CORRESPONDENCE

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Common Fault and Article 1056 C. C.

In the Canadian Bar Review for February 1946, at page 153, was published an interesting comment by Mr. Guy Favreau concerning the contributory negligence of the victim who dies in consequence of an accident and its effects on the claim provided by article 1056 of the Quebec Civil Code. On the basis of past jurisprudence, Mr. F. J. Laverty wrote a letter in which he disagreed with Mr. Favreau; this letter was published in your March number with Mr. Favreau's answer.

May I also join in the discussion? I concur with Mr. Laverty but I intend to rely on the articles of our Civil Code.

Article 1056 C.C. reads in part as follows:

> "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death."

The main principle that Mr. Favreau presented, in full agreement with the decision in *Lair* v. *Laporte*, may be summed up in this way.

The claimants under article 1056 C.C. exercise rights personal to themselves and foreign to the victim's estate; the contributory negligence of the victim cannot be invoked against them in order to reduce the amount of their claim, unless they are also heirs of the victim; if they are independent of the victim's estate, the person responsible for the accident must pay the claim in full, even though the fault of the victim contributed to the accident; after paying the full claim, this person responsible may then claim reimbursement from the victim's estate in proportion to the victim's share of contributory negligence. With all respect, I cannot admit that this doctrine is well founded. Yet I must in sincerity cite another decision in its favour: the decision rendered by Mr. Justice Errol McDougall in the case of *Ryan* v. *Bardonnex* (1941), 79 S.C. 266, and I cite from page 267:

> "The Plaintiff's action rests upon the provisions of Art. 1056 C.C. and is entirely personal to her. It is thus inappropriate for the defendant to urge through counsel that, even if the defendant is to be held liable, the claim must be reduced because of the alleged contributory fault of the deceased, presumably in being intoxicated and unable to look after himself. It is a matter of indifference to the Court that the plaintiff's late husband may have contributed (though the fact is not proved) to the fault which brought about the accident, since the liability of joint tort feasors is joint and several (C.C. 1106): (*G.T.R.* v. *McDonald*) and the plaintiff's action does not arise in a representative capacity but is independent of any claim which the deceased might have had."

It will not be overlooked that in both these cases there was in fact no proof of the contributory negligence of the victim; so that the interpreta-

tions placed by these decisions on article 1056 where there is contributory negligence of the victim are *obiter dicta*. Nevertheless, they represent a reasoned statement of the doctrine and that is our concern here.

The author of the comment maintained by examples that if this doctrine were not followed, then hardship would result under article 1056 in certain instances. But I suggest that such cases of hardship are inherent possibilities of the doctrine of freedom of willing and throw no light on article 1056, because examples of hardship may be multiplied on both sides. They merely illustrate the wisdom of the warning that hard cases make bad law.

Briefly, I maintain that this doctrine results from an erroneous interpretation of the Quebec law on joint and several liability. The relevant articles of our Civil Code are these:

> *Article 1103*
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> "There is a joint and several obligation on the part of the codebtors when they are all obliged to the same thing, in such manner that each of them singly may be compelled to the performance of the whole obligation, and that the performance by one discharges the others toward the creditor."
>
> *Article 1105*
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> "An obligation is not presumed to be joint and several; it must be expressly declared to be so.
>
> "This rule does not prevail in cases where a joint and several obligation arises of right by virtue of some provision of law;
> "Nor is it applicable to commercial transactions, in which the obligation is presumed to be joint and several, except in cases otherwise regulated by special laws."
>
> *Article 1106*
>
> "The obligation arising from the common offence or quasi-offence of two or more persons is joint and several."

I admit immediately that the claim created by article 1056 C.C. in favour of the victim's family is personal and does not flow from the victim's estate. (It is interesting to note, however, that the claim is not absolutely independent of the victim's estate because it depends on the condition that the victim's estate has not been indemnified.)

1. The first principle which I advance is that debts normally are not joint and several. The law itself stipulates that an obligation is not presumed to be joint and several: article 1105 C.C.

Were it not then for a special text providing for the joint and several liability of two persons committing one main offence, each one of them would only be responsible for his share in the damages arising from his contribution to the damaging act. There are several cases where there is no joint and several liability between two parties contributing to delictual damages. For example, when the damages are the result of an accident caused by distinct and independent acts of negligence which were committed successively, each party in such cases is condemned only to his share. One of a number of cases supporting this statement is *Jeannotte* v. *Couillard* (1894), 3 Q.B. 461. The same principle is admitted by the

Supreme Court in the case of the *Grand Trunk Railway Co.* v. *McDonald* (1918), 57 S.C.R. 268, but it is distinguished and declared not applicable.

