

THE CANADIAN BAR REVIEW

VOL. XXIII

January, 1945

No. 1

A SYNOPSIS OF TORTS IN QUEBEC AND A PARALLEL BETWEEN SOME PROVISIONS OF THE COMMON LAW AND THE CODE

More than twenty years ago, while going through the tortures of a written examination on Jurisprudence at Oxford University, I pondered over the following question, snary as I then thought: "Is there any common ground at the bottom of all liability in tort or delict?" I by-passed this question, but ever since have felt some remorse about it and to-day, may I say in order to atone for my past juvenile delinquency, I would like to study with you the principles of delictual responsibility in Quebec and draw a few comparisons between the common law and the Code on the matter.

I regret that owing to the limitations of space and time, I cannot treat the subject as completely as its importance requires. I intend to offer a synopsis only and beforehand beg your indulgence for inaccuracies which too sweeping generalization may entail, as also for possible misstatements of the common law.

The general rules of delictual responsibility are laid down in a very short chapter of our Civil Code, entitled "of offences and quasi-offences", in French "des délits et quasi-délits", and including but four articles, 1053 to 1056 inclusive.

Let us say here that the difference between delict and quasi-delict resides in the intention of the tort-feasor; in a delict, damage is caused intentionally, unintentionally in a quasi-delict. The obligation to repair is the same in both cases save in as much as a delict may import fraud, which may affect the measure of damages, and in the following, delictual will include quasi-delictual responsibility.

Articles 1053, 1054, 1055 read as follows:

1053. 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.

1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;

The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

Tutors are responsible in like manner for their pupils;

Curators or others having the legal custody of insane persons, for the damage done by the latter;

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

1055. The owner of an animal is responsible for the damages caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it.

He who is using the animal is equally responsible while it is in his service.

The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.

That is almost the whole of our law of torts. In principle then:

(a) All persons capable of discerning right from wrong are liable for damages caused to others by their fault;

(b) They are also liable for damages caused by the fault of others over whom they have control, and also by things under their care and

(c) by animals in their possession or by the dilapidation or ruin of their buildings.

The vicarious liability imposed by articles 1054 & 1055 is based on the presumption that persons in authority or possessors, of things or animals, are somehow at fault in not having prevented the damage caused by wards, dependants, etc., or property owned.

M. Billette, of the Montreal Bar, in an interesting contribution to *La Revue du Droit*,¹ puts it this way:

Il y a des siècles que la classification des délits civils a été abandonnée en droit français. Une civilisation comme la nôtre doit être dirigée par des principes et non par de la procédure ou des actions déterminées et classées. En matière de responsabilité, le principe de base est la faute actuelle ou présumée.

¹ XI *Revue du Droit*, p. 288. (Principes généraux de la resp. delict. et quasi-delict. dans Québec.)

The presumption of fault is rebuttable and as we have seen, article 1054 enacts that in cases covered by the first five paragraphs a defendant may defeat the action by establishing that he was unable to prevent the act which caused the damage.

This proviso, it will be seen, does not apply to the section of article 1054 concerning masters and servants nor to article 1055 concerning the owner of an animal or a dilapidated building, which would seem to create an absolute liability in all of these three cases. The general opinion is however, that, even there, the presumption is rebuttable, a defendant, in virtue of articles 1071 and 1072 of the Code having the right to prove that the accident was due to a fortuitous event or to irresistible force or to the act of a third party or again to the fault of the injured plaintiff himself, whereas in cases covered by the exonerating clause of article 1054, a defendant has wider means of defeating the presumption, the test being whether a defendant could or could not by reasonable means prevent the act, in the French version, *le fait*, complained of.² As an illustration, a father or tutor sued for damage caused by his son or pupil's mischief may prove, *inter alia*, that he gave him a good education, and thus escape liability.

Of course, I am aware of the well-known dictum of Lord Sumner in the *Vandry* case,³ "proof that damage has been caused by things under the defendant's care does not create a mere presumption of fault but establishes a liability. . . there is a difference, slight in fact but clear in law, between a rebuttable presumption of "faute" and a liability defeasible by proof of inability to prevent the damage." It is a nice question for a debate, and it has often been debated, but whatever the true view, whether article 1054 creates a rebuttable presumption or a defeasible liability, there remains that the vicarious responsibility established by the Code is based upon the assumption that the defendant was at fault.

To put it in the words of Sourdat:⁴ "A vrai dire, toutes les fois qu'il y a responsabilité, il y a présomption de faute contre la personne responsable."

The idea of fault then is underlying the whole law of delictual responsibility in Quebec—and generally speaking damage caused by fault, actual or presumed, is actionable—but apparently there is no such general principle in the common law of torts.

² *Watson v. Scott*, [1922] A.C. 555.

³ [1920] A.C., 662.

⁴ *Traité de la responsabilité*, T.2, p. 8.

