1972

English translation of judgment of Cannon J in Montreal Tramways Co. v. Léveillé [1933] S.C.R. 456

Neil J Foster
Supreme Court of Victoria, *Supreme Court of Victoria*

[1953] 4 D.L.R. 337 at page 366.

CANON J. - Montreal Tramways v Leveille.

The Plaintiff in his capacity as guardian of his daughter Jeannine, born 25th May, 1929 is claiming damages for injuries suffered by the child who came into the world with club feet and is suing the Defendant because the negligence of one of its servants, by causing the fall of the child's mother on 25th March, 1929 when she was seven months pregnant, is held to be the cause of the infirmity the child has suffered since birth. The Company's fault was admitted by the Jury and was not placed in doubt before us.

Only 3 points were raised of which the first was not invoked before other jurisdictions :

1. It is denied that this child is able to recover damages suffered in consequence of an accident caused to her mother before she was born and which she herself suffered indirectly.

2. The conclusions upon which the Jury based itself in order to establish causal relationship between the mother's accident and child's disability are insufficient at law to justify the Jury's verdict.

3. The Judge's charge did not sufficiently clarify this legal question for the Jury.

It should be noted that before the High Court and before the Court of the Kings Bench, the point submitted to us regarding the existence of a right to action in the circumstances described in detail in the notes of my colleague His Honour Judge Lamont was not raised.

After having carefully examined the reasons put forward on both sides, it seems to me that it is not necessary as regards the case in point to discuss the rights of the child in its mother's womb, between the time of conception and the time of birth.

The action in responsibility and hence the possibility of exercising it before the competent jurisdiction, arises in principle from the day the victim suffers damage and a wrongful act is not enough to act upon. An injury is one of the three essential elements of responsibility. Without it no action in responsibility can be possible. What compensation could a Plaintiff claim if he had not as yet suffered injury? If in principle, the Plaintiff cannot act from the very moment the wrongful act has been committed but only at the moment this wrong has caused him injury, it seems to me that Jeannine Leveille's right to compensation came into existence only after she was born when the bodily disability from which she suffers became evident. Before this time, as long as she remained in her mother's womb, it is evident that she suffered no injury, no inconvenience and no damage. No action in responsibility was open. It is only when the definite injury was suffered that her rights were encroached upon and that she became a victim with a right to compensation. It is from this moment after she was born, that she commenced to have rights. One could say that her rights were born together with her. She could then, with her guardian's help bring this action to endeavour to show that the injury she is suffering from was caused prior to her birth through the fault of the Defendant and its employee.

It is not necessary to discuss the maxim : "Infans conceptus pro nato habetur quoties de commodis ejus agitur," nor the application of articles 345, 608, 771, 838 and 945 of the civil code. It is not a question of a right the child had avant before being conceived but of a right to compensation which commenced when she was born.

The Plaintiff in her capacity as such, had to establish the fact that the mother's fall, two months before the child was born, caused the latter's disability, that is, to establish a chain of causation between the wrongful act and the injury. If the injury is the result of the illicit act, the author of the quasi-delict (technical offence) must provide compensation, even where this result was impossible to foresee at the time the wrongful act took place.

The Court of Cassation, in France, lays down as a principle, that ascertaining the causal relationship is a question of fact but we could intervene and set aside the decision of this fact by the Jury, if we concluded that it was unreasonable. In this context, the wrongful act would have overtaken the victim who is claiming before us, only indirectly. No doubt it can be said that in order to analyse the chain of causation it is not necessary to distinguish between close causes and distant causes; they are all equal from the point of view of responsibility. But should we say that the principles of causation lead to ordering compensation for indirect injury? I do not believe so, since in the sequence of injuries, there is a time where no one can any longer state with certainty, that without the wrongful act the injury would not have come about. From that moment onwards, the existence of the chain of causation is no longer established, the initial wrongful act may therefore no longer be held as being the cause of the injury.

