Recent Cases

PROCEDURE — EXAMINATION — OBJECTIONS OF PLAINTIFF — HOSPITAL RECORD — OBJECTION TO ITS PRODUCTION AS A WHOLE IN THE COURT RECORD — OBJECTION SUSTAINED — EXAMINATION OF PLAINTIFF'S PHYSICIAN — EXAMINATION AS TO PLAINTIFF'S STATE OF HEALTH PRIOR TO ACCIDENT — CONCERNING DISORDERS ALLEGEDLY CAUSED BY ACCIDENT — RIGHT TO KNOW — RELEVANT TO QUANTUM OF DAMAGES — MEDICAL PRIVILEGE — OBJECTION OVERRULED. *L.* v. *Robert et al.*, [1969] R.P. 41.

In an action in damages resulting from an accident, the Plaintiff claimed *inter alia* the sum of $100,000 for permanent incapacity.

> En effet, en raison de cet accident, le demandeur est atteint d'une importante diminution de ses facultés intellectuelles par suite des lésions causées à son cerveau et des caillots de sang qui s'y sont formés, d'une paralysie partielle et d'une surdité importante de l'oreille gauche, et en outre, il ne dort pas la nuit, fait des crises de nerfs et d'épilepsie, ne doit pas du tout étudier, et, pour ce très grave préjudice, le demandeur est bien fondé à réclamer aux défendeurs une somme de $100,000;

He also claimed the sum of $25,000 for loss of enjoyment of life and the inability to pursue his studies, all of which allegedly resulted directly from the accident.

The Defendant sought to determine if any of the afflictions complained of existed prior to the accident. In order to do so, the Defendant attempted to introduce in evidence the hospital records pertaining to the Plaintiff by asking his personal physician to produce and file them in the court record. The Plaintiff immediately objected to the production of the hospital records on the ground that there was no provision of law permitting such action. The Defendant also sought to examine the doctor as to the Plaintiff's state of health prior to the accident, to which the Plaintiff also objected on the grounds that it would be in violation of the medical privilege of the doctor under article 308 (2) C.C.P., and that the doctor had not been authorized by his patient to make any such disclosures.

The objection to the production into the court record of the hospital records was first considered by the Court. Article 400 C.C.P., which is new law, provides:

> A court may order a hospital to allow a party to examine and make copies of the medical record of the person whose examination has been authorized.

In the words of the Codifiers, this article was inserted in the new *Code of Procedure* "to set aside a certain line of jurisprudence" and

more specifically to overrule the decision in *Barron* v. *Steinberg's Wholesale Groceterias Ltd.*,[1] where the Defendant was not permitted to consult the prior medical record of the Plaintiff even though there was evidence introduced to show that the Plaintiff had been admitted into two hospitals for treatment prior to the accident.

Upon reading article 400 C.C.P., the Court concluded that all that could be inferred from its text was that a party was entitled to have access to and make copies of the hospital records; it did not provide that such documents be put in evidence or introduced into the court record, notwithstanding article 311 C.C.P. which provides generally for the production of documents which are relevant to the issues and in the possession of third parties. The Court reasoned that medical records, being the object of a particular provision in the *Code*, could not be subject to a general rule.[2] The Court therefore allowed Plaintiff's objection and did not permit the production of the medical records into the court record.

The Court then considered Plaintiff's second objection, the examination of his personal physician as to his state of health prior to the accident. The Plaintiff argued that such an examination violated the medical privilege of the doctor insofar as he could not answer without being relieved of his duty of secrecy by his patient, which release had not been given. Article 308 (2) C.C.P. provides:

> Similarly, the following persons cannot be obliged to divulge what has been revealed to them confidentially by reason of their status or profession...
>
> 2. Advocates, notaries, physicians and dentists; unless, in all cases, they are expressly or implicitly authorized by those who confided in them;

The Court held that although the doctor, a psychiatrist in this instance, had not been relieved of his duty of secrecy, the Defendant had an absolute right to determine if the conditions complained of existed prior to the accident, as having a direct bearing on the evaluation of the quantum of damages. It reasoned that if the victim of an accident can claim in certain circumstances for the aggra-

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[1] [1953] R.L. 158.

