Brazeau Transport Ltée v. Canadian Pacific Railway

William Fraiberg *

Introduction

Article 17 (24) of the Quebec Civil Code says,

> "A fortuitous event (*cas fortuit*) is one which is unforeseen, and caused by superior force which it was impossible to resist." [1]

Can a sudden illness inducing total absence of will be considered a *cas fortuit* ? In *Brazeau Transport Ltée* v. *C.P.R.*[2] the late Mr. Justice Bernard Bissonnette of the Court of Queen's Bench held that it could not.

This ruling has serious implications, for it hints at an increasingly social rather than individual concept of fault in the Civil Law of Quebec.

The Facts

Defendant company's driver drove a heavy truck down a hill in broad daylight. After travelling about seven hundred feet he reached plaintiff company's level crossing, but neither slowed down nor braked.

A violent collision with a passing freight train ensued, resulting in the derailment of two railway cars and almost total destruction of the truck. The railroad sued under Articles 1053 C.C. and 1054 C.C. for damage to its freight cars.

The defendant argued that minutes before impact, its driver had suffered a fatal heart attack, and that this was a sufficient instance of *cas fortuit* to negate the driver's, and therefore its own responsibility under Article 1054 C.C.

The Superior Court found for plaintiff, rejecting defendant's factual plea as unsubstantiated. While in the opinion of the trial judge the driver had indeed died of a heart attack, defendant could

---

* Of the Junior Board of Editors, McGill Law Journal; second year law student.

1 The expressions *cas fortuit* and *force majeure* are often used interchangeably, the former relating primarily to the unforeseeability of the event, and the latter to its irresistibility.

2 [1964] B.R. 689.

not prove that the attack came before the collision. On the proof submitted it could as well have occurred after or at the moment of the accident. This judgment was affirmed on appeal.

The Issues and Decisions

The issues before the Court of Queen's Bench were: (1) Did the driver suffer a heart attack before the accident ? (2) If so, was the heart attack a *cas fortuit* ?

The judges were unanimous in holding that defendant had failed to prove satisfactorily the time of the heart attack. It was thus unnecessary to answer the second question. Nevertheless Montpetit, J. and Bissonnette, J. offered their comments. Both held that the heart attack was not a *cas fortuit* — but from different points of view — Montpetit, J. *vis-à-vis* the trucker, and Bissonnette, J. *vis-à-vis* the driver.

Montpetit, J., having acknowledged the two essential elements of a *cas fortuit* as unforseeability and irresistibility, (Article 17 (24) C.C.), held that the driver's sudden heart attack could not exculpate his employer when the latter had failed to have its employees medically examined. In the words of the learned judge,

> "Un bon père de famille, voiturier public se doit à lui-même, à ses chauffeurs et employées, et au public en général de se soucier de l'état de santé de ceux à qui il confie la conduite de ses camions et selon les circonstances, d'agir en conséquence." [3]

Being in a position to know the normal risks and dangers of highway transport, the defendant company had been imprudent and negligent in not being concerned about the state of health of its employees. Having committed this fault of omission, the company could not validly invoke the heart attack as a *cas fortuit*. By reasonable means it could have warned itself as to the likelihood of such an event, but had failed to do so. Therefore the heart attack lacked the essential element of unforeseeability.

Bissonnette, J., taking a more sweeping approach to the problem, held that in general mental aberration or the involuntary absence of will could not be considered as a case of *cas fortuit*. If from the external circumstances fault was proved or presumed, the pathological state of the author of the damage was irrelevant. Accordingly, heart attack, stroke, or any other incapacitating seizure did not exonerate him from his liability. The rationale for this position was put by the learned judge as follows:

---

[3] *Ibid.*, p. 693.

"Il répugne à l'idée de justice qu'ayant pris place dans un autocar, le conducteur me précipite au bas d'un parapet, sans engager sa responsabilité, même si cet acte fut involontaire. Dès lors qu'on pourra rapporter preuve de sa faute, il ne pourra échapper à la responsabilité, car sa maladie... ne constituera pas un cas de force majeure." [4]

Doctrine and Jurisprudence

The judgment of Montpetit, J. accords with Quebec jurisprudence on *cas fortuit* and its equivalent, "inevitable accident" or "act of God", in the common law jurisdictions of Canada. The principle elicited from this jurisprudence is that the defendant cannot plead *cas fortuit* if he has committed a prior fault, whether of commission or omission.

