Recent Cases

NEGLIGENCE — MOTOR VEHICLES — PRACTICE OF GRIPPING AUTOMOBILE RAIN GUTTER AS CONTRIBUTORY NEGLIGENCE. *Broersma* v. *Norton,* [1968] B.R. 739.

A note on a recent case published earlier in this volume[1] dealt with two cases, *Yuan* v. *Farstad*[2] and *MacDonald* v. *Kaiser,*[3] which questioned the effectiveness of the argument put forward by the respective defendants to the effect that the failure of the plaintiff to wear a seat belt was a negligent act which contributed to his damages and that the plaintiff should not, accordingly, be entitled to receive compensation for damages attributable to the negligent act.

The cases were heard by the British Columbia and Nova Scotia Supreme Courts and the following query was raised:

> It will be interesting to see whether the Quebec courts determine that a *bon père de famille* wears his seat belt or not.

A recent judgment of the Quebec Court of Appeal, while not answering *this* question, does give same indication of what a *bon père de famille* does in fact do in his automobile.

In a automobile accident case to which judicial attention may never again be turned, defendant's son lost control of his father's car, which overturned, causing injury to plaintiff's minor son. Plaintiff sued the driver's father under the provisions of article 3 of the *Highway Victims Indemnity Act,*[4] since the latter was the owner of the vehicle.

Plaintiff was successful at trial but was met in appeal with the argument that plaintiff's son was gripping the rain gutter of the car when it overturned and that this was an imprudent action which rendered the victim the author of his own misfortune. Lovers of a warm June breeze will be pleased at the words of Casey, J.:

> The practice of gripping the gutter with one's fingers is a common one and not in itself an act of imprudence.[5]

The appeal was dismissed.

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[1] (1968), 14 McGill L.J. 332.
[2] (1967), 66 D.L.R. (2d)295, 62 W.W.R. 645.
[3] (1968), 68 D.L.R. (2d)104.
[4] R.S.Q. 1964, c. 232.
[5] [1968] B.R. 739, at p. 740.

Now that it has apparently been settled that a *bon père de famille* at least occasionally grips the rain gutter of the car in which he is a passenger,[6] we have only to learn whether he does so with his seat belt on or off.

R.I.C.

BANKRUPTCY — FRAUDULENT PREFERENCE — WHETHER INTENTION OF DEBTOR TO PREFER IS SUFFICIENT. *Re Suta*, (1968), 69 D.L.R. (2d) 620.

The controversial issue of the relevance of the intention to benefit from a fraudulent preference in contravention of section 64 of the *Bankruptcy Act*[1] was recently faced by Mr. Justice Lacourcière of the Ontario High Court in *Re Suta*.

In that case a creditor had made loans totalling $7,000 to his son-in-law and at a subsequent date, exactly twenty-four days before the bankruptcy, he was given security in the form of a mortgage for these loans. Though it was not disputed that the security had actually been executed within three months of the bankruptcy, the judge was called upon to find that the bankrupt had not even made any arrangements for subsequently giving this security before the three month period; if he had, this would have been sufficient to rebut the presumption of intention to prefer.[2]

The principal submission of the mortgage creditor was that it had not been shown that he, as well as the bankrupt, had the view of giving the creditor a preference — in other words, he interpreted section 64 so as to require a double or concurrent intent.

This question has long been a controversial one in Canadian bankruptcy law, and notwithstanding the large number of judicial decisions on the point[3] it is difficult to determine which view the

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[6] *Quaere:* The effect of the plaintiff-*driver's* gripping the rain gutter on his claim for damages suffered.

[1] R.S.C. 1952, c. 14.

[2] *Re Blenkarn Planer Ltd.*, (1958), 14 D.L.R. (2d) 719, 37 C.B.R. 147.

[3] Decisions favouring the necessity for a double intention to prefer include: *In re Webb*, (1921-22), 2 C.B.R. 16; *In re Ernest Courville*, (1950-51), 31 C.B.R. 106;*In re Trafalgar Motors*, (1952-53), 33 C.B.R. 87; *In re B.C. Boat Sales Ltd.*, (1962), 3 C.B.R. (n.s.) 19; *Lee* v. *Litvack*, (1962), 3 C.B.R. (n.s.) 272; *Union Electric Supply Co. Ltd.* v. *Marcotte*, [1965] B.R. 833.

