CASE AND COMMENT

CHAPUT v. ROMAIN ET AL.

CONSTITUTIONAL LAW — CIVIL RESPONSIBILITY — FREEDOM OF RELIGION — POLICE CONDUCT — QUANTUM OF DAMAGES — MORAL DAMAGES — PUNITIVE DAMAGES.

The recent judgement of the Supreme Court of Canada, *Chaput* v. *Romain et al.*,[1] is noteworthy in several respects. The highest court of the nation pronounced upon the scope of religious freedom in Canada, and defined the standard of conduct to which state officials must adhere in their official relationships with citizens. Moreover, the amount of damages awarded, in conjunction with certain *dicta* of several of the judges on the nature and function of civil damages, is pregnant with suggestion.

The facts which gave rise to the action were relatively simple and were not seriously disputed. "Le demandeur appelant est un ministre du culte des Témoins de Jéhovah. Le 4 septembre, 1949, un autre ministre (Mr. Gotthold) qui professe la même religion, se rendit à Chapeau, et là, chez le demandeur, présida à une cérémonie religieuse. Dans le domicile de l'appelant, où étaient réunies environ trente ou quarante personnes, il exposa les doctrines auxquelles il croyait, lut certains passages de la Bible, et la preuve ne révèle pas qu'il n'y ait rien eu de dit qui fut séditieux. Tout se passa dans le calme le plus complet."[2] The meeting commenced at two o'clock in the afternoon. Some forty-five minutes later, the three defendants, Officers of the Quebec Provincial Police,[3] entered the house. "The respondents went inside and, according to them, after observing the proceedings for approximately two minutes, Chartrand told the minister, then reading from the Bible, to discontinue, that the meeting would have to be broken up and those present dispersed . . . The respondents then seized the Bible Gotthold had been reading, the hymn books, a number of booklets on religious subjects published by Jehovah's Witnesses and the collection box, dispersing the meeting, and conducted Gotthold to the ferry which plies across the Ottawa River between Chapeau and Pembroke, Ontario, upon which they placed him. No charge of any kind was at any time

[1]Judgement delivered Nov. 15, 1955, as yet unreported. All quotations are from a transcript of the judgement.

[2]per Taschereau J.

[3]Chartrand was a member of the Judicial Section of the Quebec Provincial Police. Young and Romain were members of the Traffic Department of the Provincial Police.

laid against any of the participants in the meeting and none of the items seized have ever been returned."[4]

It is now settled that the sect of Jehovah's Witnesses constitutes a religious "class of persons".[5] Their right of freedom of religion, which exists under Canadian law, is to be protected. Taschereau J. expounded this segment of the law in stirring but accurate terms:

> Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liherté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire qu'on sert son pays ou sa religion, en refusant dans une province, à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province."

The Freedom of Worship Act[6] was relied on by Locke J. While the other judges do not cite authority for the proposition that there is freedom of worship in Canada, the criminal law in no way deprives the adherents of any religion of the right of freedom and worship, and it is a fundamental principle in a democracy that what is not expressly prohibited is permitted. The harmony of the bench upon this matter was achieved because a basic issue in Canadian constitutional law, whether "religion" falls within section 91 or section 92 of the British North America Act, 1867, did not arise in the case at bar. The problem was considered in the *Saumur Case*,[7] in which Locke, Rand, Estey, and Kellock JJ. held religion to be a matter falling under Federal jurisdiction while Rinfret C.J.C., Kerwin and Taschereau JJ. maintained that it was under Provincial jurisdiction as religion fell within Property and Civil Rights in the Province, Cartwright and Fauteux JJ. expressing no opinion.[8] The words of the learned judges in the *Chaput Case* do not give rise to the conclusion that there is a permanent, unalterable right of religious freedom in Canada. There was no attempt to commence the creation of a "Bill of Rights" by judicial legislation, for, to do so, it would have been necessary to decide that "religion" did not fall within either section 91 or section 92 of the B.N.A. Act, 1867. As long as "exclusive" jurisdiction over religion is retained by either the Federal Parliament or the Provincial Legislatures, the freedom of religion which is enjoyed at present, may be curtailed at some future date.

The Freedom of Worship Act, a statute which is for the most part declaratory,[9] provides that:

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[4]per Kellock J.

[5]*Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299. *Perron* v. *School Trustees of the School Municipality of Rouyn* [1955] Q.B. 841. See also (1955) 2 McGill L.J. 42.

[6]14-15 Vict., cap. 175; a pre-Confederation statute passed by the then Province of Canada, which, with slightly different wording, now appears in (1941) R.S.Q. cap. 307.

[7]*Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299.

[8]Cartwright J., with whom Fauteux J. agreed, appeared to favour the aspect doctrine.

[9]14-15 Vict. cap. 175. Part of the preamble reads as follows: "Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial

> . . . the free exercise and enjoyment of Religious Profession and Worship, without discrimination or Preference, so as the same be not made an excuse of acts of licentiousness, or justification of practice inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province, allowed to all Her Majesty's subjects within the same.

However, as Rinfret C.J.C. has pointed out:

> La jouissance et le libre exercice du culte d'une profession religieuse ne jouit pas, en vertu du ch. 307, R.S.Q. 1941, d'une autorisation absolue. . . . D'ailleurs il serait exagéré de prétendre que, par application du ch. 307, aucune manifestation religieuse ne pourrait être empêchée par règlement.[10]

The law is clearly set forth by Cartwright J.:

> Under the British North America Act . . . the whole range of legislative power is committed either to Parliament or to the Provincial legislatures and competence to deal with any subject matter must exist in one or other of such bodies. There are thus no rights possessed by the citizens of Canada which cannot be modified by either Parliament or the legislature, but it may often be a matter of difficulty to decide which of such bodies has the legislative power in a particular case.[11]

The statement of Taschereau J. quoted above reveals that the learned Judge has not altered his opinion that "religion" is a matter of Civil Rights within the Province. Indeed, it is to the Provinces that he addresses himself on the question of policy. The words reveal a fear that a religious majority in a province might attempt to impose its views upon a religious minority through special legislation, and would be meaningless unless this were felt to be a constitutional possibility.

Thus it is clearly seen that the decision in the *Chaput Case* did not establish a fundamental right which cannot be impaired by legislation, and in no way extended the law on this point. To do so was unnecessary, as the case raised the question of the degree of freedom under the law as it exists, and the answer was merely expository in nature.

