

CANADA / JUDGMENT

Air Canada v. McDonnell Douglas Corp.

[1989] 1 SCR 1554

COURT

Supreme Court of Canada

DECIDED

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Air Canada v. McDonnell Douglas Corp.

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Supreme Court Judgments

Date

1989-06-08

Report

[1989] 1 SCR 1554

Case number

20596, 20602

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Cory, Peter deCarteret

On appeal from

Quebec

Subjects

Civil procedure

Notes

SCC Case Information: 20596, 20602

Decision Content

Air Canada v. McDonnell Douglas Corp., [1989] 1 S.C.R. 1554

The Deutsch Company Appellant

and

McDonnell Douglas Corporation Appellant

v.

Air Canada et al. Respondents

indexed as: air canada v. mcdonnell douglas corp.

File Nos.: 20596, 20602.

1989: March 17; 1989: June 8.

Present: Lamer, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.

on appeal from the court of appeal for quebec

Civil procedure -- Declinatory exception -- Territorial jurisdiction -- Air Canada's aircraft destroyed by fire following explosion in fuel pump -- Damages occurring at Air Canada's maintenance base in Dorval -- Vendor of the aircraft and manufacturer of the pump failing to warn Air Canada of the defects of the pump -- Action for damages brought in Quebec against vendor and manufacturer who have no domicile or property in the province -- Purchase contract of aircraft concluded in the United States where vendor and manufacturer have their places of business -- Whether Superior Court has jurisdiction under art. 68(2) C.C.P. -- Nature of cause of action: contractual or quasi-delictual -- Code of Civil Procedure, R.S.Q., c. C-25, arts. 68(2), 163 -- Civil Code of Lower Canada, art. 1053.

Civil procedure -- Place of instituting actions -- Place where the whole cause of action arose -- Air Canada's aircraft destroyed by fire following explosion in fuel pump -- Damages occurring at Air Canada's maintenance base in Dorval -- Vendor of the aircraft and manufacturer of the pump failing to warn Air Canada of the defects of the pump -- Action for damages brought in Quebec against vendor and manufacturer who have their places of business in the United States -- Whether the "whole cause of action" arose in Quebec -- Locus of a failure to warn -- Code of Civil Procedure, R.S.Q., c. C-25, art. 68(2).

An explosion occurred in the auxiliary fuel tank of one of Air Canada's aircraft at Air Canada's maintenance base in Dorval. A fire followed the explosion and destroyed the aircraft. The hangar was also damaged. Air Canada had acquired the aircraft from McDonnell Douglas pursuant to a contract concluded in California. The auxiliary fuel tank, the fuel pump and associated wiring were designed, built and installed in the aircraft by Deutsch. McDonnell Douglas and Deutsch have their places of business in the United States and have no domicile or property in the province.

To recover the loss, Air Canada and the insurers subrogated in Air Canada's rights instituted an action before the Superior Court in the district of Montréal. Under art. 68(2) C.C.P., an action may be instituted "before the court of the place where the whole cause of action has arisen". In their action, respondents alleged that the explosion and fire were attributable to the fault of the

appellants in that they failed to warn Air Canada of the defects affecting the auxiliary fuel tank, the fuel pump and its related wiring. As a result, Air Canada incurred a loss of \$7,786,852. The appellants contested the action by way of motions for declinatory exception arguing that the whole of the respondents' cause of action did not arise in Quebec and that consequently the Superior Court lacked jurisdiction to hear and decide the case. The trial judge allowed the motions but the judgment was set aside by the Court of Appeal. To determine whether the Superior Court has jurisdiction under art. 68(2) C.C.P., this Court must answer the following two questions: (1) what is the cause of action? and (2) did the whole of that cause of action arise in the district of Montréal?

Held: The appeal should be dismissed.

Respondents' cause of action is quasi-delictual. The three elements necessary for an action based on art. 1053 C.C.L.C. are present in this case. There is a fault: a failure to warn Air Canada of the defects and hazards known to the appellants. There is damage: the loss of the aircraft and the damage to the hangar. There is a causal connection between the first two elements: the damage was caused by the failure to warn. The respondents' cause of action is also identical to the cause of action in *Wabasso* where this Court held that the failure of a manufacturer and vendor of goods to warn the user of a hidden danger of which the manufacturer or vendor is aware is an omission which grounds an action in quasi-delict.

