## TREMBLAY v. BERNIER

CIVIL LAW — STARE DECISIS — EFFECT IN QUEBEC COURTS OF PRIVY COUNCIL DECISIONS

A recent unreported decision[1] by Mr. Justice Edge of the Superior Court at Quebec City is contrary to the rule of law laid down by the Judicial Committee of the Privy Council in *Despatie* v. *Tremblay*,[2] and is thus a timely example of the problem of Stare Decisis in the Civil Law of the Province of Quebec.

In *Despatie* v. *Tremblay* the consorts were cousins in the fourth degree (counted in the ecclesiastical manner[3]). Their Lordships denied the request for an annulment on the grounds that Art. 127[4] of the Quebec Civil Code has no bearing upon the inherent incapacity of any person to contract a valid marriage. They held that the impediments to marriage referred to in this article only bind the conscience of the person involved. The only relationships which bar marriage, as far as the Civil Law Courts are concerned, are those expressly mentioned in Articles 124, 125, and 126 of the Quebec Civil Code.[5]

The facts in the present case, almost identical with those in *Despatie* v. *Tremblay*, were as follows: the relationship of the parties was that of cousins in the third degree, also counted in the abovementioned manner. Unaware of their relationship at the time, the parties were married in 1936. Both were at that time, and still profess to be, of the Roman Catholic Faith. Two children were born of the marriage. In 1946 the consorts learned of their relationship, one which bars marriage under Canon Law, unless a dispensation is obtained from the Church authorities, which had not been done in this case. In 1952, Dame Tremblay applied to the competent Ecclesiastical Tribunal and was granted a decree of annulment. On the strength of this ecclesiastical decree, the plaintiff demanded and was granted an annulment by the Superior Court. Justice Edge stated in giving his decision that *Article 127 of the Quebec Civil Code gave full force in Civil Law to all the religious impediments to marriage contemplated by that article.*[6] With all due respect to the learned Judge, it is the opinion of the writer that this is in direct contradiction to the *ratio de-*

[1] *Tremblay* v. *Bernier*, Quebec Superior Court, 75-912, March 26, 1955.

[2] [1921] 1 A.C. 702.

[3] Reckoned from each party by generations up to the common ancestor. Thus, two cousins who have a common great-grandfather or great-grandmother are cousins in the third degree.

[4] Art. 127 — "The other impediments recognized according to the different religious persuasions, as resulting from relationship or affinity or other causes, remain subject to the rules hitherto followed in the different churches and religious communities."

[5] According to these articles, marriage is allowed even between cousins in the second degree (counted in the same manner as in Footnote 3).

[6] Italics are the author's.

*cidendi* in *Despatie* v. *Tremblay*. Let us proceed to examine the effects of this conclusion in reference to the question of Stare Decisis in Quebec Civil Law.

The Civil Law of this Province is a unique integration of the French Civil Law and the English Common Law heritages. We might, with some profit, examine the operation of Stare Decisis in the United Kingdom and in France to see if some light can be shed on the problem in Quebec.

What is Stare Decisis? It is a legal doctrine whereby: 1) each court is bound by the decisions of all courts above it in the hierarchical court structure, and 2) courts of co-ordinate jurisdiction bind each other. In the United Kingdom the doctrine of Stare Decisis is accepted in its strictest form. One single case of a court imperatively binds all lower courts. The Court of Appeal, the Divisional Court, and the House of Lords, the highest court of the land, are each bound by their own previous decisions. This is mainly as a result of the need for certainty amid the vast number of cases. Every legal system must strike a balance between fixity and discretion; fixity, so that the citizen may with reasonable certainty know his rights and liabilities; discretion, so that the legal system does not stagnate, but can provide individual justice and develop with constantly changing social and economic conditions.

In France, court decisions are, in strict theory, not a formal source of law. Yet, soon after the promulgation of the Code Napoleon, cases were being used by lawyers and authors to explain the Code. By 1875, there was developed a system of reported cases which were in general use by the legal profession. However, there is no acceptance of the "single binding case", even insofar as the Cour de Cassation (France's highest court) is concerned. However, the lower courts will accept a consistent line of decisions of the Cour de Cassation: "une jurisprudence constante".

In Quebec, a balance has been struck between these two systems. There is a dualism both in technique and in theory. The Quebec Act of 1774 provided that: " . . . in all matters of controversy relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as a rule for the decision of the same". Thus, the private law of Quebec is a Civil Law system. Nevertheless, the court structure, the method of trial, and the method of judgement writing are in the English tradition. In theory, each Judge has the responsibility to interpret the Code himself for every case. However, in practice, Quebec Courts almost invariably follow the decisions of higher courts. There are many decisions which support the view that decisions of the Supreme Court of Canada and of the Judicial Committee of the Privy Council, in cases which were appealed from Quebec Courts, are binding on Quebec Courts.[7] P. B. Mignault has written: "I think it is now granted that the decisions of the Privy Council and of the Supreme Court of Canada are binding in the province of Quebec. When the construction or interpretation of an article of

[7] *C.P.R.* v. *Roy* [1902] A.C. 220; *Daoust, Lalonde & Cie, Ltée.* v. *Ferland & the New York Life Insurance Co.* [1932] S.C.R. at p. 351, per Anglin C.J.C.

the Code emanates from a court of high or supreme judicial rank, it is generally considered — I think I must put it even stronger and say that it should always be considered — as binding on all lower courts."[8] Professor W. Friedmann put his opinion even more categorically when he wrote: " . . . Stare Decisis is accepted in all its vigour in Quebec."[9]

We can thus safely conclude that before appeals to the Privy Council in Civil matters were abolished in 1949, it was universally accepted that the Privy Council bound Quebec courts. Now that these appeals have been abolished, what is the situation? Should the Quebec Courts still consider themselves bound by all the decisions of the Privy Council applying to this province?