Loranger, J. held in *Alexander* v. *Dame Hutchison et al.*,

"Celui qui plaide la force majeure ne peut être exempt de toute responsabilité, qu'en autant que l'accident n'a pas été précédé ni accompagné ou suivi d'une faute qui lui soit imputable." [5]

This dictum could as well be stated by saying that damage will not be deemed unforeseeable or irresistible unless before the event a minimum standard of reasonable care has been maintained. Thus a warehouse company burglarized of goods entrusted to it for safekeeping cannot invoke *cas fortuit* when it has failed to provide a night watchman.[6]

The rule has been applied primarily *vis-à-vis* events external to the author of the damage. Montpetit, J's decision falls within this category. He did not rule on whether the heart attack exonerated the deceased driver from fault. Rather it was an external event that did not exculpate the truck-owners because they could have taken reasonable care to prevent it, but had failed to do so. Although not the immediate cause of the damage, the defendant company was liable under Article 1053 C.C. because its imprudence was a contributing factor.

This accords with the decision in *Rozinsky* v. *Lambert.*[7] Here a garage-owner was held liable under Article 1053 C.C. for having rented a car to a well-known drunkard who subsequently injured a third person. Although the trucker's imprudence was not as blatant in the present case, it sufficed to actualize its direct liability.

---

[4] *Ibid.*, p. 696.
[5] (1888) 11 L.N. 60.
[6] *Franco-Canadian Dyers Ltd.* v. *Hill Express Depot Ltd.* [1951] C.S. 177.
[7] (1939) 77 C.S. 93.

Montpetit, J's decision also derives doctrinal support from Domat who stated a principle having its origin in the *Lex Aquilia* as follows:

> "Ceux qui font quelques ouvrages ou quelques travaux d'où il peut suivre quelque dommage à d'autres personnes en seront tenus s'ils n'ont usé des précautions nécessaires pour les prévenir."[8]

Bissonnette, J's decision, however, conflicts with the preponderance of the jurisprudence and doctrine. The existing case law on the subject makes it clear that a driver who has a sudden seizure at the wheel will not be liable for any damage he causes, unless it appears that he knew or ought to have known of his liability to such an attack.[9]

Thus Quebec jurisprudence has applied the same criterion to *cas fortuit* induced by the physical or mental condition of the driver as it does to events external to the driver.[10] A minimum standard of antecedent prudence must be attained before *cas fortuit* can be invoked. Put succinctly, he who allows himself to drive must to his knowledge be in a fit condition to drive.

Several illustrations of this rule may be cited. A plea of *cas fortuit* failed in *Goudreau* v. *Scotcher*,[11] where an employee, who to his own and employer's knowledge was subject to epileptic attacks, nevertheless drove a motor vehicle and caused damage as a result of such an attack.

In *St-Georges* v. *Moody* [12] a deaf driver who failed to hear plaintiff's horn, thereby contributing to the cause of the accident, was held at fault for having driven without a hearing aid.

Decisions from the common law provinces, which may be relied upon as *rationes scriptae*, affirm the rule as well. In *Hagg* v. *Bohnet* [13] a diabetic condition, aggravated by drinking prior to his taking the wheel, did not exonerate the defendant. On the other hand, in *Dessaint* v. *Carrière* [14] a seventy-year old diabetic who had suffered a sudden dizzy spell and had no reason in fact to foresee it, having been

---

8 Domat, J., Tome 3, sec. iv, no. 4, p. 320; Carré ed., Paris, 1822.

9 See Mazengarb, O.C., *Negligence On The Highway*, Toronto, 1957, pp. 67 and 222.

10 As an example of an event external to the driver that was not a *cas fortuit*, see *Coderre* v. *Douville* [1943] B.R. 687 where it was held that a sudden squall of dust did not excuse negligence, but occasioned even greater care.

11 [1947] R.L. 162.

12 [1959] C.S. 259.

13 (1962) 33 D.L.R. 378.

14 [1958] O.W.N. 481.

told by his doctor that it was quite safe for him to drive, was held not liable.