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Chaput brought an action in damages under Art. 1053 C.C.[12] for $5005.15,[13] concluding for "a recovery of both special and general as well as moral and punitive damages."[14] The action was dismissed by the Superior Court,[15] which judgement was confirmed by the Court of Queen's Bench.[16] However, the Supreme Court reversed the lower courts, a full bench unanimously con-

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Legislation; and whereas in the state and condition of this Province to which such principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority recognizing and declaring the same as a fundamental principle of our civil polity."

[10] *Saumur* v. *City of Quebec* [1953] 2 S.C.R., at p. 314.

[11] *Ibid,* at p. 384.

[12] 1053 C.C.: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

[13] The $5.15 represented the value of the pamphlets seized.

[14] See appellant's factum submitted to the Court of Queen's Bench.

[15] Superior Court, Pontiac, Fortier J., June 10, 1952.

[16] [1954] B.R. 794.

cluding that the defendants Chartrand, Young, and Romain had committed a delict which rendered them jointly and severally liable for $2,000. damages, with costs.[17]

The three constables raised several grounds of defence, alleging that:

1. Plaintiff was in possession of pamphlets containing seditious libel, and was creating animosity and hate between different classes of society.

2. Defendants were public officers fulfilling duties as peace officers duly appointed, and that they were, at the relevant time, in the scope of their duties as members of the Provincial Police.

3. Defendants were in good faith and had colour of right, as they had reasonable and probable cause and they relied on the Court of Queen's Bench decision in the *Boucher Case,*[18] thereby becoming entitled to the protection of the Magistrates' Privileges Act.[19]

4. The defendant was acting under superior instructions to maintain law and order and to do specifically what he did.

5. That there was no notice as required by law.

6. Chartrand pleaded the benefit of the short prescription of s. 5, Magistrates' Privileges Act.

The Court of Queen's Bench characterized the suit as an action for damages due to the violation of the right of property. Bissonnette J. ignored the interference with the right of worship and of assembly, and the damage to reputation, concluding that although the respondents entered plaintiff's house without a warrant, this was not illegal as it was a public meeting which had been advertised as such. The learned judge suggested the only person with a cause of action arising from the events was "l'orateur Gotthold", as he alone suffered prejudice.

With this view of the legality of the original presence of the respondents in the residence, Abbott J. agreed. Taschereau J. found that while there may have been some semblance of good faith at the outset, it did not continue, if it ever existed. However, it is submitted that the Supreme Court was correct in holding that the entry was not the fact that gave rise to the cause of action: facts subsequent to the entry of the constables created a cause of action, for religious rights and feelings were outraged and Chaput's reputation was damaged. It was in this light that the defences were examined by the Court.

It was unanimously agreed that the evidence disclosed nothing of a seditious nature. However, defendants pleaded their good faith, suggesting that they had reasonable and probable cause to expect a breach of the law, that they were protected by the decision of the Court of Queen's Bench in *Boucher* v.

[17]Judgements of some length were written by Kellock J., with whom Rand J. concurred, and Taschereau J., with whom Kerwin C.J.C. and Estey J. concurred. Shorter judgements were written by Locke J., Abbott J., and Fauteux J., with whom Cartwright J. concurred.

[18]*Boucher* v. *Rex* [1949] Q.B. 238.

[19](1941) R.S.Q. cap. 18.

Rex, and therefore were entitled to the benefits of the Magistrates' Privileges Act.

The Court of Appeal had held that the onus was on the plaintiff to prove the absence of reasonable and probable cause and that the constables were acting outside the scope of their duty, which would render them in bad faith. In the opinion of Bissonnette J., the plaintiff failed to discharge the burden of proof and therefore the Magistrates' Privileges Act protected respondents. This reasoning did not avail respondents in the Supreme Court, quite correctly, it is suggested. With respect to the learned judges of the Court of Appeal who found otherwise, it is difficult to comprehend what further evidence was necessary to discharge the burden of proof.

Abbott J. reasoned:

> En arrivant à la réunion, les intimés purent immédiatement se rendre compte de son caractère religieux, et que tout se passait dans l'ordre et la paix. En dispersant l'assemblée, les intimés en conséquence, ne pouvaient plus être considérés comme agissant de bonne foi; dans l'exercice de leurs fonctions. Ils devaient savoir qu'ils n'étaient investis d'aucun droit les justifiant d'entraver cette réunion.

The actions of the police, Locke J. emphatically argued, brought them within the then sections 199 and 200 of the Criminal Code.[20] One cannot disagree with the learned Judge when he states:

> I must confess my inability to understand how it can be suggested that a police officer is acting in the execution of his duty in committing a criminal offence. I am equally unable to understand how a person can *deliberately* commit a crime or a tort in good faith.

Taschereau J. quite properly distinguished the application of a defence of reasonable and probable cause, which will avail in cases of malicious prosecution, from the case at bar, as here there is fault because the tortious act is forbidden by law:

> Il me semble impossible de dire en conséquence que les intimés ont agi avec cause raisonnable quand un statut leur interdit de poser l'acte qui leur est reproché.

Nor could respondents rely on the decision of the Court of Appeal in *Boucher* v. *Rex*. Bissonnette J., in his decision in the *Chaput Case*, after some strong *obiter*,[21] concluded that the respondents could infer from the Court of Appeal decision in the *Boucher Case* that the pamphlets of the group were seditious:

> . . . quand les défendeurs . . . empêchaient cette réunion et saisissaient les pamphlets séditieux, ils savaient qu'ils pouvaient agir ainsi puisque la plus haute autorité judiciaire autorisait leur acte.

With respect, it was not the highest judicial authority "within the province." The judgement was reversed on appeal to the Supreme Court,[22] and so was

[20]These provisions concerning obstructing an officiating clergyman, or doing violence to or arresting an officiating clergyman are now under art. 161 of the new Criminal Code.

[21]"A tout citoyen de cette province il était notoire que les témoins de Jéhovah avaient des activités d'un caractère séditieux, particulièrement de leurs attaques inqualifiables contre la religion catholique . . . Tous savaient qu'ils étaient honnis de Québec." [1954] B.R. 794, at p. 798.

[22]*Boucher* v. *Rex* [1951] S.C.R. 265.

not a correct finding in law. Moreover, even if it were, it would not substantiate the defence. In the words of Kellock J.:

> Bissonnette J. as well as Hyde J., who based his judgement on this ground, are under complete misapprehension as to what was actually decided by the Court of Queen's Bench in *Boucher* v. *Regem*.

The charge to the jury in the *Boucher Case* referred to one pamphlet only, and that pamphlet was not on appellant's premises. It was not for the police (or the Court) to widen the application of the finding in the *Boucher Case* to include *all* activities and publications of the sect when only one publication was under consideration.

