DELICTS AND QUASI-DELICTS: 1923-1947

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In 1929 the late Chief Justice Anglin observed that "on the principle enunciated in articles 1053-4-5 C.C. depends practically the whole law of torts in Quebec".[1] A vast and ever-increasing quantity of jurisprudence has grown up around those few articles of the Quebec Civil Code which, in general terms, set forth the fundamentals of the law of delicts and quasi-delicts. To say that the law on this subject is codified may be correct technically speaking, but for practical purposes the articles are regarded rather as the basic provisions upon which the rules and principles of the jurisprudence are founded. In addition to articles 1053, 1054 and 1055, there are articles 1056, 1056a and 1056b,[2] and numerous special cases of responsibility such as those created by the Municipal Code, the Workmen's Compensation Act, the Cities and Towns Act, the Motor Vehicles Act and other statutes outside the scope of this discussion.

Since it would be impossible to treat the whole subject of delicts and quasi-delicts in any one article, the writer has selected seven important topics and, without any pretence to exhaustiveness, has endeavoured to discuss them from a practical point of view. They are (1) interpretation of article 1053, (2) responsibility for "things" under article 1054, (3) common fault and *volenti non fit injuria*, (4) joint and several responsibility under article 1106, (5) responsibility of masters and employers under article 1054, (6) damages resulting from death (article 1056), (7) presumption of fault under section 53(2) of the Motor Vehicles Act. The frequent references to jurisprudence and

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[1] *Regent Taxi and Transport Company Limited* v. *La Congrégation des Petits Frères de Marie*, [1929] S.C.R. 650, at p. 655.

[2] *Article 1055* creates a presumption of fault against owners and users of animals for damages caused by them, and against proprietors of buildings for damages caused by their ruin when due to want of repairs or to an original defect in construction. *Article 1056a*, as amended in 1941, provides that "no recourse provided for under the provisions of this chapter shall lie, in the case of an accident contemplated by the Workmen's Compensation Act, 1931, except to the extent permitted by such act". The first paragraph of *article 1056b*, which dates from 1935, provides in part that, saving the provisions of the Bar Act, "in recovering any indemnity exigible under this Chapter Third, no mandatory or intermediary can receive as remuneration, or cause to be transferred to himself as collateral security or otherwise, the indemnity, in whole or in part, which the person injured or his representatives may claim, or in any way acquire any personal interest in the amount of such indemnity". The last paragraph of article 1056b, which was added in 1939, provides that "in the case of a recourse in damages for bodily injuries, the releases and settlements and the written declarations obtained, within fifteen days after the date of the offence or quasi-offence, from the person injured, cannot be set up against him if he suffer harm thereby".

the notes of amendments will provide a fair indication of developments over the past twenty-five years. In general, but subject to notable exceptions, it may be said that the tendency towards extending responsibility has persisted, and that the extension has been due to judicial interpretation and not to statutory amendment. That this has been possible is due to the liberal language used in the articles and a jurisprudential system unfettered by the rule of *stare decisis*.

Interpretation of Article 1053 C.C.

The general rule of responsibility for delicts and quasi-delicts is contained in one short provision of the Civil Code, namely article 1053. It reads as follows:

> 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.

Under that article the burden of proving the fault or negligence complained of lies upon the plaintiff. This rule as to onus of proof, which provides a safeguard against undue extension of responsibility,[3] is not applicable in certain exceptional cases, some of which are considered later.

A mistake which recurs from time to time is to apply irrelevant common-law doctrines to actions under this article. The rule is that English decisions can be of value in Quebec civil cases only when it first has been ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given like scope in their application, and, even then, not as binding authorities but rather as *rationes scriptae*.[4] What may result from failure to follow that rule is illustrated by the recent case of *Drapeau* v. *Gagné*.[5] The plaintiff, after visiting an employee at the defendant's hotel, slipped and sustained injury while leaving the premises by a steep and slippery stairway. Applying the English common law, the trial judge dismissed the action, holding that as the plaintiff was a licensee the defendant's only obligation was not to expose

[3] Referring to a general tendency to extend responsibility, Nicholls in his admirable book, Offences and Quasi-Offences in Quebec, refers at p. 136 to "the new realization of the potentialities of the theory of 'abuse of rights'" and on pp. 23 ff. he discusses that theory at some length. See also an excellent article on the same subject by the late Mignault J. in (1927), 5 Can. Bar Rev. 1, at pp. 10ff. Because actions of this nature are governed by article 1053, the burden is upon the plaintiff to prove fault and therein should lie the protection against undue extension of responsibility in this field.

[4] *Curley* v. *Latreille* (1919), 60 S.C.R. 131.

[5] [1945] K.B. 303.

her to the danger of a hidden trap. This decision was reversed unanimously by the Court of Appeal, which cited with approval the remarks of Anglin J. in *Desrosiers* v. *The King:*

> This case affords an excellent illustration of the danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law.[6]

Likewise, extreme caution should be exercised in applying judgments of the Supreme Court based upon the laws of other provinces.[7]

The interpretation applied to the word *another* in article 1053 is of considerable consequence. In 1929, in what is commonly known as the *Regent Taxi* case,[8] the question arose as to whether the word should be limited in application to the immediate victim of an accident or whether a direct and distinct right of action also arose in favour of others who had been affected prejudicially as a result of the injury suffered by him. Anglin C.J.C., Lamont and Smith JJ. in the Supreme Court took the latter view, Mignault and Rinfret JJ. dissenting. In the Privy Council it was considered unnecessary to decide the point since the appeal was maintained on the ground of prescription. The majority judgment of the Supreme Court holds true today, from which it follows that the word "another" includes anyone who has suffered damage as an immediate and direct consequence of the defendant's fault. The effect of this ruling is far-reaching. For example, the husband of a woman injured in an accident caused by the defendant's fault may, in certain circumstances, recover damages for loss of his wife's services and companionship due to the injury, notwithstanding the fact that the wife in a separate action has recovered damages from the same defendant as a result of the same accident.[9] It goes without saying, however, that the damages cannot be duplicated, and when the wife already has been compensated for her personal injuries, the court should examine the judgment to ascertain what, if any, influence it should have on the damages to be awarded to the husband.[10] On the same basis it has been held that an insurance company, after paying its insured the amount of an accident loss, may sue the party responsible in its own name, whether or not it has been subrogated.[11]

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[6] (1919), 60 S.C.R. 105, at p. 119.

[7] *Blair* v. *Berry* (1937), 76 C.S. 189, at p. 192.

[8] *Regent Taxi and Transport Company, Limited* v. *La Congrégation des Petits Frères de Marie, etc.*, [1929] S.C.R. 650; [1932] A.C. 295.