Those in support of the unilateral intention include *Burns* v. *Royal Bank of Canada*, (1921-22), 2 C.B.R. 241; *Gavsie* v. *Goldberg*, (1938), 65 B.R. 171; *Re Blenkarn Planer Ltd.*, (1958), 14 D.L.R. (2d) 719; *In Re Ouellet*, [1962] C.S. 327; *In Re Piette et Frère*, (1960-61), 1 C.B.R. (n.s.) 1, [1960] R.L. 156.

weight of authority favours. The Supreme Court of Canda has had the opportunity on two separate occasions to pronounce upon the issue but declined to do so.[4] Proponents of the single intent theory, which has won the unanimous support of the authors on the subject,[5] argue that to insist on the double intent is to read something into section 64 which isn't there and to destroy the presumption which the legislator has created to assist the trustee in acting in the best interests of the mass of creditors.

The learned judge in the *Suta* case cites[6] Houlden and Morawetz[7] and Savoie[8] to reach the conclusion "that the absence of fraudulent intent on the part of the defendant [mortgage creditor] is immaterial . . ." [9]

In the absence of any authoritative pronouncements on this question from the appellate tribunals of Canada, the importance of the *Suta* decision is that it adds one more unequivocal authority to the "single intent theory" arsenal — a theory which would appear to have the support of most legal scholars in this field and to be more compatible with both the text and the spirit of the *Bankruptcy Act.*

D.H.T.

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[4] *Salter and Arnold Ltd.* v. *The Dominion Bank,* [1926] S.C.R. 621, 7 C.B.R. 639 [1926] 3 D.L.R. 684; *In Re Bernard Motors Ltd.,* [1960] S.C.R. 385, 38 C.B.R. 162, (1960), 22 D.L.R. (2d) 689.

[5] See, for example, Houlden and Morawetz, *Bankruptcy Law of Canada,* (Toronto, 1960), p. 151; Duncan and Honsberger, *Bankruptcy in Canada,* 3rd ed., (Toronto, 1961), p. 476; Côté, *Le traitement préférentiel accordé à un créancier au cours de la période suspecte,* (1967), 2 R.J.T. 286, at p. 303; Savoie, *Commentaires sur l'article 64 de la Loi sur la faillite,* (1967), 9 C.B.R. (n.s.) 1, at p. 5.

[6] At p. 624.

[7] *Op. cit.*

[8] *Op. cit.*

[9] At p. 624.

EVIDENCE — "WITHOUT PREJUDICE" LETTERS WRITTEN DURING BONA FIDE NEGOCIATIONS FOR SETTLEMENT — ADMISSIBILITY IN SUBSEQUENT LITIGATION WITH A THIRD PARTY. *I. Waxman and Sons Ltd.* v. *Texaco Canada Ltd.*, (1968), 69 D.L.R. (2d) 543.

It is a well established principle that *bona fide* letters written "without prejudice" with a view to settling the issues between the parties are privileged from production during litigation proceedings.[1] The Ontario Court of Appeal has recently decided that the scope of the privilege extends to protect the parties from having to produce such communications in a subsequent action brought by a third party dealing with the same or closely-related subject matter.

Aylesworth, J.A., in delivering the judgment of the court, agreed with the conclusion of the trial judge whom he quoted as follows.[3]

> I am of the opinion that in this jurisdiction a party to a correspondence within the "without prejudice" privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against a third party.

The judgment may be of interest to the Quebec practioner as well, for as far as can be determined there is only one decided case in Quebec jurisprudence which touches on this point, *Tannenbaum* v. *La Cité de Montréal,*[4] and even in that case, Decary, J., was dealing with the more general issue of admissions of responsibility.
The headnote reads as follows:

> Les aveux de la responsabilité envers des tiers et les transactions que le défendeur a pu faire avec des tiers, résultant des mêmes causes que celles dénoncées par le demandeur, ne peuvent en aucune façon lier le défendeur vis-à-vis du demandeur et ne peuvent être invoquées contre le défendeur.

