LAPIERRE v. CITY OF MONTREAL

Damages — Action récursoire — Claim against the City of Montreal as joint tort-feasor for share of amount paid in settlement of action in damages — Pedestrian injured following collision between two vehicles — Stop sign not in place at intersection — Pedestrian's action against owners of vehicles instituted more than six months after accident — Whether City's liability extinguished by prescription — Whether joint and several liability — Charter of the City of Montreal, art. 45; Civil Code, arts. 1106, 1117, 1118, 1156, 2261.

by Mary Herzberg*

This appeal to the Supreme Court[1] arose out of an *action récursoire* taken by Lapierre against the City of Montreal to recover part of the amount paid by him in settlement of an action for damages arising from a traffic accident.

The accident in question occurred on 25th January, 1952, at the intersection of Ontario and Aylmer streets in Montreal. A taxicab owned by Lapierre came into collision with another taxicab, owned and operated by one Beaudry. Ontario was at this point a "through" street, normally protected by stop signs on the intersecting street, but at the time of the accident the stop sign at this particular intersection was not in place. Because of this, Beaudry failed to stop before entering the intersection and collided with Lapierre's vehicle. As a result of this collision, Vocelle, a pedestrian, was seriously injured.

Consequently, two actions were instituted. The first was taken by Beaudry against both Lapierre and the City and the second was taken by Vocelle against Lapierre and Beaudry. The first action came to trial and was maintained; Beaudry was found to be 40% responsible and Lapierre and the City of Montreal were held to be jointly and severally responsible for 60% of the damages.

Following this judgment, Lapierre and Beaudry, who had up to this point contested Vocelle's action, entered into negotiations for a settlement. Lapierre called upon the City to be a party to these negotiations, but it declined to do so. A settlement was finally concluded, under the terms of which Vocelle was paid $13,000 plus costs of $1,000, Lapierre's contribution being $8,000 on account of damages and $600 on account of costs. Lapierre then instituted the present action against the City for recovery of 75% of the amount he paid in settlement of Vocelle's claim.

The trial judge maintained the action to the extent of 50% of the amount paid but this judgment was reversed by the Court of Appeal.[2] The Supreme

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[1][1959] S.C.R. 434.

[2][1959] Que. Q.B. 125.

Court confirmed the latter decision. Mr. Justice Taschereau, following the reasoning of the Court of Queen's Bench held that the City of Montreal:

> "par l'effet de la prescription édictée à l'art. 45 de la charte de la Cité de Montréal . . . a été totalement libérée de responsabilité vis-à-vis Vocelle à l'expiration des six mois et, en conséquence, il n'y avait plus d'obligation solidaire sur laquelle pouvait reposer une action récursoire"[3].

This case is worth noting on two grounds. The first question it raises is that of the interpretation of the rules of joint and several liability and their application to the cases foreseen by art. 1106. Although it is not proposed to reject this carefully reasoned decision, it is respectfully submitted that the net result is "hard" law. Under the rules of joint and several liability, the *solvens* (*i.e.*, the debtor who pays the joint and several debt) may recover from those jointly and severally obliged with him. In the present case the failure of the creditor, Vocelle, to take action within 6 months from the date of the accident put an end to the *action récursoire* against the City, thereby placing a heavy burden on Lapierre. This conclusion from the rules of the Code and of the City Charter leaves much to be desired insofar as an equitable sharing of responsibility for damage "arising from the common offence or quasi-offence of two or more persons" is concerned.

A second and more interesting question is posed by the *obiter dictum* pronounced by Mr. Justice Taschereau, constituting a departure from forty years of jurisprudence and the express words of art. 1106 of the Civil Code. The learned judge added a further condition for the existence of joint and several liability; he states that for solidarity to exist

> "il faut que ce délit ou quasi-délit *soit le même, qu'il soit de même nature*".[4]

This new approach to solidarity in the area of quasi-delicts and delicts would exclude it from most situations in which it has been hitherto applicable, thus limiting the scope of art. 1106 C.C. This article reads as follows:

> "L'obligation résultant d'un délit ou quasi-délit commis par deux personnes ou plus est solidaire."
>
> "The obligation arising from the common offence or quasi-offence of two or more persons is joint and several".