The Magistrates' Privileges Act[23] was considered by the Court of Queen's Bench to justify respondents' actions on the failure of the plaintiff to prove they were in bad faith. The Supreme Court, having come to different conclusions on the question of good faith, was logically bound to conclude that the statute offered no justification for defendants' acts.

The relevant sections of the Magistrates Privileges Act are as follows:

> 5. No such action or suit shall be brought against any justice of the peace, officer or other person acting as aforesaid, for anything done by him *in the performance of his public duty*, unless commenced within six months after the act committed.
> 7. Any such justice of the peace, officer or other person, shall be entitled to the protection and privileges *granted by this act* in all cases where he has acted *in good faith in the execution of his duty*, although, in doing an act, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.[24]

The privileges accorded by the Act were merely procedural, granting no relief from delictual responsibility. As was stated by Fauteux J.:

> Cette loi spéciale ne constitue pas un obstacle à la responsibilité édictée à l'article 1053 C.C.; les dispositions de cette loi spéciale impliquent, au contraire, l'application de cet article.

Kellock J. analyzed the nature of the good faith necessary to invoke the procedural provisions of the Act:

> What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts, which, had they existed, would have justified him acting as he did.

He must not merely believe he has a right; he must believe in a state of facts, which, if true would give him the right. A personal error in law is not a defence. Respondents could not claim they were in the performance of their public duty and so the procedural defences failed.

The Court clearly pronounced upon the duties of a peace officer:

> The public duty annexed by law to the office of a peace officer [is] a duty to maintain the peace, to enforce the law by preventing violations of it and by taking appropriate action to bring transgressors to justice. Every proper act of an officer against or by way of invading the ordinary rights of a citizen must be done with such a purpose; there must be the existence or the belief in the existence of facts which give rise to the duty and call for action. At the moment respondents became aware of the nature and facts of the meeting . . . the only duty that arose was to do nothing in the way of interfering . . . I assume their belief was that, in some way or

[23](1941) R.S.Q. cap. 18, particularly arts. 2, 5, 7.

[24]Italics are those of the Judges.

> other, by holding the meeting, those present were committing an offence, but such a mistake, a mistake as to what is criminal, can never give rise to a public police duty . . . [What respondents did] was not in execution of a public duty, but in carrying out an illegal instruction.[25]

The orders to break up the meeting were issued by one Sergeant Perreault of Montreal upon reference by Chartrand, who had received a telephone call from the local curé, Mr. Harrington, in respect of the meeting. The fact that appellants' activities were not approved of by the local curé was no excuse for the police to interfere, and consequently Sergeant Perreault's instructions were illegal. Although Bissonnette J. maintained that the fact respondents were acting under instructions constituted a complete defence, as Kellock J. pointed out, he did not refer to any authority in support of this view. The Supreme Court held that no one can authorize an illegal act.[26] The order of Perreault would merely make him jointly and severally liable for damage caused in carrying out his illegal order.

The readiness with which the respondents accepted the illicit order is nothing less than shocking, revealing as it does, in some of the Provincial Police, a state of abysmal ignorance of the law and of their duty under the law. Chartrand, on the witness stand was asked, "Q. You never bothered about the law, to see if it was illegal? A. No, I have nothing to do with that." Young "just went with Mr. Chartrand at his request; I did not definitely understand why we were going . . . [but] there ought to be some reason for us going there . . . *when he gets orders there must be something wrong.*"[27] On the question of suspected sedition, the respondents admitted "that they had not read any of the pamphlets either before or after the seizure."[28] Romain admitted not knowing the meaning of the word "sedition". Young gave evidence that before going into the house Chartrand told him that literature would have to be taken for evidence to find out if it was of a seditious nature or not. It is clear that the respondent police officers were unable to tell at a glance that the Douay Bible — the Catholic Bible — was not seditious!

The entry and seizure were made without a warrant of any kind having been obtained or even applied for. Had a warrant been procured, the situation would have been considerably different. The police would not have been responsible: Chaput's sole remedy would have been an action in damages due to malicious prosecution.

The Court unanimously rejected all the defences of the respondents, and awarded appellant $2000. damages, Locke J. being of the opinion that the award should have been higher.

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In awarding damages, the Court made several pronouncements which give rise to the following interesting questions. What is the nature of moral dam-

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[25]per Kellock J.

[26]See Dicey, *Law of the Constitution*, 9th ed., p. 193, quoted by Kellock J.

[27]Italics added.

[28]The trial evidence is quoted in Kellock J.'s judgement.

ages under civil law? Can Quebec civil tribunals award punitive damages? What considerations govern the quantum of damages to be awarded when only moral damages are to be granted by the court?

The plaintiff, in his conclusions, asked the court for a "recovery of both special and general as well as moral and punitive damages."[29] The Supreme Court agreed that Chaput had a right to damages. It is convenient to set out the specific words of the Judges:

Kellock J. stated:

> The appellant suffered an invasion of his home and his right of freedom of worship was publicly and peremptorily interfered with. In addition to that his property was seized and kept. He was humiliated in his own home before a considerable number of people . . . While the appellant is not, in my opinion, entitled to recover punitive damages, he is entitled to recover moral damages, a term which, for the present purposes, may be said to be analogous to general damages under common law. (Dalloz, Nouveau Répertoire, Vol. III, n. 205.)

Taschereau J. held that plaintiff:

> a subi des dommages moraux, pour lesquels il a droit à une réparation . . . un montant suffisant pour justement compenser la victime, mais pas si élevé, qu'il soit disproportionné aux dommages subis .

Locke J. affirmed that:

> The appellant's right to maintain his good name and to enjoy the privileges conferred upon him by the [Freedom of Worship Act] are absolute and very precious rights, and he is entitled to recover substantial *general damages*[30] . . . The moral damages allowed in cases of this kind in Quebec do not differ in their nature from the general damages allowed at common law for wrongs such as those inflicted upon the appellant by the respondants in this matter.

The learned Judges characterized the cause of action as the breach of the rights of freedom of religion and free assembly, illegal invasion of a private home, and damage to reputation.

It is submitted, with respect to the learned Judges who equated moral damages under civil law to general damages under common law, that there are certain differences which render it desirable that the Courts preserve civil law terminology when the subject matter under consideration falls within the ambit of the Civil Law.[31] A cause of action which will give rise to substantial moral damages under civil law, might not, under common law, call for an award of general damages. It seems probable that the attorney for the plaintiff-appellant,[32] being learned in both the Common and the Civil Law, incorporated the common law term, *general damages,* into his plea for civil law damages, and this term was taken up by Kellock and Locke JJ., both of whom have a common law background. No benefit accrues from importing the common law term into a judgement awarding moral damages under Civil Law.

