1932
*Oct. 24.
1933
*May 8.

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

PAUL LÉVEILLÉ (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Negligence—Tramway—Pregnant mother—Fall from car—Company's fault admitted—Infant born with club feet—Right of infant to sue for damages after birth—Jury trial—Evidence—Reasonable inference—Whether deformity of the child's feet resulted from accident to mother.

The respondent's wife, being seven months pregnant, was descending from a tram car belonging to the appellant company when, by reason of the negligence of the motorman, she fell, or was thrown, from the car and was injured. Two months later she gave birth to a female child who was born with club feet. The respondent, as tutor to his child, brought an action against the appellant company, claiming that the deformity of the child was the direct consequence of the negligence of the appellant company by which the mother was injured. The action was tried with a jury who found in favour of the respondent and judgment for $5,500 was rendered accordingly, which was affirmed by a majority of the appellate court.

Held, Smith J. dissenting, that the judgment appealed from should be affirmed and the appeal dismissed.

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

(1) [1933] 2 W.W.R. 154; 14 C.B.R. 377.

Held, also, Smith J. dissenting, that there was sufficient evidence adduced at the trial to produce in the jury's minds a conviction that it was reasonably probable that the deformity of the child resulted as a consequence of the mother's injury, and, consequently, their verdict should not be disturbed. The fact that the appellant's fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury. These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child's deformity may have been due to the consequences of the mother's accident. It must go further and be sufficient to justify a reasonable man in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there is a reasonable probability that the deformity was due to such accident.

Per Smith J. (dissenting).—The evidence of the medical experts called on behalf of the respondent establishes that medical science has not yet discovered the cause of club feet and such evidence has merely put forward more or less plausible theories on that subject. Therefore, having regard to the scientific problem involved, there was no evidence sufficiently positive and definite upon which the jury could reasonably find as a fact that the child's club feet resulted from the injury to the mother.

Held, further, Smith J. dissenting, that under the civil law, a child, who suffers injury while in its mother's womb as the result of a wrongful act or default of another has the right after birth to maintain an action for damages for the injury received by it in its pre-natal state.

Per Rinfret, Lamont and Crocket JJ.—The answer to the appellant's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., is that, although the child was not actually born at the time the appellant by its fault created the conditions which brought about the deformity to its feet, yet, under the civil law, it is deemed to be so if for its advantage. Therefore when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the appellant produced its damage on the birth of the child and the right of action was then complete.

Per Cannon J.—The action in damages, and consequently the possibility of exercising it, has its existence from the date the injured person has suffered prejudice. In this case, the right of the infant child to claim damages was not entire before its birth. The child, while in its mother's womb, was not suffering any prejudice nor inconvenience and no complete right of action then existed. Right to damages was born at the same time as the child when the deformity was revealed and therefore the respondent's action was well founded in law.

Per Rinfret, Lamont, Smith and Crocket JJ.—The great weight of judicial opinion in the common law courts denies the right of a child when born to maintain an action for pre-natal injuries; *per* Rinfret,

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Lamont and Crocket JJ., although it has been held that the doctrine, which regards an unborn child as born if for its benefit, had been adopted in England by the Ecclesiastical and Admiralty courts, and to some extent by the Court of Chancery.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Duclos J., sitting with a jury, and maintaining the respondent's action in damages.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Arthur Vallée K.C. for the appellant.

H. N. Chauvin K.C. and *J. Hélal* for the respondent.

The judgments of Rinfret, Lamont and Crocket JJ. were delivered by

LAMONT J.—On March 25, 1929, the respondent's wife, then seven months pregnant, was descending from a tram car belonging to the appellant (hereinafter called the Company) when, by reason of the negligence of the Company's motorman, she fell, or was thrown from the car to the street and was injured. Two months later she gave birth to a female child—now called Jeannine—who was born with club feet. The respondent had himself appointed tutor to the child and brought this action ès-qualité against the Company, claiming that the deformity of the child was the direct consequence of the negligence of the Company by which its mother was injured. The action was tried with a jury who found for the respondent and awarded damages in the sum of $5,500, for which amount judgment was entered. This judgment was affirmed by the Court of King's Bench (appeal side), Dorion and Hall JJ. dissenting. From the judgment of the Court of King's Bench the Company appeals to this court.

The appeal presents three questions for determination:

1. Has a child, who suffers injury while in its mother's womb as the result of a wrongful act or default of another, the right after birth to maintain an action for damages for the injury received by it in its pre-natal state?

2. Was there evidence on which the jury could reasonably find that the deformity of the child's feet was the result of the accident to its mother?

3. Was the charge of the trial judge to the jury sufficient in law?

These questions fall to be determined by the civil law of the province of Quebec. The action is brought under article 1053 of the civil code, which reads:—

> 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.

For the Company it was contended that the first question should be answered in the negative, because—

1. A child *en ventre sa mère* is not an existing person—*in rerum naturâ*—but only a part of its mother and, therefore, does not come within the meaning of the term "another" in article 1053 C.C., and

2. The Company's liability was founded in contract, express or implied, and there had been no contract with the child.

In support of its contention the Company cited the case of *Walker* v. *G.T.N. Rly. Co. of Ireland* (1). In that case the plaintiff's mother, while a passenger on the defendant's railway, was injured by the defendant's negligence, and the plaintiff, who was then *en ventre,* was subsequently born deformed. After the child was born it brought an action for damages for the deformity which it alleged was caused by the company's negligence. On demurrer, the court, which consisted of four judges, held that the child could not maintain the action. The decision was based largely on the ground that the company had only contracted to carry the mother to whom alone it owed a duty not to be negligent. The broader ground, namely, the legal right of an unborn child to personal security, was discussed at some length, but the views of the judges on that point were against the recognition of the right; the Chief Justice, however, expressly stated that he would leave the question open, and based his judgment on the single ground that there were no facts set out in the statement of claim which fixed the defendants with liability for breach of duty as carriers of passengers.

During the argument in that case it was pointed out that under English law a conceived but unborn child, for the purposes of succession to property on an intestacy and for

(1) (1891) 28 L.R. (Ir.) 69.

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many purposes in connection with wills and their construction, was deemed to be born at a particular time if it was for the child's benefit that it be so held, and that in *The George and Richard* (1), it was held that a child *en ventre sa mère* at the date of its father's death was capable, when born, of maintaining an action under Lord Campbell's Act. Reference was also made to the language of Mr. Justice Buller in *Thellusson* v. *Woodford* (2), who, when replying to an allegation that a child *en ventre sa mère* was a non-entity, at page 322, said:—

> Let us see what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

The court, however, took the view that the doctrine which regards an unborn child as born, if for its benefit, was a fiction of the civil law which had been adopted in England by the Ecclesiastical and Admiralty courts, and to some extent by the Court of Chancery; but that the common law courts had never recognized the fiction as applying so as to permit a child to obtain damages for pre-natal injuries.

That pre-natal injury affords no foundation for an action for damages on the part of a child was held in the following American cases: *Allaire* v. *St. Luke's Hospital* (3); *Gorman* v. *Budlong* (4); *Nugent* v. *Brooklyn Heights Rly. Co.* (5); *Drobner* v. *Peters* (6); *Stanford* v. *St. Louis-San Francisco Rly.* (7). The only case to the contrary cited to us was *Kine* v. *Zukerman* (8). These were all cases under the common law and it must be admitted that the great weight of judicial opinion in the common law courts denies the right of a child when born to maintain an action for pre-natal injuries.

The rights of an unborn child under the civil law are based on two passages found in the Digest of Justinian, lib. 1, tit. 5, ss. 7 and 26, as follows:—

(1) (1871) L.R. 3 Adm. 466.
(2) (1798) 4 Ves. 227, at 335.
(3) (1898) 76 Ill. App. 441, affirmed 184 Ill. App. 359.
(4) (1901) 49 Atl. 704.
(5) (1913) 154 App. Div. (N.Y.), 667.
(6) (1921) 232 N.Y., 220.
(7) (1926) 108 S.O. 566.
(8) 4 Pa. Dist. & Co. Reports, 227.

7. Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partas quaeritur.

(An unborn child is taken care of just as much as if it were in existence in any case in which the child's own advantage comes in question.)

26. Qui in utero sunt in toto paene jure civili intelliguntur in rerum naturâ esse.

(Unborn children are in almost every branch of the civil law regarded as already existing.)

The Civil Code of Quebec makes provision for the appointment of a curator to the person or to the property of children conceived but not yet born. Arts. 337 and 338 C.C.

Art. 345 reads as follows:—

The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.

This article practically embodies the Roman Law rule first above quoted.

Art. 608 C.C. reads as follows:—

608. In order to inherit it is necessary to be civilly in existence at the moment when the succession devolves; thus, the following are incapable of inheriting:—

1. Persons who are not yet conceived;
2. Infants who are not viable when born;

Under this article the right to inherit is made to depend upon civil existence. A conceived but unborn child, therefore, is deemed to have civil existence if subsequently born viable.

Articles 771 and 838 C.C. deal with gifts *inter vivos* and by will. The former article reads:—

771. The capacity to give or to receive *inter vivos* is to be considered relatively to the time of the gift. It must exist at each period, with the donor and with the donee, when the gift and the acceptance are effected by different acts.

It suffices that the donee be conceived at the time of the gift or when it takes effect in his favour, provided he be afterwards born viable.

Article 838 C.C. contains a similar provision in respect of a conceived but unborn child taking a benefit under a will.

It was contended by the Company that as the civil code by express provision had declared that the conceived but unborn child should possess the rights and capacities of a born child in respect of the matters mentioned in articles 608, 771 and 838 C.C., it limited by implication the cases in which a child *en ventre* would be deemed to be born to those expressly mentioned. On the other hand the respondent contended that the matters referred to in these articles,

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though specially dealt with in the civil code, are merely illustrative instances of the rule that an unborn child shall be deemed to be born whenever its interests require it, but that they in no way limit the meaning of article 345 C.C., which is general in its terms.

The Code Napoléon of France contains articles similar to articles 608 and 771 of the Quebec civil code. The French authorities may, therefore, be helpful in determining whether or not, under the civil law, the rule is of general application.

In Baudry-Lacantinerie et Houques-Fourcadé's *Droit Civil Français,* 3rd ed., tome 1, at page 270, the learned authors say:—

289. L'homme constitue une personne dès le moment même de sa naissance. Jusque-là il n'est pas une personne distincte, il n'est encore que *pars viscerum matris.* Pourtant, en droit romain, on considérait, par une fiction de droit, l'enfant simplement conçu comme déjà né, lorsque son intérêt l'exigeait. Ce principe, admis aussi dans notre ancien droit, a été en ces termes: *infans conceptus pro nato habetur, quoties de commodis ejus agitur.* Le code civil en consacre lui-même plusieurs applications, qui prouvent qu'il a été maintenu dans toute sa généralité.

In Aubry et Rau, Droit Civil Français, 4th ed., tome 1, par. 53, page 262, the author says:—

Dans le sein de sa mère, l'enfant n'a point encore d'existence qui lui soit propre, ni par conséquent, à vrai dire, de personnalité. Mais, par une fiction des lois civiles, il est considéré comme étant déjà né, en tant du moins que son intérêt l'exige. En vertu de cette fiction, l'enfant simplement conçu jouit d'une capacité juridique provisoire, subordonnée, quant à ses effets définitifs, à sa naissance en vie et avec viabilité.

And in Mignault's *Droit Civil Canadien,* we find the following:—

Une vieille maxime dit que l'enfant conçu est déjà réputé né toutes les fois qu'il s'agit de ses intérêts.

Then, after referring to the nomination of the curator under article 345 C.C., the learned author continues:—

Il n'est pas nécessaire de citer les cas qui nécessitent cette nomination. Elle se fait *dans tous les cas* où l'intérêt de l'enfant l'exige.

In determining the generality of the application of the fiction reference may also be made to the opinions expressed by certain English judges familiar with that law.

In *Burnet* v. *Mann* (1), Lord Chancellor Hardwicke said:—

The general rule is that they (unborn children) are considered *in esse* for their benefit not for their prejudice.

(1) (1748) 1 Ves. Sen. 156.

and in *Wallis* v. *Hudson* (1), the same judge, at page 116, stated that a child *en ventre sa mère* " was a person *in rerum naturâ.*" Then, after referring to the Statute of Distributions which he said was to be construed by the civil law, he proceeded as follows:—

> As to the civil law, nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit.

This statement as to the civil law was referred to with approval by Lord Atkinson in *Villar* v. *Gilby* (2). See also *Schofield* v. *Orrel Colber* (3).

In *Doe* v. *Clark* (4), Butler J. used this language:—

> It seems indeed now settled that an infant *en ventre sa mère* shall be considered, generally speaking, as born for all purposes for its own benefit.

In many of the English cases in which effect was given to the rule of the civil law it was applied simply as a rule of construction by which the term " child " or " children " was held to include a child *en ventre sa mère.* But in *Doe* v. *Lancashire* (5), the question was not one of construction but of the revocation of a will by the birth of a child, and Gross J., at page 63, said:—

> I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's life, that does not equally extend to a posthumous child.

These learned judges undoubtedly considered the fiction to be of general application.

To the Company's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., the answer, in my opinion, is that, although the child was not actually born at the time the Company by its fault created the conditions which brought about the deformity of its feet, yet, under the civil law, it is deemed to be so if for its advantage. Therefore when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete. The separate existence of an unborn child is recognized even at common law,

(1) (1740) 2 Atk. 115.
(2) (1907) A.C. 139.
(3) [1909] 1 K.B. 177.
(4) (1795) 2 H. Bl., 399 at 401.
(5) (1792) 5 T.R. 49.

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for it is well established that if a person wrongfully causes injury to a child before its birth which results in death after it has been born alive, such person will be guilty of a criminal offence although the wrongful act was directed solely against the mother. *Rex* v. *Senior* (1); Russell on Crimes, 8th ed., vol. 1, page 622. It was, however, urged that there is no true analogy between crime and tort, as the punishment of crime is for the public benefit, while the remedy in tort is for private redress. While in some cases there may be no analigy yet there are, in my opinion, many cases in which crime and tort are merely different aspects of the same set of facts and in which there is so close an analogy that something more than the bare denial of it is necessary to carry conviction. The wrongful act which constitutes the crime may constitute also a tort, and, if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort.

If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.

The argument that the Company's liability is founded in contract cannot, in my opinion, be maintained. This is not the case of a person not a party to the contract suing for a breach of it. The respondent does not seek to recover from the Company on the ground that it failed to perform its contract with the mother, but on the ground that it committed an independent tort against the child. The

(1) (1832) 1 Moody's C.C. 346.

fault which constitutes a wrong to the child may also constitute a breach by the Company of its contract with the mother, but, under article 1053 C.C. the existence or non-existence of the mother's contract is entirely irrelevant in tort.

There were two other matters to which our attention was called; the first was that cases similar to the present one must have arisen many times in the past, but that no decided case (or at most only one) has been found in which the child's right of action for pre-natal injuries has been maintained. The paucity of decided cases is far from conclusive, and may be largely accounted for by the inevitable difficulty or impossibility of establishing the existence of a causal relation between the fault complained of and the injury to the child. With the advance in medical science, however, that which may have been an insuperable difficulty in the past may now be found susceptible of legal proof.

