dismissed several defences of fact. Defendant then appealed to the Court of Queen's Bench which by this judgment affirmed the decision of the lower court. Opinions were written by Bissonnette and Hyde J. J. Mr. Justice Taschereau concurred.

What makes this case noteworthy is the interpretation given to the amendment of art. 957 C.P. Mr. Justice Bissonnette, discussing the purpose of the amendment, writes:

> "C'est précisément parce que, dans de nombreux cas, une action principale, à laquelle on aurait voulu joindre une injonction ancillaire, n'était guère possible, que la Législature a créé l'action directe d'injonction. C'est surtout dans le champ du droit administratif que se révélait impossible une action principale. Ainsi, dans les cas de grève, de piquetage, de relations ouvrières, de difficultés syndicales, d'excès de pouvoir des corporations privées ou publiques, de faits répréhensibles dans l'abandon d'une charte ou de la signature du contrat, un recours en annulation ou en dommages-intérêts n'était pas recevable, quoiqu'il put résulter d'une action ou d'une opération un tort irréparable."[5]

This is the first judicial statement we have as to the purpose of the amendment. According to the learned judge it would thus serve to fill the gap created by cases — especially in administrative law — which do not admit of any principal recourse to which an interlocutory injunction could be attached. However, one cannot help wondering whether another recourse such as damages would not exist in some of the instances mentioned by Mr. Justice Bissonnette. Indeed, the requirement under art. 957 (3) C.P. that there be "no other recourse" is still far from clear. In fact it is difficult to imagine one single case where an injunction but "no other recourse" would lie. Even in this case — the first successful reliance on art. 957 (3) C.P. — there is no doubt that plaintiff *had* another recourse: damages.

Mr. Justice Hyde, while concurring with his brother on the merits of the case, is apparently very reluctant to take the amendment literally and seems less than happy with its wording:

> "Whether the words "no other recourse" in the first paragraph of sub-section 3 of art. 957 C.P. include an action for damages or not is something which does not have to be decided in this case. This whole sub-section is drafted in a peculiar manner and is by no means easy to interpret."

Then follows the thought-provoking suggestion:

> "One possible interpretation of these particular words could be that such other recourse must constitute an adequate recourse to prevent continuance of the prejudice suffered by petitioner. This would man giving them an effect similar to the prerequisite for the issue of a writ of *mandamus*, normally, that there is 'no other remedy equally convenient, beneficial or effectual' (art. 992 C.P.)
>
> It is generally recognized that an action in damages is not considered equally convenient, etc. as the performance of an act or duty by a public officer or other

[5]At p. 842.

person against whom a *mandamus* may be directed, and I think the same can also be said of the prejudice complained of by plaintiff in the present instance."

Unfortunately, as Hyde J. points out, the meaning of the words "no other recourse" did not have to be decided in this case and his remarks must be interpreted as being only "of an *obiter* nature."[6] Sooner or later the matter will have to come before the courts and may then receive a satisfactory solution.

The second point of interest in this case is the important ruling by Mr. Justice Bissonnette that the petition for an injunction under art. 957 (3) C.P. constitutes an action like any other action which must be decided "selon les droits respectifs et les rapports juridiques des parties en cause."[7] The important consequence is that in the case of a principal demand of injunction the court may only consider the respective rights of the party and may not weigh the balance of convenience, an element it must consider whenever an injunction is demanded under the first two paragraphs of art. 957 C.P. It will thus be impossible to plead, as defendant in this case attempted to do, that the disadvantage to defendant if the injunction is issued will exceed the disadvantage to the petitioner should his petition fail.

On the other hand, since the demand under art. 957 (3) C.P. "constitutes suit", there is no reason why the petitioner could not seek an interlocutory injnnction until judgment on the principal demand of injunction. Then, of course, as Bissonnette J. points out, the balance of convenience would have to be considered in adjudicating on the interlocutory injunction. In other words, a petitioner seeking an injunction under paragraph 3 of art. 957 C.P. could simultaneously demand one under paragraph 1, although a minor textual difficulty results from the fact that par. 1 speaks of "the time of issuing the writ of summons" which obviously cannot be the case of an action such as that under par. 3, which is initiated, not by a writ of summons, but, by a petition. In fact, Mr. Justice Hyde points out that this new remedy is an exception to the rule of art. 117 C.P. which requires that all suits be begun by means of a writ of summons. The improper inclusion of the principal injunction within an article regulating interlocutory injunction has thus led to the Alice in Wonderland situation in which, theoretically, you can secure an interlocutory injunction under art. 957 (1-2) C.P. pending the decision on a petition for an "interlocutory" injunction under art. 957 (3) C.P.

Helpful though this case may be, it has not solved any of the problems raised by the amendment.[8] There is little doubt that our courts will have to wrestle with it again. Only a further amendment and rearrangement of the articles dealing with injunctions can provide a solution.

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[6]At p. 844.
[7]At p. 842.
[8]See footnote 3.
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