In commercial matters where no provision is found in the Civil Code rules of evidence, "recourse must be had to the rules... laid down by the laws of England," which would appear to mean the common law as interpreted by the courts of that jurisdiction;[7] thus the decision of the Ontario Court of Appeal in the *Waxman* case might well provide a useful precedent in the law of evidence in this province.

D.H.T.

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[1] See, for example, *Phipson on Evidence*, 10th. ed. by M.V. Argyle, (London, 1963), p. 679.

[2] Fraser, J. The Ontario High Court decision is reported at (1968), 67 D.L.R. (2d) 295.

[3] At p. 544.

[4] (1939), 43 R.P. 253. Cited with approval in Nadeau and Ducharme, *Traité de Droit Civil du Québec*, t. 9, (Montréal, 1965), p. 507.

[5] *Ibid.*, p. 254.

[6] Art. 1206 C.C.

[7] Nadeau and Ducharme, *op. cit.*, pp. 6 *et seq.*

PRIVATE INTERNATIONAL LAW — MINORITY — MINOR DOMICILED IN BRITISH COLUMBIA — AUTOMOBILE ACCIDENT IN QUEBEC MINOR INJURED — CAPACITY TO INSTITUTE ACTION IN DAMAGES. *Wakely* v. *St-Denis*, [1968] R.P. 263.

On June 16, 1963, Catherine Sue Wakely, a minor domiciled in the Province of British Columbia, was a passenger with Islam in an automobile driven by Swan. Swan's vehicle collided with a car travelling in the opposite direction. That auto was driven and owned by Charbonneau who died as a result of the collision. The question of responsibility was not in issue at the trial, Charbonneau's responsibility having been determined in an action taken by Islam, and the conclusions thereof having been adopted in this action by consent.

Although this action did involve the determination of damages sustained by a minor in an automobile accident, the issue which interests us is the defendant's contestation on the grounds that the action was instituted by a person not competent to do so, under either the law of Quebec or of British Columbia. The action, instituted by Frederick G. Hubbard in his capacity of *"procheyn amy"* (next friend) and curator to Catherine Sue Wakely, sought to recover from defendant the sum of $35,000. Plaintiff described himself as follows in the writ of summons:

> Frederick G. Hubbard, General Secretary of the Young Men's Christian Association of the City of Montreal, District of Montreal, acting to these presents as "next best friend" to Catherine Sue Wakely, according to the laws of the Province of British Columbia and in his quality of curator to the said Catherine Sue Wakely, as appointed by the Court in this connection, Plaintiff *ès qualité*.[1]

In issue therefore was the capacity both under the *lex fori* and the *lex domicilii* of a minor of foreign domicile to institute an action in a Quebec court to recover damages suatained in an automobile accident which occurred in Quebec.

The court found that the style of cause was deficient in two ways: first, according to the civil law, Mr. Hubbard's appointment as curator was null and void, as in contravention of art. 348*a* C.C.; second, according to the laws of British Columbia, a minor child had the capacity to take an action through her next friend. The question then became whether or not it was possible to amend the style of cause, prescription having elapsed, to remove plaintiff *ès qualité* in his capacity of curator to the minor and add the minor as a party in the action. The court held that both amendments were possible.

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[1] [1968] R.P. 263, at pp. 264-265.

There was no doubt in the court's mind as to the necessity and validity of the amendment to remove plaintiff *ès qualité* as a party to the action in his capacity of curator. As for adding the minor as a party to the action, the court referred to both the laws of British Columbia, being the *lex domicilii*, thus the law governing matters of status and capacity, and the law of Quebec as the *lex fori*, the law applicable to matters of procedure, in virtue of art. 6 C.C. Under art. 56 C.P.C., the amendment was proper and furthermore it was provided that it had a retroactive effect, thus dispelling any doubts about the action's being prescribed.