The other matter to which we were asked to give serious consideration was the practical inconvenience and possible injustice to which the Company might be exposed if it were held that this right of action could be maintained. It was urged that to so hold would open wide the door to extravagance of testimony and lead, in all probability, to perjury and fraud. I am not apprehensive on this point for, although in certain cases special care will be required on the part of the judge in instructing the jury, I feel quite confident that the rules of evidence are adequate to require satisfactory proof of responsibility and that the determination of the relation of cause and effect will not involve the court in any greater difficulty than now exists in many of our cases.

For these reasons I am of opinion that the fiction of the civil law must be held to be of general application. The child will, therefore, be deemed to have been born at the time of the accident to the mother. Being an existing person in the eyes of the law it comes within the meaning of "another" in article 1053 C.C. and is, therefore, entitled through its tutor to maintain the action.

Support for this view is, I think, furnished by the fact that none of the judges below cast any doubt upon the right of the respondent to sue. The point, it is true, does

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not appear to have been raised in either court but I cannot think a point so important and outstanding would have been passed without comment had not the judges below been satisfied as to the existence of the right.

The next question is, whether there was evidence on which the jury could reasonably find the existence of a causal relation between the accident to the mother and the deformity of the child's feet.

The general principle in accordance with which in cases like the present the sufficiency of the evidence is to be determined was stated by Lord Chancellor Loreburn in *Richard Evans & Co., Limited* v. *Astley* (1), as follows:—

> It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise but courts, like individuals, habitually act upon a balance of probabilities.

There was undoubtedly evidence to go to the jury that the mother's accident was caused by the fault of the Company, and the jury's finding on that point cannot be disturbed. That such fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury. These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child's deformity may have been due to the consequences of the mother's accident. It must go further and be sufficient to justify a reasonable man in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there is a reasonable probability that the deformity was due to such accident.

The distinction, I think, is well brought out by a comparison between two cases of the province of Quebec: *Boilard* v. *Cité de Montréal* (2), and *Montreal Tramways Company* v. *Mulhern* (3).

(1) [1911] A.C. 678. (2) (1914) 21 R.L.n.s. 58.
(3) (1917) Q.R. 26 K.B. 456.

In the *Boilard* case (1), the young child of the plaintiff had been compulsorily vaccinated in compliance with a city by-law. Shortly after the vaccination, the child's arm became paralysed and permanently useless. Contending that the condition of the arm had been brought about as a result of the vaccination, the plaintiff, as tutrix, sued the city in damages on behalf of the child. At the trial, three different theories were advanced by the medical experts. One was that it was a clear case of infantile paralysis in no possible way to be attributed to the vaccination. Another theory ascribed the cause either to infected vaccine or to infantile paralysis. The third theory was that the use of infected vaccine was the sole possible explanation of the condition of the arm. There was, however, no positive evidence of the fact that the vaccine was actually infected. The jury held the city responsible on the ground that the vaccine used was infected. The Court of King's Bench set aside the verdict. Sir Horace Archambault, then Chief Justice of the province of Quebec, delivering the judgment of the court, said:—

> Une chose est claire, au milieu de cette obscurité, c'est qu'il s'agit ici d'une question d'opinion, et non d'une question de fait constant, positif. Aucun témoin n'est venu jurer positivement que le vaccin était infecté. Tout ce que certains d'entre eux ont pu dire, c'est que le résultat produit tendrait à établir, ou ferait présumer, que le vaccin était infecté. Les jurés n'ont donc pu que décider entre les diverses opinions émises, et émettre eux-mêmes une opinion. Ce n'est pas là la décision d'un fait; et les jurés n'ont pas d'autre juridiction que de décider les questions de fait.
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> Sans doute, il faut s'en rapporter à l'opinion de médecins, d'experts, pour connaître les effets, les conséquences d'un accident. Ainsi, une maladie nerveuse se déclare à la suite d'un accident; les médecins seront admis à prouver que cette maladie a été produite par l'accident. De même, on entendra des médecins pour savoir si la maladie est permanante ou temporaire. Mais, dans ces cas, l'accident lui-même doit d'abord être prouvé, ainsi que la faute de la partie que l'on veut tenir responsable des dommages qui ont résulté de l'accident. En d'autre termes, le fait générateur de la responsabilité doit être établi par témoins, qui en attestent l'existence. Les conséquences de ce fait peuvent ensuite être établies par des experts.

In the *Mulhern* case (2), the question was whether the respondent had established that the death of her husband was due to the bodily injuries sustained by him in a collision several months previous to his death and which, at first, did not appear to be serious. The autopsy had shewn that the death was due to "thrombosis of the coronary

(1) (1914) 21 R.L.n.s. 58. (2) (1917) Q.R. 26 K.B. 456.

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artery." The question was whether the thrombosis had been caused by the accident. Three doctors testified that, in their opinion, the accident had either caused or aggravated the condition of the deceased. Other doctors, while admitting that possibility, said that it was not the cause in the particular circumstances. Yet another one declared that it was a scientific impossibility for the thrombosis to have been the result of the accident. The jury found in favour of the plaintiff. The case came before the Court of King's Bench, in Quebec, which included four of the five judges who had sat in the *Boilard* case (1). The court held that the finding of the jury should not be interfered with. It distinguished *Boilard* v. *City of Montreal* (1), as appears by the head-note:—

In a jury trial where damages are claimed for (an accident), a verdict cannot be founded only on medical controverted opinions, but the case is different where the medical evidence is supported by a proof of non contested facts. The jurors may then render their verdict by appreciating the facts and opinion of medical men, which they have before them.

An affirmative verdict can be rendered upon facts and probabilities only if they establish presumptions; and if these presumptions are strong enough to bring about a reasonable conviction in the mind of a jury, the Court should not interfere.

Mr. Justice Carroll delivered the judgment of the court, and, referring to the *Boilard* case (1) (page 459) (2), he said:

Dans cette dernière cause, il s'agissait d'un enfant qui avait été vacciné et qui, à la suite de l'opération, avait perdu l'usage du bras vacciné. Le jury avait déclaré que le vaccin était infecté, mais cette réponse ne résultait pas des faits prouvés, elle résultait seulement d'opinions théoriques controversées entre les médecins entendus comme témoins.

Ici (meaning in the *Mulhern* case), nous avons bien des théories contradictoires, mais nous avons aussi des faits non contestés. Le défunt, avant cet accident, jouissait d'une bonne santé et n'avait manifesté aucun symptôme de la maladie dont il est mort. Il s'est plaint immédiatement après l'accident de douleurs dans la région du coeur. Les témoins que l'ont connu nous disent qu'il n'était plus le même homme d'affaires averti, consciencieux et travailleur, l'accident en a fait une ruine physique.

Les jurés pouvaient-ils, eu égard à ces faits prouvés devant eux, conclure que l'accident avait ou déterminé ou accéléré la mort? Sans doute que l'autopsie a révélé des lésions au coeur, plus anciennes que celles qu'auraient causées l'accident, mais si l'accident a fait évoluer plus rapidement la maladie et abrégé la vie de Holman, la compagnie est responsable.

Les faits qui ont été établis devant les jurés produisent des probabilités, et cette cause ne peut être décidé que sur des présomptions basées sur ces probabilités. Si les présomptions ainsi créées sont assez fortes pour produire une conviction raisonnable chez douze jurés, est-ce qu'une cour doit intervenir? Je ne le crois pas.

(1) (1914) 21 R.L.n.s. 58. (2) (1917) Q.R. 26 K.B. 456.

The judgment was affirmed by this court (1).

In *Jones* v. *G.W. Rly. Co.* (2), the House of Lords had to consider whether there was evidence on which a jury could properly find negligence on the part of the defendant's servants which caused or contributed to the death of the husband of the first plaintiff. In stating the principles which should govern in such a case, Lord MacMillan, at page 45, said:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogeny of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved.

