G. v. C. and De COSTER — *Mise en cause*

Responsibility — surgeon — operation — clamp left in abdominal cavity — Act of carelessness — damages — contractual fault — prescription by thirty years.

by Arnold Isaacson*

The field of medical liability has in the past few years come under close scrutiny by the Court of Queen's Bench. In this recent decision[1], the court held that the relationship of doctors and their patients was contractual, thus affirming the decision of *X. v. Mellen*[2] and hence solidifying the court's opinion on this point. The recognition that there exists this contractual relationship between a doctor and his patient, either express or implied, developed due to the court applying the distinction between an obligation of "means" ("obligation générale de prudence et diligence") and an obligation of "result" ("obligation déterminée"). This change within the field of medical liability has created far-reaching effects which will be demonstrated subsequently. An attempt will be made to show the historical evolution within the field of medical liability in the law of Quebec, that is, how, within the field of medical liability, the contractual regime of civil responsibility finally was recognized and accepted in the case of *G. v. C. and De Coster.*

The facts of the case, which were not in dispute, are as follows:

In July of 1950 the plaintiff was operated on by the defendant. During the course of the operation a clamp or forceps was used to help arrest the bleeding. After completing his main task, however, the surgeon, while closing the incision, forced the clamp or forceps that had been on the outside of the plaintiff's body, into the abdominal cavity. After the operation, the plaintiff complained of pain but the doctor said that this was normal after an operation of this kind and that it would soon subside. The plaintiff suffered for six years without realizing the cause of the pain. A chiropractor whom he consulted suggested that X-rays be taken. When it was discovered that the pain was due to the clamp, the defendant was sued. The action was instituted in March of 1957. The trial judge awarded damages to the plaintiff and an appeal was made by the defendant. The presiding judges of the Court of Queen's Bench dismissed the appeal. The court, in a unanimous decision, held that the particular facts and circumstances of the case created a strong presumption of fault against the defendant. Thus the onus was upon the defendant to rebut this presumption

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[1][1960] Q.B. 161.

[2][1957] Q.B. 389.

of fault. In this connection, however, the Court of Appeal was of the opinion that the defendant failed to rebut the presumption and hence his defence of no negligence failed. As Mr. Justice Casey asserted in his judgment:

> So far as this aspect of the case is concerned, the jury had before it evidence that put on the defendant an almost overwhelming burden. When (plaintiff) proved that this clamp had been placed in his abdominal cavity and then left there, his burden was discharged and defendant found himself in the position of having to explain. The jury concluded that defendant had not exculpated himself and this conclusion was not only reasonable, it was the only one possible.[3]

It is submitted that the above holding of the case is correct and there should be no dispute as to the law. Although in case of fault or negligence the onus of proof is normally on the plaintiff, in certain cases our jurisprudence has held that a fault of the defendant may be inferred due to the particular circumstances arising from the case. However, this does not absolve the plaintiff from proving that damages were incurred and that there was a causal connection between the damages suffered and the presumed fault.

The second defence raised by the defendant is important for the purposes of this comment, for it was here that the relationship between a doctor and his patient was held to be contractual. The defendant had pleaded that since his fault had been a delictual one, the plaintiff's action was prescribed by art. 2262 C.C. paragraph 2, which provides a prescriptive period of one year for all actions taken for bodily injuries. Casey J., however, explained that the relationship of the parties was contractual and hence prescribed by thirty years, according to art. 2242 C.C.

> There remains the question of prescription which is discussed by defendant in his factum. *It is now accepted* that the relationship between a surgeon and his patient is contractual with the result that actions such as the one now under discussion are subject to prescription by thirty years[4].

Casey J. affirms that there exists a contractual relationship between a doctor and his patient — which does not necessarily have to be written — and he holds this to be an accepted proposition of the law. It should be noted parenthetically that the plea of the defendant *re* a prescriptive period of one year would not have availed even if a contract did not exist, due to the fact that the prescriptive period runs from the date when the plaintiff becomes aware of the damage, and not from the date when the negligent act is committed.[5]

Apparently Casey J., in discussing the contractual nature of a "doctor-patient" relationship, was referring to *X. v. Mellen*. In this latter case, the relationship between the doctor and his patient was fully analyzed, Bissonnette J. holding that since there was a contract between the two, the doctor could be sued under contract as well as under delict.