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Plaintiff, in the case at bar, asked for damages which would be sufficiently high to compensate him, and which would act as a preventive with regard to

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[29]See appellant's factum submitted to the Court of Queen's Bench.

[30]Italics added.

[31]See *infra.*

[32]W. Glen How, of the bars of Quebec and Ontario.

possible future derogations from duty by police officers. These delicts, it was argued,[33] ought to be visited with sufficient damages to make law enforcement officials realize that the liberty of the citizens of a free nation is not to be treated as a matter of small importance. Moreover, as the action in damages is often the sole remedy available to the ordinary citizen, it is essential that it be efficacious: the citizen must find it worth his while to go to court to have the law enforced. The administration of justice suffers directly if the quantum of damages awarded is insignificant.

In *Prime* v. *Keiller, Rainville, and the City of Montreal,*[34] plaintiff sought $500. for false arrest. Tyndale J., as he then was, stated:

> Plaintiff did not prove any specific damages. It is clear, however, that he went through a very humiliating experience and is entitled to some monetary reward.[35]

However, plaintiff was granted merely $100. and the costs of an action for $200.

Similarly in *Brault* v. *City of Montreal,*[36] plaintiff received what appears to be an inadequate award. The court found that, to an innocent question:

> . . . the constable replied in very vulgar language . . . The constable struck [plaintiff] in the face with his fist and broke his glasses, and calling someone to his assistance, took him across the street and stood him there for some time in the midst of a crowd of onlookers until the patrol arrived, when the plaintiff was taken to the police station, stripped, and lodged in a cell where he remained [until bailed out] . . . The arrest was made without reasonable cause . . . The complaint, as subsequently laid, was an afterthought and false in every respect, to the knowledge of complainant.

Brault sued for $999.99 and was awarded $336.40.

A similar argument in respect of quantum of damages can be made for cases based on insults to religion. In *Ortenberg* v. *Plamondon,*[37] an action seeking $500. for public insult to plaintiff's religion and a consequent loss of business, two of the defendants were condemned to pay a total of $75.

The Criminal Law provides rules by which items may be seized for possible use as evidence in a criminal trial. In the case at bar, the police, without investigating what they were seizing, seized a Douay Bible, a number of pamphlets, and the cigar box used to collect money. The report of the police shows the disrespect for law and order that characterizes some of those whose special function it is to uphold the law:

> Nous avons tout saisie tout les livres qui avait dans la maison.[38]

The items seized were never returned, although no criminal charge was laid. Section 432 of the new Criminal Code provides for a means of securing the return of items (lawfully) seized. This provision is new law, and appears

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[33]See appellant's factum submitted to the Court of Queen's Bench.

[34][1943] R.L. 65.

[35]*Ibid,* at pp. 70, 71.

[36][1944] S.C. 185.

[37](1915), 24 K.B. 69.

[38]Quoted in Kellock J.'s decision.

to be necessary law.[39] Similarly, provision must be made to secure a person's rights against illegal seizures. The courts have held fairly consistently that evidence seized without a warrant can be produced at a Criminal trial and will appear as an exhibit in the record. The only remedy for the illegal seizure is a civil suit against the officer.[40] The Civil Courts should make effective the sole sanction to secure enforcement of this rule of law by granting sufficient damages.

Pothier, appropriately in his time, advocated a conservative view of damages:

> Il faut même selon les différents cas apporter une certaine modération à la taxation et estimation des dommages dont le débiteur est tenu.[41]
> Il doit être laissé à la prudence du juge, même en cas de dol, d'user de quelque indulgence sur la taxation des dommages et intérêts.[42]

In his analysis of the Court's tendencies in awarding damages, Baudouin notes that judges:

> . . . ont une tendence naturelle malgré les principes, à réduire le montant des dommages-intérêts.[43]
> Dans la pratique jurisprudentielle . . . une certaine habitude s'est développée qui tend, malgré l'énoncé de principe, à atténuer ou tout au moins à proportionner le montant de la réparation non plus au montant du préjudice mais au degré de culpabilité.[44]

Whether or not one approves of this tendency, it can be argued that the courts ought to apply the same considerations in a positive way in appreciating the amount of damages when there is flagrant culpability. As Planiol argues:

> Les juges usent parfois de leur pouvoir souverain d'apprécier le montant du dommage pour allouer une indemnité d'autant plus élevée que la faute est plus grave. C'est attribuer aux dommages-intérêts un rôle de sanction, *en même temps* qu'un rôle de réparation.[45]

Planiol considers that the award may be punitive and compensatory at one and the same time.

The Supreme Court, in the case at bar, stated that punitive damages were not to be granted. Moral damages are purely compensatory, even though no pecuniary loss be suffered.[46] The decision of Taschereau J. is central to the discussion of damages in the *Chaput Case,* as Locke, Kellock, and Abbott JJ.

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[39]See *Martin's Criminal Code,* Toronto, 1955, annotation at p. 719.

[40]The Criminal Law is stated in, among many decisions on this point, *Rex* v. *Honan* 20 C.C.C. 10; *Rex* v. *Wright* 52 C.C.C. 285; *Rex* v. *Lee Hai* 64 C.C.C. 49; *Rex* v. *Gilchrist* 65 C.C.C. 356. Its application by the Court of Appeal in Quebec is found in *Rex* v. *Hawkins* 42 C.C.C. 305: "It was urged that these officers penetrated into the sanctity of the accused's castle and illegally took possession of these cheques. That may be, and it may be that the accused might have some recourse against the intruders into his castle . . . ," but the evidence was accepted. Per Greenshields J., at p. 307.

[41]Pothier, *Obligations,* pt. I, ch. ii, art. 3, no. 160.

[42]Pothier, *op. cit.,* no. 168.

[43]Baudouin, *Le Droit Civil de la Province de Québec,* Montreal, 1953, p. 872.

[44]Baudouin, *op. cit.,* p. 846.

[45]Planiol, *Traité Pratique de Droit Civil Français,* 1952, no. 682. Italics are added.