An instance of a case where this court "bridged the hiatus" is that of *Shawinigan Engineering Co.* v. *Naud* (3). It is sufficient to refer to the judgment of the court (Duff, Mignault, Newcombe, Rinfret and Smith JJ.), more particularly to the passage from the foot of page 344 to the end of page 345, to realize how strikingly similar the problem of the relation of cause and effect happened to be both in that case and in the present case.

By article 1242 C.C. presumptions not established by law are left to the discretion and judgment of the court. The corresponding article in the Code Napoléon (art. 1353) is to the same effect but with the limitation that the court will admit only such presumptions as are "*graves, précises et concordantes,*" by which is meant presumptions in which the connection between the facts established in evidence and the fact to be proved is such that the existence of the known facts establishes by inference or deduction the fact in dispute.

Article 1242 of the Quebec Civil Code does not contain the limitation of the Code Napoléon but as a presumption to be admitted as legal proof is necessarily a deduction from proven facts, there is, perhaps, but little if any differ-

(1) (1917) 55 Can. S.C.R. 621. (2) (1930) 47 T.L.R. 39.
(3) [1929] Can. S.C.R. 341.

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ence between the meaning to be ascribed to the two articles. See the *Montreal Rolling Mills* v. *Corcoran* (1).

In the present case there was evidence from which the jury could find that the mother fell on her stomach and that the fall produced ecchymosis on the right side thereof; that, after the accident, she suffered abnormal pains in her abdomen which continued until after her confinement, and for the first time she had a leakage of fluid from the uterus which, though slight and intermittent, continued until the birth of the child. These leakages Dr. Benoit, the family physician, explained as coming from the amniotic fluid. The doctor's view was that the three membranes of the sac had been slightly fissured, sufficiently to permit the fluid to slowly filter through, but not sufficiently to bring about a premature confinement.

The jury had also before them the further testimony of Dr. Benoit, who was present at the confinement, and who stated that in delivering the mother he had to break the sac—that the water therein had partly escaped and "*l'accouchement a été presque à sec.*" He examined the child immediately after its birth and found that each foot was bent inwards. Witnesses also testified that the child was born with a black mark on its heel. There was also evidence that no members on either side of the family had ever had club feet; that Madame Léveillé's first child had been perfect in health and form; that her carriage of Jeanine had been normal and that up to the 25th of March, 1929, she had not suffered any accident or fright. This evidence was uncontradicted. It was, therefore, for the jury to determine, in the light of that evidence and the medical testimony, whether a causal relation existed between Madame Léveillé's fall and the child's club feet.

Nine medical witnesses were examined at the trial, three testifying for the respondent and six for the appellant.

For the respondent Dr. Langevin, a gynaecologist and obstetrician professor at the University of Montreal, testified that in its mother's womb the child's members were in a flexed position and their malformation would be promoted by the absence of liquid in the uterine cavity which would cause the walls thereof to contract and the flexing to increase. He further said that in the last months of

(1) (1896) 26 Can. S.C.R. 595.

pregnancy, particularly from the seventh to the ninth month, the calcification of a child's bones greatly increases; that during this period it requires twenty-two times more lime than during the first months, and that with the extra pressure caused by the contraction of the uterine cavity the chances of the bones calcifying in their flexed position become greater. He also said that when the pressure is found in the uterine cavity the probability is that a deformity will result. Dr. Langevin's conclusion was that while club feet may result from various causes, the only satisfactory explanation, in the circumstances of this case, was that the deformity resulted as a consequence of the mother's fall. In fact he said that scientifically there was no other explanation.

Dr. Letondal, professor of children's clinic of the faculty of medicine, and specialist in children's diseases, testified to the same effect as Dr. Langevin. He admitted that his conclusion was simply a theory incapable of scientific demonstration but he expressed the opinion that it was the most probable theory and there was no other that he could suggest.

Dr. Benoit also testified as follows:—

Q. Docteur, à quoi attribuez-vous cette condition de pieds bots dont l'enfant souffre aujourd-hui?—R. Enfin, d'après les auteurs,.....

Q. Docteur, dans le cas présent, qui nous occupe?—R. Dans le cas présent ici, je l'attribue par la pression utérine sur la position des membres, pression qui a duré deux mois, au cours desquels il y a calcification des membres et cette malformation a été causée par la position des membres qui a été exagérée et je crois que le pied bot qui est ni plus, ni moins qu'une exagération d'une position normale au moment où il y avait calcification. Et je pourrais dire que le pied a été calcifié dans cet état-là.

* * *

Q. Maintenant, voulez-vous me dire s'il y a relation entre l'état que vous avez constaté et l'infirmité que vous avez vu chez cet enfant?—R. Pour moi, c'est l'état de contractibilité des membranes de l'utérus, et c'est dû au traumatisme qu'elle a eu lors de sa chute.

On the other hand the medical witnesses called on behalf of the appellant stated that the cause of club feet in children is not known to the medical profession. They did not agree with the conclusion reached by the respondent's witnesses, some because they thought that if there had been a rupture of the uterine cavity sufficient to permit leakage from the amiotic sac it would have produced a premature confinement. Others thought the fall of the

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mother would not cause club feet in the child she was carrying at the time, and one added: that at seven months the feet of a child have become so ossified that a fall which would injure them would be likely to break the bones. The testimony given by these witnesses was largely of a negative character and they could not suggest any reasonable hypothesis to account for the deformity.

Does the evidence in this case take us beyond the region of pure conjecture and into the domain of reasonable inference? It was contended on behalf of the Company that, even if the accident to the mother was the result of the Company's fault, there was no evidence whatever to connect the deformity of the child's feet with the mother's accident; that it was just as reasonable to attribute the club feet to an unknown cause as to attribute it to the consequences of the mother's fall. I do not think this is so. Ascribing the club feet to an unknown cause does not eliminate uterine contraction as a probable cause. The Company's medical witnesses by saying that they do not know the cause of club feet do not negative the testimony of those who find uterine contraction a very probable cause. In this case the cause which produced club feet cannot be demonstrated to a certainty and the law does not require that it should be. It is simply a question of drawing an inference. Three medical witnesses for the respondent gave it as their opinion that the contraction caused by the escape of amiotic fluid was not only sufficient to account for the deformity in this case but that they could see no other probable cause. The jury were entitled to accept the conclusion of these witnesses and to infer from the whole evidence the existence of a causal relation.

The argument advanced on behalf of the Company in this case was advanced in the case of *Craig* v. *Glasgow Corporation* (1). In that case a farmer was found lying beside the track of a tramway company with his head so badly injured that he had no recollection of what had taken place. He remembered that he had been driving two cows along the track, but had no recollection of having seen the tram car. The questions were whether he had been struck by the car and, if so, could it reasonably be inferred that the accident was due to the negligence of the company's

(1) (1919) S.C. (H.L.) 1.

driver? The driver testified that he would have been proceeding more slowly if he had seen the man and the cows. He did not see the man at all, nor did he see the cows until he was within three feet of them. The Lord Ordinary found that the man had been knocked down by the car as a consequence of the driver's failure to keep a proper lookout. This judgment was reversed on appeal but was restored by the House of Lords. In his judgment in the House of Lords Lord Findley, at page 9, said:—

> It is of course within the bounds of possibility that the pursuer had a fit and fell and injured his head upon the rail. It is within the bounds of possibility, as was suggested as a hypothesis—not, I think, that it was put as a very likely hypothesis—that he was knocked down by one of these cows. But what is the reasonable inference? That is what we have to deal with.

The data furnished by the evidence which the jury accepted and from which they deduced a presumption of causal relation, were, in my opinion, more convincing in the case before us than those found in the following cases in which the inferences drawn by the jury were upheld. *McArthur* v. *Dominion Cartridge Company* (1); *Jones* v. *G.W. Rly. Co.* (2); *Grand Trunk Rly. Co.* v. *Griffith* (3).