[9] *Jacques* v. *Goldberg*, C.S. 158473 (1937, unreported); *Lister* v. *McAnulty*, [1944] S.C.R. 317: *n.b.* the headnote in the report is incorrect.

[10] *Hôpital du St-Sacrement* v. *Roberge* (1939), 68 K.B. 186.

[11] *E.g.*, *Hébert* v. *Rose* (1935), 58 K.B. 459, at p. 461.

In 1933 the Supreme Court applied a further important interpretation to the word "another". A child was born with club-feet allegedly brought about by an accident to its mother two months before birth. It was held that when the child subsequently was born alive and viable it was clothed with all the rights of action it would have enjoyed if actually in existence at the date of the accident, and that being an existing person in the eyes of the law, it came within the meaning of "another" in the article.[12]

There has been some discussion as to the age at which a child should be considered "capable of discerning right from wrong". Although not strictly applicable, the civil courts have borrowed the criminal law rule that no person under seven years of age shall be convicted of a crime.[13] In the cases of slightly older children consideration should be given both to age and degree of intelligence. In one instance a boy of eleven was found to have less intelligence than a boy of seven and, therefore, was held incapable of contributory negligence.[14] In other cases normal children of nine and ten have been held responsible for their shares of negligence, although in lesser proportions than if they were adults.[15]

The rule has been stated and repeated quite recently that "*neglect* may, in law, be considered a fault only if it corresponds with a duty to act".[16] In accident cases it has been held that to take no precautions is negligence if the possibility of danger emerging is reasonably apparent; but "if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".[17] The word *skill* in the article means reasonable and average skill.[18]

The scope of article 1053 is such that, as Dorion J. remarked in 1924, "there is no necessity for a law on each and every fault a man may commit, because article 1053 provides for all faults".[19] Laws in one form or another continue to accumulate, but except

[12] *Mtl. Tramways Co.* v. *Léveillé*, [1933] 4 D.L.R. 337.
[13] *E.g., Bouvier* v. *Fee*, [1932] S.C.R. 118; *Lattereur* v. *City of Mtl.* (1934), 72 C.S. 180.
[14] *Harnois* v. *Sansregret* (1937), 44 R.J. 19.
[15] *E.g., Lauzon* v. *Lehouillier*, [1944] R.L. n. s. 449; *Laperrière* v. *The King*, [1946] 1 D.L.R. 431.
[16] *Drapeau* v. *Gagné, op. cit.*, at p. 306; *C. N. R.* v. *Lepage*, [1927] S.C.R. 575, at p. 578.
[17] *Zakaib* v. *Mtl. Tramways Co.* (1939), 71 K.B. 50 (affirmed by S.C.C. November 1st, 1939) citing *Fardon* v. *Harcourt-Rivington* (1932), 48 T.L.R. 215, at p. 216.
[18] *Henderson* v. *Rosen* (1937), 76 C.S. 1.
[19] *Giroux* v. *Wright* (1924), 38 K.B. 466, at p. 471.

when they derogate from the general rule of responsibility article 1053 remains in force and effect. For instance, both the Motor Vehicles Act and the city by-laws contain regulations governing the conduct of motor vehicles at intersections. Yet in the event of a collision between two such vehicles the juridical basis upon which the action should be decided is article 1053.[20]

Responsibility for "things" under Article 1054 C.C.

Article 1054 provides in part:

> He is responsible not only for the damage caused by his own fault, but also for that caused . . . by things which he has under his care.
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> The responsibility attaches . . . only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

The liability for the damage caused by things affords a good example of the extension of responsibility. For many years [21] the law was settled that upon proof by a plaintiff that his damages were caused by a thing under the defendant's care a presumption arose that such damages were imputable to the defendant's fault. In that event the defendant was responsible unless he could exculpate himself. However, in 1920 (in the *Vandry* case [22]) the Privy Council placed a new interpretation on article 1054, holding that such proof by the plaintiff does not raise a mere presumption of fault but establishes a *liability* unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. In delivering that opinion Lord Sumner observed that there is a difference "slight in fact but clear in law" between a rebuttable presumption of fault and a liability defeasible by proof of inability to prevent the damage. In 1922 (in the *Watt & Scott* case [23]) the Privy Council reasserted its earlier opinion and completed its interpretation by adding that "unable to prevent the damage complained of" means "unable by reasonable means", *i.e.* the words do not denote an absolute inability.[24]

Following those two Privy Council decisions unsuccessful attempts were made to extend the article to cover damage caused

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[20] *Rudnitsky* v. *Dickman*, [1943] C.S. 269, *per* Tyndale J. at p. 270.

[21] Following the decision in *The Shawinigan Carbide Co.* v. *Doucet* (1909), 42 S.C.R. 281. Originally the victim of an accident caused by a machine could recover only on proof of fault. But with the development of mechanical devices it became obvious that such proof often was impossible and that a change in the law was indicated.

[22] *Que. Ry. L. H. & P. Co.* v. *Vandry*, [1920] A.C. 662.

[23] *City of Mtl.* v. *Watt & Scott Ltd.*, [1922] 2 A.C. 555.

[24] *Colpron* v. *C. N. R.*, [1934] S.C.R. 189.

by a thing while under somebody's direction. However, it is now settled that the liability arises only when the damage is caused by the thing itself and not when it results from the intervention of a human agency.[25] Contrary to earlier jurisprudence it is also clear that the liability arises notwithstanding the fact that the thing (*e.g.* a machine) was functioning normally at the time of the accident.[26] Moreover, the article has been held to apply to liquids, electricity and gas,[27] and even to immoveables.[28] In the latter case, however, the damage must be due to the immoveable itself and not to some intervening cause. For example, if a person slips and is injured on a wet station platform, which apart from the wetness is in good condition, the case is governed by article 1053 and not 1054.[29]

Not long ago it was common for a defendant, in pleading to an action of this kind, to deny liability and allege that the damage was due to some cause or causes unknown, for which the defendant was not responsible and which, by the exercise of reasonable precautions, he was unable to prevent. In view of the *Vandry* and *Watt & Scott* decisions, and the interpretations placed upon them, such a plea should no longer succeed. In *Carmiel* v. *Plotnick*[30] the rear wheel of the defendant's automobile suddenly became detached and, hurtling across the highway, struck the plaintiff's car, forcing it into the ditch and causing damage. E. McDougall J. held:

> The defendant who seeks to avoid liability under 1054 C.C. by invoking the exculpatory provision of the article, asserting that it was impossible for him to foresee or prevent the accident, *must first show precisely how the accident came about* and having done this, he may then argue that the facts show that he was unable to prevent the occurrence; otherwise, the action should be maintained.