[46]See Nadeau, *Traité de Droit Civil,* (Trudel series), vol. 8, no. 582.

refer to his opinion, although they appear to differ in their conclusions as to what is decided therein:

> Même si aucun dommage pécuniaire n'est prouvé, il existe quand même, non pas un droit *à des dommages punitifs ou exemplaires, que la loi de Québec ne reconnaît pas* mais certainement un droit à des *dommages moraux*. La loi civile ne punit jamais l'auteur d'un délit ou d'un quasi-délit; elle accorde une compensation à la victime pour le tort qui lui a été causé. La punition est exclusivement du ressort des tribunaux correctionnels.[47]

Abbott J. agreed that the civil law does not provide for punitive damages. Locke J. phrased his reference with a slightly different emphasis, implying that Taschereau J.'s decision might be consistent with punitive damages in Quebec under other circumstances, though not in the case at bar:

> I have had the advantage of reading the reasons for judgement to be delivered by my brother Taschereau, in which he has discussed the circumstances in which moral damages, as distinguished from punitive damages, have been allowed in the courts of Quebec, and indicated that, in his opinion, those awarded *in the present matter* should fall within the former category.[48]

Kellock J. took exception to the reasoning in the decisions of the Court of Appeal to which Taschereau J. referred with approval,[49] although not necessarily to the ultimate disposition of those cases:

> In so far as the recent decisions in the Provincial Courts are founded upon the view that the civil Courts of the Province have no jurisdiction to order recovery of anything in the nature of a penalty, it being for the Criminal Courts to impose punishments, they are not, in my opinion to be accepted. [However,] insofar as [the reasoning] is based on the construction of art. 1053, I respectfully agree. The language of the article is "damage caused".

The learned Judge argued that public law statutes of the Province, which make specific provision for penalty, are to be interpreted in the light of English authorities and precedents, and therefore would authorize an award "of common law damages". As the learned Judge remarked, the question is clearly *obiter,* but the argument is instructive. Although Kellock J. concluded that the appellant could not recover punitive damages, the courts have jurisdiction to award punitive damages. This reasoning, however, may be met with the argument that a provincial public law statute may allow English precedents to determine if fault existed, but once fault is found, the ordinary law of civil responsibility applies, and consequently only civil law damages can be awarded. Definitive pronouncement upon this point will have to await another case in which the Court is squarely confronted with the issue.

It is evident that the Judges with a Common Law background are more sympathetic to the notion of punitive damage in civil courts. Should their views eventually prevail in Quebec, it would not be an innovation, but rather a return to principles of Quebec law from which the Courts deviated some

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[47]per Taschereau J. The learned judge cites with approval the following cases: *French* v. *Hétu* (1908), 17 B.R. 429; *Guibord* v. *Dallaire* (1932), 53 B.R. 123; *Savignac* v. *Duquette* (1936), 61 B.R. 503; *Duhaime* v. *Talbot* (1938), 64 B.R. 391.

[48]Italics added.

[49]See footnote 47.

decades ago. Kellock J. cites with approval *Lachance* v. *Casault,*[50] in which the Court of Appeal, after hearing argument, awarded penal damages. As the Court awarded moral damages in the *Chaput Case,* it is still open to the Supreme Court to avow that punitive damages are part of the Civil Law, as expounded by Planiol, referred to above. This appears to be consistent with the award made in *Lachance* v. *Casault,* where Ouimet J., in his reasoning, stated that defendant "devra être condamné à payer à l'appelant une somme de $200., savoir $100. pour lui rembourser ses dispenses, et $100. comme dommages exemplaires";[51] but in the formal judgement it was merely "considérant qu'en dénonçant et en faisant arrêter l'appelant comme susdit, l'intimé lui a causé des dommages que cette cour évalue à $200.[52] The jurisprudence of the Court of Appeal has since abandoned this position, but the process of arriving at the sum of damages may often be the same. In the case at bar, the Supreme Court awarded $2000. It is uncertain if this included the $5.15 specific damages for the pamphlets. If it does, how did the Court arrive at the sum of $1994.85?[53]

There is a split in the doctrine on the question of punitive damages. Mignault declared unequivocally:

> Quant aux dommages exemplaires qui peuvent être accordés en certain cas, même lorsqu'aucun tort réel n'a été causé, afin d'exprimer la réprobation d'un acte malicieux ou répréhensible, et d'en punir l'auteur, et quant au montant de ces dommages, on pourra voir les causes suivantes:

and he cites nine cases.[54]

Goldenberg agrees:

> Where moral damage is suffered . . . the Court may award exemplary or punitive damages, or merely nominal damages. . . . The award is punitive and exceeds the actual injury caused, because malicious intent or grave negligence is presumed.[55]

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[50](1902), 12 K.B. 179.

[51]*Ibid.,* at p. 203.

[52]*Ibid.,* at p. 204.

[53]A breakdown of specific damages is not without its practical application. The Minister Gotthold unquestionably had a right to sue, and may have been entitled to even greater damages than Chaput. How much the latter was awarded for damage to religious sentiments as distinct from the other segments of the whole cause of action, would have served as a guide to others. One cannot help but wonder what would have been awarded to each of the thirty-six other Witnesses present for insult to their religious sentiments and interference with their right to be present at a lawful assembly for purposes of worship.

[54]Mignault, *Droit Civil Canadien,* vol. 5, p. 388. *Watson* v. *Thompson* 24 L.C.J. 129; *Brossoit* v. *Turcotte* 20 L.C.J. 241; *Papineau* v. *Taber* M.L.R. 2 Q.B. 107; *Fitzgibbons* v. *Woolsey* 13 Q.L.R. 49; *Stephens* v. *Chaussé* M.L.R. 3 Q.B. 270, confirmed by the Supreme Court, 11 L.N. 90; *Beauregard* v. *Daignault* 11 L.N. 403; *Lamirande* v. *Cartier* R.J.Q. (1892), 2 C.S. 43; *Pednault* v. *Ville de Buckingham* 5 R. de J. 40; *Chalim* v. *Gagnon* 5 R. de J. 320. Mignault's list is not exhaustive. See *Guest* v. *MacPherson* 3 L.N. 84.

[55]Goldenberg, *The Law of Delicts,* Montreal, 1953, at p. 115.

The author may have meant one of two things: either formal punitive damages are allowed under civil law, which was certainly Mignault's view, or that heavy damages may be awarded which in fact are punitive. In either case, the net result is that the Court can award a substantial sum as damages which will in fact punish the party at fault.