[2] In a claim for an insurance indemnity under a life insurance policy, where the Defendant, the insurer, pleaded misrepresentation on the deceased's part as to his health, the Court ordered the mis-en-cause, the hospital, to produce in the record their records on the deceased thus, in fact, providing the insurer with a means of obtaining irrebuttable proof of misrepresentation. The Court relied, *inter alia*, on article 402 C.C.P. which provides that a court may order the production of any document relating to the issues between the parties, and in the instance, the medical record was essential to determine if there had been misrepresentation which, in turn, was relevant to the validity of the contract. See, *Jean-Paul Martin* v. *Metropolitan Life Insurance Co.*, P.C.M. 77,833, June 14, 1968, Mr. Justice Jean-Paul Noël.

vation of a sickness or infirmity existing prior to the accident, then it follows that the author of the damages must be allowed to examine witnesses on the state of such sicknesses or infirmities to determine to what extent he might have aggravated them.[3]

The Court could not see how testimony relating to the length of time a person has been afflicted with a specified sickness or infirmity, the cause of which is attributed to an accident, could be construed as a breach of the medical privilege of the doctor. The Court went even further, stating that even if construed as a breach of the medical privilege, this privilege must be subordinated to the interest of the public at large. The learned judge quoted to that effect Mr. Justice Samuel Freedman of the Court of Appeal of Manitoba:

> The duty of secrecy to the patient must always be weighed against the duty to the community as a whole.[4]

The Court also referred to an article by Jean-Louis Beaudoin where he states that it is in the interest of public order that, in similar cases, the patient must not be the one left to decide whether or not to release his doctor of his duty of secrecy:

> Laisser au client seul le soin de décider s'il doit ou non relever le médecin de son obligation au silence est chose dangereuse. On court le risque de voir le client relever le médecin de l'obligation au secret pour tout fait que le client a avantage à divulguer et, au contraire, lui imposer un silence absolu sur les faits dont la révélation pourrait nuire à ses intérêts. N'est-ce pas là encourager une demi-vérité et même, dans certains cas, courir le risque de fraude?[5]

The Court therefore concluded that Plaintiff's physicians could properly be examined on

> (L)'existence de maux qu'il attribue à son accident, sur les prédispositions du patient à ces affections, sur leurs symptômes, leur diagnostic, leur évolution et leur traitement.[6]

and that these questions were relevant to the appreciation of the quantum of damages.

L.S.

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[3] See especially, Savatier, *Traité de la responsabilité civile*, t. 2, 2e éd., (Paris, 1951), No. 464, p. 14 and Mazeaud et Tunc, *Responsabilité civile*, t. 3, 5e éd., (Paris, 1960), No. 2395, p. 527 who states also: "Le préjudice doit s'évaluer au regard de la victime, en considération de ce qu'elle a effectivement souffert. Ce serait revenir aux temps les plus barbares qu'apprécier le dommage en lui-même, *in abstracto*, indépendamment de la personne qui le subit; on aboutirait à une tarification semblable à celle des compositions;..."

[4] *Medical Privilege*, (1954), 32 Can. Bar Rev. 1, at p. 18.

[5] *Le Secret professionnel du médecin — Son Contenu — Ses Limites*, (1963), 41 Can. Bar Rev. 491, at p. 507. See also Jean-Louis Beaudoin, *Secret professionnel et droit au secret dans le droit de la preuve*, (Paris, 1965), p. 93.

[6] [1969] R.P. 41, at pp. 46-47.