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[3]At p. 163.

[4]At p. 164. (Emphasis added).

[5]See *Rajotte v. X* (1936) 74 S.C. 569; (1938) 64 K.B. 484, 494 (Que.). The judgement of the court of King's Bench was reversed on appeal to the Supreme Court of Canada but on another point; [1940] S.C.R. 203. See also Meredith; *Malpractice Liability of Doctors and Hospitals*, pp. 206-7.

> Qu'un lien contractuel se soit établi entre le père de l'enfant et le chirurgien, ceci ne peut souffrir de doute. Que le contrat se soit formé par voie de mandataire (le médecin de famille) ou par une stipulation pour autre (le père de l'enfant) ou enfin qu'il soit tout simplement présumé, la détermination de son mode de formation me paraît être d'aucune importance pratique. En effet, dès que le patient pénètre dans le cabinet de consultation du médecin prend naissance entre celui-ci et le malade, par lui-même ou pour lui-même, un contrat de soins professionnels[6].

To see the significance of the change within the field of medical liability, it is important to understand the reasons behind the situation that had existed before this change. The idea that there was a contractual relationship between a doctor and his patient was recognized as early as 1900 in the case of *Griffith v. Harwood.*[7] Here Mr. Justice Lacoste, speaking for the Court of Appeal, said the following:

> Nous sommes de l'opinion que la faute imputée au médecin est contractuelle, et que l'article 2262 ne s'applique pas à la contractuelle. Je crois que le médecin dont les services sont requis agit en vertu d'un contrat[8].

However, this recognition had no influence upon the juridical nature of medical responsibility. Thus the courts continued to hold to the view that the responsibility of the doctor came under the delictual regime and was not contractual. Accordingly, the rules of delict applied. The court's reason for applying the delictual regime of civil responsibility to the "doctor-patient" relationship was its failure, before the case of *X. v. Mellen,* to apply the distinction between "obligation of means" and "obligation of result." Hence, before 1957, the burden of proof shifted according to whether the damage was a delictual or a contractual responsibility. If it were delictual, the burden of proof was on the plaintiff, if contractual, the burden of proof was on the defendant. This explains why Quebec jurisprudence was reluctant to recognize the contractual nature of medical responsibility, since there would be too much of a heavy burden imposed on the doctor if the onus were to be tied to the contractual regime of responsibility. As a result, a doctor who was negligent and caused damages, had to be sued under the delictual regime — the legal mind reasoning that "the art of healing is not an exact science, and adverse results may follow the treatment administered by even the best physicians."[9] Because of this inexactitude, the law felt that it would be too much of a burden on the doctor to prove his innocence if the onus was upon him.

In the case of *X. v. Mellen* it was pointed out that this concept of the relationship between the regime of responsibility and the burden of proof was an erroneous one. The burden of proof is not tied to the regime of responsibility but rather to the nature of the obligation assumed by the defendant. It depends on whether the obligation is one of "means" or of "result". This distinction,

[6]At pp. 408-9.

[7][1900] B.R. 299.

[8]At p. 307.

[9](1942) 2 *Revue de Barreau*, p. 412.

first developed in France in the 1920's by Renée Demogue, a leading jurist,[10] is one of the most important discoveries in the law of obligations, since it clears away the confusion relating to the burden of proof. An obligation of "result" can be defined as that obligation whereby the debtor undertakes to bring about a specific result desired by the parties and hence any breach of it, irrespective of fault, will find the debtor liable. He can only be absolved by proving *cas fortuit*, *force majeure*, or *chose étrangère*. Any other plea, other than the above mentioned, will not suffice because the debtor has undertaken to bring about a specific result. (Here the creditor need only prove the damages that he suffered and this establishes the breach of the obligation). In an obligation of "means" the debtor of the obligation only undertakes to take reasonable care as a prudent administrator in order that the hoped for result may occur.[11] This is different from the obligation of result; not only must the creditor prove damages but he must also show the debtor's fault as well as a causal connection between the two. The differences are quite clear; and it has been illustrated that the burden of proof varies with the nature of the obligation, and not according to whether it is in the contractual or delictual regime.[12] Article 1675 C.C., concerning the obligations of carriers, and art. 1509, regarding the seller's duty of warranty, are obligations of "result"; art. 1664, on the other hand, is recognized by the code as an obligation of means.