Nadeau disagrees with this reasoning, arguing forcefully that penal damages are foreign to Quebec civil law as they would constitute an unjustified enrichment:

> La victime ne peut prétendre à un enrichissement parce que le défendeur a eu des torts envers elle, mais uniquement à la réparation des pertes réelles subies.[56]
> Les tribunaux doivent apprécier les dommages moraux actuellement causés au demandeur, et accorder une indemnité pécuniaire pour le tort réellement subi, exclusion faite des dommages dits exemplaires ou punitifs.[57]

The author suggests, less convincingly, that:

> nos tribunaux avant 1935 avaient accordés ce qu'ils appelaient des dommages exemplaires ou punitifs. En réalité il s'agissait de dommages moraux présentés erronément sous cette étiquette.[58]

This bit of rationalization might more correctly be inverted, for punitive damages under the guise of moral damages have been awarded since 1935, though not in sufficient amounts. Moreover, it is not undesirable that this should take place. It is submitted that the interests of Justice would be well served if an increased liberality in awards would find favour with the Courts, particularly those of first instance. It is not significant, from a practical point of view, whether this takes place under the title of punitive damages, or by awarding an increased quantum of moral damages, which in effect would be punitive. In either event, the application of the principles of civil responsibility, with significant economic consequences, would aid in preventing similar breaches of private rights by the police. The *Chaput Case* may be the beginning of a new trend in this direction.

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[56]Nadeau, *op. cit.*, no. 258.
[57]Nadeau, *op. cit.*, no. 259.
[58]Nadeau, *op. cit.*, no. 257.
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HENRY v. RIVARD

CIVIL LAW — DAMAGES — 1054, PARA. 7 C.C. — RESPONSIBILITY OF EMPLOYER FOR DELICT COMMITTED BY EMPLOYEE — INTERPRETATION OF THE WORDS: "IN THE PERFORMANCE OF THE WORK FOR WHICH THEY ARE EMPLOYED".

A rather thorny field of inquiry in the Quebec law of civil responsibility is the determination of the responsibility of masters and employers for the acts of their servants and workmen. The final paragraph of Article 1054 C.C. provides that "masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed". The majority of litigation under this provision has been concerned with the interpretation of the words: "in the performance of the work for which they are employed". How can one determine with any degree of certainty when an act causing damage is in the performance of the work for which the actor is employed, thus engaging the responsibility of the master or employer?

In the case of *Henry* v. *Rivard*,[1] the Superior Court was again confronted with the question of determining the responsibility of an employer for a delict committed by his employee. The facts are as follows. On the 3rd of October, 1953, Gérard Henry, the plaintiff's minor son, went for a ride in a delivery truck driven by Gaston Rivard and belonging to the latter's employer, Paul-Emile Rivard. During the trip an accident occurred in which Gérard Henry received injuries. In the present action, Paul-Emile Rivard was sued under 1054, para. 7 C.C. in his capacity as employer. The evidence discloses the following: (1) that Gaston Rivard was employed by his brother, Paul-Emile Rivard, for the purpose of making deliveries and for other purposes incidental to his business; (2) that the driver, Gaston Rivard, had only three deliveries to make on the day of the accident and that he had made them long before the accident occurred; (3) that the accident occurred outside the normal route which Gaston Rivard usually took in the performance of his duties; (4) that the driver was under the influence of liquor at the time of the accident and that the accident was caused by his careless driving; and (5) that the driver was given the use of the delivery truck for his own use, in partial payment for his services.

On the basis of the facts and the interpretation given to the last paragraph of 1054 C.C. in the decisions of *Curley* v. *Latreille*,[2] *Moreau* v. *Labelle*,[3] and *Alain* v. *Hardy*,[4] Mr. Justice Marquis concluded that the driver of the vehicle:

[1] [1955] S.C. 317.
[2] (1920), 60 S.C.R. 131.
[3] [1933] S.C.R. 201.
[4] [1951] S.C.R. 540.

> . . . n'exécutait aucun travail dans l'intérêt du commerce du défendeur Paul-Emile Rivard et ses actes ne pouvaient lier ce dernier.[5]

From the uncontradicted evidence adduced by the defendant, it was quite clear that the acts of the driver at the time of the accident had no connection whatever with his employment. After dismissing the plaintiff's action on the evidence before the Court and on the basis of the authorities cited above, Mr. Justice Marquis goes on to make the following statement, which must be considered to be an *obiter dictum:*

> Même si le défendeur Gaston Rivard avait été dans l'exécution de ses fonctions, le défendeur Paul-Emile Rivard n'était pas responsable des dommages causés au voyageur bénévole Gérard Henry.[6]

This statement directly implies that a gratuitous passenger is barred from the recovery of damages from an employer when the employee is in the performance of the work for which he is employed. We know, however, that this is not the law in Quebec, although it is in certain common law jurisdictions (e.g. Ontario) where a gratuitous passenger's right of recovery from the driver or his employer is barred by statute. Since we have no such statute barring recovery in this Province, the second and only possible meaning of this statement (after considering it in the light of the arguments which follow it) is that the exercise of the functions for which a servant is employed is incompatible with his inviting a gratuitous passenger to accompany him; in other words, that it is impossible for a driver to be in the performance of the work for which he is employed while he has a gratuitous passenger in his vehicle. In the writer's opinion, it would appear that there is no incompatibility here in spite of the lengthy arguments relied upon by the Court in support of its view. Since it not infrequently happens that *obiter dicta* are cited as authorities for subsequent judicial decisions, and thus become permanently imbedded in our law, it is the writer's purpose to examine the above statement in the light of the reasoning and precedents which prompted it.

In arriving at this statement, the trial judge found it necessary to discuss the various theories offered as to the basis of the vicarious liability of masters and employers for delicts committed by their servants and employees. After a brief discussion of the theories advanced by Pothier, Baudry-Lacantinerie et Barde, and Savatier, Mr. Justice Marquis ultimately found favour with the theory expounded by a recent author, Edmond Bertrand, in his book entitled *Le Préposé Moderne,* wherein the basis of the vicarious liability of the master is said to reside in the *representative function* which the employee fulfills in acting for his employer. Thus there is, according to Bertrand, a substitution of the personality of the employee for that of the employer's in the performance of the work for which the former is engaged, on the reasoning that "si une personne peut se substituer à une autre pour la conclusion d'un contrat,

[5][1955] S.C. 317, at p. 318.
[6]*Ibid,* at p. 319.

pourquoi ne le pourrait-elle pas pour la réalisation d'un fait matériel?"[7] After quoting liberally from Bertrand's text, the trial judge concludes:

> Ainsi, si le défendeur avait été dans l'exécution de ses fonctions, il aurait engagé la responsabilité du commettant en heurtant un piéton, ou en heurtant un autre véhicule sur la voie publique. C'est tout comme si le commettant avait commis lui-même cet acte. Mais, si le préposé n'est pas dans la poursuite du but à atteindre, s'il va faire une promenade pour ses fins personnelles, ou encore *s'il invite un voyageur bénévole à l'accompagner, il ne représente pas alors le commettant et ne peut engager sa responsabilité.*[8]

The writer finds it difficult to agree with this line of reasoning and with the conclusion reached to the effect that an employee ceases to represent his employer, thus disengaging the latter's responsibility, whenever, or as soon as, the employee or servant invites a gratuitous passenger to accompany him. It is admitted that drivers are not hired to pick up gratuitous passengers. Does this admission, then, lead us to conclude that a driver ceases to represent his employer in all cases where the former picks up a gratuitous passenger? If we were, for a moment, to agree with Mr. Bertrand's theory as to the basis of the vicarious responsibility of employers, would we not be justified in concluding *mutatis mutandis* that since a driver isn't hired to drink while driving, he would cease to represent his master as soon as he begins to drink while driving, thus disengaging his employer's responsibility? A fallacy in this method of argument now becomes obvious. This fallacy, it is submitted, is due to an omission of a necessary distinction between: (a) the act of picking up a gratuitous passenger, wherein, if we accept Bertrand's theory, the driver ceases to represent the master in so far as that act is concerned; and (b) the delictual act which causes injury to the passenger at the moment of the accident wherein the servant may have returned to the performance of the work for which he is engaged. Thus, if a driver, contrary to his master's instructions, stops on the highway to pick up a passenger, he may at that moment, if we accept Bertrand's theory, cease to represent his master. But as soon as the passenger takes his seat and the driver resumes his journey along his route of business, has not the driver returned to the performance of the functions for which he is engaged? The truth of the matter is that it is quite possible for the servant to be engaged at one and the same time on his own business and on that of his master's. For some obscure reason, our Courts have been reluctant to admit this possibility.

As to disobedience by a driver of orders given by his employer to refrain from picking up passengers, it is an established rule of law that an express prohibition of any act by the master will not relieve the latter where the transgression of a prohibition only deals with conduct within the sphere of employment.[9] It is submitted that the only time where the act of giving a ride

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[7]At p. 250 of Bertrand's text, quoted at p. 321 of the decision.

[8][1955] S.C. 317, at p. 322. The italics are the writer's.

[9]Apart from the cases discussed in this case comment, there are no reported Quebec decisions as to the precise effect of disobedience by a driver of an order given by the

to an unauthorized person is not merely a wrongful mode of performing an act of the class which the driver is employed to perform, but the performance of an act of a class of which the driver is not authorized to perform at all is where notice of the prohibition to unauthorized persons to travel on their vehicle is affixed to the driver's cab where it is clearly visible to the world at large.[10]

The decisions of *Fink* v. *Herer*[11] and *Duquette* v. *Pinard*[12] were heavily relied upon by the trial judge in support of his dictum. In *Fink* v. *Herer*, after a review of the French jurisprudence and doctrine on the subject, Mr. Justice Mackinnon concluded that the French jurisprudence appears fairly settled that the taking of a passenger does not come within the scope of the servant's authority and is not a mode of exercising his master's employment.[13] On this basis, the trial judge in that case held that the owner of a vehicle is not responsible for injuries suffered by a passenger who had been invited by a servant, driver of the vehicle, without the knowledge of the owner. It is respectfully submitted that the view taken of the French jurisprudence is an erroneous one. Neither the French jurisprudence[14] nor the French doctrine[15]

master prohibiting the latter from picking up passengers. But, as to the effect of disobedience generally: *Prain* v. *Bronfman* (1931), 69 S.C. 187; *Cloutier* v. *Savard* (1923), 36 K.B. 73; *Hudson's Bay Co.* v. *Vaillancourt* [1923] S.C.R. 41; *Curley* v. *Latreille* (1920), 60 S.C.R. 151. These cases, and many others not quoted here, illustrate the difficulty of determining when the transgression of a prohibition or the disobedience of the master's instructions disengages the master's liability. In this connection, a distinction was laid down by Lord Dunedin in *Plumb* v. *Cobden Flour Mills* [1914] A.C. 62, at p. 67, which has been frequently cited by our Courts in order to determine when the transgression of a prohibition takes the employee outside the scope of his employment, thus disengaging the responsibility of the master. Said Lord Dunedin: "There are prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery and compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." Cf. *Moreau* v. *Labelle* [1933] S.C.R. 201, at p. 211, where this distinction was quoted and followed by the Supreme Court of Canada.

[10]Compare with *Duquette* v. *Pinard* [1953] K.B. 705, at p. 708, last paragraph. Refer to A. Nadeau's case comment (1954), 32 Can. Bar Rev. 774, at p. 777.

[11](1934), 72 S.C. 509.

[12][1953] K.B. 705.

[13](1934), 72 S.C. 509, at pp. 513 to 515.

[14]11 juin 1928, *Gaz. Pal.*, 1928.2.307; 8 avril 1933, *Gaz. Pal.*, 1933.2.156; 21 juill. 1933, *Gaz. Pal.*, 1933. Note especially the two following cases which are quoted by Mr. Justice Mackinnon: *Sevin* v. *Honore-Mathon, Gaz. Pal.*, 1930.2.639, and *Broggini* v. *Frigirio, Gaz. Pal.*, 1926.1.355. See also 22 nov. 1932, *Gaz. Pal.*, 1933.1.236; 3 avril 1933, *S.*, 1933.1.190. For a list of the French jurisprudence cf. H. & L. Mazeaud, *Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle*, 2 ed. 1934, p. 771, no. 914, footnotes (1) to (7). See also No. 914, footnotes (1) to (7) in the 3rd and 4th editions of this text for additional jurisprudence.