It is the opinion of the writer that it would not be a sound view to maintain that Canadian Courts consider themselves bound by the past decisions of the Privy Council. The Judicial Committee, unlike the House of Lords, acknowledged its power to overrule its own previous decisions.[10] It could thus develop the Civil Law of Quebec to suit changing conditions in the province. A large part of the Private Law of this province has been formulated and built up by the Privy Council. If one admits that these decisions remain binding, there would consequently be no court able to alter or overrule them. They would remain *ad infinitum,* with only legislative action capable of altering or overruling them. This would obviously not be conducive to the proper development of Quebec Civil Law.

Having reached the point in our analysis where we conclude that Canadian Courts should no longer be bound by Privy Council decisions, it does not necessarily follow that the Quebec Courts should be the ones to be able to reverse them. If, for example, the Superior Court Judges feel they have the right to reverse Privy Council decisions, what utter confusion would result in Quebec Law, especially since no Superior Court Judge considers himself bound by any other Superior Court Judge.[11] No person would know his rights or liabilities unless he knew before what Judge his case would come, and even then he could only guess what view that Judge would take of Privy Council decisions in point. This would result in the undermining of the confidence of the public in the law and the administration of justice. In point of fact, how should a Quebec lawyer advise a client at this moment about the meaning of Article 127, in view of the decision of Justice Edge in *Tremblay* v. *Bernier*?

The writer therefore suggests that, by all means, Canadian Courts be not bound by past Privy Council decisions. However, since a strong central tribunal would lead to a more consistent development of the law, the only Canadian Court capable of overruling the decisions in question should be the

[8](1925), 3 C.B.R. 1.
[9](1953), 31 C.B.R. 723.
[10]*Tooth* v. *Power* [1891] A.C. at p. 292.
[11]Mignault, (1925), 3 C.B.R. at p. 18.

Supreme Court of Canada. The Quebec Courts should consider themselves bound by Privy Council decisions, unless and until the Supreme Court of Canada alters or overrules any particular decision. Since the Supreme Court claims that its decisions are binding on all Canadian Courts, which is generally admitted,[12] and since the Supreme Court considers itself formally bound by its own decisions save in very exceptional circumstances,[13] this would maintain the necessary reasonable predictability in Quebec Civil Law, with the Supreme Court performing the role formerly filled by the Judicial Committee of the Privy Council. The Civil Law of this province would be devoid of this necessary quality of predictability if it were admitted in principle that Quebec Courts can overrule Privy Council decisions, as was done by Justice Edge in *Tremblay* v. *Bernier.*

BENJAMIN J. GREENBERG*

---

[12]Laskin, (1952), 30 C.B.R. 1038; Mignault, (1925), 3 C.B.R. at pp. 12 and 15. See also cases listed in Footnote 7.

[13]*Stuart* v. *Bank of Montreal* (1909), 41 S.C.R. 516, per Duff and Anglin JJ.

**Second Year Student.*

## LAMOTHE v. PLASSE

CIVIL LAW — DAMAGES — 1053 C.C. — ASSUMPTION OF RISK — VOLENTI NON FIT INJURIA — COMMON FAULT — DRIVING WHILE INTOXICATED

This decision affords an opportunity to examine the applicability of the common law plea of *volenti non fit injuria* in the civil law of responsibility. In the common law, the defence of *volenti non fit injuria* is based upon the theory that a person who voluntarily accepts a risk cannot thereafter justly complain of the consequences because his voluntary assumption of the risk relieves the defendant of any legal duty of conduct.[1] In this decision, Mr. Justice Prévost of the Superior Court had to determine whether the voluntary acceptance of a risk in Quebec law operates as it does in the common law to exempt the defendant from the duty of care which he would otherwise have owed.

The case concerns an action by the plaintiff, Lamothe, to recover damages for an injury which he sustained as a passenger in a vehicle driven by the defendant, Plassé. The plaintiff and the defendant were fellow workers on a construction project. The evidence discloses that on the afternoon of July 1, 1950, the plaintiff had asked the defendant for a drive in the latter's truck. Throughout that morning and afternoon, Lamothe and Plassé had been drinking and by the afternoon the defendant had consumed a considerable quantity of liquor. Although the plaintiff admitted drinking three bottles of beer, no evidence was offered to show that the plaintiff was unable to realize the risk he was taking by travelling with a driver whose ability to drive safely was affected by the intoxicant which he had consumed. The defendant proceeded at a dangerous speed and ridiculed his passenger's frequent requests to slow down. At the moment of the accident, the defendant was travelling about 50 m.p.h. on a dangerous stretch of gravel road which had just been covered by a layer of pebbles in preparation for resurfacing. The defendant's imprudent speed on such a surface, coupled with his impaired reflexes as a result of his intoxication, caused him to lose control of the vehicle. The truck skidded and finally swerved into a deep ditch on the left hand side of the road. As a consequence of the accident, the plaintiff had to have his right hand amputated.