In Excursus A of the 14th Edition of Pollock's Law of Torts, Mr. Landon seems to show conclusively that to succeed in an action in tort, it is necessary, so he writes, "to bring the facts which he (the plaintiff) alleges within a recognized head of tort". . . and further "the truth is, and we can face it with equanimity, that the law of torts is just what Pollock declared it could not be, a mere enumeration of actionable injuries. . . only that harm which falls within one of the specified categories of wrongdoing entitles the person aggrieved to a legal remedy. The categories of tort are closed" whereas in our system and with our principles, new categories of tort may be recognized by our courts as new circumstances may demand, provided there be damage, fault and causal relation!

But what is fault or when is one at fault. Fault has been defined "*un manquement à une obligation pré-existante*", which hardly helps since one will naturally ask when is there a preexisting obligation and a failure to fulfil it in matters of delicts and quasi-delicts. A better definition is to be found in an essay by G. V. V. Nicholls,⁵ of the Bar of Montreal: "A fault is a mode of behaviour on the part of a person, capable of realizing the nature and consequences of his act or omission, that is contrary to an express provision of law or that fails to measure up to the standard of care required by the courts in similar circumstances." The Code contains no definition of fault save that it often gives as a criterion "*la conduite d'un bon père de famille*" and surely it would also apply to the measurement of care.

One will have noticed that under the Quebec law, infants and lunatics are not liable in tort since they are not capable of discerning right from wrong. I take it that under the common law, infancy and lunacy are not defences as a rule.⁶ Minors, out of infancy, are however responsible in Quebec for their offences and quasi-offences, that is when capable of discerning.

The measure of damages in an action based on an offence or quasi-offence is to be found in articles 1073, 1074, and 1075 of the Code, that is to say, the measure of damages in tort is the same as that in contract, and for that matter as in any obligation arising from any source. The reason is that at the outset of title third of the Code, of obligations, article 983 gives the sources of obligations as including offences and quasi-offences and the different rules of the title, saving exceptions, apply to all obligations.

⁵ The responsibility for offences and quasi-offences under the law of Quebec, p. 22.

⁶ Pollock, *Law of Torts*, pp. 48, 49.

1073. The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived: subject to the exceptions and modifications contained in the following articles of this section.

1074. The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

1075. In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution.

Under the above sections, more extensive damages may be granted in the case of fraud; whether or not there is fraud, damages claimed must be the immediate and direct consequence of the offence of the debtor, but in case of fraud, the defendant is also liable for damages which might have been foreseen though I confess, that in practice, one hears little of the difference between foreseen and unforeseen damages, direct and immediate damage being usually of a nature to be easily foreseen.

The English rule as to remoteness of damage in torts appears to be equivalent or at least analogous,⁷ if we except the case of fraud, but there is a marked difference when we come to consider contributory negligence. At common law, in general, a plaintiff guilty of contributory negligence is debarred from any action,⁸ unless the defendant had the last opportunity of avoiding the accident in which case the plaintiff would recover for the whole. "The common law, reasonably or not, makes no provision for apportioning damages in such cases."⁹

In Quebec, on the contrary, our courts apportion damages as a matter of course, and in the concluding paragraph of the judgment in *Watson v. Scott*, of the Privy Council,¹⁰ we find the following acknowledgment of the difference between the two systems of law on that particular point:

"The law of Lower Canada,, unlike the law of England enjoins apportionment of the damage where there has been negligence of the plaintiff contributing to the accident."

Another difference formerly existed in the case of joint wrong-doers. Pollock states¹¹ that "where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage." In

⁷ Pollock, p. 24 and Salmond, *The Law of Torts*, (2nd ed.) p. 106.

⁸ Salmond, p. 32.

⁹ Pollock, p. 373 *et seq.*

¹⁰ [1920] A.C. 662.

¹¹ P. 159.

other words they are jointly and severally liable. In French, we say that "l'obligation est solidaire, il y a solidarité" and article 1106 is to the same effect.

1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

But as between joint wrong-doers themselves, according to the rule at common law, prior to the Law Reform Act of 1935, one tort-feasor who had been compelled to pay the whole damages had no right to indemnity or contribution from the others.¹²

Under the Code,

1117. The obligation contracted jointly and severally toward the creditor is divided of right among the codebtors who among themselves are obliged each for his own share and portion only.

So far, we have not analyzed article 1056 which was referred to as one of the basic sections of civil liability. It deals with special cases, where the person injured by the commission of an offence or quasi-offence dies in consequence, without having obtained satisfaction of damages, and provides that his consort and his ascendant and descendant relations have a right, within a year after his death to recover. If many persons have distinct claims, they must join in one action which is independent of criminal proceedings. In the case of duel, action may be brought against the author of death and against seconds and witnesses. The passing of Lord Campbell's Act seems to be the origin of these provisions and they are not in line with the general principles preceding them. Indeed, when article 1053 stipulates that damage caused to another, (in French, à autrui, the meaning of which is wider) is recoverable, article 1056 restricts the number or classes of persons who can recover in the case of the victim's death so that those not included have no redress even if they suffered direct and immediate damage that could have been foreseen.