Again, in *City of Montreal* v. *Lesage*[31] it was held that the defendant must not content itself with proving merely that the cause of the accident (the bursting of a pipe) was unknown; to escape liability it must offer *une preuve formelle et décisive.*

In short, the present law in the writer's submission is this: when damage is caused by a thing under the defendant's care,

[25] *Perusse* v. *Stafford*, [1928] S.C.R. 416; *Curley* v. *Latreille*, *op. cit.*
[26] *Can. Vickers Ltd.* v. *Smith*, [1923] S.C.R. 203.
[27] *E.g.*, *Jalbert* v. *Gorman*, [1942] C.S. 423; *Canada & Gulf Terminal Ry. Co.* v. *Levesque*, [1928] S.C.R. 340, at p. 363.
[28] *Potvin* v. *Gatineau Electric Co.* (1934), 57 K.B. 215, affirmed by the Privy Council, [1935] 4 D.L.R. 1; *Can. Int. Paper Co.* v. *Chenel* (1935), 59 K.B. 242, at p. 245; *Peck* v. *Corona Hotel Co.* (1940), 70 C.S. 107, at p. 116, affirmed by (1941), 71 K.B. 403.
[29] *E.g.*, *Wilson* v. *C. P. R.* (1937), 75 C.S. 510.
[30] (1935), 73 C.S. 517. The italics are the writer's.
[31] [1923] S.C.R. 355, *per* Brodeur J. at p. 360.

direct liability is created independently of any allegation or proof of fault. To escape that liability, the defendant must first show how that damage was brought about and, in order to bring the exculpatory clause into play, must prove that the act which caused that damage was one which he was unable by reasonable means to prevent. However, the first step is up to the plaintiff, the burden being upon him to prove (a) that the damage was in fact caused by the thing in question within the meaning of article 1054, and (b) that that thing was at the time under the defendant's care.[32] It follows that in order to comply with the terms of article 110 of the Code of Civil Procedure the defendant should include in his plea an allegation as to how the damage occurred.

The common law doctrine of *res ipsa loquitur* is referred to frequently as the equivalent of the liability for things under article 1054 C.C. It is true that the two are similar in many sets of circumstances, but they are by no means identical and the common law jurisprudence on this question must be handled with caution. In the same connection, it should be noted that there are important differences between Quebec law and the corresponding article 1384 of the Code Napoléon in France.[33]

Common Fault and Volenti Non Fit Injuria

The term "common fault" has long been a target for criticism, but it is the application rather than the unfortunate name of the doctrine which deserves attention. In *C. P. R.* v. *Fréchette*,[34] Lord Atkinson pointed out that contributory negligence can properly be applied only when the parties are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. Since that time there has been a tendency to seek the determining cause of the damage in cases where both parties are negligent, that is, to distinguish between the *causa causans* and the *sine qua non*.[35] However, there is still room for improvement. In *Tardiff* v. *Croteau*, E. McDougall J. commented:

> To follow the line of least resistance by finding contributory negligence, unless it is clearly imposed by the facts, would seem to me to do violence to notions of scientific judicial reasoning.[36]

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[32] *Lacombe* v. *Power et al.*, [1928] S.C.R. 409; *Canada & Gulf Terminal Ry. Co.* v. *Levesque*, *op. cit.*, at p. 362.

[33] *E.g.*, see *Ménard* v. *Que. R. L. & P. Co.* (1929), 46 K.B. 1, *per* Rivard J. at p. 4; and see Goldenberg, The Law of Delicts, pp. 91, 97-8.

[34] [1915] A.C. 871.

[35] *E.g.*, *C. N. R.* v. *Montpetit*, [1925] 4 D.L.R. 151; *C. N. R.* v. *Lepage*, [1927] S.C.R. 575; *Wilson* v. *C. P. R.* (1937), 75 C.S. 510; *James* v. *Ayres*, [1944] C.S. 95.

[36] (1941), 47 R.L. n.s. 459, at p. 480.

In another case the trial judge said in part:

> As a rule, I would say that in nine cases out of ten, there is no such thing as a common fault; there is generally one determining fault that causes the accident, and the other is not a contributing fault in the sense of the law. I might say with due respect to my fellow judges that the common fault is often an easy way to decide a doubtful case.[37]

That statement is not without some foundation, but as it was a part of the judge's charge to the jury it is not surprising that the Appeal Court ordered a new trial.

Various tests have been proposed to determine common fault, but as each case must be considered as a *cause d'espèce*, no single test can be satisfactory. To use the words of Mignault J: "in no subject, perhaps, in the whole realm of jurisprudence is reference to cases which turn on particular facts more apt to prove delusive".[38] It should be recalled that the doctrine applies not only in actions under article 1053 C.C., but also in cases where a legal liability or presumption operates against the defendant. Its application in connection with article 1056 is considered later.

Recent cases have confirmed that to succeed on a plea of *volenti non fit injuria*, it must be established that the plaintiff freely and voluntarily, with full knowledge and realization of the risk he ran, impliedly agreed to incur it.[39] It is a mistake to treat *volenti non fit injuria* as the legal equipollent of *scienti non fit injuria*, but while knowledge is not in itself a conclusive defence, the circumstances of that knowledge may be such that no inference is open but one, namely that the risk has been voluntarily encountered. In that event, the defence would appear to be complete.[40] In addition to its common association with accidents to employees falling outside the scope of the Workmen's Compensation Act, the doctrine of *volenti non fit injuria* has a wide application. For instance, on the principle that spectators and players taking part in sports voluntarily assume the risks inherent in such pastimes, the plea has been raised successfully in several cases of accidents happening during the course of games.[41] It also has been raised, but with limited

[37] *Mtl. Tramways Co.* v. *Duperé* (1931), 50 K.B. 414, at p. 416.
[38] *C. P. R.* v. *Laporte*, [1924] S.C.R. 278, at p. 287.
[39] *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725; *Nolin* v. *Can. Vickers Ltd.* (1928), 34 R.J. 222, affirmed by K.B. and by S.C.C., [1930] 1 D.L.R. 71.
[40] See Lord Shaw in the *Letang* case (*op. cit.*) at p. 730.
[41] *Gervais* v. *Candn. Arena Co.* (1936), 74 C.S. 389; *Hennessey* v. *Park Tobogganing Club, Ltd.* (1934), 72 C.S. 385; *Maritzer* v. *Grégoire et al.*, [1945] K.B. 403, at p. 405.

success, in actions taken by injured gratuitous passengers against automobile owners and drivers.[42]

Joint and Several Responsibility (Article 1106 C.C.)