From the evidence it was quite clear to the Court that the accident was caused by a fault attributable to the defendant. The latter argued that the plea *volenti non fit injuria* applied so that the acceptance of the risk by the plaintiff entirely absolved him from any responsibility. To support this argument, the defendant relied on the case of *Dandurand* v. *Héritiers Desjardins et al*[2] where Judge Chase-Casgrain held:

---

[1] *Prosser on Torts*, p. 377.

[2] (1938), 44 R. de J. 76.

Une personne qui accompagne un chauffeur d'automobile en état d'ivresse, et qui en subit un accident, ne peut ensuite réclamer, parce qu'elle, en connaissance de cause, assume le risque qu'il y avait à se faire conduire par une personne en état d'ivresse.

While admitting that there is no absolute decision on this point in the Province of Quebec, Judge Chase-Casgrain nevertheless based his decision on the four following cases: *Mackenzie* v. *Meyers*,[3] *Whitfield* v. *General Accident Assurance Company*,[4] *Kaugh* v. *Adkins*,[5] and *Delaney* v. *City of Toronto*.[6]

Mr. Justice Prévost took objection to the reasoning of Judge Chase- Casgrain in the Dandurand case for the following reasons: (1) the comments concerning the effect of acceptance of risk made by Galipeault and Bernier JJ. of the Court of Queen's Bench in the Mackenzie and Whitfield cases respectively (and on which Judge Chase-Casgrain relies) are merely obiter; (2) the cases of Kaugh and Delaney are common law decisions and, without legal justification, are not authoritative precedents for Quebec courts; and (3) Judge Chase-Casgrain does not give any convincing reasons for his contention that the acceptance of risk by the victim prevents the latter from claiming and constitutes a *fin de non recevoir*.

Having thus dismissed the Dandurand case as a binding precedent, the Court then consulted a leading civil law authority[7] on the effect of acceptance of risk on civil responsibility. This revealed that in similar circumstances in French jurisprudence, there is no question of the total exoneration of the defendant since the resulting damage, loss or injury is considered to be caused by the common fault of both plaintiff and defendant. After citing a decision[8] of the "tribunal correctionel de Nice" on this precise point, Judge Prévost allowed the victim a partial indemnity of 50% of the proven damages on the ground that both plaintiff and defendant had each committed a fault and thus contributed to the resulting injury: the defendant by driving his vehicle carelessly and negligently in an intoxicated condition, and the victim by travelling with a driver whom he knew to be intoxicated and incapable of driving safely at the time. But in coming to this decision, it was necessary for the Superior Court to recognize and to answer three questions: (1) Does the acceptance of risk constitute a stipulation or agreement of non-liability exonerating the author of the delict of the damage suffered by the victim? (2) Does the consent of the victim constitute such a serious fault as to remove or entirely absorb the fault of the defendant? (3) Does the acceptance of risk by the victim constitute a *fin de non recevoir?*

---

[3](1934), 57 K. B. 357.
[4](1931), 50 K. B. 310.
[5][1933] O. W. N. 709.
[6](1922), 64 D. L. R. 122.
[7]H. & L. Mazeaud, *Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle*, 4th ed. Vol II, Nos. 1486 ff.
[8]Nice, 21 Nov. 1938, D. H. 1939. 62.

FIRST QUESTION:

In relation to the first question the Court made reference to the remarks of the Mazeaud brothers in their *"Traité théorique et pratique de la responsabilité civile, délictuelle et contractuelle"*, and on this basis held:

> Pour notre part nous pensons avec les frères Mazeaud que ce serait aller trop loin, surtout dans un cas analogue à celui qui nous est soumis, que de présumer que le consentement de la victime comporte une convention de non-responsabilité: telle convention, exonérant le défendeur de sa faute lourde, serait d'ailleurs nulle.[9]

There are, in reality, two separate issues involved in the first question: (a) does the acceptance of a risk by the victim constitute a tacit agreement excluding liability; and (b) is such an agreement or stipulation legally valid.[10] As regards the first issue there are wide differences of opinion.[11] In the writer's opinion, it is difficult to see how the simple acceptance of a risk can amount to an agreement excluding liability since the acceptance of a risk is in effect only a unilateral act. An agreement, whether it is express or tacit, is always a bilateral act. But even if we assume that the acceptance of a risk by the victim, or his consent to drive with the defendant whom he knows to be intoxicated, is equivalent to an agreement excluding liability, we are still faced with the second and more complex problem of determining whether such agreements are legally valid in delictual matters.[12] This issue has given rise to a serious and somewhat irreconcilable controversy both amongst writers and in the jurisprudence.[13] In the writer's opinion, the better view is

---

[9][1953] S. C. 341 at p. 343.

[10]Query (b) arises, of course, only if (a) is answered in the affirmative.

[11]For the view that the voluntary acceptance of a risk by a victim is equivalent to an agreement excluding liability, see M. P. Esmein, *De L'Influence de l'acceptation des Risques par la Victime eventuelle d'un Accident*, Rev. Trim. de Droit Civil, Vol. 37, 1939, p. 387 at p. 396. For the opposite view, see H. & L. Mazeaud, *op. cit.*, Vol. II, p. 411-412.