However, a driver has not discharged his duty of care merely by being examined routinely by a physician who does not warn him not to drive, if he has failed to inform the latter of pains which forecast a fatal heart attack.[15]

In *MacPherson* v. *Mallabon* [16] a less rigorous standard of exculpability was adhered to. There the driver suffered a sudden indeterminate seizure from which he apparently died minutes after colliding with plaintiff's parked car. No post mortem was conducted to establish the actual cause of death, and no enquiry was made into the driver's prior state of health. The court ruled, however, that it was a reasonable conclusion that he was overcome before the collision, and this in itself sufficed to exculpate him.

Despite the foregoing deviation, it is submitted that the true test as to the exonerating force of a sudden seizure is that offered by the Supreme Court of Canada. In *Gootson* v. *The King*,[17] a driver in the employ of the Crown suffered an epileptiform seizure with the result that his car mounted a sidewalk and injured a pedestrian. Ruling on whether the attack rebutted the presumption of negligence, Rand, J. held at page 35:

> ... "That involuntary act was of such a nature that it might or might not have been negligent, depending upon the antecedent experience of the driver. The negligence would lie in the fact, if it were so, of his undertaking to operate an agency of such potential danger, knowing that at any time he might be taken with such a seizure." [18]

The distinction between Bissonnette, J's decision and the jurisprudence is that the latter deems involuntary absence of will a *cas fortuit* if the *facts* show that it could not have been foreseen. Bissonnette, J. however, refused to apply this concrete test of foreseeability. In his view a sudden seizure is not a *cas fortuit a priori* because it is always foreseeable, whether or not the driver himself foresaw it. Although this reasoning is at best implicit in the present case, Bissonnette, J. was more explicit in *Bertrand* v. *Dame Anderson*.[19]

> "Mais par ailleurs l'action intérieure du conducteur d'un véhicule même si son effet est imprévu n'acquiert pas nécessairement le caractère d'irrésistibilité à telle enseigne que ce conducteur doit prévoir ... qu'une réaction de sa

---

15 *Turner's Transport Ltd.* v. *Anderson et al.* 1962-64 D.R.S. 85-575, Sept. 10, 1962 (N.S.) Q.B.

16 (1958) 11 D.L.R. 350.

17 (1948) 4 D.L.R. 33.

18 *Ibid.*, p. 35.

19 [1963] B.R. 523.

> condition physique ou mentale, même si l'une ou l'autre était imprévisible, se posera pour autrui comme cause d'un dommage. Ce que j'entend dire par là, c'est que la victime a le droit de se prévaloir d'un fait qui, tout en échappant à la prudence antérieure de son auteur peut être dans l'expérience quotidienne de la vie, normalement prévisible." [20]

Thus the learned judge applied an *abstract* test of foreseeability. A heart attack cannot be a *cas fortuit* because it is an event normally foreseeable in the daily experience of life. Support for this radical narrowing of personal exculpability was found by Bissonnette, J. in the work of Mazeaud and Tunc.[21] A cursory examination of the latter's treatise reveals a premise for this harsh position in the refusal to consider any subjective element in civil fault.

> ..."La faute ne doit pas s'apprécier *in concreto* en tenant compte de l'état d'âme de l'agent, mais *in abstracto* en comparant la conduite du défendeur à celle qu'aurait tenue une autre personne; analyser la faute civile *in concreto*, c'est confondre responsabilité civile et responsabilité pénale." [22]

According to the authors the acts of an automaton are *ipso facto* different from those of a *bon père de famille* and therefore faulty. The only mitigating factor allowed in this *in abstracto* appreciation of fault is the placing of the *bon père de famille* in the same external circumstances as the defendant. Obviously an absence of will, no matter how induced, is not an external circumstance. The fictional *bon père de famille*, the standard of comparison, is by definition in full possession of his reasoning powers. Therefore incapacitating illness — "les faits internels" — are irrelevant to the determination of fault. Civil fault consists of failing to behave, even unintentionally, in the accepted social manner. The authors maintain that if the courts are prepared to impose liability for acts occasioned by momentary lapses of will, such as simple negligence or inattention, they should be equally prepared to do so for acts stemming from a total absence of will. The social character of fault demands a total rejection of any subjective assessment of individual conduct.[23]

Critique of the Decisions

Montpetit, J's application of the test of antecedent responsibility to an instance where heart attack is pleaded as *cas fortuit* is in full accordance with the jurisprudence, doctrine, and provisions of the Civil Code.

