CORRESPONDENCE

THE EDITOR,

CANADIAN BAR REVIEW.

I read with great interest the comment by Mr. Guy Favreau in the last number of the CANADIAN BAR REVIEW,[1] on the question of common fault under article 1056 C.C. in the case of actions taken by the widow or children against a defendant alleged to be responsible for the death of the husband or father.

This question has puzzled me very much and I must admit I do not see my way clear to its solution. I do not, however, think it is safe to accept *Lair* v. *Laporte* as settling our jurisprudence; Mr. Favreau suggests that it is well-founded in law. I am prepared to admit that it may be well founded in logic, but unfortunately the law is not logical; the rule *stare decisis* often leads to legal paradoxes.

In a large number of cases our courts have mulcted a widow or children for a part of the damage, in view of the common fault of a deceased husband or father. (See *Price* v. *Roy*, 29 S.C.R. 494; *Nichols* v. *Lefebvre*, 43 S.C.R. 403; *Grenier* v. *Wilson*, 32 S.C.R. 193; *C.P.R.* v. *Toupin*, 18 K.B. 557; *Ducharme* v. *C.P.R.*, 16 R. J. 27; *Johnson* v. *C.N.Q.R.* 80, 22 K.B. 63; *Caron* v. *St. Henry*, 9 S.C. 490, *Dalphond* v. *Hamel*, Demers, J., 8th May, 1944.)

A few weeks ago our Court of Appeals rendered judgment in *Bennett* v. *Morin;* defendant had been condemned to pay full damages to a father, arising out of the death of a child; he appealed, with the result that the court reduced the judgment by fifty per cent on account of the boy's contributory fault.

Apart from the two Ontario judgments referred to in (1943), 21 Can. Bar Rev. 416, see *Price* v. *B.C. Motor*, [1933] S.C.R. at 336 *ff.*, the remarks of Anglin C.J.C., approved in *Littley* v. *Brooks*, [1932] 2 D.L.R. 386; see also *Royal Trust Co.* v. *Toronto Transportation Commission*, [1935] S.C.R. 671; *Stuart* v. *Ottawa Electric Co.*, [1945] 4 D.L.R. 400.

In *Ryan* v. *Bardonnex*, 79 S.C. 266, McDougall J. agreed with Loranger J. in *Lair* v. *Laporte*. These are the only two judicial pronouncements to my knowledge in that sense.

In *Hunter* v. *Gingras*, 33 K.B. at 408, Lamothe C.J. points out that in Quebec, under article 1056, the courts apply the doctrine of common fault against the widow or children with the sanction of the Supreme Court and the Privy Council, whereas in Ontario the contrary is the rule. Since then, that province and several others have paid us the compliment of imitating our doctrine of common fault and have passed Contributory Negligence Acts, under which a number of judgments have been rendered, splitting the damages when the fault of the deceased victim contributed to his death.

I am quite frank to admit that I do not see any conclusive answer to the arguments that plaintiffs should not be affected by the common fault

[1] (1946), 24 Can. Bar Rev. 153.

of the *de cujus*, seeing that the action is personal to them and does not form part of his succession. The relevant statute, however, based on Lord Campbell's Act, was introduced into our law in 1846 and for very many years now our courts have applied to it our doctrine of common fault.

Errol McDougall J. in a recent decision (*Savard* v. *The King*, [1944] K.B. 341) repeated his views in remarks which he stated were *obiter dicta*, as they were not necessary for the decision of the case; he pointed out that the decision would have to be met squarely in the future. Apparently this has been done since then, in *Bennett* v. *Morin*, in which both the judges and the parties seem to have accepted the postulatum that, if common fault was established against plaintiff's child, the damages accorded the father would necessarily have to be reduced.

I think I am right in suggesting that the entire doctrine of common fault is an outstanding example of judge-made law, not based, to my knowledge, on any specific text.

In 5 Mignault, at p. 383, the learned author points out that some judgments began by applying the common law doctrine, in virtue of which any contributory fault of the victim was a ground for dismissal of the action. He continues by stating that after considerable hesitation the jurisprudence was definitely settled by the Supreme Court in 1899, in *Price* v. *Roy*, where that tribunal for the first time ruled that the damages must be mitigated in the case of common fault; as it happened, that action was one arising out of the death of plaintiff's husband. Mignault evidently approves and accepts the rule so laid down, which has been applied in numerous cases in the last forty-seven years. This means that it is based on exactly the same authority as the principle of common fault, as applied when the victim himself is the plaintiff. In other words, both doctrines are instances of judge-made law.

F. J. LAVERTY.

Montreal.

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THE EDITOR,

CANADIAN BAR REVIEW.

