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THE MONT SAINT-SAUVEUR CASE: IS THE COURT OF APPEAL THINKING OUTSIDE THE BOX IN THE ASSESSMENT OF DAMAGES?

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On August 25th, the Court of Appeal, for the reasons of Justice Nicholas Kasirer[1], rendered a significant decision[2] with regard to the duty of care required from ski instructors and the assessment of damages awarded to a victim who developed a serious neurological disorder resulting from a ski accident.

In their capacity as tutors of their child (referred to as "X" in the judgment), as well as in their personal capacity, Plaintiffs claimed damages for approximately $3.8M against Les Stations de la vallée de Saint-Sauveur Inc. and Mont Saint-Sauveur International (hereinafter "MSSI") pursuant to the ski accident that their child suffered.

The facts

On January 12, 2003, Plaintiffs registered their child in a group ski lesson at Mont Olympia, owned by MSSI. At the time, the child was 9 years old. He was a beginner and it was his first lesson with the instructor, referred to as "Z" in the judgment.

Z was 17 years old, but was an experienced skier. On the day of the accident, she was responsible for a group of eight beginners, all aged 8 or 9. This was her first lesson with a group of more than four skiers. Towards the end of the lesson, one of the children became scared and stopped in the middle of the slope. The instructor, who was unable to comfort the child, told the other children (including X) to ski down the slope (which was classified as a beginner slope) on their own to meet their parents. The instructor could not see the ski school meeting place or the entire slope from where she stood. Furthermore, she gave the children no instructions as to how to ski to the bottom or what precise trajectory they should take.

The accident occurred while X was skiing down the slope. No one witnessed the accident, but it appears that X lost control of his skis and went off the trail into the woods. He suffered serious injuries to the head and lungs; his heart stopped for 18 minutes and he was in a coma for nearly 13 days. X sustained significant and permanent neurological injuries as a result of the accident.

The trial judgment

The trial judge found MSSI liable for the accident given that the instructor committed a fault, which was the direct cause of X's injuries. The parents were awarded $2,364,169 in their capacity as tutors to compensate for their child's future loss of income, the management fees he will have to pay, as well as non-pecuniary losses (pain, suffering, etc). The trial judge also awarded plaintiffs over $300,000 in their personal capacity.

The judgment of the Court of Appeal

The Court of Appeal confirmed the trial judgment regarding the determination of the fault, the causal link as well as the assessment of damages.

- The fault

Justice Kasirer mentioned that the fault must be analyzed on a contractual basis, as the parents entered into a contract with MSSI when they enrolled X at the ski school.

Despite the absence of evidence as to the explicit content of this contract, the Court confirmed that although the main obligation of a ski instructor is obviously to teach his students how to ski, such contract also includes an accessory obligation to provide the students with safe supervision for the time they are under his care. This obligation is one of means and lasts throughout the entire lesson.

Justice Kasirer took into account the fact that the instructor was giving a group lesson rather than a private ski lesson, recognizing that the duty of supervision is less stringent in a group lesson. He also considered that the instructor allowed the students to go down the slope on their own, unsupervised, and without specific instructions. From where she stood, the instructor could not see the children skiing down to the meeting place. In any event, she did not even look at the children since she was busy dealing with the frightened skier. The instructor admitted that the instructions she had received were to provide constant supervision to her students.

In light of the foregoing, the Court of Appeal confirmed that the trial judge was right to conclude that the instructor failed to fulfill her contractual obligation when she allowed the children, including X—a beginner—to ski down the remaining part of the slope on their own and without any supervision. When she stopped in the middle of the slope to comfort the frightened child, the instructor could have asked the ski school for assistance, but she did not. Her actions should not be compared to those of a reasonable parent, but rather to those a reasonable ski instructor would have taken in the same circumstances.

Additionally, the Court of Appeal recognized that, in some circumstances, a person who participates in an activity that can be dangerous assumes the reasonably foreseeable risks of an accident. A person who takes a ski lesson obviously assumes foreseeable risks inherent to such lesson. However, in this case, the Court concluded that the accident was the result of an unforeseeable risk. Indeed, when parents enroll their child in ski lessons, they are entitled to expect him to be adequately supervised. Thus, according to the Court, it is unforeseeable that the instructor leave children unsupervised like Z did in the present case.

Lastly, the Court of Appeal confirmed that the instructor could reasonably foresee such an accident. She should have anticipated the risk of an accident created by allowing beginners to ski down a slope unsupervised and by failing to give them proper instructions.

In such circumstances, the Court of Appeal found that the instructor committed a contractual fault.

- The causal link

MSSI argued that the trial judge erred in concluding that there was a causal link between the instructor's fault and the accident, claiming that the real cause of the accident was the child's loss of control of his skis. The Court of Appeal rejected such argument and confirmed that there was a causal link between the instructor's fault and the accident. Indeed, failure to adequately supervise the child caused him to ski too fast, not make suitable stops and turns, and therefore lose control. The Court took into consideration that the instructor admitted that had she supervised and guided the children, she would have taken them down another path, far from the trees on the side of the trail.

MSSI also argued that even if the instructor had properly supervised the children, the accident could still have occurred. The Court pointed out that this was not the burden of proof that lied with the Plaintiffs. They did not have to prove that the accident would not have occurred had the instructor supervised the children; they simply had to demonstrate, as they did, that according to a balance of probabilities, the accident was caused by the instructor's lack of supervision.