[12]We are here concerned with agreements excluding liability for personal acts only. Further difficulties arise when considering these agreements in the case of vicarious liability. Refer to J. Perrault, *Des Stipulations de Non-Responsabilité*, Thèse pour doctorat en droit, Université de Montréal, 1937, Ch. 9, pp. 124-128.

[13]For the view that agreements excluding responsibility in delictual matters should be declared valid, see Esmein, *op. cit.*, p. 387 ff. For jurisprudence on this view see *Regina* v. *Grenier* (1899), 30 S.C.R. 42 where it was held that a workman may contract with his employer so as to exonerate the latter from liability for negligence for which the former would otherwise be entitled to recover damages. Before this decision, the Quebec Court of Appeal had always declared agreements excluding responsibility to be null. In *Miller* v. *Grand Trunk Railway Co.*, (1903), 34 S.C.R. 60, Judge Girouard (dissenting) stated that in the Grenier case, the Supreme Court had not passed judgment on the question of responsibility for personal acts under 1053 C.C. For an ambiguous Quebec decision, see *Gagné* v. *Godbout* [1946] S.C. 16. Also cf. L. Baudouin, *Le Droit Civil de la Province de Québec*, pp. 869 to 878; J. Perrault, *op. cit.*, pp. 119 to 128; H. & L. Mazeaud, *op. cit.*, Vol. III, No. 2580. For the view that the victim of an accident cannot renounce beforehand his right to claim an indemnity for damages resulting from a delictual fault, refer to French jurisprudence which generally declares null all clauses

that a person cannot make a valid agreement to exonerate himself beforehand of his civil responsibility in the case of his intentional fault or in the case of his *faute lourde* or gross negligence.[14] In the case before us, the evidence clearly indicates that the fault of the defendant is of a nature which makes it *faute lourde* or gross negligence, so that even if it were admitted that the acceptance of risk amounted to a tacit agreement excluding liability, that agreement would have no legal effect and would, therefore, not exonerate the defendant from compensating the victim for his injuries.

SECOND QUESTION:

The second question again involves two separate issues: firstly, whether the consent of the victim to ride with the defendant quashes or conceals what would otherwise be a fault of the defendant, and secondly, whether the consent of the victim to travel with a drunken driver constitutes so serious a fault that it entirely absorbs the fault of the defendant. As regards the first issue, the Court adopted the view that:

> . . . le consentement de la victime ne fait pas disparaître le caractère fautif que pouvait revêtir le fait du défendeur,[15]

and held that in delictual matters the fault of the defendant must always be abstracted and considered separately. With regard to the second issue, a subtle distinction[16] was made between: (a) the intentional fault of the victim: the case of a person who wishes to commit suicide and decides to throw himself under the wheels of a speeding vehicle; (b) the simple knowledge on the victim's part of the possible realization of injury: the case of a pedestrian who crosses a street at an intersection; and (c) the acceptance of risk by the victim where he consents to the danger of injury without wishing to suffer it: the case of a person who, as in the case before the Court, accepts a drive from a person whom he knows to be intoxicated and incapable of driving safely.

In case (a) the victim wishes to be injured and he merely uses the defendant's imprudence as he would use a pistol or a lethal dose of poison for the purpose of destroying himself. Only in this case does the consent of the victim to suffer damage (as opposed to his consent to merely accept the risk) seem

---

excluding responsibility in delictual matters. Cf. Civ., 4 janv., 1933, D.H. 1913.113; Civ., 21 mars 1933, D.H. 1933.301 and other cases cited by Mazeaud, *op. cit.*, Vol. III, No. 2570 footnote (3 bis). For an ambiguous decision refer to D. 1932.1.1. Also cf. J. Perrault, *op. cit.*, pp. 124 ff. Notice that Mazeauds' views are inconsistent with the general tendency of the French jurisprudence. It seems that the only way to disentangle the different opinions on the validity of agreements excluding liability is not to extend the holdings of these decisions beyond the facts submitted to the Courts.

[14]This is the view expounded by H. & L. Mazeaud, *op. cit.*, Vol. III, No. 2580; L. Baudouin, *op. cit.*, p. 877; J. Perrault, *op. cit.*, p. 128.

[15]H. & L. Mazeaud, *op. cit.*, Vol. II, p. 416, No. 1493.

[16]*Ibid*, No. 1486 ff.

to absorb entirely the fault of the defendant.[17] This statement, however, is not legally accurate since it assumes that responsibility is based on the degree[18] of fault rather than on fault alone. Although the defendant, in this case, had committed a fault by driving imprudently, the victim or his heirs could not succeed in an action in damages, not because the intentional fault of the victim absorbs the fault of the defendant, but because the victim's intentional fault becomes the actual cause of his injuries:[19] there is no causal connection (lien de causalité) between the driver's imprudence and the injury of the victim since the former's imprudence is used as a means by the latter in order to achieve self-destruction.[20]

In case (b), the pedestrian who is injured by an imprudent driver at an intersection would have a right of action for full compensation for his injuries.

As to the victim's remedy in case (c), the Mazeaud brothers suggest the following solution which Judge Prévost uses as a basis for his decision:

> Ne doit-on pas, adoptant un système mixte, ne lui [victime] allouer qu'une réparation partielle.[21]

THIRD QUESTION:

On the basis of his discussion of the two previous questions, Judge Prévost refused to accept the defendant's argument and Judge Chase-Casgrain's decision in the Dandurand case that the consent of the victim to drive with the defendant constituted a *fin de non recevoir* so as to exclude him from compensation for his injury.[22]

ANALYSIS

There is a cause of action at common law wherever there is negligence causing damage in circumstances in which a duty is owed to the plaintiff to take care.[23] It seems clear that the English law recognizes no general right not to be damaged by another.[24] The law of torts consists in a number of specific rules[25] prohibiting certain kinds of harmful activity although the

[17] *Ibid,* No. 1480.