So I say that it is well established in our law that one person is only obliged to pay his own share of a debt and can be forced to pay the debt in full only if joint and several liability, which is exceptional and not to be presumed, is applicable to the case.

2. As my second point, I question if there is any joint and several liability of a defendant with the victim of an accident in favour of the claimants proceeding under article 1056 C.C. Joint and several liability cannot exist unless there be two debtors owing the same debt to the same creditor. The definition of joint and several liability under article 1103 C.C. is to that effect, and article 1106 C.C. refers to "the obligation arising from the common offence". Thus there must be two debtors bound by the same obligation to a creditor who has the right to proceed indifferently against one or the other, or either's estate.

But it has never been established in our law to my knowledge that the victim who died from an accident partially caused by his own fault has incurred any debt or obligation toward the creditors mentioned in article 1056 C.C. These creditors are entitled to damages from the other party who partially caused the death of the victim. But does the victim or his estate owe anything to those mentioned in article 1056 who suffer loss on account of his death?

Article 1056 C.C. creates an exceptional right which otherwise would not exist. Normally it is the victim who can claim the damages suffered. By article 1056 C.C. a special right belonging to persons other than the victim or his estate has been created and that right is limited to the consort, ascendant and descendant relations of the victim. But I would not be prepared to propose that this article creates a right of action in their favour against the victim or his estate.

Yet it would have to be clearly shown that the fact of the victim dying through some share of negligence on his part creates an obligation toward those who could expect some benefit out of his activities, before joint and several liability can be maintained under article 1056 C.C. In other words, it must be established that there is a legal obligation on the part of a father to live, so that his wife and ascendants and descendants may reap whatever benefits they expect.

Therefore my second proposition is that since it is not established that the victim or his estate can be sued by the claimants under article 1056 C.C., then the other party responsible for the accident, against whom the claimants can proceed, cannot be jointly and severally liable with the victim's estate.

3. My third and last point follows from the two previous ones. If there is no joint and several liability between the victim and the other author of the accident, the latter is not responsible for the full claim of the victim's family but only for his share, and he is justified in invoking the contributory negligence of the victim to limit his share of the damages.

The Supreme Court of Canada and our Quebec courts have several times divided the damages because of the contributory negligence of the victim in claims under article 1056 C.C. I do not believe that the problem was discussed as it is now but it would seem that the principle was

applied as if indisputable. In *Price* v. *Roy* (1899), 29 S.C.R. 494, the court divides the damages and Girouard J. at page 497 adds (I translate):

> "The appellant was certainly at fault in authorizing such work, and so was the victim in exposing his life. It is therefore a case of common fault and of dividing the damages suffered according to that most equitable *do trine* in Quebec jurisprudence."

The damages were also divided in the following cases:

Grenier v. *Watson* (1907), 32 S.C. 193;

Dame Simard v. *Port Alfred Pulp and Paper* (1932), 38 R.L. n.s. 465;

Séguin v. *Montreal Tramways Company* (1915), 21 R.L. n.s. 235.

In *Grand Trunk Railway Co.* v. *McDonald*, above cited, the Supreme Court, *de facto* admitting that the common fault of the victim may have some bearing and can be opposed to the claim under article 1056 C.C., discussed the facts to find out whether the victim was guilty of contributory negligence but finally decided that the victim did not commit any fault.

LAURENT E. BÉLANGER

Montreal

BUILDING MEN

Progress in engineering has come largely from improved metals; the maker of an aeroplane or an automobile knows that success depends on the quality of his materials as well as on his manufacturing technique. Equally, progress in politics and life depends on getting improved human material—men who will keep the laws and covenants which are so easy to construct. The makers of states have yet to realize this, or at any rate to act as if they did. Innumerable books have been recently written about the future of the world and the problem of peace; they have discussed every conceivable economic and political project; but how many of them have shown any perception of the obvious truth that human character is the most important element in the problem, or devoted any thought to the question of its improvement? (From "Education and the Training of Character" by Sir Richard Livingstone in the July 1946 number of The Atlantic Monthly)