The obligation to warn arises out of the manufacturer's or vendor's knowledge of a hidden danger in the goods manufactured or sold by him. The manner in which that danger came to exist does not affect the obligation to warn. The dangerous condition of the goods is simply part of the underlying factual situation, and does not constitute a part of the fault upon which the cause of action is based. The fact* that McDonnell Douglas was party to a contract with Air Canada and that McDonnell Douglas and Deutsch are allegedly responsible for the existence of the danger in the auxiliary fuel tank does not make their failure to warn Air Canada of that danger any less a fault which, independent of the genesis of the danger, grounds an action in quasi-delict.

Where a hidden defect or danger in a thing sold is alleged, the action is not necessarily based on the warranty against latent defects enunciated in arts. 1522 et seq. C.C.L.C. and therefore contractual. A plaintiff who is party to a contract may choose to pursue the defendant either on the basis of the contract or on the basis of a quasi-delict, provided of course that the facts constitute delictual as well as contractual fault. Although the facts alleged by the respondents in this case may ground several causes of action, their declaration clearly indicates that they have opted to base their action on art. 1053 C.C.L.C. The fact that the respondents make no mention in their declaration of the contract of sale between Air Canada and McDonnell Douglas can only support the conclusion that the respondents' action is not contractual in nature.

The Superior Court, district of Montréal, has jurisdiction under art. 68(2) C.C.P. to hear and decide the respondents' action. For the purposes of establishing jurisdiction pursuant to art. 68(2) C.C.P., the locus of an omission to warn must be determined by reference to the place where the pre-existing obligation or duty ought to have been performed, either where the user is located or

where the goods are used, and here, at Air Canada's maintenance base in Dorval. Since the damage also occurred in Dorval, it follows that the "whole cause of action" arose within the district of Montréal as the three elements of the action based on art. 1053 C.C.L.C. (fault, damage and causation) occurred within that district.

Cases Cited

Applied: *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578; explained: *Trower and Sons, Ltd. v. Ripstein*, [1944] A.C. 254; distinguished: *Canadian Motor Sales Corp. v. Lemay*, [1979] C.A. 295; referred to: *Ross v. Dunstall* (1921), 62 S.C.R. 393.

Statutes and Regulations Cited

Civil Code of Lower Canada, arts. 1053, 1522 et seq.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 68, 163.

APPEAL from a judgment of the Quebec Court of Appeal, [1987] R.D.J. 232, 12 Q.A.C. 121, setting aside a judgment of the Superior Court, J.E. 85-280. Appeal dismissed.

Guy Gilbert, Q.C., for the appellant The Deutsch Co.

François Rolland and Stephen Hamilton, for the appellant McDonnell Douglas Corp.

Edouard Baudry and Odette Jobin-Laberge, for the respondents.

//Gonthier J.//

The judgment of the Court was delivered by

GONTHIER J. --

Introduction

The territorial jurisdiction of Quebec courts is primarily defined by art. 68 of the Code of Civil Procedure, R.S.Q., c. C-25 ("C.C.P.") That article contemplates that as a general rule, actions should be instituted before the court of the defendant's domicile. However, the second paragraph of art. 68 C.C.P. provides that a plaintiff may institute action "[b]efore the court of the place where the whole cause of action has arisen".

One of Air Canada's aircraft was destroyed by fire. To recover its loss, Air Canada and the insurers subrogated in Air Canada's rights instituted action before the Superior Court in the district of Montréal. All of the defendants named by the respondents are foreign, and have no domicile in Quebec. Two of the defendants, the present appellants, contest the action by way of motions for declinatory exception: they argue that the whole of the respondents' cause of action did not arise in Quebec and that consequently the Superior Court lacks jurisdiction to hear and decide the case. The resolution of this appeal, therefore, turns on the nature of the respondents' cause of action and the meaning of the term "the whole cause of action" in art. 68(2) C.C.P.

Facts and Proceedings

For the purposes of determining the Superior Court's jurisdiction, one is required to accept as true the allegations of fact set out in the respondents' declaration.