Applying the new criterion to the present case, where Lapierre's fault consisted in the unskillful and negligent driving of his taxi and the City's fault in failing to replace the stop sign, Mr. Justice Taschereau concludes that, since these faults were of a different nature, there was never any solidarity between the plaintiff and the defendant. He adds that the Court would, if the question were raised in a future case, be pleased to consider this as a valid approach to the application of art. 1106 C.C.[5]

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[3][1959] S.C.R. 434, at p. 439. Taschereau J. apparently erred in his reference to the relevant section of the City Charter of Montreal. He should have referred to sec. 536a, which reads as follows: "No action against the city for damages or for compensation shall be admissible unless the same be instituted within six months from the date when the right of action originated."

[4]*Ibid.*

[5]*Ibid.*

The learned Justice supports his argument by referring to the case of *Jeannotte v. Couillard*[6]. It is significant to note that the decision in this case was later rejected by the Supreme Court, which held that

> "There may be joint and several responsibility of two different parties for the consequences of an accident caused by independent acts of negligence committed by both at the same time and contributing directly to the accident."[7]

This is the leading case on the subject and subsequent decisions[8] have reiterated that it is only necessary for the acts of negligence to have been committed at the same time in order for there to be joint and several responsibility among the joint tort-feasors. No reasoning is offered by Taschereau J. to justify this apparent departure from the words of the Code and the established jurisprudence.

Several questions immediately arise regarding the juridical implications of this shift in interpretation. First, what will be its effect on the rules with regard to responsibility for the faults of others under art. 1054 C.C.? Is it not also possible that art. 1106 C.C. would become a "lame-duck" article under this interpretation, as it would be difficult to find circumstances in traffic and other accidents where the several parties committed the same offence or quasi-offence? Again, the advantages which art. 1106 C.C. offers to the victim — a single suit against any or all of the parties responsible, interruption of prescription and the right to sue any one of the parties for the whole of the debt — would disappear if the co-authors of the damage had to commit the same offence or quasi-offence. Furthermore, the party sued would presumably lose the advantage of being able to call the other co-debtors in warranty. This aggravation of the problems of the victim is, it is suggested, a step away from efficient and fair judicial redress.

In connection with the learned Judge's suggestion, it is interesting to note the difference between the French and English text of the Code. While the former speaks of the "délit ou quasi-délit commis par deux personnes ou plus", the latter says the obligation arises from the "common offence or quasi-offence". The Codifiers' Report fails to comment on this article, although it is different from that found in the Code Napoléon; instead, the Report merely cites Pothier (Obligations, No. 264), where reference is made to an obligation arising from "un délit commis par plusieurs (quatre) personnes", each debtor being responsible to the victim for the whole of the damage, but among themselves each co-debtor being responsible for an equal share under an assumed recursory action. However, in another section, Pothier speaks of an "*obligation solidaire à l'égard de ceux qui ont concouru à un délit*".[9]

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[6](1894) 3 Que. Q.B. 461.

[7]*Grand Trunk Railway and City of Montreal v. Macdonald* (1919) 57 S.C.R. 268.

[8]*Napierville Junction Railway v. Dubois*, [1924] S.C.R. 375; *The King v. Canada Steamship Lines*, [1927] S.C.R. 68; *Thériault v. Huctwith*, [1948] S.C.R. 86; *Nobert v. Morais*, [1956] Que. Q.B. 740.

[9]Pothier, *Obligations*, No. 268.

The primary sources then are inconclusive, but do not seem to support the view that art. 1106 C.C. need be restricted to fact situations where the delicts are the same.

In the Quebec doctrine, only Mignault seems to offer support to this new look for art. 1106 C.C. He speaks of "*individus condamnés pour un même crime ou pour un même délit*".[10] This language is, it must be noted, a reproduction of art. 55 of the French Penal Code; this is criminal and not civil law and must therefore be transferred into our law with caution, if at all. Faribault talks of "les auteurs communs d'un délit" and also says that

> "pour qu'il y ait solidarité il faut cependant que les dommages réclamés proviennent d'un même délit ou quasi-délit auquel les défendeurs ont contribué. Elles n'existent pas lorsque les dommages résultent d'actes distincts et indépendants de la part des divers défendeurs".[11]

Nevertheless, the cases he cites as upholding his opinion[12] follow the criterion set up in the *Grand Trunk* case,[13] *viz.* that the actions may be different as long as they are committed at the same time and contribute directly to the delict or quasi-delict. Nadeau says "*les co-auteurs d'un délit ou quasi-délit . . . sont obligés à la réparation solidaire*"[14] but then goes on to approve the "*ratio*" of the *Grand Trunk* case.