CONSTITUTIONAL LAW — SECTIONS 4 TO 9 OF THE QUEBEC PUBLICATIONS AND PUBLIC MORALS ACT CONCERNING PUBLICATIONS CONTAINING IMMORAL ILLUSTRATIONS — SECTIONS ULTRA VIRES OF THE POWERS OF THE QUEBEC LEGISLATURE — PROVINCIAL STATUTE DUPLICATING THE PROVISIONS OF A FEDERAL STATUTE — ARTICLES 1 (c), 2, 3, 4 TO 9 PUBLICATIONS AND PUBLIC MORALS ACT, 14 Geo. VI, S.Q. 1950, c. 12, now R.S.Q. 1964, c. 50 — ARTICLES 150 TO 157 Cr. C. — ARTICLE 1003 C.C.P. (1897) — ARTICLE 846 C.C.P. (1965). *Montreal Newsdealer Supply Company Limited* v. *Board of Cinema Censors of the Province of Quebec* and *The Attorney General for the Province of Quebec,* [1969] C.S. 83.

Laws are the ultimate victim in any revolutionary wave. The "sexual revolution" is hardly unique in this respect, as it too has taken its toll.[1] When enforcement becomes more rigourous in an effort to stem the liberal tide, jurisdictional legitimacy over legislated morality is necessarily an issue of heated controversy. Part of this debate has now been resolved by a recent decision of the Quebec Superior Court.[2]

The Petitioner, a newsvendor in the City of Montreal, sought by a writ of prohibition (now evocation) to quash an order of censorship, which declared the magazine *Cavalier* to be an immoral publication within the meaning of Sections 4-9 of the Quebec *Publications and Public Morals Act;*[3] the order made copies of the magazine liable to confiscation and destruction.

The major argument advanced by the Petitioner was that the Quebec legislation was a usurpation of the exclusive jurisdiction and competence of the Federal Parliament over the subject matter of criminal law, reserved to it by section 91 (27) of the *B.N.A. Act, 1867,* and specifically enacted in sections 150-157 of the Canadian *Criminal Code.*

Mr. Justice Batshaw, in deciding the case, appears to have skirted the more obscure but burning issues raised by the petitioner, mainly that the *Act* in question constituted an illegal interference with the freedoms of speech, press and trade and commerce.

In holding the impugued legislation *ultra vires,* the leaned judge had to distinguish two recently entrenched precedents, *O'Grady* v.

[1] See *inter alia* the recent amendments to sections 144-150 of the *Criminal Code,* Bill C-150, First Session, 28th Parliament, 17-18 Eliz. II, S.C. 1968-69, ss. 7 & 8.

[2] Mr. Justice Batshaw, presiding.

[3] R.S.Q. 1964, c. 50.

Sparling[4] and *Mann* v. *The Queen*;[5] these cases were decided in favour of provincial legislation on highway offences bearing substantial similarity to section 221 of the *Criminal Code*. The task was accomplished in one neat sentence:

> In effect, the judicial interpretation of our constitution has concluded that despite the fact that both enactments deal with offences concerning the manner of driving on a highway and to that extent may be overlapping, they nevertheless are not deemed to be repugnant because they are regarded as dealing with different subjects *and as having been enacted for different purposes*.[6] (emphasis added).

However, Batshaw, J., was not quite so benevolent with the Quebec legislation:

> (B)oth statutes by title and definition deal with the same subject matter, namely the corruption of public morals by obscene illustrations, in terms which are virtually identical... It is extremely difficult, therefore, to recognize a valid difference in object, purpose, or "pith and substance" between the two enactments.[7]

Apart from any issue of Federal paramountcy, the learned judge could not find a valid provincial aspect of the impugned statute which might possibly justify its co-existence with the duplicative legislation of the *Criminal Code*.