The respondents allege that on June 2, 1982, an explosion occurred in the auxiliary fuel tank of one of Air Canada's DC-9 aircraft, while it was being readied for the installation of a new interior at Air Canada's maintenance base in Dorval. A fire followed the explosion and extensively damaged the aircraft, resulting in its total loss. The hangar was also damaged.

The aircraft had been designed and built by the appellant McDonnell Douglas Corporation ("McDonnell Douglas"), known at the time as Douglas Aircraft Company, Inc. Air Canada acquired the aircraft from Douglas Aircraft Company, Inc. in July 1968 pursuant to a Purchase Agreement for a number of DC-9 aircraft entered into in California in 1964 between Douglas Aircraft Company, Inc. and Air Canada's predecessor Trans-Canada Airlines. The aircraft was delivered in California.

The auxiliary fuel tank, fuel transfer pump and associated wiring were designed, built and installed in the aircraft by the appellant The Deutsch Company ("Deutsch"). The respondents allege in paragraph 5 of their declaration that these components of the aircraft were defective:

5. The auxiliary fuel tank, the fuel transfer pump and the wiring and connector associated with the pump were negligently and improperly designed, fabricated and installed in that:
 - a)The auxiliary transfer pump motor, harness and associated wiring and connector were installed within the tank where they constituted a potential explosion hazard whereas they could and ought to have been installed outside the tank.
 - b)Although the pump motor and associated wiring and connector had been installed within the tank and were thus likely to be exposed to explosive fuel vapour/air atmospheres, they did not meet standard electrical code requirements and usual engineering practice for equipment designed for operation in such atmospheres.
 - c)The fuel pump connector was not properly isolated from the fuel and vapours in the tank, allowing, under normal and foreseeable operating conditions in the field, such fuel and vapours to come in contact with the electrical connection.
 - d)The individual contacts in the fuel pump connector were susceptible to sparking.

The appellants, allege the respondents, became aware of the existence of the defects and the hazards they presented following delivery of the aircraft. Nevertheless, neither appellant took any step to warn Air Canada of the defects and the consequent hazards, either by service bulletin, which McDonnell Douglas routinely sent to Air Canada at its maintenance base in Dorval to advise of technical changes to the aircraft, or by any other means. As a result of the appellants' fault in failing to give warning, the respondents allege Air Canada suffered a loss of \$7,786,852.

The appellants met the respondents' writ of summons and declaration with motions for declinatory exception made pursuant to art. 163 C.C.P.

Relevant Legislative Provisions

The legislative provisions pertinent to the disposition of this appeal are arts. 68 and 163 C.C.P.

68. Subject to the provisions of articles 70, 71, 74 and 75, and notwithstanding any agreement to the contrary, a purely personal action may be instituted:
- (1) Before the court of the defendant's real domicile or, in the cases contemplated by article 85 of the Civil Code, before that of his elected domicile.

If the defendant has no domicile in Québec but resides or possesses property therein, he may be sued before the court of his ordinary residence, before the court of the place where such property is situated, or before the court of the place where the action is personally served upon him;

- (2) Before the court of the place where the whole cause of action has arisen; or, in an action for libel published in a newspaper, before the court of the district where the plaintiff resides if the newspaper has circulated therein;
- (3) Before the court of the place where the contract which gives rise to the action was made.

A contract giving rise to an obligation to deliver, negotiated through a third party who was not the representative of the creditor of such obligation, is deemed to have been made at the place where the latter gave his consent.

163. A defendant, summoned before a court other than that before which the suit should have been instituted, may ask that the suit be referred to the competent court within the legislative authority of Québec, or that the suit be dismissed if there is no such court.

Decisions of the Courts Below

The motions for declinatory exception were decided by Turmel J. of the Superior Court on January 18, 1985: J.E. 85-280. In his view, if the Superior Court could be said to have jurisdiction by virtue of art. 68 C.C.P., para. 2 of that article alone could found that jurisdiction. Article 68(1) C.C.P. would not serve, since neither McDonnell Douglas nor Deutsch were domiciled or had property in the province of Quebec. Article 68(3) C.C.P. was equally inapplicable inasmuch as the contract between McDonnell Douglas and Air Canada was concluded in California, not in Quebec. Therefore, the Superior Court would have jurisdiction only if, in the words of art. 68(2) C.C.P., "the whole cause of action has arisen" in Quebec.