I am, therefore, of opinion that the evidence here does take us beyond the realm of conjecture and into the domain of reasonable inference, in which case it was for the jury to say if the evidence produced in their minds a conviction that it was reasonably probable that the deformity of the child resulted as a consequence of its mother's injury. They, having said it was, their verdict should not be disturbed.

The only other question is as to the sufficiency of the charge of the trial judge. Several objections were taken to the charge but the only one requiring consideration is that the judge misdirected the jury in respect of the law applicable to presumptions. The chief objection was that he failed to instruct the jury that a presumption was admissible as legal proof only when it was "*grave, précise et concordante*" or "weighty and serious"; that instead he instructed them that they were entitled to accept presumptions that rendered only simply probable or likely the existence of a causal relation between the deformity of the child and the accident to the mother. As required in the

(1) [1909] A.C. 72. (2) (1930) 47 T.L.R. 39.
(3) (1911) 45 Can. S.C.R. 380.

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case of mixed juries the judge charged them in both the French and English languages. The following passages were referred to as embodying errors in law:

Quand on examine les faits dans cette cause, ceux qui rendent même simplement probable le résultat, c'est que l'accident rend probable que les pieds bots soit la conséquence de la chute.

It is left to your discretion to find out and decide whether from all the circumstances there is sufficient for you to presume to create in your minds a likely presumption that the injury was caused as a direct result of the accident.

In this case you could not have direct proof. You must go by inference or presumption. More often the contested point is not demonstrated, but is simply rendered possible, *vraisemblable* to a more or less degree.

In this latter passage I take it the learned judge having used the word "possible," immediately substituted therefor, the word "*vraisemblable*," for he has not elsewhere instructed the jury that the mere possibility of a causal relation was sufficient.

In support of his instructions the trial judge quoted to the jury the following passages dealing with presumptions of fact from well known French authors.

Planiol—9th ed., no. 36:

la preuve proprement dite, directe et absolue n'existe presque jamais; le plus souvent il n'y a que des présomptions qui pourront non pas démontrer mais simplement rendre la chose probable à un degré plus ou moins fort.

Marcadé—vol. 5, art. 1353 C. N.:

Cette disposition de la loi est de la plus haute importance; elle est l'une de celles qu'il faut se graver profondément dans l'exprit, pour ne les jamais perdre de vue.

Sa portée est, en effet, immense puisqu'elle érige en preuves légales pour tous les cas où le témoignage est admissible, les simples conjectures du magistrat, les simples probabilités que les dépositions des témoins ou les diverses circonstances de la cause peuvent faire naître dans son esprit.

Does the law as stated by these authorities differ from that laid down in the above mentioned cases? In my opinion there is practically no difference for, under either the French or English jurisprudence, the presumptions or inferences to be receivable as proof must be a deduction from established facts which produces a reasonable conviction in the mind that the allegation of which proof is required is probably true. That conviction may vary in degree between "practical certainty" and "reasonable probability" or, as Planiol puts it, may render "la chose probable à un degré plus ou moins fort."

In the *Jones* case (1) Lord MacMillan points out that a conjecture is of no legal value " for its essence is that of a guess," while Marcadé would accept as proof " *les simples conjectures du magistrat.*" In my opinion these are not inconsistent views for as I read Marcadé he was not using the word " conjecture " in the sense of " guess."

In Littré—*Dictionnaire de la Langue Française,* the first meaning given for " conjecture " is " *opinion établie sur des probabilités* "; and in *Larousse pour tous,* the meaning given is: " *présomption, supposition, opinion fondée sur des probabilités.*" This appears to me to be the sense in which Marcadé used the word " conjecture." It, therefore, is simply a conviction founded on probabilities. For all practical purposes I see no reason why the principle stated by Lord MacMillan in the *Jones* case (1) is not just as applicable to Quebec law as to English law. The objection, therefore, that the trial judge misdirected the jury in the observations referred to cannot be maintained.

The question, however, is whether he instructed the jury sufficiently? In a case such as this it is, in my opinion, essential that the judge should instruct the jury that the presumption which they are entitled to admit as proof must not be a mere guess on their part, but must be a reasonable deduction from such facts as they shall find to be established by the evidence. The learned trial judge did not in so many words give the jury this instruction but I think, in effect, he conveyed it to their minds. He called their attention to the uncontradicted evidence of the respondent's witnesses—to the reasoning and conclusions drawn from that evidence by Dr. Langevin, and then he said:—

> Si vous croyez, si vous en venez à la conclusion que les faits dont les témoins ont parlé constituent dans votre esprit une présomption raisonnable, et si vous adoptez le témoignage de M. Langevin qui est le seul qui nous donne une opinion un peu formulée, si vous adoptez son opinion, vous répondrez à cette question: oui.

Dr. Langevin had stated the inferences which he drew and the reasons why he drew them. In leaving it to the jury to say if they drew the same inferences the trial judge was practically instructing them that the presumption to be admitted as proof must be a deduction and not a guess.

(1) (1930) 47 T.L.R. 39.

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After considering the charge as a whole I agree with the majority of the court below that there was nothing in the charge to mislead the jury.

I would dismiss the appeal with costs.

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CANNON J.—Le demandeur, en sa qualité de tuteur à sa fille Jeannine, née le 25 mai 1929, réclame les dommages soufferts par cette enfant, venue au monde avec des pieds bots, et poursuit la défenderesse parce que la négligence d'un de ses préposés, en causant la chute, le 25 mars 1929, de la mère de l'enfant, alors enceinte de sept mois, serait la cause de cette infirmité dont l'enfant souffre préjudice depuis sa naissance. La faute de la compagnie a été affirmée par le jury et n'a pas été mise en doute devant nous.

Trois points seulement sont soulevés, dont le premier n'a pas été invoqué devant les autres juridictions:

1. L'on nie que cette enfant puisse recouvrer des dommages qu'elle aurait soufferts comme conséquence d'un accident causé à sa mère avant sa naissance et dont elle aurait, par ricochet, elle-même souffert;

2. Les présomptions sur lesquelles le jury s'est fondé pour établir la relation de causalité entre cet accident à la mère et l'infirmité de l'enfant ne sont pas suffisantes en droit pour justifier le verdict du jury;

3. La charge du juge n'a pas suffisamment éclairé le jury sur cette question de droit.

I.

Il est à remarquer que devant la Cour Supérieure et devant la Cour du Banc du Roi l'on n'a pas soulevé le point qui nous a été soumis quant à l'existence du droit d'action dans les circonstances révélées en détail dans les notes de mon collègue, l'honorable juge Lamont.

Après avoir examiné avec soin les raisons que l'on a fait valoir de part et d'autre, il me semble qu'il n'est pas nécessaire en l'espèce de discuter les droits de l'enfant dans le sein de sa mère, entre sa conception et sa naissance. L'action en responsabilité, et partant la possibilité de l'exercer devant la juridiction compétente, naît, en principe, du jour où la victime a subi le dommage; et une faute ne suffit pas pour agir. Le préjudice est l'un des trois éléments essentiels de la responsabilité. Sans lui, pas d'action en responsabilité possible. Quelle réparation pourrait réclamer

un demandeur s'il n'avait subi encore aucun dommage? Si, en principe, le demandeur ne peut agir dès l'instant où la faute a été commise mais seulement à l'instant où cette faute lui a causé un dommage, il me semble que le droit à réparation de Jeannine Léveillé n'a commencé à exister qu'après sa naissance, lorsque l'infirmité corporelle dont elle souffre s'est révélée. Avant cette date, aussi longtemps qu'elle était dans le sein de sa mère, il est évident qu'elle ne souffrait aucun dommage, aucun inconvénient et aucun préjudice. Aucune action en responsabilité n'était ouverte. Ce n'est que lorsque le préjudice certain a été souffert que ses droits ont été lésés, qu'elle est devenue une victime ayant des droits à réparation. C'est de ce moment, après sa naissance, que son droit a commencé. On peut dire que son droit est né en même temps qu'elle. Elle pouvait donc, assistée de son tuteur, intenter la présente action pour essayer de démontrer que le préjudice dont elle souffre a été causé antérieurement à sa naissance par la faute de la défenderesse et de son employé.