> On the contrary, it seems rather an attempt to use the property and civil rights head of section 92 as a ground for justifying an unwarranted intrusion into the field of criminal law. Similar attempts have been struck down by the Supreme Court as colourable legislation in more than one instance.[8]

The judgment contains some extremely forceful *dicta* against regional control over public morality. Batshaw, J., unequivocally asserts:

> The legislation under review, however, deals with public morals and this is a field which has always been deemed to be an aspect of criminal law, which in turn, of course, falls within the exclusive jurisdiction of Parliament.[9]

and further:

> However, morality and criminality are far from co-extensive and Parliament alone can define crime and enumerate the acts which are to be prohibited and punished in the interest of public morality.[10]

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4 [1960] S.C.R. 804.

5 [1966] S.C.R. 238.

6 [1969] C.S. 83, at p. 87.

7 *Ibid.*, at pp. 90-91.

8 *Ibid.*, at pp. 92-93. See the cases of *Switzman* v. *Elbling*, [1957] S.C.R. 285, *Birks* v. *The City of Montreal*, [1955] S.C.R. 799, *Dufresne* v. *The King*, [1912] 5 D.L.R. 501, *Johnson* v. *Attorney General for Alberta*, [1954] S.C.R. 127.

9 [1969] C.S. 83, at p. 89.

10 *Ibid.*, at p. 90.

The constitutional validity of enactments such as section 10 of the *Cinema Act* [11] and by-law 3416 of the City of Montreal, recently given *prima facie* legitimacy in a judgment of the Quebec Court of Appeal,[12] must be considered extremely tenuous. The exclusivity of Federal jurisdiction in matters of public morality can neither be mitigated nor encroached upon under the dubious guise of ficticious provincial "aspects" or contrived provincial "purposes". Another telling blow has been struck against the pernicious practice of having local arbiters dictate moral imperatives to the community at large. It is perhaps superfluous to note that the Attorney General's Department did not proceed in appeal from this welcomed decision.[13]

H.S.

PROCEDURE — SEIZURE BEFORE JUDGMENT — GROUNDS FOR ISSUANCE OF WRIT — FEAR OF THE PLAINTIFF — DEGREE OF FEAR REQUIRED — ARTICLES 78, 733 C.C.P. *Manufacturers Mutual Fire Insurance Company* v. *Post* and *Canadian Imperial Bank of Commerce,* [1969], C.S. 60.

The coming into force of the new Quebec *Code of Civil Procedure* brought with it substantial modifications in civil law procedure. It remains in the realm of speculation as to how liberally or restrictively Quebec courts will view and interpret many of the changes. One such problem of interpretation concerns the wording of article 733 C.C.P.,[1] dealing with seizures before judgment, an article which has as its origin article 931 of the former *Code of Civil Procedure.*[2] The crux of the difference lies in the fact that art. 931 of the old

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[11] 15-16 Eliz. II, S.Q. 1966-67, c. 22, s. The section reads: "It shall be the duty of the board to examine any cinematographic film which it is proposed to show in the Province and to permit it to be shown if, in its opinion, it is not prejudicial to public order and good morals."

[12] *Dame L'Abbée* v. *La Ville de Montréal,* [1968] B.R. 419. The by-law prohibits any employee or entertainer in an establishment where alcohol is served from mingling with the customers.

[13] An appeal was instituted by the Attorney General's Department, C.A.M. No. 10705. By judgment of the Court, dated November 11, 1968, the inscription in appeal was struck and the appeal was dismissed for failure of the Attorney General's Department to appear within the delays. Ed.'s Note.

Code clearly provided that a writ of seizure before judgment would lie only in cases where the creditor could demonstrate an intent to defraud on the part of the debtor, either by leaving the province or by secreting his assets, thereby depriving the creditors of any recourses they may have possessed.[3] The corresponding provision in the new *Code* speaks only of a fear on the part of the creditor that recovery of his debt will be put in jeopardy, but omits any reference whatsoever to the necessity of showing an intention to defraud by the debtor. Is such an intention still a pre-requisite, or is fear of non-recovery sufficient in itself? The recent decision in *Manufacturers Mutual Fire Insurance Company* v. *Post* and *Canadian Imperial Bank of Commerce* may assist in providing an answer.