[18] *Ibid,* No. 1482.

[19] *Ibid,* No. 1483.

[20] *Ibid.*

[21] *Ibid,* No. 1487. Quoted by Judge Prévost at p. 344.

[22] Compare with R. Savatier, *Traité de la Responsabilité Civile en Droit Français,* 1st ed., Vol. II, No. 658; also compare Savatier's views in his first edition to his 2nd ed., Vol. II, Nos. 656 to 666.

[23] *Salmond on Torts,* 11th ed., p. 19.

[24] *Ibid.* The text adds that the English law recognized no general right not to be damaged by another even if that other acts in bad faith and intends to cause the damage.

[25] *Ibid,* p. 17: "Just as the criminal law consists of a body of rules establishing specific offences, so, the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability." Also refer to Williams, *The Foundations of Tortious Liability,* (1939), 7 Camb L. J. 111; *Prosser on Torts,* p. 4 ff; *Winfield on Tort,* 6th ed., pp. 16-17.

courts have complete power[26] to determine whether a duty of care is, in the circumstances of the case, owed to the defendant by the plaintiff. In order to succeed in an action for damages at common law, the following four requisites have to be proved: (a) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (b) a failure on the defendant's part to conform to this duty, or, in other words, a breach of duty to take care (this breach of duty is usually termed *negligence*); (c) actual loss, damage or injury to the plaintiff; and (d) a reasonably close causal connection between the *negligence* and the resulting damage, loss or injury.[27]

It is clear that it is not all negligence or carelessness that is actionable at common law, but merely that *negligence* which causes damage in circumstances in which there is a duty owed to the plaintiff to take care.[28] The plea of *volenti* is based on the theory that voluntary subjection to a known risk negatives the existence of a duty on the defendant's part by the breach of which he would otherwise be a wrongdoer.[29] Bohlen summarizes this idea as follows:

> The maxim 'volenti non fit injuria' is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies, he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself. While therefore protecting him from external violence, from imposition and from coercion, the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.[30]

As opposed to the common law, responsibility for offences and quasi-offences in the civil law does not rest on a number of specific rules prohibiting certain kinds of harmful activity — at most civil responsibility rests on a fundamental principle that it is wrongful to cause harm to other persons in the absence of some specific justification or excuse.[31] Under the Civil Code, responsibility is based upon fault. In order to succeed in an action under civil law, the following three requisites have to be proved: (a) fault, which is imputable to the defendant; (b) damage, loss or injury to the plaintiff; and (c) a causal connection between the fault and the resulting damage, loss or injury.[32]

---

[26]*Ibid,* p. 19: "When relationships come before the Courts which have not previously been the subject of judicial decision the court is unfettered in its power to grant or refuse a remedy for negligence." Also refer to p. 20: "The categories of negligence are never closed . . . as the law develops we are moving in the direction of a general principle of liability." Compare to *Winfield on Tort,* p. 17.

[27]*Prosser on Torts,* p. 177.

[28]*Winfield on Tort,* p. 478; *Prosser on Torts,* p. 395.

[29]*Winfield on Tort,* p. 26 ff; *Prosser on Torts,* p. 377; *Salmond on Torts,* p. 38 ff.

[30]F. H. Bohlen, *Voluntary Assumption of Risk,* (1906), 20 H.L.R. 14.

[31]G. V. V. Nicholls, *The Responsibility for Offences and Quasi-Offences under the Law of Quebec,* passim; H. & L. Mazeaud, *op. cit.,* passim; Savatier, *op. cit.,* passim.

[32]Nicholls, *op. cit.,* ch. 2.

It immediately becomes apparent that the common law counterpart of *fault* is a breach of duty to take care, or *negligence*. Since the defence of *volenti* at common law is based upon the theory that the voluntary acceptance of a risk by the plaintiff relieves the defendant of any legal duty of conduct, it becomes essential to determine whether the notion of *fault* contains any specific concept of duty (as is found in the notion of *negligence*) which may be relieved by the plaintiff's voluntary acceptance of risk. In other words, is the common law notion of *negligence* identical to the civil law notion of *fault* so that the voluntary acceptance of risk may be said to operate in the same way in both systems, namely, to relieve the defendant of his duty of care to the plaintiff.