Under article 1106 C. C. an innocent party sustaining damage through the common offence or quasi-offence of two or more persons has a joint and several claim against each and all of them and is entitled to recover the full amount of his damages from any one of them. In 1918 the Supreme Court (distinguishing *Jeannotte* v. *Couillard*[43]) held that there may be joint and several responsibility of two different parties for the consequences of an accident caused by *independent* acts of negligence committed by both at the same time and contributing to that accident.[44] The same ruling was repeated by the same court in 1924 in *Napierville Junction R. R. Co.* v. *Dubois*[45] and has since been followed in many other decisions.[46] In a recent case[47] in which the defence placed the blame for some of the damage upon a third party, Archambault J. held that the defendant must show that the act of the third party was the sole cause of the damage and "that he himself had nothing whatever to do in the realization of the prejudice; if the evidence shows a prior fault or a concurrent fault or a subsequent fault of his own he cannot be exonerated from his responsibility". However, where there are two successive acts of negligence, care must be taken to determine the *causa causans* as distinct from the *sine qua non*. It often happens that the chain of causation between the damage and the primary wrongful act of one party is broken by a subsequent and intervening act of negligence of another party which brings about the damage. In that event, there is no joint and several liability; the wrongful act of the first party was the occasion but not the cause of the damage, whereas the negligence of the second party was the cause and not the occasion of the damage: the quasi-delicts are, therefore, severable.[48]

[42] *Leonard* v. *Valiquette* (1940), 46 R.J. 400; *Whitefield* v. *Gen. Acc. Ass. Co.* (1931), 50 K.B. 310; *Racine* v. *Huot* (1940), 78 C.S. 7; *Robert* v. *Boucher*, C.S. 164892 (1939, unrep't.); *Faucher* v. *Faucher* K.B. 2563 (1944, unrep't.). It should be recalled that, in Quebec, a driver is responsible for damages suffered by a gratuitous passenger in an accident caused by even a slight fault on the driver's part. It is to be hoped that this "passenger hazard" will be abolished before long.

[43] (1894), 3 Q. B. 461.

[44] *G. T. R. et al.* v. *McDonald* (1918), 57 S.C.R. 268.

[45] [1924] S.C.R. 375.

[46] *E.g.*, *Trepanier* v. *C. P. R.* (1925), 31 R.L. n.s. 119; *Langevin* v. *Beauchamp* (1928), 44 K.B. 569; *Brosseau* v. *Chartier et Marotte* (1929), 46 K.B. 479; *McLaughlin* v. *Labbé*, [1944] R.L. n.s. 321.

[47] *Longeway* v. *Charbonneau*, [1943] R.L. n.s. 571.

[48] *Voyer* v. *Joyal*, [1946] K.B. 752; *Tremblay* v. *Ribaud* (1938), 64 K.B. 68; *Beauchesne* v. *Roberge* [1943] K.B. 612.

Nor is article 1106 applicable to the case where delicts or quasi-delicts are committed successively by different and disconnected persons at different times and places.[49] Solidarity results from the impossibility of separating actions which take place simultaneously and *"qui y sont rattachées par des liens de cause à effet"*.[50] It is applicable, for example, to the case of joint owners of a property for damages caused by permitting a sidewalk to remain in a dangerous condition through want of repair.[51] Its application in cases under article 1056 C. C. is considered later.

While the obligation of tortfeasors in respect of negligence is joint and several as between them and the person injured, the damage as between themselves is apportionable.[52] Thus, where three parties are equally at fault but only one is sued, the latter may institute action against the other two to be indemnified to the extent of two-thirds of the quantum of damage. Such action may be taken in the form of a warranty action without awaiting the outcome of the principal suit [53] or, alternatively, an *action recursoire* may be instituted following the judgment condemning the principal defendant. It has been held on good authority that prescription of the right to take such an action begins to run only from the date of the principal judgment, and not from the date of the offence or quasi-offence.[54] In fact, it was held on one occasion that the *action recursoire* is not an action founded upon either delict or quasi-delict, but is an *action de gestion d'affaires* subject to a thirty year prescription.[55] The question of prescription in such cases is likely to be discussed at some length in *Montreal Tramways Co.* v. *Eversfield* now pending in the Court of King's Bench (Appeal Side).[56]

Responsibility of Masters and Employers (Article 1054 C.C.)

The concluding paragraph of article 1054 reads:

> 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.

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[49] *Corp. des Rélig. du Très St-Sacrement et al.* v. *City of Mtl.*, 39 Q.P.R. 368 (K.B., 1935).

[50] Brodeur J. in *G. T. R.* v. *McDonald, op. cit.*; see also Nicholls, *op. cit.*, p. 45.

[51] *Paquet* v. *Crépault et al.* (1939), 67 K.B. 381.

[52] *Legault* v. *Mtl. Terra-Cotta Co.* (1914), 20 D.L.R. 388 (C. of R.)

[53] *Can. Stewart Co. Ltd.* v. *Perih* (1921), 32 K.B. 157.

[54] *Robin, Jones & Whiteman Ltd.* v. *Francoeur*, [1945] Q. P. R. 289; *Robillard* v. *Jodoin* (1939), 43 Q. P. R. 1. See art. 2231 C. C. as to interruption of prescription, and art. 1156 C.C. as to legal subrogation.

[55] *Blais* v. *April*, C.S. 34447 (1934, unrep't.) Surveyer J.

[56] K.B. no. 2910.

We are reminded periodically that article 1054, being exceptional in character, should be confined strictly to cases in which the principle of vicarious liability permits of no doubt. That this rule has not been followed in many cases may be due to the absence of any universal test to determine with certainty whether or not a wrongful act was committed in the performance of the work for which a servant or workman was employed. To answer that question it is necessary to consider several rules and principles, some of which are of recent origin. They may be stated briefly as follows:

1. The damage must be something done in the execution of the servant's functions as servant, or in the performance of his work as servant: if the act done belongs to the kind of work which the servant is employed to perform or the class of things within the execution of his functions, then responsibility rests upon the employer.[57] Obviously therefore, each case of this nature is a *cause d'espèce* necessitating an examination of the contract and the relevant facts. In the *Vaillancourt* case [58] the manager of a remote trading post was clothed with special authority somewhat akin to the captain of a ship. In the circumstances a majority judgment of the Supreme Court held that while shooting an employee was an abuse of function, the manager was nevertheless in the performance of the work for which he was employed. On the other hand, where a bank employee, who was required to carry a revolver while accompanying a co-employee on trips to the clearing-house, took the revolver to his home contrary to instructions and during the evening shot and killed the plaintiff's son, the bank was exonerated. Although the revolver belonged to the bank, the employee was in no sense in the performance of his duty at the time of the shooting.[59]