- The damages

Justice Kasirer emphasized from the outset that a Court of Appeal should not intervene on the question of assessment of damages, unless there is an error of law or an overriding and manifest error in the trial judge's appreciation of the evidence. This principle is well known, but the fact that Justice Kasirer mentions it in the specific context of assessment of damages is particularly significant as it shows to what extent the courts sitting in appeal are reluctant to intervene.

In first instance, the parents, in their capacity of tutors of their child, were awarded damages as follows:

1. Loss of future income: $1,622,191
2. Management fees[3]: $491,978
3. Non-pecuniary losses: $250,000

In assessing the loss of future income, the trial judge had considered the fact that the child had a good academic record, that he was quite disciplined, and that he had other qualities that predestined him to pursue higher education. The trial judge also considered the child's home environment and his parents' career path. The Court of Appeal confirmed that the trial judge was correct in taking these factors into consideration.

The Court of Appeal also confirmed that the trial judge was right to conclude that the child would not be able to be gainfully employed and rejected MSSI's argument that in spite of the intellectual disabilities, Plaintiffs had not proven that the child would not be able to do any physical work.

Moreover, the Court considered that the amount allocated by the trial judge with regards to management fees was correct in light of the circumstances, even if it is substantially higher than the amount awarded as to management fees in other cases. The Court also rejected MSSI's argument contending that the information on rates obtained by the expert actuary from the two financial institutions he had consulted was hearsay.

As to non-pecuniary losses, MSSI argued that the amount of $250,000 awarded by the trial judge was exaggerated in comparison to the amounts awarded in similar cases, namely the *Andrews*[4] case, in which the victim suffered very serious physical damages (tetraplegia). In the present case, X could be physically active, go to school, participate in sports and entertainment activities and express himself in three languages. MSSI pled that the sum of $250,000 corresponded to 90% of the present value of the sum of $100,000 awarded by the Supreme Court in 1978[5], which was said at the time to be the maximum amount that could be awarded to compensate a non-pecuniary loss.

According to the Court of Appeal, when assessing non-pecuniary losses, one must be careful not to compare the injuries of a given victim to those incurred by the victim in the Andrews case. The Court reiterated that non-pecuniary losses have to be evaluated subjectively, based on the pain, suffering and inconveniences the victim truly experienced. The "creation of a judicial scale" would erroneously suggest that the assessment of non-pecuniary losses should be done objectively. The maximum amount fixed by the Supreme Court ($100,000 in 1978) should not be viewed as a basis of comparison to assess non-pecuniary losses, but simply as a maximum that should not be exceeded.

The Court of Appeal thus confirmed the trial judge's analysis and determined that the amount of $250,000 awarded for non-pecuniary losses was adequate in light of the circumstances.

Lastly, with regards to the damages claimed by the parents in their personal capacity, Justice Kasirer confirmed the amount of $75,000 granted by the trial judge to each parent for the stress, pain and suffering they incurred, as well as the sum of $100,000 (calculated at a rate of $10/hour) awarded to the mother for the extraordinary care she had provided and will continue to provide to her son, such care exceeding the ordinary care a parent would typically provide.

Conclusion

The Court of Appeal confirms, in this judgment, the principles established by previous case law as to the determination of a ski instructor's liability.

This judgment is also consistent with other judgments with respect to physical injuries rendered by the Court of Appeal over the past few years as it reiterates the importance of evaluating non-pecuniary losses subjectively, without using a pre-established calculation method.

However, this judgment is innovative in that it deems inappropriate to evaluate non-pecuniary losses by comparing the severity of the injuries suffered by different victims, unless such victims suffered the same type of injuries. According to the Court, one cannot systematically and blindly use the *Andrews*[6] case as a basis of comparison. Moreover, the Court held that it is not suitable to use the maximum of $100,000 awarded by the Supreme Court in the Andrews case as a basis for calculation. This should only be considered as a maximum amount, which serves to limit the amount that can be awarded for non-pecuniary damages. Needless to say that this Court of Appeal's decision will make the assessment of non-pecuniary losses more challenging. The amount awarded for non-pecuniary losses is substantially higher not only compared to the amounts awarded in previous judgments but also in light of the disabilities suffered by the victim.

The Court of Appeal decided that an intellectual incapacity (evaluated at approximately 29% in this case) is worth almost as much as a total physical incapacity, such as the tetraplegia, even if the victim can be physically active. It remains to be seen if this decision will be appealed to the Supreme Court of Canada and if it will have an impact on the amounts awarded by our Courts in the future.

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1 - Justice Jacques Chamberland, J.A. and Justice Nicole Duval-Hesler, J.A. agreed with Justice Kasirer's reasons.
2 - *Les stations de la vallée de Saint-Sauveur* v. *M.A.*, 2010 QCCA 1509.
3 - Fees that the child will need to pay to a professional because of his intellectual disability to manage the amount awarded by judgment.
4 - *Andrews* v. *Grand & Toy Alberta inc.*, [1978] 2 S.C.R.
5 - *Andrews*, aforesaid, *Thornton* v. *Prince-Georges School District No 57*, [1978] 2 S.C.R. 267 and *Arnold* v. *Teno*, [1978] 2 S.C.R. 287.
6 -Aforementioned, note 3.