Excepting the case of the injured party's death, it would seem that anybody suffering damage through the fault of another would have a good right of action against him, seeing the generality of the wording of article 1053, damage to another, dommage à autrui, but the question has led to considerable difference of opinion and is not settled. In the case of *Regent Taxi v. Les Frères Maristes*,¹³ it came up before the Supreme Court, and the decision, three judges to two, was to the effect that not only the

¹² Pollock, p. 160.

¹³ [1929] S.C.R. 650.

immediate victim, but any injured party would recover. The Privy Council however reversed the judgment, but on a question of prescription.

The limitation of actions of torts is determined by articles 2261 and 2262 of the Code, the general rule being in 2261, namely, actions for offences and quasi-offences are prescribed by two years, with a few exceptions, two of which are to be found in article 2262. In virtue of the latter article, actions for libel and slander are prescribed by one year, reckoning from the day it came to the knowledge of the aggrieved party—the general rule being that prescription runs from the date of commission of the act causing damage. Actions for bodily injuries are also prescribed by one year, but where death ensues the term is one year after death. Under the Statute of Limitations of James 1,¹⁴ I believe the limitation of actions of torts is generally longer, the rule being six years with two exceptions: injuries to the person are prescribed by four years and slander actionable per se by two years.

Finally under the Quebec Code of Procedure,¹⁵ a trial by jury may be had in all actions for the recovery of damages resulting from personal wrongs or from offences or quasi-offences against moveable property, provided the amount claimed exceeds one thousand dollars. The right to a jury trial has thus been limited in two ways, in respect of torts, generally by doing away with jury trial in all actions in which the amount claimed does not exceed one thousand dollars, and needless to say, by far the greater number of actions are for less than one thousand dollars; moreover, actions for wrongs that are not personal or against moveable property are not triable by jury.

It would be very important indeed to determine what are personal wrongs, but I am afraid a complete definition is not to be found in the numerous cases that have dealt with the point. They merely decide that a jury trial is or is not available in a particular case. The more so, since s. 4 of article 833 of the same Quebec Code of Procedure provides that coercive imprisonment is pronouncable against a person condemned by a judgment awarding damages of \$50.00 or more for personal wrongs. The right to jury trial in cases of torts and incidentally the freedom of the subject rests on whether or not a particular wrong comes within the legal meaning of the words personal wrongs, the meaning of which, in my opinion, has yet to be ascertained.

To sum up, there is under the Quebec law a common ground at the bottom of all liability in tort, namely, an action lies when-

¹⁴ James 1, c. 16.

¹⁵ Article 421 *et seq.*

ever damage is caused directly by fault. On the contrary in English law, to quote Salmond, 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. In either case there is no general principle of liability. There are a number of actionable wrongs in which fault is not an essential element, for instance actions on trespass, and in some cases, actions against infants and lunatics. Conversely, there might be cases of *damnum sine injuria*, unactionable wrong, where fault would be found and yet no legal remedy be given, as under the old law there was no remedy for seduction as such, "*nisi servitium amisit*."

On the other hand, though the principle of fault may import a wider measure of responsibility, and possibly supply a more adaptable instrument in view of the ever changing conditions of life, what I would call the secondary rules of liability, the rules particular to each tort or class of action, are by far more ascertained, determined or defined under the common law than under our Code. And also, they vary more from one tort to another, there are more distinctions and the law is more complex. Under the civil law, the courts apply the same few principles above mentioned, in all cases, from trespass to negligence and defamation.

Precedents of course are numerous in such an important branch of the law and though the rule of *stare decisis* may not be literally binding, our courts in practice will follow the decisions of tribunals of equal jurisdiction and from the accumulated experience, many a criterion has been arrived at or evolved in finding whether a man is at fault or is exculpated, but strictly speaking, each case is to be weighed according to its circumstances.

As must be observed, much is left to the appreciation of the judge, and in their estimation of fault and exculpation, our courts have naturally borrowed from French doctrine and precedents; there are however important differences between the two codes. But our courts have also taken after common law decisions; for instance one has to read but a few decisions in slander cases to meet such expressions as qualified or absolute privilege. Incidentally, it is interesting to note that even though under our law, libel is not actionable without proof of damage, punitive or nominal or exemplary damages are being granted by the courts when the plaintiff has not been able to prove pecuniary loss. I will not try and decide which system is using a roundabout way, but the result is much the same.

In the end, if we assume that codification is the putting together of scattered rules of law and the ascertaining of what precisely their extent may be, we come to this rather paradoxical result that our law of torts is hardly codified indeed, and that it is bound to be further judge-developed, but to use again the words of Mr. Landon, this also we can face with equanimity.

ARISTE BROSSARD.

Montreal.