2. However, mere disobedience of the master's orders does not relieve the employer from responsibility. There are prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within that sphere. A transgression of the latter class is simply an *abus des fonctions* and does not avoid the master's responsibility. A transgression of the former class implies that the employee has gone beyond his sphere.[60]

3. When an employee in the general service of one employer passes into the temporary service of another, the latter becomes

[57] *Gov. & Co. of Gentlemen Ad. of England* v. *Vaillancourt*, [1923] S.C.R. 414, *per* Duff J. at p. 416; *Morissette* v. *Lemieux et al.*, [1943] K.B. 602, at p. 609.
[58] *Op. cit.* Duff and Anglin JJ. dissented.
[59] *Sheehan* v. *Bank of Ottawa* (1923), 35 K.B. 432.
[60] *Plump* v. *Cobden Flour Mills*, [1914] A.C. 62; and see *Morissette* v. *Lemieux et al.*, *op. cit.*

the *patron momentané*, as distinct from the *patron habituel*, and is responsible for damage caused by the employee while in such temporary service.[61] The problem in any given case is to determine which employer exercises the legal right of effective control.[62] Payment is not everything; it is a circumstance pointing to the person who is the employer, but the real test is control.[63]

4. Effective control involves subordination of the employee to the employer — the retention by the latter of the power to supervise and control the work generally. This element of subordination is the principal factor in distinguishing between an employee and an independent contractor.[64] For example, when an automobile owner makes an agreement with a garage proprietor by which the latter is bound to take care of the car and to deliver it at his residence on demand, the owner is not responsible for an accident happening in the course of the delivery when the car is under the control of an employee of the garage. The contract in that instance is a lease of work (as distinguished from the hire of personal services) entered into with an independent contractor.[65] On the other hand, a car owner has been held responsible for damage done by a chauffeur supplied by a garage to drive the car for the owner's purposes.[66] In a recent case two professional wrestlers came to blows outside the ring, one maliciously kicking the other and precipitating him against a spectator.[67] The latter sued the organizers of the bout for damages for the personal injury he received, basing his action on article 1054. It was in evidence that the kick in question was in contravention of the rules and was deliberately administered by the wrestler McNab for the sole purpose of injuring his opponent. Agreeing with the other members of the court that the action should be dismissed, Barclay J. stated in part:

> There is no evidence that these wrestlers were under a contract of lease or hire of services. The evidence rather tends to establish that they were wrestlers who gave exhibitions wherever they were employed to do so by any organizer. They were experts in their own profession [sic], who retained independence of action, and were not under the complete direction of the organizers. . . . Even if it could be said

[61] *Bain* v. *Central Vt. Ry.*, [1921] A.C. 412.
[62] See Nicholls, *op. cit.*, p. 66.
[63] *Bain* v. *Central Vt. Ry.*, *op. cit.*
[64] See Howard J. in *Lambert* v. *Blanchette* (1925), 40 K.B. 370, at pp. 377-8, cited and approved in *Quebec Asbestos Corp.* v. *Couture*, [1929] S.C.R. 166, at p. 169; *Maritzer* v. *Grégoire et al.*, [1945] K.B. 403, at p. 414 (appeal by plaintiff to S.C.C. abandoned).
[65] *Automobile Owners Ass'n.* v. *Backer* (1928), 66 C.S. 559, *per* Bond J. at p. 562; affirmed by 47 K.B. 36.
[66] *Cannon* v. *Donnacona Paper Co. Ltd.* (1937), 75 C.S. 349 (reversed by K.B. but on another point).
[67] *Maritzer* v. *Grégoire et al.*, *op. cit.*

> that McNab was an employee of the defendants within the meaning of article 1054, I would agree with Mr. Justice St-Germain that what he did was not in the performance of the work for which he was employed.

The relationship of employer and employee may exist even in a case where the employee is free to work or not as he wishes; provided, however, that when he does work he is subject to his employer's orders, directions and control.[68]

5. Recent years have seen some far-reaching decisions as to responsibility of automobile dealers for the negligence of their commission salesmen while driving cars entrusted to them by the dealers. Such decisions are based upon the special nature of the contract whereby the employer in his own interest leaves to his employee the absolute discretion as to how the car is to be used. Thus, on the principle that a salesman is an ambulating advertisement liable at any moment to pick up a prospect, an employer has been held liable for his salesman's negligence while driving his employer's car on a personal visit to friends on a Sunday afternoon.[69]

6. Two further principles are of importance in automobile cases: (a) when an employee has the legal, continuous and uninterrupted possession of his employer's car, the burden is upon the latter to establish that at the moment of the accident his employee was not in the performance of his duties; (b) in the event of deviation from the regular route, the extent of such deviation should be taken into account.[70] A business trip may be converted into a pleasure trip and vice versa; but when a pleasure trip is sought to be changed into a business trip, there must be some evidence to denote a change of character or nature of the enterprise, something that will show the unmistakable use of the car for the owner's business purposes.[71] Thus, when a truck driver driving his employer's truck went on a pleasure trip after working hours and later decided to stop at a filling station to get gasoline for the next day's work, the deviation in route was held to be merely an incident during a trip undertaken entirely for the driver's benefit.[72]

Damages Resulting from Death (Article 1056 C.C.)

Article 1056 reads in part:

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[68] *Verochio* v. *Temiscouata Ry. Co.* (1941), 71 K.B. 311.
[69] *Garage Touchette Ltée.* v. *Casavant*, [1944] K.B. 117; and see *Jarry & Jarry* v. *Pelletier*, [1938] S.C.R. 296.
[70] *Moreau* v. *Labelle*, [1933] S.C.R. 201.
[71] *Dufresne* v. *Lefebvre Ltée.*, [1944] K.B. 573, at p. 578.
[72] *Roy* v. *Cons. Plate Glass Co. of Can. Ltd.*, [1945] K.B. 565.

> 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.
>
> . . . . . .
>
> In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.
>
> . . . . . .

Notwithstanding some confusion introduced by certain innovations in the jurisprudence, considerable progress has been made in the last twenty-five years in clarifying the law on this subject. The situation may be summarized as follows:

1. In 1930 the French version of article 1056 was amended by replacing the words *père, mère et enfants* by the words *ascendants et ses descendants*, thereby making the French version the same as the English.[73]

2. Being exceptional in nature, the article should be strictly interpreted and the right of action must be limited to the deceased's consort and his ascendant and descendant relations. Hence, the recourse is not open to a brother or sister, nor to the father or mother of an illegitimate child.[74]

3. As the right of action is personal and independent, the plaintiff is not bound by any agreement or contract made between the deceased and the tortfeasor purporting to waive any and all claims against the latter. It follows that no such agreement or contract can avail as a defence to the plaintiff's action.[75]

4. No damages are recoverable for mental anguish or *solatium doloris*, the right to recover being restricted to the pecuniary loss. This includes future loss, *e.g.* the natural and reasonable expectation of deriving future pecuniary benefit from a son,[76] but not remote damages such as legal and investigation expenses in connection with a coroner's inquest,[77] nor (in the

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[73] 20 Geo. V., c. 98.