The court then dealt briefly with a further issue relating to the necessity of a minor, who attains majority during proceedings, filing a petition in continuance of suit. The learned judge found that such a petition was useless and unnecessary as the minor was already a party to the action, the judge having held that the amendment adding her as a party to the action had a retroactive effect. The court then proceeded to award damages in the sum of $14,920.

As stated above, it is a rule of Quebec private international law that matters of status and capacity be governed by the law of the domicile of such persons, while matters of procedure must be resolved by the *lex fori*.[2] It was thus necessary for Mr. Justice Boucher to inquire into both the laws of Quebec and those of British Columbia, in order to ascertain who had capacity to institute the present action before the courts of the Province of Quebec. Indeed, by the very terms of art. 348*a*, the Court is directed to make such inquiries whenever it faces incapable persons domiciled elsewhere. Art. 348*a* provides in part that:

> Whenever an incapable person domiciled outside the Province of Quebec possesses property or has rights to be exercised in the Province and the law of the domicile does not provide for him to have a representative as to his property or his rights, a curator to his property may be appointed for him to represent him in all cases where a tutor or a curator may represent a minor or an incapable person under the law of this Province...

Therefore if the foreign law does not make any provisions for the representation of minors or incapable persons for the purpose of administering their property and enforcing their rights, then, and only then, may a Quebec court appoint a curator for those objects mentioned in the article. In this case, plaintiff *ès qualité* alleged in the style of cause the existence of some foreign provision to the effect that a minor could sue by a "next best friend". The court relied on the cases of *Farmer* v. *Lacroix* [3] and *Costlett* v. *Germain*,[4]

[2] Art. 6 C.C.
[3] [1962] R.P. 230.
[4] [1949] B.R. 521.

where it was held that art. 348*a* applies only when it is proven that the foreign law does not provide for the appointment of a representative. In the *Costlett* case, Létourneau, C.J., stated:

> [I]l incombait au demandeur d'établir que la loi du domicile du mineur qu'il prétend représenter "ne pourvoit pas à ce qu'il ait un représentant quant à ses biens et à ses droits."[5]

Mr. Justice St-Jacques was of the same opinion:

> Ce n'est pas à la défenderesse qu'il incombait de faire la preuve de cette loi, mais au demandeur lui-même, puisque la compétence du tribunal pour nommer un représentant n'existe qu'à la condition imposée par l'article 348*a*, à savoir: que la loi de l'état de son domicile ne lui permet pas d'avoir un représentant pour intenter des poursuites en son nom.[6]

The court inevitably came to the conclusion that plaintiff *ès qualité* could not act in the capacity of curator to the minor and that, therefore, under our law his appointment as curator was null and void.

The law of British Columbia then had to be ascertained in order to determine the exact nature of the representation provisions. Two expert witnesses were called to make proof of the foreign law. The court relied heavily of the testimony of former Supreme Court Justice Locke, now a member of the Bars of British Columbia, Manitoba and Ontario. He testified that, under the laws of British Columbia, an infant domiciled therein could sue. Marginal rule 138 of the rules of the Supreme Court of British Columbia was interpreted by him to mean that

> infants may sue as plaintiff by their next friend in the manner heretofore practiced in equity and may defend by their guardian appointed for that purpose.[7]

Locke also relied on Halsbury.[8] Thus, according to the law and practice of British Columbia, the action should have been taken by the minor through his next friend, and not by someone instituting the action in his own name in his capacity as next friend of the minor.

The style of cause, being defective under the laws of Quebec as well as those of British Columbia, the question became whether the defects could still be remedied at that late stage. The right to amend is undoubtedly procedural by the law of Quebec. Consequently it must be resolved by the application of Quebec law, the *lex fori*.[9] The

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[5] *Ibid.*, at p. 527.

[6] *Ibid.*, at p. 529. See generally, Johnson, *Conflict of Laws*, 2nd ed., (Montreal. 1962), pp. 150-158.

[7] [1968] R.P. 263, at p. 265.

[8] *The Laws of England*, 3rd ed., vol. 31, (London, 1960), p. 364.