Il n'est pas nécessaire de discuter la maxime: *"Infans conceptus pro nato habetur quoties de commodis ejus agitur,"* ni l'application des articles 345, 608, 771, 838 et 945 du Code civil. Il ne s'agit pas d'un droit que l'enfant avait dès sa conception, mais d'un droit à réparation qui a commencé à sa naissance.

II

Le demandeur ès-qualité avait à établir en fait que la chute de la mère, deux mois avant la naissance de l'enfant, a causé l'infirmité de cette dernière, c'est-à-dire établir un lien de causalité entre la faute et le préjudice. Si le préjudice est la conséquence de l'acte illicite, l'auteur du quasi-délit doit réparer, même si cette conséquence était imprévisible au moment de la faute.

La Cour de cassation, en France, pose en principe que l'appréciation du rapport de causalité est une question de fait; mais nous pourrions intervenir et mettre de côté la décision du fait par le jury si nous en arrivions à la conclusion qu'elle est déraisonnable. Dans l'espèce, la faute n'aurait atteint la victime qui se plaint devant nous que par ricochet. Sans doute, peut-on dire que l'analyse du lien de causalité ne nécessite pas une distinction entre les

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causes prochaines et les causes lointaines; toutes sont équivalentes au point de vue de la responsabilité. Mais devons-nous dire que les principes de la causalité conduisent à ordonner la réparation de dommages indirects? Je ne le crois pas; car dans la série des préjudices, il y a un moment où nul ne peut plus affirmer avec certitude que sans la faute le dommage ne se serait pas produit. A partir de ce moment, l'existence du lien de causalité n'est plus établie; la faute initiale ne peut donc plus être tenue comme cause du préjudice.

Comme le disent MM. Henri et Léon Mazeaud, dans leur *Traité de Responsabilité Civile,* 1931, no. 1673,

* * * l'auteur de la faute initiale ne répond dans la chaîne des préjudices que de ceux qui sont la conséquence certaine, nécessaire de son acte. L'expression de "dommage nécessaire", ou de "suite nécessaire", qu'employait déjà Pothier, est préférable à celle de "dommage direct" ou de "suite immédiate"; elle marque plus exactement la nature du lien de causalité qui est exigé et le point où s'arrête le responsabilité du défendeur. Elle ne laisse pas en effet supposer que seul le premier préjudice doit être réparé: le deuxième, le troisième, le quatrième, etc., sont susceptibles d'engager la responsabilité de l'auteur de la faute initiale: il en est ainsi chaque fois qu'ils ont un lien *certain* de causalité avec cette faute; mais, plus ils s'éloignent dans la chaîne des conséquences, plus la certitude diminue.

Ces mêmes auteurs soulignent le fait que la jurisprudence en France, avec raison, ne voit dans la nécessité d'un préjudice direct que l'application du principe d'après lequel la relation de cause à effet doit exister avec certitude entre la faute et le dommage.

Dès que cette relation existe, le préjudice doit être réparé, si lointain soit-il; et cela montre assez que les expressions "dommage indirect" et "suite immédiate" exprimaient fort mal l'idée générale qu'elles recouvrent. Il n'est pas question de proximité dans le temps ou dans d'espace, mais seulement de l'existence d'un lien de causalité.

Dans la cause actuelle, avons-nous réunis les trois éléments de la responsabilité: préjudice, faute, rapport de causalité, de façon a établir un lien de droit entre la victime du préjudice et l'auteur de la faute?

Ici, l'on a dû nécessairement, pour établir ce rapport de causalité, avoir recours aux présomptions découlant des circonstances prouvées: chute de la mère, symptômes anormaux avant et pendant la naissance, qui ne s'étaient pas produits chez elle auparavant; marques de l'enfant; constations du médecin traitant et témoignages médicaux. Les présomptions que le jury a tirées des faits légalement établis devant lui sont, en principe, suffisantes dans le procès en

responsabilité. Le juge du fait est souverain quant à leur appréciation (arts 474-475 C.P.C.); mais il a le devoir de conscience de n'admettre que des présomptions graves, précises et concordantes. Il faut donc, dans chaque espèce, scruter les faits invoqués par le demandeur en responsabilité pour établir la faute, le dommage et le lien de cause à effet; et une fois que le juge de première instance, assisté d'un jury, a constaté les faits, a établi cette relation comme certaine et non problématique, un tribunal d'appel ne peut, en vertu du code de procédure civile, intervenir que si le verdict est contraire au poids de la preuve; et l'article 501 C.C. nous dit que le

> verdict n'est pas considéré comme étant contraire à la preuve, à moins qu'il ne soit de telle nature que le jury, en examinant toute la preuve, n'aurait pu raisonnablement le rendre.

ou, suivant l'article 508 C.C., un jugement différent peut être rendu

> lorsque les faits, tels que constatés par le jury, exigent que le jugement soit en faveur de l'appelant.

La Cour du Banc du Roi a refusé d'en venir à cette conclusion; et je ne vois aucune raison valable pour mettre de côté cette décision. Les conclusions des docteurs Langevin et Letondal à l'effet que les circonstances de cette cause indiquaient comme seule explication satisfaisante, que la chute de la mère et ses conséquences avaient amené la difformité de son enfant, ont été acceptées par le jury. Est-ce un verdict déraisonnable? Il n'aurait peut-être pas été celui d'un jury de médecins ou de spécialistes; mais il a reçu l'approbation du tribunal choisi et désigné par le loi pour décider souverainement du fait suivant sa conscience; et rien au dossier ne démontre que ce tribunal a erré. Le verdict du jury ne règlera pas la controverse médicale engagée devant lui. Mais la loi ne peut attendre que les médecins soient unanimes pour décider la question de fait soulevée en cette cause. L'on n'a pas établi que l'infirmité de l'enfant provenait d'une autre cause que l'accident causé à sa mère pendant la période de gestation par la faute maintenant admise du préposé de la défenderesse. Je ne crois pas qu'en présence d'un verdict du jury, approuvé par le juge de première instance et par le tribunal d'appel, nous puissions, sur une question de fait, mettre de côté ces jugements concordants, à moins que l'on puisse nous in-

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diquer une erreur manifeste qu'il serait de notre devoir de corriger. On ne l'a pas fait.

Comme dans *Shawinigan Engineering Co.* v. *Naud* (1), le fait que les médecins de la compagnie, tout en soutenant que l'infirmité de l'intimée n'est pas le résultat de la chute de la mère, se déclarent incapables d'en découvrir une autre cause, affaiblit la valeur probante de leur opinion, et l'affirmation contraire me paraît mieux s'accorder avec l'enchaînement logique des circonstances et la succession des symptômes qui se sont manifestés. Ces circonstances et ces symptômes sont suffisamment graves, précis et concordants pour nous permettre de décider que l'intimée a fait la preuve qui lui incombait, de la relation entre l'infirmité dont elle souffre et l'accident que sa mère a subi par suite de la négligence de l'appelante.

III

Quant au troisième point, je crois, comme mon collègue, l'honorable juge Lamont, et pour les mêmes raisons, que le juge avait suffisamment indiqué au jury les règles à suivre pour tirer des déductions des faits établis devant lui.

Je crois donc que l'appel devrait être renvoyé avec dépens.

SMITH J. (dissenting).—The respondent sues on behalf of his infant child for injuries alleged to have been sustained by the child by reason of the mother having fallen in alighting from the appellant's car at a time when she was seven months pregnant of the child. The child was born two months later, with club feet. The allegation is that the club feet were the result of the fall, which the jury has found was caused by the appellant's negligence.