[74] *Windsor Hotel Ltd.* v. *Stadnicka et al.* (1938), 64 K.B. 298; *Orrell* v. *Thackena*, [1942] K.B. 621.

[75] *E.g.*, see *Turgeon* v. *Que. Airways Ltd.* (1942), 48 R.J. 396 (inscribed in appeal and later settled); *Miller* v. *G. T. R.* (1906), 15 K.B. 118 (P.C.); *C. P. R.* v. *McGinn* (1921), 32 K.B. 468.

[76] *E.g.*, *Town of Mtl. West* v. *Hough*, [1931] S.C.R. 113, at p. 116; *Hunter* v. *Gingras* (1921), 33 K.B. 403, at p. 412.

[77] *McAthey* v. *Redpath* (1931), 69 C.S. 26; *Dupré et al.* v. *C. P. R.*, C.S. 213394 May 11th, 1943 (unrep't.).

case of a child's death) medical expenses for attendance on the plaintiff's wife.[78]

In *Lachance* v. *C. P. R.*[79] the Supreme Court held that with the exception of *solatium doloris*, the jury may take into consideration every other "disadvantage" which in the natural and ordinary course is attributable to the death and can fairly be appraised in money. On that basis it was held that a widow and children are entitled to compensation for the loss of a husband's services at home, of his assistance in managing the family resources, and of his care and protection of his wife and family. Similarly, it has been held that a widower is entitled to damages for the loss of his wife's companionship and for the loss of assistance she could reasonably have been expected to give him in the future.[80] However, an allegation claiming damages on behalf of minor children for material and moral loss due to their father's death is open to a partial inscription-in-law and the word "moral" should be struck out.[81] Likewise a widow cannot recover damages for deprivation of "comfort and affection" due to her husband's death, although she is justified in claiming for loss of his comradeship, attention and guidance.[82]

5. Until a few years ago there was a difference of opinion as to the effect of insurance benefits on damage awards. It was contended on the one hand that the tortfeasor should not be permitted to benefit by the wisdom and foresight of the victim in providing for insurance to which the tortfeasor never contributed. On the other hand, it was argued and generally held that account should be taken of the saving of premiums on a life policy, and of a policy stipulating a double indemnity in case of accidental death. The question was settled in 1942 by an important amendment to article 2468 C.C., to which was added the provision that "civil responsibility shall in no way be lessened or altered by the effect of insurance contracts".[83]

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[78] *Forget* v. *Taillon*, K.B. 2862 October 1946 (unrep't.); *Howard* v. *The King*, [1924] Ex. C.R. 143, at p. 147: see however, *Robichaud* v. *Foster* (1941), 45 Q. P. R. 183, where plaintiff himself suffered nervous shock as a result of his son's death. An exception was filed to that judgment and the action was later settled.

[79] (1909), 42 S.C.R. 205.

[80] *Lair* v. *Laporte*, [1944] R.L. n.s. 286, at p. 296.

[81] *Dupré et al.* v. *C. P. R.* (*op. cit.*)

[82] *C. P. R.* v. *Dennison*, K.B. 2080, December 1941 (unrep't). See also *Malboeuf* v. *Mtl. Gen. Hospital*, C.S. 77994, March 1931 (unrep't.). In *Leblanc* v. *Blair*, [1946] Q. P. R. 418, a partial inscription-in-law against an allegation claiming loss of affection and love was (in the writer's opinion) wrongly dismissed in the Superior Court.

[83] 6 Geo. VI, c. 68.

6. Article 1056 provides that no more than one action can be brought on behalf of those entitled to the indemnity and that the judgment determines the proportion of such indemnity each is to receive. It follows that several plaintiffs can join in one and the same action, and demand a global sum without specifying how much is claimed on behalf of each. In that event the general rule as to particulars is inapplicable and the defendant cannot oblige the plaintiffs to state how much is claimed by each.[84] However, particulars can be obtained as to the nature of the damages, and if more than one ground of damage is alleged, the defendant is entitled to know how much of the total sum is claimed on each ground.[85] If either the declaration or particulars allege damages not recoverable under article 1056, the defendant may proceed against the objectionable allegations by inscription-in-law.

7. The recovery of funeral expenses has been the subject of a great deal of jurisprudence. For many years such expenses were considered part of the damages occasioned by death and were recoverable under article 1056 without the necessity of any special form of pleading. However, in 1938 a majority judgment of the Court of Appeal decided that funeral expenses are not chargeable to the widow as such, but are chargeable to the deceased's heirs.[86] The plaintiff's husband had died intestate, but no proof was made to that effect, and since the plaintiff was not in any event his sole heir-at-law, it was held that the expenses could not be allowed. Subsequent judgments sought to attenuate the rigour of that ruling, some reverting to the original jurisprudence and others holding that funeral expenses are recoverable if the plaintiff alleges and proves that he was under an obligation either legal or moral to pay them:[87] in that event he is not required to prove his quality of heir.

But while the costs of the funeral can be recovered on proof of an obligation to pay them and while the same principle has been held to apply to hospital and medical costs of the last ill-

[84] *Bonenfant et al.* v. *Pageau et al.* (1938), 42 Q.P.R. 276; *Creeley et al.* v. *Mtl. Tramways Co.*, C.S. 239733, Feb. 13th, 1946 (unrep't.).

[85] *McGoun* v. *Mtl. Tramways Co.*, C. S. 242929, March 12th, 1946 (unrep't.); *Friend* v. *C. P. R.*, C. S. 255084, October 29th, 1947 (unrep't.).

[86] *Bahen* v. *O'Brien* (1938), 65 K.B. 64. See also *Bradley et al.* v. *Myers et al.* (1940), 78 C. S. 327; *Nolet et al.* v. *Peletz*, [1942] C. S. 14; *Belisle* v. *C. P. R.*, [1945] Q. P. R. 116.