[15]There is little divergence between the French jurisprudence and doctrine on this matter. Cf. R. Savatier, *Traité de la Responsabilité Civile en droit français*, 2 ed., 1951,

holds that the taking of a passenger does not come within the scope of the servant's authority and is not a mode of exercising his master's employment. Even the French cases[16] cited in this decision do not lead to this conclusion. Rather, the French jurisprudence holds that a passenger is precluded from suing the master vicariously only when the passenger knew or ought to have known that the servant was acting "en dehors de ses fonctions", and that where a passenger accepts a place *offered* by the driver, in the belief that the latter was acting with the approval or at least the tacit consent of the master, the latter will be liable. The tendency of the French jurisprudence is summed up as follows:

> Lorsque la victime du préposé a su que ce dernier agissait en dehors de ses fonctions, elle ne peut pas demander réparation au commettant; ce dernier, déclare la Cour de cassation, cesse d'être responsable lorsque le préposé a été envisagé par la victime comme ayant agi non pour le compte de son commettant, mais pour son compte personnel.[17] Il en est ainsi lorsque, par exemple, quelqu'un demande au chauffeur d'une automobile de le conduire dans la voiture du patron, ou accepte d'y monter, sans aucune autorisation du propriétaire. Celui, au contraire, qui accepte une place *offerte par le chauffeur, croyant que ce dernier agit sur les ordres ou du moins avec le consentement de son patron, peut invoquer, au cas de dommage l'article 1384(3)* [equivalent to 1054, para. 7 C.C.]. On voit généralement ici une application de la théorie de l'apparence: on exige qu'il y ait eu apparence de l'exercice des fonctions.[18]

Also:

> Toutefois, la responsabilité du commettant cesse lorsque le tiers victime du dommage causé par le préposé savait ou devait savoir que celui-ci agissait en son nom personnel et non comme représentant du commettant, c'est-à-dire n'était plus dans l'exercice de ses fonctions, au cas, par example, d'un accident causé à une personne qui avait pris place bénévolement et *à sa demande* sur un camion conduit par un employé.[19]

In the light of this revelation, one has no alternative but to conclude that the case of *Fink* v. *Herer* was decided on a misinterpretation of the source on which it relies.

In addition to the French jurisprudence and doctrine, the trial judge in the *Fink case* also relied on a number of American and Common Law decisions. One must remember the danger of citing American and Common Law jurisprudence in this field of law, especially since such concepts as "trespasser"

Nos. 318 to 325; H. & L. Mazeaud, *op. cit.*, 2nd, 3rd & 4th ed., nos. 903 ff., especially at no. 914.

[16]*Broggini* v. *Frigirio, Gaz. Pal.*, 1926.1.355; *Marteau* v. *Demangeon, Cass., Gaz. Pal.*, 1928.2.307; *Sevin* v. *Honore-Mathon, Gaz. Pal.*, 1930.2.639. See also footnote 14.

[17]Cf. the 3rd and 4th editions of H. & L. Mazeaud, *op. cit.*, no. 914, footnote (2 bis) where the authors add: "Puisque, dans la thèse jurisprudentielle, il y a là une condition d'application de l'article 1384 [equivalent to 1954 C.C.], il appartient à celui qui se prévaut de ce texte d'en faire la preuve: c'est donc la victime qui doit prouver qu'elle croyait le préposé dans l'exercice de ces fonctions." To this effect: Paris, 30 avril 1936, *Gaz. Pal.*, 1936.2.468.

[18]H. & L. Mazeaud, *op. cit.*, 2 ed., No. 914. The same conclusions are also reached in the two subsequent editions of this treatise. The italics are the writer's.

[19]Colin et Capitant (de la Morandière), *Cours élémentaire de droit civil français*, 1948, 10 ed., no. 353. The italics are the writer's.

and "mere licensee" are used in such jurisdictions in order to determine the master's liability towards gratuitous passengers. Such concepts have no counterpart in, and are not part of, our civil law. Hence, American and Common Law decisions in this particular field can be relied upon only as *rationes scriptae.*

The second decision relied upon by Mr. Justice Marquis in support of his dictum is the case of *Duquette* v. *Pinard,* decided by the Court of King's Bench in 1954. In this decision, the majority of the judges of the Court of Appeal unquestioningly accepted the reasoning and conclusions of Mr. Justice Mackinnon in *Fink* v. *Hefer* and, on this basis, reversed the Superior Court, which had held the employer jointly and severally liable with his employee for injuries suffered by a gratuitous passenger who had been present in the vehicle while the driver was making his deliveries. In a case comment which appeared in the Canadian Bar Review shortly after the Court of Appeal rendered its decision, a well-known author[20] illustrated his disapproval of this reversal by convincing arguments but on grounds other than those mentioned by the present writer.

CONCLUSION

In this field of vicarious responsibility, we are constantly aware that we are dealing with a branch of law in which there is an evident conflict between different interests. The right of the community to have its business and industry carried out in the most efficient manner, although this may create some risk, is in conflict with the right of ordinary individuals to security of life and limb. It is the primary aim of the courts, in making an adjustment between these two interests, to see that justice is done, in so far as may be possible, in every case that comes before them. For this reason, then, it is the writer's opinion that the adjustment between the two interests is a matter of degree rather than of principle.

Through a series of decisions beginning with the *Fink* case and culminating in Mr. Justice Marquis' *dictum* in the case under discussion, we have seen the establishment of a principle the effect of which is to disengage the master's liability towards a third person who suffers damage as a result of a delict committed by a servant while the latter is in the performance of the work for which he is employed. The possibility that a driver may be engaged on his own business, as well as his master's, at one and the same time has already been discussed. It is to be observed, further, that if a driver is really engaged on his master's business, the fact that he is at the same time engaged on his own is no defence to the master even though: (1) it was the competing claims of the servant's business which caused him to perform his master's negligently; or (2) the delictual act causing the damage was committed at a moment when the servant was engaged on his own as well as on his master's

[20]A. Nadeau, (1954), 32 Can. Bar. Rev. 774.

business. In either of these two cases, the master still retains his recourses against his employee.

For these reasons, therefore, to hold that "même si le défendeur Gaston Rivard avait été dans l'exécution de ses fonctions, le défendeur Paul-Emile Rivard n'était pas responsable des dommages causés au voyageur bénévole Gérard Henry" is to urge the application of a principle which has been erroneously construed. It appears that in this branch of law there is no single principle which will determine with certainty when an act causing damage is in the performance of the work for which the actor is employed. Only a proper appreciation of the facts in each particular case will afford a true guide. Hence, such a principle as is urged by Mr. Justice Marquis' *dictum* is particularly misleading both because it is based on a misconception and because it is in direct contradiction to a normal state of affairs, namely, that it is possible for a servant to be on his own business as well as on his master's at one and the same time. However strong the attraction towards precedent may be in the judicial process, it is hoped, in the final analysis, that our Court of Appeal will, at the earliest opportunity, rectify the misinterpretation made of the French jurisprudence in the *Fink* and *Duquette* decisions, and that our Court of original jurisdiction will see fit in the future to discourage both the application of this *dictum,* and the extension of the holdings of precedents in this field of vicarious responsibility beyond the particular facts to which they apply.

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