The first question to be determined upon the appeal is whether or not any action lies on behalf of the child.

My brother Lamont has reviewed authorities on this point at length, and concludes that the great weight of judicial opinion in the common law courts denies the right of a child, when born, to maintain an action for prenatal injuries, but that such right of action exists under the Civil Code of Quebec.

(1) [1929] S.C.R. 341, at 345.

In my view, the provisions of the Civil Code in reference to appointment of curators to unborn children or as to the right of such children to inherit or take, by gift or will, do not help to distinguish the law under this code from the common law, as all these rights exist also under the common law, and are entirely different in character from the right of action in tort set up in this case.

It seems to me that in the various citations made by my brother Lamont as to the civil law, the reference is to rights concerning property, and not to rights such as here claimed. Neither under the common law nor under the Civil Code of Quebec does the law on this point seem to have been definitely settled by authority; but, while admitting that the point is a doubtful one, my view is that the action does not lie.

I am further of opinion that, having regard to the scientific problem involved, there was not evidence upon which the jury could reasonably find as a fact that the child's club feet resulted from the injury to the mother.

The medical evidence offered by the respondent to shew that the deformity of the child's feet resulted from the accident is that of Doctors Langevin, Letondal and Benoit.

The two latter do not pretend to have formed any independent opinion of their own. Dr. Letondal says:

* * * évidemment que ce témoignage du docteur Langevin m'a excessivement impressionné. Mais il s'agit simplement d'une hypothèse et pas d'une chose qu'on peut démontrer scientifiquement.

Mais dans le cas particulier c'est vraiment l'hypothèse la plus probable, et il n'y en a pas d'autre que je puisse assigner, dans ce cas particulier, je n'en vois pas d'autres.

Dr. Benoit attended the mother from the time of the accident until after the birth of the child, two months later, and says:

on n'aurait pas pu en faire la preuve mais j'ai entendu le témoignage cet après-midi, du docteur Langevin, des causes qui amènent le pied bot, et je crois que c'est l'hypothèse la plus plausible. Il y a de certains cas où l'on ne peut pas affirmer. Cependant, je n'ai jamais fait d'études spéciales parce que je ne suis pas un spécialiste.

It may be noted here that he learned of no causes from Dr. Langevin except the one, as that witness mentioned no others. These two doctors therefore add nothing to the testimony of Dr. Langevin, but merely accept what he says, but both, on the strength of what Dr. Langevin has said, proceed to confirm his opinion.

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Dr. Langevin is a "*gynécologiste,*" and "*médecin en chef de la Maternité,*" professor at the University of Montreal, and has charge of the obstetrical course. He is asked if there is a relation between the accident and the club feet of the child, and answers:—

C'est une possibilité. D'ailleurs, dans l'analyse du processus psychologique, ce qu'il faut se rappeler, c'est que naturellement l'enfant a les membres fléchis dans la cavité utérine. Deux causes peuvent favoriser surtout la difformation des membres normalement, l'absence de liquide dans la cavité de l'utérus venant contracter l'enfant, le fléchissement s'accentue.

Then the following question is asked:—

Q. Docteur, au cas où vous auriez un enfant, et la preuve démontre ceci que la femme était parfaitement bien jusqu'au moment où elle est tombée sur le ventre alors qu'elle portait depuis sept mois, qu'elle est arrivée chez elle immédiatement après être tombée presque sans connaissance, et qu'elle s'est sentie immédiatement des douleurs dans l'abdomen, qu'en arrivant chez elle sa mère a constaté que ses habits étaient souillés, qu'il y avait des marques rouges; que depuis elle a continué de perdre un peu et de tacher son linge jusqu'au moment de l'accouchement et que ces pertes qui arrivaient chez elle c'était des eaux et que à part de cela elle était parfaitement bien; et maintenant j'ajouterai, par la preuve que nous allons faire, que l'accouchement s'est fait comme l'on dit, à peu près à sec; et que l'enfant, à sa naissance, portait des marques noires, comme des contusions à l'endroit ou ce traumatisme ce serait produit à l'extérieur; ces faits étant donnés, dites-moi donc, docteur, si vous trouvez qu'il y a relation entre l'accident et puis l'état de l'enfant à sa naissance. —R. Je le crois.

Asked if there might be any other cause, he answers:—

Il peut y avoir un nombre de causes, mais du moment qu'il y aurait eu pression dans la cavité utérine il est probable qu'il y a eu difformation. Il peut y avoir d'autres causes que cet accident, mais cet accident, dans le moment, qui s'est produit, par suite du traumatisme, peut expliquer le cas.

The doctor is not a specialist on club feet, and does not pretend to have made any special study on their cause. He says there may be many causes, but tells us nothing of what these other causes are, or of what medical science has discovered about the causes that lead to club feet.

Dr. Letondal, one of the respondent's witnesses, says that it is not exactly known in medicine what leads to club feet and, so far as he is concerned, it is not determined what is the cause of club feet.

According to the last answer of Dr. Langevin, quoted, if the mother was well before the accident, and not well after it, it is a satisfactory conclusion to say that any defect in the child when born is the result of the accident.

One of the basic facts submitted in the question is that the child, at its birth, carried black marks like contusions at the place where this "*traumatisme*" would be produced at the exterior. The only evidence of any marks on the exterior of the woman's body after the accident is that given by her mother, Justine Therrien. She is asked:—

Q. Et puis, après cela, avez-vous constaté qu'elle avait des marques rouges.—R. Un petit peu sur le ventre.

The injured woman gave evidence, and makes no mention of any marks; and Dr. Benoit, who was called in to see her the next day, and presumably examined her, although he does not say so, makes no mention of any such marks.

When the child was born, Madame Beaulieu, a sister of the injured woman and an attendant at childbirth, discovered that the child had club feet, and called the doctor's attention to it; and then the mother and the doctor examined the child; and all three gave evidence as to what they saw. Madame Beaulieu says:—

* * * j'ai constaté que l'enfant était infirme, et alors qu'il avait des taches sur les pieds.

* * * Quel genre de taches?

Des bleus, des ecchymoses * * *.

The mother of the child says:—

* * * j'ai regardé les marques.

Q. Des marques?—R. Bien. Je sais qu'il avait des taches noires en arrière, des marques que j'ai vues.

Dr. Benoit examined the child, and found that it had club feet but says not a word about marks, either black or blue, on the back or on the feet. I have quoted every word of evidence that there is in reference to marks on the mother and on the child, and, as will be seen, there is nothing connecting these blue marks on the feet, or these black marks *en arrière* (perhaps meaning on the back of the feet—that is, on the heels—with the *petit peu* red marks on the body of the mother referred to in the evidence of Justine Therrien quoted, either as to position or otherwise. The marks mentioned in the question are black marks, and the only black marks mentioned in the evidence are those *en arrière*.

One of these facts, therefore, upon which Dr. Langevin's theory is built, is not established by evidence.

Another of the basic facts, submitted in the question, is that on arriving home, the mother of the injured woman

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discovered that her clothes were soiled, that from that time she continued to lose a little, and to stain her linen, up to the moment of the birth; and that this loss, which happened with her, was of water; that is, fluid. In addition to what is stated in the question, Dr. Langevin states, that he has heard the evidence giving the description of the symptoms which were present in consequence of the accident. The description, as given in the evidence, is entirely different from what is stated in the question.

As to the loss of fluid, the mother of the child says she had no loss up to the time of the accident, and, being asked if she had any such loss immediately after, answers that she cannot tell, as she was too nervous, and that they might ask Dr. Benoit. Two months passed from the date of the accident until the birth, during which time these alleged losses continued, saturating the woman's clothes; but she says not a word about it.