Turmel J. considered that the respondents' action was both contractual and delictual in nature. To establish their cause of action, the respondents were required to prove not only damage but also a fault on the part of the appellants and a causal link between the fault and the damage. The respondents' action, in the opinion of Turmel J., flowed from the appellants' inexecution of their

obligations as designer, manufacturer and vendor, respectively, of a defective aircraft and from their failure to warn the user or purchaser of the defects. Turmel J. found that these faults occurred in California, where the aircraft was sold and delivered. The whole cause of action could not be said to have arisen in Quebec: only the damage occurred in Quebec and damage alone does not generate liability. Turmel J. granted the motions and dismissed the respondents' action.

The Court of Appeal disagreed with Turmel J. In the opinion of Chouinard J.A., writing for the Court, this Court's decision in *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578, compelled a finding that the whole of the respondents' cause of action arose in Quebec. The definition of the "whole cause of action" adopted by the Privy Council in *Trower and Sons, Ltd. v. Ripstein*, [1944] A.C. 254, at p. 259, to the effect that "... the phrase must signify all of the facts, causes, moyens and motifs alleged in the declaration, which if traversed, must be proven" no longer had any application.

The essence of the Court of Appeal's decision, which is reported at (1987), 12 Q.A.C. 121, is contained in the following paragraphs at pp. 126-27:

[TRANSLATION] In the case at bar the source of the right is undoubtedly the contract of sale, at least as between Air Canada and McDonnell Douglas; the situation is different as regards the Deutsch company, also a defendant. However, the immediate cause of action is the failure to perform an obligation imposed by law regarding the duty to notify or to warn the user of an aircraft of a known danger, particularly when the manufacturing company, an expert in the matter, gives the user maintenance manuals for use in maintaining the aircraft, and delivers these to its head office, in this case at the Air Canada office in Montréal.

By itself, the allegation of knowledge of defects in certain components pertaining either to manufacture or use, coupled with absence of notice in proper terms to the user of the aircraft, taken together with the fire and the damage, are [sic] sufficient to constitute "the whole cause of action". Assuming a failure to give notice in Montréal, the place where the maintenance manuals were delivered by McDonnell Douglas, such facts, assuming they are proven, may be a basis for an order against the defendants. The quasi-delictual cause of action thus originated in the district of Montréal, regardless of any other possible contractual basis for the action. The choice was up to the appellants, including Air Canada. [Footnote references omitted.]

By judgment of July 6, 1987, the Court of Appeal overturned the decision of the Superior Court and dismissed the motions for declinatory exception. The appellants applied for leave to appeal to this Court, and leave was granted December 17, 1987, [1987] 2 S.C.R. viii.

Issue and Submissions of the Parties

All parties to this appeal are agreed that paragraphs 1 and 3 of art. 68 C.C.P. do not confer jurisdiction upon the Superior Court to hear and decide the respondents' action. There is thus only one issue before this Court: does the Superior Court have jurisdiction by virtue of art. 68(2) C.C.P.? In other words, do the facts alleged by the respondents in their declaration show that "the whole cause of action" arose in Quebec?

The appellants both concede that, following this Court's decision in *Wabasso*, *supra*, the fact that a contract exists between McDonnell Douglas and Air Canada does not prevent Air Canada from instituting an action in delict or quasi-delict. Indeed, Deutsch accepts that the respondents' action is delictual in nature: there is no contract between Air Canada and Deutsch.

McDonnell Douglas argues that the respondents' action is contractual in nature. It suggests, citing the authority of *Canadian Motor Sales Corp. v. Lemay*, [1979] C.A. 295, that because Air Canada seeks reparation for damages caused by latent defects to the thing sold to it, Air Canada's action is based upon the warranty against latent defects enunciated in arts. 1522 et seq. C.C.L.C. This warranty comes into existence with the contract of sale and since the contract was not concluded in Quebec, the Superior Court can have no jurisdiction.