The facts of the case are briefly as follows. Plaintiff, an insurance company, paid to its insured the sum of $1,425,874 as the result of a fire. At this particular moment in time the defendant was a director and shareholder of the insured. Slightly over six years later the defendant was found guilty of defrauding Plaintiff for the said sum of $1,425,874 by reason of arson. While the Defendant's appeal from his conviction was pending before the Court of Appeal, Plaintiff requested a writ of seizure before judgment, which request was

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[1] Article 733 C.C.P. reads as follows: "The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.

[2] Article 931 of the old *Code of Civil Procedure* read as follows: "A creditor may, before obtaining judgment, procure a writ to attach the goods and effects of his debtor, in any case wherein the defendant is personally indebted to the plaintiff in a sum exceeding five dollars:

1. In the case of the *dernier équipeur;*
2. When the defendant:
   a. Is immediately about to leave the Province with intent to defraud his creditors in general or the plaintiff will thereby be deprived of his recourse against the defendant; or
   b. Is secreting or making away with, has secreted or made away with, or is immediately about to secrete or make away with, his property, with intent to defraud his creditors in general or the plaintiff in particular, and the plaintiff will thereby be deprived of his recourse against the defendant; or
   c. Is a trader who has ceased his payments, and has refused to make an abandonment of his property for the benefit of his creditors, although duly required to do so."

[3] See for example: *Williams* v. *Colombia Airways Inc.*, 33 R.P. 426; *Renaud* v. *Vandusen*, 21 L.C.J. 44 (B.R.); *Sabourin* v. *Gatineau Bus Line Co.*, (1929), 46 B.R. 301; *Leshchynski* v. *Ross*, [1951] R.P. 81.

opposed by the Defendant on the grounds of the insufficiency and falsity of the affidavit.

In deciding whether a seizure before judgment would lie in these circumstances Mr. Justice Paré discussed the new wording of article 733 C.C.P. It was pointed out that article 733 C.C.P. originated from article 931 of the former *Code of Civil Procedure*, and that it incorporated the idea of fraud therein expressed. However, Paré, J., recognized that the criterion was no longer solely "an intent to defraud", and that the element of fear of non-recovery of the debt had been introduced. This new factor was quickly qualified by the Court in that it was held that the fear of non-recovery of the debt must in some way be related to an intention to defraud, and, moreover, that the fear must not be a subjective and unjustified one, but rather a fear which a normal and reasonable person would have in similar circumstances.

Applying this interpretation to the facts of the case at bar, Mr. Justice Paré held that the conviction of the Defendant for arson, notwithstanding his appeal, was of such a nature as to cause a reasonable person to entertain serious fears, and further, that the nature of the fraud practised by the Defendant made the latter appear to be one who would do all in his power to hide or secrete his assets. On the basis of these findings the court dismissed the motion to quash the seizure before judgment.

It is respectfully submitted that the approach taken by Mr. Justice Paré in interpreting the meaning of article 733 C.C.P. was a proper one, as a strict adherence to the wording of the article would have opened the door to numerous, and in many cases, unnecessary seizures before judgment. As the name implies, a seizure before judgment is an extraordinary recourse, to be used in exceptional circumstances. By qualifying the pre-requisite of fear of non-recovery of the debt so that such a fear must in some way be connected to an intention to defraud, the Quebec courts appear unwilling to permit a seizure before judgment unless some fraudulent intent is ascertainable on the part of the debtor, and thus has insured that no one will be subjected to a seizure before judgment merely on the whim of a creditor.

S.W.

OBLIGATIONS — MINOR — STUDENT — LOAN — ACQUISITION OF A GUITAR — SUMMER EMPLOYMENT — LESION — CRITERIA TO BE APPLIED — WHETHER A MUSICIAN OR NOT — WHETHER THE MINOR IS AN ARTISAN. *La Caisse Populaire de Lanoraie* v. *Dalcourt,* [1969] R.L. 182.