With due respect I would not be inclined to accept the statement of Mr. Laverty that, in the Province of Quebec, the question of the application of the doctrine of common fault in an action under article 1056 by the widow or the children of the deceased is an instance of judge-made law. The doctrine of *stare decisis* does not apply as such in Quebec, in view of the existence of the Civil Code, and I do not think that in Quebec jurisprudence has any more binding power than in France. It should at most serve as a *ratio decidendi;* but, even then, the decision relied upon must be justified by sound and acceptable reasons for judgment. As our Mr. Perrault put it in *La Revue du Barreau* (November, 1942, page 430) :

> Dans le droit québécois cet argument basé sur les décisions antérieures est le plus faible, à moins que l'on ne retrouve dans ces jugements des raisons d'ordre juridique à l'appui de la théorie discutée.

Therefore, under our system, if a theory is "logically" derived from established principles, it should be considered as the juridical solution of a problem in preference to a judgment unjustified by logic studied in the light of the Code.

If the recourse under article 1056 of the Civil Code is to be considered as essentially personal to those mentioned in the article and distinct from the succession of the deceased, then both the deceased and the defendant, being third parties as far as the plaintiffs are concerned, have participated in causing the damage for which an indemnity is being claimed. Thus article 1106 C.C. must be given effect to as against each of them or their succession :

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

If the victim is at fault together with the defendant, the latter, if sued alone, must be condemned to the whole amount of the damages suffered by third parties suing under 1056, in accordance with the principles of joint and several liability as if he were sued with the victim.

I do not believe that any of the decisions quoted by Mr. Laverty in his letter has specifically dealt with the subject, or that any reason based on our law has been advanced for applying the principle of common fault against persons claiming under article 1056. For instance, I have read the notes of the judges of our Court of Appeal in the case of *Bennett* v. *Morin*: the postulatum that the damages would have to be reduced in an action under article 1056, if common fault of the deceased were established, was not accepted as such by the court. As a matter of fact, the whole discussion turned around a question of fact and it does not seem to have occurred to the court that any question under article 1056 could be raised by the case, probably because of the consent of the respondents to accept a reduction in their claim should the court find that there had been fault on the part of the victim.

As far as *Hunter* v. *Gingras* (33 K.B. 403) is concerned, it does not appear clearly that the opinion expressed by Lamothe C.J. at page 408 applies to the theory of common fault under article 1056. If it does, it would in any case be purely *obiter*; the case not resting at all on the question of common fault, but only on that of "moral prejudice". At page 407 the learned judge said that, even if the damages claimed by appellant would not be granted by English courts under Lord Campbell's Act, it could not be argued validly, although our article is derived from Lord Campbell's Act, that such a claim is also to be denied in Quebec. He went on to give examples where, even under the same federal statute, the application and consequences could very well be different in Quebec and in Ontario :

> La loi fédérale des chemins de fer, par exemple, s'applique aux deux provinces. C'est une loi unique. Cependant, dans la province de Québec, en cas de mort causée par accident, nous appliquons, avec la sanction de la Court Suprême et du Conseil Privé, la doctrine de la faute commune ou de la négligence contributoire, — alors que, dans la province d'Ontario, on n'applique pas cette doctrine. Ainsi, si la victime a été partiellement en faute, l'action en indemnité pourra être totalement rejetée dans Ontario, pendant que, dans la province

de Québec, la Compagnie de chemin de fer sera tenue responsable d'une partie des dommages. Cette différence d'application est constante.

To my mind, this meant only that, as the law stood at the time, an action under the Railway Act must be dismissed in Ontario if there has been fault on the part of the victim, but that it could be partially maintained in Quebec in proportion to the fault of the other party. So, in like manner, the application of article 1056 in the Province of Quebec might be different from that of the Fatal Accidents Act in Ontario, if the other principles governing the case are not the same in both provinces.

On the whole, and until the jurisprudence on the matter is definitely settled by a reasoned judgment of at least the Court of Appeal, I believe that the decision of Loranger J. in *Lair* v. *Laporte* should be regarded as sound in law and should be accepted, together with *Ryan* v. *Bardonnex*, which Mr. Laverty quotes. I must add, however, that I have only today learned that a decision has recently been rendered in Quebec, by Mr. Justice Laliberté, in which he has applied the doctrine of the common fault of the victim as against persons claiming under article 1056. It may be that new reasons are given, but I have not yet had an opportunity of reading the judgment.

In any event, I agree that Mr. Justice Errol McDougall is right in the passage referred to in Mr. Laverty's letter and that, once and for all, the question should be met squarely by a higher tribunal.

GUY FAVREAU.

Montreal.