Is the notion of *fault* equivalent to the notion of *negligence*? Fault consists of a failure to act as a reasonable man in the circumstances and is made up of a subjective and an objective element.[33] The subjective element presupposes the subjective capacity to foresee the damage that will result and to avoid it. In Quebec, then, persons incapable of discerning right from wrong are incapable of *fault* and are not responsible for the damage they may cause to another. Thus, insane persons, idiots, persons who are affected by the more serious types of feeble-mindedness, and children who are so young as to be incapable of appreciating the nature of their behaviour would escape liability.[34] The notion of *negligence,* on the other hand, neither contains nor implies such a subjective aspect. This is readily illustrated by the fact that under the common law, lunatics, insane persons and infants are held liable for their torts.[35] Thus under the English law, an insane person has been held liable in tort action for assault and battery, false imprisonment, destruction of property, conversion, suing out an injunction, and injuries caused by the defective condition of his property.[36]

The objective element in *fault* is a certain behaviour which, when judged by objective standards, is legally reprehensible. "Just as a person to be responsible under civil law, must be subjectively to blame, so his behaviour judged by objective standards, must be legally reprehensible."[37] Now, what are these objective standards by which a person's behaviour must be judged to determine whether he is responsible for his injurious acts. Nicholls tells us that this objective standard is that of the care and skill expected of a reasonably careful and prudent man in the circumstances.[38] So long as a person acts with the care and skill of a reasonably careful and prudent man in the circumstances of the case, he will not be responsible for the resulting damage. An examination of the common law notion of *negligence* quickly

[33]*Ibid,* p. 17.
[34]*Ibid,* p. 18.
[35]*Salmond on Torts,* pp. 74-75.
[36]Specific references to common law jurisprudence may be found in *Prosser on Torts,* p. 1089.
[37]Nicholls, *op. cit.,* pp. 19-20.
[38]*Ibid,* pp. 20-21.

discloses that approximately the same objective standard, namely, that of a reasonable man of ordinary prudence,[39] is used to determine when the breach of a legal duty has occurred. The similarity between *negligence* and *fault,* then, is found in the application of approximately the same objective standard in both common and civil law systems in order to determine when the breach of a legal duty has occurred (common law) or when the defendant's behaviour has failed to measure up to the objective standard so as to fulfill the objective element of fault (civil law). In the writer's opinion, it is precisely this similarity of technique which has led some writers[40] to come to the conclusion that the "common law notion of 'negligence' and the civil law notion of 'fault' are thus identical",[41] and on this basis to assume that the plea of *volenti* must, therefore, produce the same effect[42] on responsibility in the civil law as it does in the common law.

Before a breach of duty can be said to have occurred at common law, it must be first determined whether or not there was a duty owed to the plaintiff to take care.[43] The plaintiff cannot win his action unless he first of all shows facts "from which the court can deduce a legal obligation on the part of the defendant towards the plaintiff to take care".[44] "There must be a duty on the defendant not to cause damage of a specified kind to the plaintiff by careless conduct."[45] The decision as to whether a duty exists is always a question of law for the judges.[46] In the civil law, on the other hand, we are not primarily concerned with establishing the existence of a duty before we can determine whether or not a fault has been committed. The Court simply tries to discern from the evidence offered whether the act, conduct, or omission of the defendant failed to measure up to the care expected of a reasonable man in the circumstances. Therefore, since *fault* under the civil law does not depend[47] on the existence of specific duties, it is submitted that there can

---

[39]*Prosser on Torts,* p. 224.

[40]e.g. W. S. Tyndale, *Civil Responsibility for Damage,* B.C.L. Thesis, McGill University, 1948.

[41]*Ibid,* p. 45.

[42]Note especially Trudel series, *Traité de Droit Civil de Québec,* Vol. VIII, by A. Nadeau, p. 476.

[43]*Winfield on Torts,* p. 478.

[44]*Ibid,* p. 479.

[45]*Ibid.*

[46]*Ibid.*

[47]Although the ability of the plaintiff to establish "fault" at civil law does not depend on his previous ability to show facts "from which the court can deduce a legal obligation on the part of the plaintiff towards the plaintiff to take care", this does not mean that there is no relationship between "fault" and "obligation". "A person cannot be at fault if he was not bound to anything before the commission of the act in question." Refer to Planiol, *Traité de Droit Civil,* Vol. II Nos. 863 ff: "La faute est un manquement à une obligation pré-existante, dont la loi ordonne la réparation quand il a causé un dommage à autrui." The distinction to be made is the following: At common law, the plaintiff has to establish the duty owed to him before he can proceed to prove "negligence". (Refer to

be no question of *acceptance of risk* on the part of the plaintiff which will have the effect of relieving the defendant of the duty of care which he would otherwise have owed:

> Nous avons le devoir de nous montrer prudents même à l'égard de ceux qui nous sollicitent de ne pas l'être.[48]

*Assumption of risk* and *volenti non fit injuria* are terms which have been surrounded with great confusion in the civil law texts. Beullac, for instance, discusses the plea of *volenti* under the heading: "Faute de la victime". He states:

> Lorsque la faute de la victime a été la cause unique du dommage, l'action en responsabilité doit être renvoyée. Cette notion du droit trouve son expression dans la maxime 'volenti non fit injuria'.[49]

Nicholls has the following to say:

> It might as well be said immediately, however, that if the plea [of volenti] is to succeed in Quebec it will succeed not because the plaintiff consented to undergo the risk of damage, but because in the circumstances of the particular case that consent amounted to a fault that caused or contributed to the damage.[50]

Mignault discusses *volenti* in three lines in his chapter entitled: "Faute commune", but he does not venture to explain what the term means. He states thus:

> Si c'est la faute de la victime [qui a causé le dommage], il est clair qu'il n'y a point de responsabilité civile: volenti non fit injuria.[51]

Hémard and others have a novel approach to the application of *volenti:*

> . . . on applique la maxime 'volenti non fit injuria' à certain délits, tels que le vol, qui consistent dans un dommage aux biens, mais non à d'autres infractions qui, tels le meurtre, les coups et blessures, consistent dans un dommage à la personne physique.[52]