The Defendant, while a minor, borrowed from the Plaintiff the sum of $620 of which $375 were still owing at the time of the institution of the present action. His mother endorsed the note and it appears that she was largely responsible for whatever payments had been made in reduction of the debt. The Defendant testified that he used the loan to purchase a $775 guitar with the hope of forming a band which was to play during the summer holidays. At the time of the purchase, the Defendant had never played a guitar, nor taken any lessons. The group was eventually formed, but met with little success. The Defendant's share for a night's engagement never amounted to more than $15, and, in the three summers he used the guitar, his gross revenues amounted to about $300. In his defense, the Defendant pleaded lesion to be relieved of his obligations.

Article 323 C.C. provides that:

> A minor engaged in trade is reputed of full age for all acts relating to such trade.

Article 1005 C.C. completes article 323 C.C. and provides further in the French version:

> Le mineur banquier, commerçant ou artisan n'est pas restituable pour cause de lésion contre les engagements qu'il a pris à raison de son commerce, ou de son art ou métier.[1]

The Defendant argued that article 1005 C.C. implies that the minor must be acting in a professional capacity for it to apply, and thus, in this instance, the Defendant could not be strictly described as a musician, lacking both formal training and membership in any guild of musicians. In any event, the Plaintiff is alleged to have taken a risk in lending such an exhorbitant sum of money in view of the Defendant's total lack of training and experience.

The Court agreed with the Defendant's interpretation of article 1005 C.C. Playing the guitar, as the Defendant did in these circumstances, most probably was not an art, and even less a trade or business. But even if it were an art of some kind, the same criteria

[1] The learned judge relied on the French version of the article which in many ways is preferable to the English version. In the English text, the word "artisan" is incorrectly translated by the word "mechanic" and the phrase "à raison de son commerce, ou de son art ou métier" is simply translated by "for the purposes of his business or trade", there being no translation given for "ou de son art".

used to determine if a minor is a trader must be applied to the minor-artisan.

The Court gave the following definition of a trader:

> Est commerçant, celui qui par sa profession, pose habituellement des actes de commerce.[2]

In support of the above definition, the learned judge quoted Perrault to the effect that:

> Quand le mineur a-t-il la qualité de commerçant? A deux conditions: poser des opérations commerciales et les poser à l'état professionnel.[3]

The Court also relied on Trudel[4] and the decision in *Kruse Motors Ltd.* v. *Beauchamp,*[5] and the authorities cited therein, in support of its definition of what constitutes a trader.

There are several other decisions in our jurisprudence which have attempted to define what is a trader and which could have been cited by the Court for a more complete definition. For example, in the case of *Bloomfield* v. *Gantous,*[6] it was held that:

> Pour être commerçant, il ne suffit pas de poser de temps en temps des actes de commerce: il faut en faire sa profession habituelle. Il faut aussi faire le commerce pour son avantage et non comme prête-nom d'autrui.

In the case of *Morton* v. *Trainor,*[7] it was also held that once a minor ceases to be a trader, he cannot be sued personally even for debts incurred while being a trader.[8]

The Court therefore concluded that the Defendant was neither a banker, trader or artisan within the meaning of article 1005 C.C. and thus could properly be relieved of his obligations for cause of lesion.

L.S.

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[2] At p. 183.

[3] *Traité de droit commercial,* t. 2, (Montreal, 1936), No. 1218, p. 708.

[4] *Traité de droit civil du Québec,* t. 2, (Montreal, 1942), p. 376.

[5] [1960] C.S. 186.

[6] (1928), 32 R.P. 399 (Mr. Justice Surveyer).

[7] (1930), 68 C.S. 426.

[8] See also, *Robidoux* v. *Abran,* [1956] R.P. 153; *Vanier* v. *Saumure,* [1955] R.P. 141.