[9] Art. 6 C.C.

governing provision is found in art. 56 C.P.C., which provides in paragraphs 2 and 3:

> A person who has not the free exercise of his rights must be represented, assisted or authorized in the manner provided by the law which governs his status and capacity.
>
> The irregularity resulting from failure to be represented, assisted or authorized has no effect unless it is not remedied and this may be done retroactively at any stage of the case, even in appeal.

The terms of this article do not allow for any uncertainty. The irregularity appearing in the style of cause of this action was one which was envisaged by the enactment of art. 56 C.P.C. The court therefore allowed the style of cause to be amended and to read:

> Catherine Sue Wakely, an infant, by Frederick G. Hubbard, General Secretary of the Young Men's Christian Association of the District of Montreal, acting as her next friend.[10]

The amendment was held also to have a retroactive effect. The last paragraph of art. 56 C.P.C. is new law enacted for the first time in the new Code of Procedure, which came into force on September 1, 1966. It was primarily designed "to avoid a situation whereby the rigourous application of technical rules adopted in order to protect certain persons considered unable to exercise their rights would themselves lead to the loss of a right."[11] The only case on point is *Martel* v. *Royal*,[12] to which case the court did not refer. In *Martel*, however, the court reached the same conclusions as to the interpretation and application of art. 56 C.P.C. as did Mr. Justice Boucher in the case under review.

Thus, under the *lex fori*, the law of Quebec, an amendment to the action to allow the minor to sue on her own behalf by her next friend, as provided for by the law of her domicile, was allowed as proper. However the court felt a necssity to inquire if under the law of the domicile such amendment to the action was also proper. In the case of *Schartner* v. *Yaski Yoka*,[13] the Court of Appeal of British Columbia allowed an amendment to "convert the action into one by the infant suing in her own behalf by her next friend."[14] This was sufficient for Mr. Justice Boucher. However his reasons for going into the law of British Columbia are not clear, as the matter of

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[10] [1968] R.P. 263, at p. 267.

[11] *Code of Procedure*, Bill 20, 3rd. Sess., 27th Leg. (Que.), 13 Eliz. II, 1964, pp. 11*a* and 12*a*.

[12] [1967] C.S. 393.

[13] (1957), 22 W.W.R. 26, 9 D.L.R. (2d) 160 (C.A.B.C.); see also (1957), 21 W.W.R. 322 (S.C.B.C.).

[14] See headnote, (1957), 22 W.W.R. 26, at p. 27.

amending an action is necessarily procedural in Quebec and thus only the law of the forum need be considered.[15]

In the light of this case, it would therefore appear that where an action is instituted on behalf of a minor domiciled outside the Province, it must be taken according to the laws of his domicile [16] and should it not provide for some kind of representation of the minor, and only if it does not, then, under art. 348*a*, a curator may be appointed to him to enforce his rights or administer his property. Where such foreign law does provide for the appointment of a representative, but the action was not instituted in accordance with the laws and procedure of such foreign law, the action may be amended to correct any irregularity, and this retroactively, by virtue of art. 56 C.P.C.

It would seem, it is respectfully submitted, that it would be of no consequence that the foreign law would or would not be prepared to allow the same amendment under its procedural rules. In matters of procedure, the law of Quebec must be applied.

L.S.

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[15] See for example *Samson* v. *Holden*, [1963] S.C.R. 373, where in an action under 1056 C.C., the widow instituted proceedings in Quebec on her own behalf and on behalf of her children, even though under the law of her Maine domicile, (where the automobile accident also occurred) only the personal representative of the deceased had a right of action. The court held, *inter alia*, that where there is a substantive right of action provided in the foreign law applicable, the right to sue is procedural and thus Quebec law is applied to determine whether the widow was the proper person to institute the action before the courts of Quebec. Even though it was not necessary in this case to amend the action to provide for the bringing in of the personal representative, the case illustrates the principle that Quebec law must be applied in so far as those procedural matters including the proper style of cause and the proper parties to the action.

[16] Art. 6 C.C.