The French authors are also of interest on this point. Planiol[15] speaks of "*corresponsables d'un même dommage*" and also uses Pothier's expression "*concouru à un même délit*". MM. Mazeaud, basing themselves on the principle that a person is responsible for the whole of the damage caused by his fault, even to the slightest degree (art. 1382 C.C., art. 1053 C.C.), not only deny the necessity that the faults be of the same nature, but also state that the faulty acts may be successive and need not be simultaneous in time.

> "Les fautes peuvent donc être indépendantes; elles peuvent même être successives . . . La simultanieté n'est pas plus indispensable que l'unité ou l'identité. Un même dommage peut être, en effet, produit par la réunion de fautes successives dont chacune est, à elle seule, cause de tout le dommage.[16]

French jurisprudence in this sense is cited and thus we not only see the proposition of Mr. Justice Taschereau in the present case denied, but we also see rejected the criterion of simultaniety of faults established in the case of *Grand Trunk Railway v. Macdonald*. It must be remembered, however, that there is no equivalent in the Code Napoléon of our art. 1106 C.C. and thus the French

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[10]Mignault, P.B., *Droit Civil Canadien*, Vol. 5, p. 490.

[11]Faribault, *Traité de Droit Civil du Québec*, Vol. 8 *bis*, p. 192.

[12]*Bell Telephone Co. v. Major Ltée*, (1926) 64 C.S. 143; *Corp. des Réligieux du Très Saint-Sacrament v. Belmont Construction Co.* (1936) 39 R.P. 368.

[13](1919) 57 S.C.R. 268.

[14]Nadeau, A., *Traité de Droit Civil du Québec*, Vol. 8, p. 527.

[15]Planiol, Ripert & Boulanger, *Traité Pratique du Droit Civil Français* (1952), Vol. 6, p. 685.

[16]Mazeaud, MM. H. & L., Tunc, A., *Traité Théorique et Pratique de la Responsabilité Civile*, 5ième ed. (1958), Vol. 2, No. 1944, 1983.

courts and authors have more freedom to vary the criteria for the existence of joint and several liability among co-authors of a quasi-delict.

While the body of Canadian doctrine provides little support for the *obiter dictum* of Mr. Justice Taschereau, the Canadian jursiprudence offers even less, inasmuch as it follows the case of *Grand Trunk Railway v. Macdonald*. In this case the responsibility of the parties was incurred as a result of a traffic accident, where the faults of the different parties were similar to those in the present case. However, in the case of *The King, v. Canada Steamships*[17] the fact situation was different but the same criterion of simultaniety of acts causing damage was applied. The accident in question in this case occurred when the steamship company overloaded a landing slip belonging to the Crown. The landing slip had not been kept in repair and the Court found, on the basis of the facts, "'a case of common offence or quasi-offence' of the respondent company and of the appellant resulting in a joint and several obligation on their part."[18]

The case of *Jeannotte v. Couillard*[19], relied on by the Supreme Court in the present case, is factually dissimilar to the above cases. A physician wrote out a prescription for the plaintiff's child, naming a drug not in commercial use. The pharmacist changed the prescription without consulting the doctor and substituted a substance of similar chemical composition. The father sued in damages for the death of his child, which would have occurred had either drug been given. The Court of Appeal held that "solidarity only exists when the damage results from the same act and not from an independant act on the part of each defendant". This is the criterion which was expressly rejected in the *Grand Trunk* case[20].

The *obiter dictum* of Mr. Justice Taschereau is thus in conflict with previous decisions of the Supreme Court. Leaving aside the question whether this court is, since the abolition of appeals to the Privy Council, still bound by its former decisions, the Court has a great latitude in distinguishing cases on their facts. It is respectfully suggested, however, that before adding new criteria for art. 1106 C.C. the implications of this *dictum* should be carefully considered. It is undesirable, in this writer's opinion, that the recourses now available to accident victims for damages suffered be restricted by additional obstacles of law.

The present case also reveals the need for a clarification of the rules which apply to delictual solidarity. Although the law in this area has remained constant for over forty years the situation is not altogether satisfactory; consideration of this matter by the Supreme Court would be a welcome addition to the jurisprudence.

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[17][1927] S.C.R. 68.

[18]at p. 79.

[19](1894) 3 Que. Q.B. 461.

[20](1919) 57 S.C.R. 268, at p. 287.