There is the evidence of Justine Therrien, mother of the child's mother, who undressed her on her arrival home after the accident, and who says she discovered that the patient was wetted, that she was very nervous, and had a headache. Asked if these losses of fluid lasted a long time, she answers: "Non, monsieur, pas trop longtemps." Then asked if she remarked, following this, losses of fluid, she answers, "Plusieurs jours." To the question, "Elle égouttait?" she responded, "Oui, monsieur."

Next we have the evidence of Madame Beaulieu, already mentioned. She saw her sister the second day after the accident. She saw fluid on her sister's clothes and her linen soiled, and this condition continued; and at the birth there was no fluid at all. She is asked if, before the birth, her sister "était avec un gros ventre?" to which she replied, "Pas du tout." She is asked if this was due to the loss of fluid, and answers that, before the accident her sister was very big, but after, this diminished. She was so big before the accident as not to be able to button her coat, and after the accident "ca tout diminué." At the birth, she says, there was no fluid at all, that it was "un accouchement à sec, dans le sang."

Dr. Benoit, who was called in to see the patient the day after the accident, and who attended her regularly, as he says, for the following two months, is asked if he dis-

covered that she lost fluid, and answers, "I did not discover it myself." Asked if the patient spoke to him on the subject, he says, "Frankly, I do not remember that." He says not a word about the bigness of the patient having diminished; and this sister of the child's mother, who went to see her every day, and who must have come in contact with the doctor very frequently, never mentioned either the loss of fluid that she was observing nor the diminution of bigness to the doctor; and the doctor himself never heard of these conditions until some time after the birth, never was told of them by anybody; but he does say that he observed at the time of the birth that there was very little fluid.

He builds up, however, in his own mind a theory and says the fluid flowed away gradually by an opening very slight, and even, he believes, that it was some membranes of the sac which were torn. There are three of them, and he believes that one of the membranes had an opening lengthwise in one tissue and probably there was also an opening a little further away; and the fluid would run like that between the membranes, but the sac was not much open. Then he says that this is an anomaly, on which he would not rely if there had been no accident.

It will be noticed that all this is not founded on anything that he observed. He never knew, until the birth, that there was any loss of fluid; he then discovered, he says, that there was very little fluid, which did not even draw from him a remark about its loss at the time, nor a little later, when he discovered the club feet. If he had thought at the time that the small quantity of fluid had anything to do with the club feet, surely he would not have left all this theory about small openings in different plies of the walls of the sac to conjecture afterwards; but would have examined the sac there and then, when it was before him, to ascertain if there was any rupture at all. This was the sure method of determining the fact, but, instead of adopting this very obvious method, he waits until he gets into the witness box, and then propounds a conjecture about it, which has no basis whatever in fact, and which is entirely improbable. If a blow from the outside tore these membranes, why should it tear only one ply at one place, and another ply at some distance off? The

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doctor was not accepting the evidence of this sister of the patient, because, on his theory, there could have been no diminution of the bigness from the time of the accident. If such a thing occurred, it could only occur gradually, in accordance with the gradual loss that the doctor speaks of, and would be most significant at the time of the birth; and at that time the doctor noticed nothing of the kind.

What, then, under all these circumstances, was the state of fact upon which Dr. Langevin's answer is based? He heard the evidence of the three women; then he heard what was stated in the question. We have it in evidence by Drs. Gray and Dubé, called for the defence, that if there had been a loss of fluid as described, causing the pressure assumed, there would have been a miscarriage, and matters could not have gone on for two months, to the completion of the birth in the natural way in the natural time. The conditions spoken of did not hasten the birth by a day, the child was born without any complications, and in perfect health. Did Dr. Langevin, in his answer, assume that there was such a great loss of fluid that the largeness disappeared almost immediately after the accident, and brought about the pressure that he speaks of from that time? If he did, he is not basing his answer upon what is stated in the question, as he was bound to do. If he did not accept that as the condition, but accepted the statement in the question as indicating a gradual loss of fluid, then when does he think the pressure that he relies on commenced? It must have been, on that view of the case, a very considerable time, probably at least a month, before pressure, to any practical extent, would commence. The doctor's theory, of course, is utterly denied by a number of doctors as prominent as himself, called by the defence; but if the doctor's opinion, under the circumstances mentioned, is sufficient evidence to sustain a verdict, it is useless to place the contrary opinion of other doctors against his, because it is the province of the jury to decide as to the weight to be attached to a number of conflicting opinions; and, in order to discard Dr. Langevin's evidence, and the verdict founded on it, one must go further.

As already stated, Dr. Langevin is not a specialist in the matter of club feet. His specialty in obstetrics has no more to do with club feet than it has to do with insanity.

If this child had been born an idiot, Dr. Langevin could just as well have said that he believed it was caused by pressure on the skull, and, knowing no other reason, he would consider that one sufficient. He does not pretend to have formed his opinion on anything of the kind that he had observed in his own experience, does not pretend that he had made any special study as to the causes of club feet, or that he formed his opinion on anything that he learned from medical science. He does not say that he ever heard of such a case.

Dr. Benoit and Dr. Letondal, witnesses for the respondent, say that the cause of club feet is not known to medical science, and the same statement is made by Dr. Gray, Dr. Ferron, Dr. Nutter and Dr. De Martigny, and this is not denied by Dr. Langevin. All he says is that there are a number of causes, without naming a single one of them except the one that he propounds in this case.

What force or probability, then, is there in Dr. Langevin's opinion? As already stated, it is not based on anything that he has observed, on any study of the matter that he has made, or on anything that has been discovered by medical science. Such an opinion, to be worth anything, must be based on a definite state of facts of which there is evidence, and here it is impossible to tell what particular state of facts he had in mind as the basis of his opinion. Did he, from the statement in the question, conclude that the black marks mentioned indicated that the feet, perfectly formed, were subjected to violence at the time of the fall, that twisted or distorted them, and that they were subsequently held in that position by pressure?

Perhaps he discarded all statements about marks, and relied only on the pressure. The greatest pressure would be suggested by the evidence of the sister, who discovered the mother's bigness practically gone when she saw her, a little after the accident, and which was never recovered. Did Dr. Langevin take his theory of pressure from this testimony, which he says he heard? If so, his answer is not based on the statements in the question, and he must have rejected Dr. Benoit's theory of gradual leakage between the plies of tissue of the walls of the sac.

Again, did the doctor disregard the evidence of Dame Beaulieu about great loss of fluid, causing at once the loss

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of bigness, which he had heard, and which Dr. Benoit also heard and evidently disbelieved? If so, with the gradual leakage that otherwise took place, such as described by Dr. Benoit, when did pressure begin sufficient to twist the bones of the feet already formed at seven months? The pressure necessarily would come gradually, following the gradual loss of fluid that extended over the whole two months. On this supposition there would be for some time the rapid calcification of the bones of the feet that the doctor dwells upon as going on so rapidly during the last two months, before the pressure could become sufficiently great to have effect. I wonder at what time the doctor settled in his mind as the basis of his theory that pressure sufficient to twist the bones of the feet commenced? He was at liberty to choose in his mind any one of many different conditions as the basis of his theory, and no one can tell what the basic conditions on which he built were.

Then there is the evidence of the two doctors called for the respondent, and the other doctors already referred to and not controverted by Dr. Langevin's evidence, that medical science has not discovered the cause of club feet, and has merely put forward more or less plausible theories, of which Dr. Langevin's does not seem to be one.

For the reasons indicated, I think that there was no evidence sufficiently positive and definite to warrant the jury in finding that the club feet resulted from the accident. Dr. Langevin's theory is a mere guess.

In coming to this conclusion, it is a satisfaction to me to feel that I am doing no injustice to this unfortunate child, because on the evidence, including that of Dr. Langevin, I am fully convinced that there is not the slightest probability that his theory is correct.

The appeal should be allowed, and the action dismissed, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Vallée, Vien, Beaudry, Fortier & Mathieu.*

Solicitor for the respondent: *Joseph Hélal.*