[87] *E.g.*, *Lambert* v. *Dumais*, [1942] K.B. 561; *Epiciers Modernes* v. *Sivitz*, [1944] K.B. 229; *Bégin Ltée.* v. *Morin*, [1942] K.B. 549; *Johnson* v. *Antle* (1940), 78 C. S. 203; *The King* v. *Savard*, [1944] K.B. 328.

ness,[88] it is preferable and better practice to claim such expenses under article 1053, alleging and establishing the plaintiff's quality of heir. Such a claim may be included in the same action as a claim for damages under article 1056, the plaintiff suing in a dual capacity.[89] A reasonable sum for the widow's mourning (which is legally chargeable to the estate) may be claimed in like manner, the award depending upon circumstances.[90] If the heir is not one of the persons mentioned in article 1056, two separate actions may be taken, one by the heir under article 1053 to recover funeral expenses etc. paid by the estate, the other by one or more of the persons entitled to sue under article 1056 for the damages occasioned by death.

8. The jurisprudence is somewhat contradictory as to whether or not the defendant can successfully invoke the contributory negligence of the deceased. The question does not arise when the plaintiff is suing as heir and therefore in a representative capacity, for in that case the proportion of fault attributable to the deceased should certainly be taken into account. But as the right of action under article 1056 is personal and independent, it has been held (on the principle of solidarity) that the plaintiff can collect his full damages from the defendant, notwithstanding common fault.[91] Such holdings, however, are contrary to a long line of earlier jurisprudence and have not been generally accepted. Accordingly, in a motion to determine the questions to be put to a jury in a fatal accident case, it is customary to allow the stock question as to common fault, and the courts latterly have inclined to follow the earlier jurisprudence.[92] In a recent case [93] Tyndale J. (now C.J.) said in part:

> But can it really be said that the consort, the descendant or the ascendant of the victim, suing under article 1056 C.C., is a third party entitled to invoke article 1106 C.C.? While, strictly speaking the action of such a plaintiff does not derive directly from the victim, it is because of his or her relationship with the victim that the plaintiff is entitled to make a claim. If the victim were totally responsible for the accident, obviously there would be no recourse. Is it not,

[88] *Milard* v. *Bouchard*, [1945] K.B. 369, at p. 378; but see *Smith* v. *Pelletier*, [1942] K.B. 664.

[89] *E.g.*, *Milard* v. *Bouchard* (*op. cit.*) *per* Barclay J. at p. 374.

[90] *Lair* v. *Laporte* (*op. cit.*) p. 293; *Bahen* v. *O'Brien* (*op. cit.*). Mourning expenses of a widower and children are not recoverable.

[91] *Lair* v. *Laporte* (*op. cit.*); *Ryan* v. *Bardonnex* (1941), 79 C. S. 266; and see Note by Guy Favreau (1946), 24 Can. Bar Rev. 153.

[92] *E.g.*, *Gagné* v. *Godbout*, [1946] C. S. 16; *Morin* v. *Bennett*, K.B. 2599, Nov. 1945, cited by André Nadeau (1947), 7 R. du B. 3; *Libercent* v. *Doyon*, [1946] K.B. 521, *per* Letourneau C.J. at p. 542.

[93] *Larocque* v. *Vineberg et al.*, C.S. 232521, June 1946 (pending in appeal K.B. 3152); to be cited by André Nadeau in chapter 12 of his forthcoming book, "Traité de droit civil de Québec, Vol. VIII, La responsabilité civile delictuelle.

then, both equitable and logical to decide that if the victim is himself responsible in part and the defendant or his *préposé* is responsible only in part, the damages should be reduced in proportion to the fault of the victim?

9. The quantum of damages necessarily depends upon the circumstances of each case. Generally speaking it may be said that damages awarded for the death of a child are remarkably low;[94] damages allowed in the case of death of a wife and mother also are low as compared with awards in certain other jurisdictions,[95] while the damages recoverable for the death of a husband and father vary from a small to a substantial sum depending upon the evidence. In all three cases consideration must be given to the parties' station in life, their respective ages, capacities, and the ordinary risks of life and health. For example, a reasonable expectation of future pecuniary benefit from a son does not mean that the damages should be assessed on a "replacement value";[96] the court should take into consideration the possibility of sickness, death, or accident which might wholly or partially incapacitate the boy, loss of employment, the chances of his leaving home [97] and the probability of marriage.[98] Some consideration also should be given to expenditure on education and to the possible demands to be made on the son by the parents in later life.[99] In the case of the death of a husband and father, particular attention should be given to any increase or decrease in earnings over a period of several years preceding death, and to the probability or otherwise of an increase in earnings had he lived. It is equally important to know what, if any, proportion of his earnings he was saving, how much he expended on his wife and children, and the approximate amount of his own personal expenses. It is clear that the wife and children cannot expect to receive a damage award capable of yielding the revenue of which they were deprived,[100] but if the deceased had many working years ahead of him and was in the process of building up an estate, the damages should be substantial.

10. Because the right of action under article 1056 lies against the person who committed the offence or quasi-offence

[94] Varying from about $300 to $2,000 depending upon circumstances — a scale sometimes adversely criticized, *e.g.* in *McAthey* v. *Redpath* (*op. cit.*).

[95] *E.g.*, *Milard* v. *Bouchard* (*op. cit.*); *Lair* v. *Laporte* (*op. cit.*); *Bergeron* v. *City of Sherbrooke*, [1946] K.B. 498; *Meunier* v. *Diamond Truck Co. Ltd.* (1938), 44 R.L. n.s. 389, at p. 394.

[96] *Johnson* v. *Antle* (*op. cit.*).

[97] *Mason* v. *Dominion Transport Co.* (1928), 67 C.S. 73.

[98] *Daly et al.* v. *McFarlane* (1933), 55 K.B. 230.

[99] *Ibid.*, and see *McLung* v. *Perrault*, [1945] C.S. 349; *Demers* v. *City of Quebec* (1940), 45 Q. P. R. 92, and authorities cited in those reports; *Mtl. Tramways Co.* v. *Crépeau* (1922), 35 K.B. 102.

[100] *E.g.*, *Lasalle* v. *Rivest* (1923), 62 C.S. 26.

or his representatives, it is not affected by the death of the party at fault.

Presumption of Fault under Section 53(2) of the Motor Vehicles Act [101]

The steady increase in motor vehicular traffic over the past quarter century and the consequent hazard to all users of the highways has given this statutory provision a position of great practical importance. From the legal standpoint its importance is due to the exception it makes to the general rule of burden of proof. The sub-section (which, in its present form, dates from 1924) provides:

> Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

Section 2 (18) of the Motor Vehicles Act defines "public highway" as "any part of a bridge, road, street, place, square or other ground open to public vehicular traffic".