Juliot de la Morandière, on the other hand, denies the application of the whole theory of *acceptation des risques* in the civil law:

> Une autre conséquence est que la convention d'irresponsabilité ne peut être tacitement supposée; ainsi on ne peut admettre qu'une personne accepte par avance de supporter tel ou tel risque. La prétendue acceptation des risques laisse la possibilité à la victime d'obtenir des dommages-intérêts en prouvant la faute de l'auteur de l'accident.[53]

---

footnote 44). At civil law, the law itself establishes a general duty on *everyone* not to cause damage to others; this general duty is imposed quite apart from the activities of the parties (compare with footnote 30); it cannot be altered by the unilateral act of one of the parties, and is always presumed to exist so that the plaintiff does not have to establish the duty owed to him before he proceeds to establish fault: "Nous avons le devoir de nous montrer prudents même à l'égard de ceux qui nous sollicitent de ne pas l'être." (see footnote 48).

[48]H. & L. Mazeaud, *op. cit.*, Vol. II, No. 1492.

[49]P. Beullac, *La Responsabilité Civile dans le droit de la Province de Québec*, p. 609.

[50]Nicholls, *op. cit.*, p. 127.

[51]Mignault, *Le Droit Civil Canadien*, Vol. V, p. 384.

[52]Quoted in H. & L. Mazeaud, *op. cit.*, Vol. II, No. 1488 and footnote.

[53]J. de La Morandière, *Précis de Droit Civil*, Vol. II, No. 341.

The Mazeaud brothers feel that the basis on which the theory of *acceptation des risques* has been built in the civil law is unsound and rather questionable:

> Certes la simple connaissance de la responsabilité d'un dommage ne peut influer sur la responsabilité d'un défendeur . . . . On parle quelquefois ici de risque accepté, mais très improprement: la victime n'a rien accepté du tout; son consentement fait défaut.[54]

Later on they say:

> L'examen des différents cas dans lesquels le problème de l'acceptation des risques se pose en pratique montre qu'il est inexact de vouloir construire une théorie générale du risque accepté. Outre que, en bâtissant cette thèse, on confond souvent 'acceptation' et 'connaissance' des risques, il n'est pas possible, même au cas d'acceptation véritable, de faire jouer la maxime 'volenti non fit injuria'.[55]

Savatier's treatment of *volenti* is particularly confusing. After stating that the theory of *volenti* lacks any precise meaning or definition and is often confused with the *fault* of the victim or his consent to accept the risk, he states:

> Mais la maxime 'volenti non fit injuria', malgré l'existence de la faute de l'autre partie à cette convention, paraît empêcher l'action en responsabilité de la victime, alors du moins que son consentement a été absolument libre et que le dommage consenti n'est pas contraire à l'intégrité de la personne humaine.[56]

Nadeau tells us that the plea of *volenti* exists in our law as it does in the common law but with different modalities, yet he neglects to tell us what these modalities are:

> La règle 'volenti non fit injuria' existe dans notre droit français de la responsabilité, tout comme en droit anglais, mais elle agit chez nous selon des modalités distinctes.[57]

These excerpts are typical of the confusion and uncertainty surrounding these terms in our jurisprudence and texts. Those texts and decisions, moreover, which maintain the application of the plea of *volenti* nowhere explain on what legal basis this plea may be said to constitute a valid defence. It is settled that, at common law, this plea is based on the voluntary acceptance of risk which relieves the defendant of his legal duty of conduct without which there can be no negligence.[58] Is the plea of *volenti* at civil law based on the *faute commune* of the plaintiff, as Nicholls, Mignault & Beullac seem to suggest?[59] Or, it is based on the acceptance of risk? If it is based on the acceptance of risk, does such acceptance by the plaintiff qualify the objective standard by which the defendant's behaviour must be judged in order to determine whether he is responsible for his injurious acts? Or does the acceptance of risk by itself constitute an estoppel or *fin de non recevoir*?[60]

---

[54]H. & L. Mazeaud, *op. cit.*, Vol. II, No. 1486.

[55]*Ibid*, No. 1500.

[56]Savatier, *op. cit.*, 1st ed., No. 658. Compare with his 2nd ed. Nos. 656 to 666 where he seems to change his opinion. See also footnote 22.

[57]A. Nadeau, *Trudel Series*, Vol. VIII, p. 476.

[58]At common law, then, the maxim *volenti* cannot apply where there is "negligence". Refer to *Salmond on Torts*, p. 40; see also *Prosser on Torts*, p. 377.

[59]Cf. footnotes 49, 50, & 51, *supra*.

[60]Compare with Savatier, *op. cit.*, 1st ed., Vol. II, pp. 246 ff.; 2nd ed., Vol. II, pp. 237 ff.

Since the victim, at civil law, does not have to establish the existence of any specific duty of conduct on the part of the defendant towards the plaintiff in order to succeed in his action,[61] and since the notions of *fault* and *negligence* are not identical, is it correct to assume that the plea of *volenti* produces the same effect on responsibility in the civil law as it does in the common law? The common law attaches precise meaning to *acceptance of risk* and *volenti non fit injuria.* Most standard texts on torts[62] contain a separate chapter devoted exclusively to the plea of *volenti* wherein the scope and application of this defence are strictly determined. This is to be contrasted to civil law texts and jurisprudence wherein the term is only confusingly mentioned *en passant* without any attempt being made to define the term or to delimit its application.