In the case of *X. v. Mellen*, Mr. Justice Bissonnette relied upon the writings of both Professor Paul-A. Crépeau and the late Dean Meredith, who has said:

> As soon as a doctor undertakes a case, a contractual relationship is established between him and his patient. This immediately gives rise to certain rights and obligations on the part of each of them. No express contract is necessary. Indeed it would be unusual to make one unless the doctor had agreed to treat his patient under special conditions *e.g.* gratuitous or for a limited time, or at a certain place, or in the comparatively rare cases in which he had undertaken to bring about a cure. But a court is likely to view with suspicion any claim that a doctor guaranteed a result unless he admits having done so, or a written agreement is produced to that effect[13].

Here Dean Meredith is saying that, even though it is considered as a contract, the obligation within it, unless specified otherwise, is not an obligation of "result" but an obligation of "means", that is, the burden of proof should remain with the plaintiff since the doctor did not undertake to bring about a definite result. Otherwise,

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[10]*Traité des obligations*, t.s. no 1237, T.6 no 181.

[11]The doctor's obligation is to act as a "bon père de famille" towards his patient. In order to prove the inexecution of the medical contract of care, the plaintiff must show that the doctor did not take reasonable care or act in a prudent fashion according to the rules of his profession, *i.e.* he should prove the fault of the defendant.

[12]It should be noted here that there are separate rules for contractual and delictual regimes, hence the legal implications arising from a contractual responsibility differ from those of a delictual responsibility. Some examples of the differences are with regard to prescription (arts. 2242, 2258, 2260, 2261, 2262 C.C.), suing for unforseen damages (1074 C.C.), quantum of damages awarded (1074 C.C.), joint and several liability (1105, 1106 C.C.).

[13]*Op. cit.*, p. 407.

> if the physician had to exercise his profession with the sword of Damocles in the shape of liability for damages continually suspended over his head, the work might be seriously hampered indeed, since he would not feel free to apply his knowledge as he sees fit, to the great peril of humanity, and healing might in certain cases, thereby become impossible[14].

The whole approach to this discussion has been admirably and succinctly summarized by Albert Mayrand, who writes:

> ". . . s'il base son action sur le contrat médical, il doit quand même prouver la faute puis qu'il doit prouver l'inexécution du contrat (art. 1071 C.C.). L'obligation du médecin n'est pas de guérir mais de tâcher de guérir; ce n'est pas une obligation de résultat mais de moyen. Prouver qu'un malade a subi des dommages à la suite d'une intervention chirurgicale, ce n'est pas prouver que le chirurgien n'a pas exécuté son obligation. Le demandeur doit aller plus loin et établir que le chirurgien n'a pas utilisé tous les moyens qu'un chirurgien normalement compétent aurait employés, ce qui revient en somme à prouver sa faute. Comme le remarque M. Lalou, dans les obligations de moyen — il n'y a pas de différence entre la faute contractuelle et la faute délictuelle quant au fardeau de la preuve. Par conséquent, la clause de non-responsabilité ne libère pas le médecin du fardeau de la preuve puisque même sans cette clause il n'en est pas chargé"[15].

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The case of *G. v. C. and De Coster* is significant in that it has taken a realistic look at the problem of medical liability and has come to the conclusion that it is ludicrous to leave it within the delictual regime. Hence, applying the reasoning as laid down by *X. v. Mellen*, the court reinforced the rule that a contract exists between a doctor and his patient and the obligation within this contract is an obligation of "means", unless specifically stated otherwise. Notwithstanding the fact that our courts do not follow the rule of *stare decisis*, previous decisions have been known to hold much weight and it is respectfully submitted that this decision is sound and should be followed.

It is, however, unfortunate that the Court of Appeal has shown an inconsistent attitude when ruling with regard to liability of carriers of persons. Here this same court has refused to apply the distinction of obligation of "means" and "result" and have left the liability of the carrier within the delictual regime.

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[14](1942) 2 *Revue de Barreau*, p. 412.

[15]31 *Canadian Bar Review* at page 156.