Recent cases (and there have been many) stress the principle that the presumption, being an exceptional provision, must be strictly construed, and that although it need not be specifically alleged, the first onus is upon the plaintiff; that is, he must first prove clearly that the circumstances are such as to bring the presumption into operation.[102] If, for example, a young boy climbs on to a truck backing into a lane and is injured, the presumption will not apply. Such was the situation in *Roy* v. *Charbonneau* in which E. McDougall J. said:

> When a plaintiff seeks to take advantage of a statute which, by its exceptional provisions, relieves him of the usual burden of proof of negligence, he must obviously bring his case clearly within the purview of such law.[103]

For the same reason the presumption does not operate if the cause of the accident remains inexplicable;[104] nor where the accident takes place on private property;[105] nor in the case of a collision between two moving automobiles resulting in damage to both cars;[106] nor in favour of an injured passenger;[107] nor when

[101] R.S.Q., 1941, c. 142.
[102] *E.g.*, *The King* v. *Savard et al.* (*op. cit.*).
[103] [1942] C.S. 402.
[104] *Lalande* v. *Lauzon* (1923), 29 R.L. n. s. 349 (K.B.).
[105] *Forrester* v. *Handfield*, [1944] R.L. n.s. 260.
[106] *Moreau* v. *Rodrigue* (1920), 29 K.B. 300.
[107] *Perusse* v. *Stafford* (*op. cit.*).

a pedestrian comes into contact with a car that has been stationary for some seconds.[108] Nor does it operate against drivers or owners of tramcars which are not "motor vehicles". However, the presumption has been held to apply to damage caused *off* the highway by reason of the manner in which a motor vehicle was conducted *on* the highway;[109] also to the case of a motor cyclist who, while pushing his cycle along the highway, is struck by an automobile.[110]

In the case of a collision between two automobiles causing injury to a pedestrian, the presumption may operate against both drivers, although only one of the vehicles struck the pedestrian. However, before the presumption can arise in such a case, the plaintiff must establish that the motorist from whom the damage is claimed was the author of that damage. Thus in 1944, in *Boxenbaum* v. *Wise*,[111] Taschereau J. stated:

> This presumption which the law creates is not a presumption that the driver of an automobile has caused *damage*. It is a presumption that he is *liable* when it is *proven* that he has caused damage, and he has therefore the onus of showing that he committed no fault which contributed to the accident.

The onus is not of a shifting or transitory nature, but remains upon the defendant until the end of the case when the question must be determined whether or not he has sufficiently shown that he did not in fact cause the accident by his negligence.[112] Such proof in rebuttal may be made by showing that the defendant was neither negligent nor guilty of improper conduct: there is no necessity for him to prove *cas fortuit* or *force majeure*.[113]

The presumption may play a specially important rôle in jury trials. The general rule is that when there is an assignment of facts, the jurors must indicate specifically in their verdict the fact or facts constituting the fault or omission alleged: a general expression of opinion is insufficient.[114] However, the situation may be different when the presumption under section 53(2) is applicable. In *Blair* v. *Berry*[115] the jury, in answer to the usual

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[108] *Plow* v. *Sicard* (1940), 78 C.S. 537.
[109] *Pageau* v. *Prov. Transport Co.*, [1945] K.B. 431, at p. 436.
[110] *Lemenu* v. *Lacoste et al.* (1930), 36 R.L. n.s. 131.
[111] [1944] S.C.R. 292.
[112] See *Winnipeg Elec. Co.* v. *Geel*, [1932] A.C. 690, in which the Privy Council ruled on a provision (s. 62) of the Manitoba Motor Vehicle Act similar in effect to s. 53(2) of the Quebec Motor Vehicles Act.
[113] *Martineau* v. *The King*, [1944] S.C.R. 194; *Plouffe* v. *McKenzie*, [1943] R. L. n.s. 242 (K.B.).
[114] Article 483 C.C.P. and see, for instance, *Davis* v. *Julien* (1915), 25 K.B. 35.
[115] (1937), 76 C.S. 189.

question as to common fault, replied: "Yes. The plaintiff did not pay proper attention to the traffic, and the defendant showed lack of judgment and care when he first observed the plaintiff". Such an answer (in so far as it related to the defendant) probably was insufficiently explicit within the meaning of article 483 C.C.P. However, McDougall J. maintained the verdict, holding that it was clear from the finding of common fault that the jury had not exonerated the defendant and therefore that the presumption had not been rebutted. In another somewhat similar case Barclay J. expressed the opinion that all the jury had to do was to decide whether or not the defendant had rebutted the presumption.[116]

It is worth noting that the effect of one presumption may cancel the effect of another. Hence, the presumption under section 53(2) of the Motor Vehicles Act and the presumption arising under article 1055 C.C. have been held to cancel each other in the case of a collision between a motor vehicle and an animal.[117]

* * *

Codification has not retarded the progress of the law of delicts and quasi-delicts. On the contrary the liberal language used in the articles has afforded ample latitude for interpretation, thereby permitting the jurisprudence to keep pace with the times. A good illustration of this is the extension of responsibility for damage caused by things under one's care. By judicial construction, and without any statutory amendment, the law on that subject was changed by stages from the original requirement of proof of fault to the point where a liability was imposed upon the defendant. It is interesting, therefore, to recall that in England where the common law and the rule of *stare decisis* are in force, the evolution of the law of torts has been due mainly to legislation.[118]

The extension of responsibility to which references have been made was an almost inevitable result of social and industrial development. Along with that development grew the theory of *risque créé*,[119] which became the basis of the Workmen's Com-

[116] *Sloan* v. *Fraid*, [1943] K.B. 91.

[117] *E.g.*, *Angers* v. *Lemire*, [1944] C.S. 343:

[118] See Mignault (1927), 5 Can. Bar Rev. 1, at p. 2. The general principles of liability under the English law of torts are summarized in an excursus to Pollock's Law of Torts (14th ed.), at pp. 43 et seq.

[119] The gist of this theory, which originated in France, is that when a person derives a profit from business or other activities which create a risk of injury to others, he should be liable for the damages caused even without fault on his part.

pensation Acts. The first of those acts, in 1909, was administered by the civil courts, but by the Act of 1928,[120] and later by the Act of 1931,[121] a Commission was established which, with certain exceptions, has exclusive jurisdiction in workmen's compensation cases.[122] But objective liability has no place in the present discussion. The basis of responsibility is fault either proved or presumed, and in most cases it must be proved. In those exceptional cases where fault is presumed the language of the Code is sufficiently broad to permit of further extension if conditions should warrant it. For the present, however, it is submitted that the reasonable limit has been reached, if not already exceeded.

[120] 18 Geo. V., 1928, c. 79.
[121] 21 Geo. V., 1931, c. 100.
[122] R. S. Q., 1941, c. 160, s. 59.