As Messrs. Henri et Leon Mazeaud say in their Treatise on Civil Responsibility 1931 No. 1673 "The author of the initial wrongful act is answerable in the sequence of

injuries only for those which are the definite and necessary consequence of his act. The expression "necessary injury" or "necessary consequence" which Pothier was already using, is preferable to "direct injury" or "immediate consequence", it brings out more precisely the nature of the chain of causation which is required and the point where the Defendant's responsibility ends. Indeed, it must not be inferred that the first injury alone is to be compensated, the second, the third, the fourth etc. are likely to involve the responsibility of the author of the initial wrongful act; this happens each time they have a definite causal link with this wrongful act, but the further they go in the sequence of events, the more certainty diminishes."

These same authors emphasize the fact that French jurisprudence, quite rightly, sees in the necessity for a direct injury, only the application of the principle according to which the relation between cause and effect must exist with certainty between the wrongful act and the injury.

"Immediately this relation exists, the injury must be compensated no matter how distant; and this shows well enough that the expressions "indirect injury" and "immediate consequence" expressed rather badly, the general idea they embody. It is not a question of proximity in either time or space but solely of the existence of a causal connection."

In the case under review, have we brought together the three elements of responsibility: injury, wrongful act, causal relationship in such a way as to establish a legal link between the victim of the injury and the author of the wrongful act.

At this stage, it became necessary in order to establish the causal relationship to have recourse to the conclusions flowing from the circumstances proved: the mother's fall, abnormal symptoms before and during birth, which she had not previously experienced; marks on the child, observations of the Doctor in attendance and medical evidence. The conclusions which the Jury drew from the legally established facts before it are, in principle, sufficient in a law suit in responsibility. The Judge of the fact has the final say as to their evaluation (C.P.C. 474-475) but he is morally bound to admit only weighty and serious presumptions. It is therefore necessary, in each case, to scrutinise the facts invoked by the Plaintiff in responsibility in order to establish the wrongful act, the injury and the chain of cause and effect and once a Judge of first Instance assisted by a Jury, has established the facts and has established this relationship as definite and not problematical, a court of appeal may not, under the Code of Civil Procedure, intervene unless the verdict is contrary to the weight of evidence, and article 501 tells us that the "verdict is not considered contrary to the proof unless it be of such a nature that the jury upon examination of the whole of the proof, would not reasonably have been able to reach it" or, in accordance with article 508 a different judgment may be given "where the facts, as established by the Jury, require the Judgment to be in favour of the Appellant".

The Court of the King's Bench refused to arrive at this conclusion; and I can see no valid reason for setting aside this decision. The conclusions of Doctors Langevin and Letondal to the effect that the circumstances in this action

showed that the only satisfactory explanation was, that the mother's fall and its consequences had brought about the child's deformity, were accepted by the Jury. Is this an unreasonable verdict? It may perhaps not have been the verdict of a Jury of Doctors or of specialists, but it received the approval of the tribunal chosen and designated by the law to decide the matter without appeal according to conscience and nothing in this matter is there to show that this tribunal erred. The Jury's verdict will not settle the medical controversy which took place before it. But the law cannot wait for the Doctors to be unanimous on the issue raised in this action. It was not established that the child's disability originated from a cause other than the accident which was caused to the mother during the period of pregnancy through the fault, now admitted of the Defendant's servant. I believe we cannot in the face of the Jury's verdict, approved by a Judge of first Instance and the Court of Appeal, on a question of fact, set aside these judgments which agree, unless there can be shown to us, a manifest error which it would be our duty to correct. This has not been done.

As in Shawinigan v. Naud (1929) 4 D.L.R. 57, at p.61 the Company's Doctors, whilst agreeing that the disability of the Respondent is not a result of the mother's fall, admit they can find no other cause, weakens the power of conviction of their opinion and to affirm the contrary, appears to me to blend in better with the logical sequence of circumstances and the chain of symptoms which manifested themselves. These circumstances and these symptoms are sufficiently weighty and serious to enable us to decide that the Respondent has supplied

the proof incumbent upon her which was to show the relationship between the disability from which she suffers and the accident her mother met with as a result of the Appellant's negligence.

As regards the third point, I believe, as does my colleague His Honour Judge Lamont, and for the same reasons, that the Judge had sufficiently well pointed out to the Jury, the rules to be followed, to draw conclusions from the facts established before him.

I therefore believe that the appeal should be dismissed with costs

CROCKET, J., concurs with LAMONT, J.

APPEAL DISMISSED.