However, even if one admits that Air Canada's action is based upon a quasi-delict, McDonnell Douglas submits that art. 68(2) C.C.P. would not give jurisdiction to the Superior Court. Both McDonnell Douglas and Deutsch analyze a cause of action based on art. 1053 C.C.L.C. as being composed of three elements: damage, fault and the causal connection between the fault and the damage. In order for the whole of such a cause of action to arise in Quebec, each of these elements must have occurred within that province. The damage, they readily concede, occurred in Quebec. The fault, however, did not. The respondents' declaration, they argue, shows that the fault imputed to McDonnell Douglas and Deutsch is "continuous": it began with the negligent or careless design, manufacture and installation of the auxiliary fuel tank, continued through the acquisition of knowledge of the defects in the auxiliary fuel tank and ended with the failure to warn Air Canada of those defects. Each component of the fault occurred in the United States: that is where the auxiliary fuel tank was designed, manufactured and installed, that is where Deutsch and McDonnell Douglas would have become aware of the defects and the danger they presented, and that is where the appellants failed to act to advise Air Canada of the danger. Deutsch's position departs somewhat from that of McDonnell Douglas in that Deutsch's counsel did concede at the hearing of the appeal that if Deutsch had a duty to advise Air Canada, the warning should have been given to Air Canada at its maintenance base in Dorval. Nevertheless, the "continuous" fault did not occur in Quebec.

The respondents agree with the appellants that a cause of action based on a quasi-delict is composed of the three elements of fault, damage and causation. They agree that the Superior Court will not have jurisdiction by virtue of art. 68(2) C.C.P. unless each of these elements of the cause of action arose in Quebec. The respondents differ from the appellants in their characterization of the element of fault. The fault of the appellants and other defendants, for the

purposes of establishing the "whole cause of action" within the meaning of art. 68(2) C.C.P., is the failure to warn Air Canada. This omission alone is sufficient to ground an action in quasi-delict. The situs of an omission, in this case a failure to warn, is the place where the act omitted ought to have been performed. That place, submit the respondents, is Air Canada's maintenance base in Dorval. Since both damage and fault are located in Quebec, and more precisely in the judicial district of Montréal, Air Canada concludes that the Superior Court, district of Montréal, has jurisdiction to hear the action pursuant to the terms of art. 68(2) C.C.P.

Analysis

The issue before this Court is to determine whether the respondents' action was properly instituted before the Superior Court of Quebec, district of Montréal. That action will have been properly instituted if the criteria set out in the second paragraph of art. 68 of the C.C.P. are met. For convenience, I reproduce art. 68(2) C.C.P. below:

68. Subject to the provisions of articles 70, 71, 74 and 75, and notwithstanding any agreement to the contrary, a purely personal action may be instituted:

...

(2) Before the court of the place where the whole cause of action has arisen; . . .

To determine whether the Superior Court has jurisdiction under art. 68(2) C.C.P., two questions must be answered: (1) what is the cause of action? and (2) did the whole of that cause of action arise in the district of Montréal? I will address each in turn.

1) The Cause of Action

A cause of action comprises certain facts which, if proven, establish a plaintiff's right to the remedy sought from the defendant. Paragraphs 13 and 14 of the respondents' declaration state their cause of action:

13. The explosion and fire are attributable to the fault, neglect and lack of care of the Defendants in that they failed to advise Air Canada, through the issuance of service bulletins or otherwise, of the defects affecting the auxiliary fuel tank, the fuel pump and its related wiring and connector and failed to recommend immediate action in order to eliminate the hazards caused by such defects, though having become aware of these defects and hazards prior to the 2nd June 1982.
14. As a result of Defendants' fault, negligence and want of skill, Air Canada has incurred a loss of seven million five hundred thousand dollars (\$7,500,000.00) with respect to the total loss of the aircraft, being the value of the aircraft on the 2nd June 1982 and has incurred a further loss of two hundred and eighty-six thousand eight hundred and fifty-two dollars (\$286,852.00) as a result of the damage to and destruction of other property and equipment in the vicinity of the aircraft, including particularly the hangar.

The respondents characterize their action as quasi-delictual in nature. I agree with that characterization. An action based on art. 1053 C.C.L.C. is composed of three elements: fault, damage, and a causal connection between the first two elements. All three elements are alleged in the paragraphs of the respondents' declaration quoted above. There is damage: an alleged loss of \$7,786,852. There is fault: a failure to warn Air Canada of the defects and hazards known to the defendants. And the respondents state in plain words that the damage is due to the fault.