---

[20] *Ibid.*, p. 527.

[21] Mazeaud, H. and L., and Tunc, A., *Traité Théorique et Pratique de la Responsabilité Civile*, Paris, 1957, Tome 1, no. 459 et s. p. 508.

[22] *Ibid.*, no. 59, p. 509.

[23] *Ibid.*, no. 461-2, p. 511.

It is, however, respectfully submitted that Bissonnette, J's blanket rejection of sudden illness as a *cas fortuit* cannot be justified under the present state of our law. The Civil Code manifestly requires a subjective test before liability can be imposed. Article 1053 C.C. reads,

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

The article imposes a general obligation of care on all citizens whenever they put themselves into positions where they may cause harm. However, to qualify as debtors of the obligation they must first be capable of discerning right from wrong — a qualification that obviously demands that they be in possession of their faculties. Whether or not a defendant meets this criterion must be determined by an *in concreto* test. Only after it has been shown that the defendant was capable of reasoning at the time that fault is imputed to him, is the court justified in comparing his conduct with that of the abstract *bon père de famille.*

For purposes of imposing delictual or quasidelictual liability the Civil Law of Quebec has divided the human being into a controlling, reasoning self and a submissive, corporeal self. It is in effect the former to which fault is imputed. Support for this view is found in Pothier, who said,

> ..."Il n'y a que les personnes qui ont l'usage de la raison qui soient capables de délits et de quasi-délits." [24]

Mazeaud and Tunc, on the other hand, view the author of any damage as a unity, and therefore at fault, even if in a state of pathological incapacity. While most of the French tribunal have not accepted their reasoning, the words of the Code Napoléon at least make it feasible by failing to qualify the notion of fault by any prior subjective requirement.[25] Our Codifiers, however, explicitly ruled out persons of deranged or undeveloped intellect as debtors under Article 1053 C.C.

Thus Bissonnette, J. could not invoke an abstract test of fault to exclude sudden illness as a *cas fortuit.* He relied instead on an abstract test of foreseeability which had the same effect. Because of the *latent possibility* that he will suffer a seizure at the wheel of his car, a driver will be liable, even though before the occurrence,

---

[24] Pothier, R.J., *Des Obligations,* no. 118.

[25] An English translation of Article 1382 C.N. reads, "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."

he feels perfectly healthy. This test clearly conflicts with the jurisprudence, which requires that the driver's mental or physical condition be such as to make incapacity probable, or at least intensify its possibility. By adopting it, Bissonnette, J. denied the subjective and individualist aspect of fault which the present state of our law demands.

Conclusion

Although the decision of Bissonnette, J. is objectionable in law, one can easily sympathize with the sense of social responsibility which motivated it. The innocent victims of automobile accidents should be adequately compensated. However, to impute fault to the innocent driver flies in the face of legal reality.

There is another way to achieve increased driver liability under our present law. This would lie in the courts tightening the standard of antecedent care to be met by a defendant who pleads *cas fortuit*. It is reasonable to demand that the physical and mental condition of any person who drives a car be such that he does not pose a threat to the safety of others. The mere feeling of good health is not a sufficiently rigorous standard. Every driver should inform himself as to the state of his health by undergoing a routine medical examination annually. Failure to do so should prevent his invoking any sudden seizure at the wheel as a *cas fortuit*. This was the requirement of antecedent prudence imposed by Montpetit, J. on a trucking company. There is no reason why non-professional drivers should not have to meet the same standard.[26]

Further we cannot go. To do so would involve amending the Civil Code so as to allow for a strictly objective test of fault. An alternative lies in removing automobile accidents from the realm of fault altogether through the establishment of a general insurance fund to which all car-owners would contribute.[27]

---

[26] In *Bertrand* v. *Dame Anderson*, *op. cit.*, the defendant had asthma, arteriosclerosis, and an occlusion of the coronary artery which might have induced his fainting at the wheel. Nevertheless, he had never been treated by a physician and was therefore ignorant of his predisposition to seizure. Bissonnette, J. could have ruled that the failure to have himself examined ruled out a plea of *cas fortuit*, instead of rejecting a seizure *per se* as a *cas fortuit*.

[27] See *Accidents de la circulation*, an article by Paul Langlois in *Mélanges Bissonnette*, Montreal, 1963 at pp. 367-8.