Common law writers are careful to distinguish the defence of *volenti* from the defence of *contributory negligence.*[63] In the first case, there is no question of any negligence on the part of the plaintiff[64] by accepting the risk as he may be acting quite reasonably. Where the plaintiff's own conduct in accepting the risk has been unreasonable in view of the forseeable danger, we are no longer involved with *assumption of risk* but rather with *contributory negligence,* and the plaintiff is now barred from recovery by the policy of the common law which refuses to allow him to shift to the defendant a loss for which his own unreasonable conduct is in part responsible.[65] In the case of *contributory negligence* there is negligence on both sides whereas in the case of *assumption of risk* there is no negligence at all. If any of the definitions of *volenti* given by those civil law authors who maintain that the plea is a valid defence at civil law, are correct, then our plea of *volenti* becomes similar to the plea of *contributory negligence* which common law authors are very careful to distinguish. *Volenti* then becomes equivalent[66] to *faute commune* where both plaintiff and defendant are considered to be at fault and where the damages are awarded proportionately.

Those who maintain that the plea of *volenti* 'existe dans notre droit français de la responsabilité, tout comme en droit anglais',[67] point to its frequent application at sports events,[68] especially those events of a more dangerous nature, such as wrestling, lacrosse, stock-car racing, football and so on, where those in attendance are said to have accepted the risks inherent in that

[61]Cf. footnotes 44, 45, 46, 47, *supra.*

[62]e.g. *Prosser on Torts; Pollock on Torts; Winfield on Tort; Salmond on Torts.*

[63]Cf. *Prosser on Torts,* p. 378.

[64]*Ibid,* pp. 377-378. The common law recognizes a duty on the part of the plaintiff to conform to the same objective standard of conduct, namely, that of a reasonable man of ordinary prudence, for his own protection. See *ibid,* p. 395.

[65]*Ibid,* p. 378. This rule has been altered by statute in some common law jurisdictions.

[66]Cf. Nicholls' definition, *supra.*

[67]Nadeau, *op. cit.,* p. 476.

[68]e.g. *Gervais* v. *Canadian Arena Co.,* (1936), 74 S.C. 389, and other cases cited by Nadeau, *op. cit.,* footnote 62 on p. 477.

particular sport by the mere fact of their attendance. Not too surprisingly, a survey of these civil law judgments which have dismissed the plaintiff's action on the basis of assumption of risk will reveal innumerable references to common law precedents. Hence it is not unexpected that so much confusion and disagreement exists in our law on this subject. In the writer's opinion, there does not appear to have been any necessity in all these cases to make use of a common law concept in order to determine that which could have been adequately determined on the basis of *fault* alone. These decisions seem to have lost sight of the very fundamental principle on which our whole law of responsibility is based: there is *NO* responsibility without *FAULT!* Keeping in mind that a spectator isn't necessarily at *fault* by attending a dangerous but licit sports event, all these cases could have been decided on the basis of *fault* alone: did the defendant (wrestler, hockey player, stock-car driver, and so on) act with the care and skill of a reasonably careful and prudent man *in the circumstances:*[69]

> Ainsi la personne qui assiste volontairement à un spectacle sportif n'en conserve pas moins le droit de se prévaloir de l'article 1382 (equivalent to 1053 C.C.) si elle est blessée du fait du spectacle.[70]

CONCLUSION:

For the reasons given for the judgment under discussion, it may well be concluded that this decision marks a reversal and establishes a new line of jurisprudence the effect of which may be to check permanently the assimilation heretofore of the effects of the common law plea of *volenti* into Quebec jurisprudence. In the presence of such confusion and disagreement regarding the application of this plea at civil law, it is surprising that our Courts had previously declined to adopt a view which is more in keeping with civil law concepts. In the writer's opinion, the common law plea of *volenti,* based on the *acceptance of risk,* cannot be made applicable at civil law, since the basis on which this plea rests at common law has no civil law counterpart. Further, it is suggested that as long as serious controversy exists as regards the meaning and use of these terms, less recourse be made to common law concepts in order to determine that which could be adequately (and sometimes, indeed, more equitably) determined on the basis of *fault* alone. It is regrettable that Mr. Justice Prévost did not make use of this opportunity to examine and

---

[69]One must remember the difficulty of proving *fault* at sports events such as hockey, motor races, flying meets and so on, since the dangers and perils which may reasonably be expected to occur at such meetings, cannot, unless the conduct of the defendant is proved to be intentional, be made attributable to *fault.* The reason for this, of course, is that the objective standard of conduct changes *in the circumstances.* In a dangerous but licit sports event, such as a flying meet, the dangers and perils which are inherent in the nature of the event cannot, without great difficulty, be proved to be attributable to a *fault* of the defendant. The harm would almost have to be intentional to permit the victim to prove *fault.*

[70]J. de La Morandière, *op. cit.,* Vol. II, p. 166.

determine precisely the applicability of this plea at civil law. Yet, one cannot help feeling that Mr. Justice Prévost's most astute and equitable decision may have the effect of persuading Judges in the future to rely less on common law concepts and decisions in reaching decisions which are both equitable and in keeping with our own Civil Law concepts.

MICHAEL AWADA*

**Third Year Student.*