The respondents' cause of action is identical to the cause of action in *Wabasso*, supra. This Court held in *Wabasso* and in *Ross v. Dunstall* (1921), 62 S.C.R. 393 before it, that the failure of a manufacturer and vendor of goods to warn the user of a hidden danger of which the manufacturer or vendor is aware is an omission which grounds an action in quasi-delict. In the *Wabasso* case, *Wabasso Ltd.* purchased machines from the National Drying Machinery Company for the processing of polyester. As a result of fibres collecting in the upper part of the machines, a fire ignited which destroyed *Wabasso Ltd.*'s factory in Trois-Rivières. The instruction manuals given to *Wabasso Ltd.* made no mention of the necessity to clean the upper part of the machines, which appeared to be permanently closed, nor did the National Drying Machinery Company's employees inform *Wabasso Ltd.* of the necessity when they attended at *Wabasso Ltd.*'s place of business to install the machines and instruct *Wabasso Ltd.*'s employees in their use. Chouinard J., writing for the Court, cited with approval at p. 590 the following passage from Paré J.A.'s opinion. Paré J.A. explains the nature of *Wabasso Ltd.*'s cause of action:

[TRANSLATION] Indeed, from the viewpoint of art. 1053 C.C., it is not so much the sale which gives rise to liability here, but rather the fact that appellant permitted respondent to use an object made by it, knowing the risks of using it, without warning respondent of those risks. This duty to warn becomes the basis of the liability, and it exists whether or not there is a contract. It is an aspect of negligence which could be cited without recourse to the contract, for anyone who places an object which he knows to be dangerous in use in the hands of another has a duty to warn him of this.

There is a superficial distinction between the facts in the case at bar and the facts in *Wabasso*. In the case at bar, the respondents allege that the hidden danger that gave rise to the appellants' obligation to warn came into existence because of the appellants' fault in the design, manufacture and installation of the auxiliary fuel tank. In contrast, the hidden danger in the machines sold to *Wabasso Ltd.* was due not to defective design or manufacture but simply to a peculiarity of design, such that the upper part of the heat treatment machines appeared permanently closed.

However, the obligation to warn arises out of the manufacturer's or vendor's knowledge of a hidden danger in the goods manufactured or sold by him. The manner in which that danger came to exist does not affect the obligation to warn. The dangerous condition of the goods is simply part of the underlying factual situation, and does not constitute a part of the fault upon which the cause of action is based. Thus, defective manufacture, a peculiarity of design, as in the *Wabasso* case, or simple wear and tear could produce a danger which, if known to the manufacturer or vendor, would give rise to an obligation to warn. The facts that McDonnell

Douglas is party to a contract with Air Canada and that McDonnell Douglas, Deutsch and the other defendants are allegedly responsible for the existence of the danger in the auxiliary fuel tank does not make their failure to warn Air Canada of that danger any less a fault which, independent of the genesis of the danger, grounds an action in quasi-delict.

McDonnell Douglas, however, submits that the respondents' action is not quasi-delictual in nature. It suggests that the respondents' allegation of negligence in the design, manufacture and installation of the auxiliary fuel tank and the hazards that resulted from this negligence amount to an allegation of latent defects in the thing sold. Citing the authority of *Canadian Motor Sales Corp. v. Lemay*, supra, McDonnell Douglas concludes that the respondents' action is based on the warranty against latent defects enunciated in arts. 1522 et seq. C.C.L.C. and is therefore contractual.

I find McDonnell Douglas' argument unpersuasive. *Canadian Motor Sales Corp.*, bears no resemblance to the case at bar. *Canadian Motor Sales Corp.* concerned an action in warranty. The vendor of a car, Lemay, was sued by the purchaser for the loss of certain items which were in the car at the time the car was destroyed by fire. Lemay impleaded its own vendor, *Canadian Motor Sales Corporation Ltd.*, in warranty. Both actions were successful at first instance, but *Canadian Motor Sales Corporation Ltd.* appealed. On appeal, Lemay attempted to argue that the purchaser's cause of action was delictual. The Court of Appeal found that the principal action was based on arts. 1522 et seq. C.C.L.C. and should have been instituted within a time period stipulated in art. 1530 C.C.L.C. The principal action was not instituted within a reasonable delay, and *Canadian Motor Sales Corporation Ltd.*, as defendant in warranty, had the right to raise this defence against Lemay as the latter neglected to raise it against its purchaser.

I see nothing in *Canadian Motor Sales Corp.*, which would support a statement of principle to the effect that where a plaintiff alleges a hidden defect or danger in a thing sold to him the action is necessarily based on the warranty against latent defects in arts. 1522 et seq. C.C.L.C. Such a principle would be contrary to this Court's decision in *Wabasso* which held that a plaintiff who is party to a contract may choose to pursue the defendant either on the basis of the contract or on the basis of a quasi-delict, provided of course that the facts constitute delictual as well as contractual fault. The facts alleged by the respondents in the case at bar may ground several causes of action. But paragraph 13 of the respondents' declaration clearly indicates that the respondents have opted to base their action on art. 1053 C.C.L.C. The fact that the respondents make no mention in their declaration of the contract of sale between Air Canada and McDonnell Douglas can only support the conclusion that the respondents' action is not contractual in nature.

2) The Locus of the Cause of Action

The respondents' cause of action, then, is quasi-delictual. It has three elements. First, the fault: that the defendants, knowing that the auxiliary fuel tank and associated wiring were defective and presented a danger to the user of the aircraft, failed to warn Air Canada of that danger. Second, the damage: the loss of the aircraft and the damage to the hangar. Third, the causal connection: the damage was caused by the failure to warn.

The Superior Court, district of Montréal, will have jurisdiction to hear and decide the respondents' action if each of these three elements occurred in the judicial district of Montréal such that the requirement in art. 68(2) C.C.P. that "the whole cause of action has arisen" within that district is met. The respondents and the appellants agree that the damage was sustained by Air Canada in Montréal. It remains to be decided, however, whether the fault alleged by the respondents occurred in Montréal.

The fault alleged by the respondents is an omission. An omission standing alone has no location for it is an act that, by definition, did not occur. Nonetheless, the omission must be given a location in order to determine the Superior Court's jurisdiction pursuant to art. 68(2) C.C.P. The respondents submit that failure to warn of the danger the auxiliary fuel tank presented must be held to have arisen at Air Canada's maintenance base in Dorval. I agree.

Since a failure to warn is an act which did not occur, some criterion, other than the omission itself, must be used to fix the location of the omission for the purposes of establishing jurisdiction pursuant to art. 68(2) C.C.P. A failure to warn constitutes a fault only when there is a pre-existing duty to inform of the existence of the danger. In my opinion, therefore, the locus of an omission to warn must be determined by reference to the place at which the pre-existing obligation or duty ought to have been performed. An obligation to warn the user of such goods can only be performed by giving warning where the warning will be effective: the nature of a warning is such that it must be received at a place and a time that allow the user of the goods to act to avoid the danger warned of. The locus of a failure to warn is the place at which the warning ought to have been received, and that place may be either where the user is located or where the goods are used.

In the case at bar, the appellants and other defendants had, if the facts alleged by the respondents are true, the obligation to inform Air Canada of the hazards created by the defective auxiliary fuel tank. This obligation ought to have been performed at Air Canada's maintenance base in Dorval: that is where Air Canada could have acted to eliminate the danger. I note two facts which point to an implicit recognition, at least on the part of the appellant McDonnell Douglas, that warning of a hidden danger in the aircraft should be given to Air Canada at its Dorval base. The first is McDonnell Douglas' practice of delivering the service bulletins, which advise of technical changes to the DC-9 aircraft, to Air Canada at its maintenance base in Dorval. The second is the presence of a McDonnell Douglas representative at Air Canada's maintenance base. A part of this representative's functions is to receive "Alert Bulletins", which alert the recipient to the imminent issue of a high-priority service bulletin, from McDonnell Douglas and to direct those bulletins to the appropriate Air Canada personnel. Consequently, the fault alleged by the respondents arose in the judicial district of Montréal.

Before concluding, I wish to comment upon the considerable argument the appellants devoted to the question of whether the definition of the words "the whole cause of action" enunciated by the Privy Council in *Trower and Sons, Ltd. v. Ripstein*, supra, had been overruled by this Court's decision in *Wabasso*. It must be remembered that the primary issue before this Court in *Wabasso* was whether a party who has a cause of action based upon a contract may disregard the

contractual system and found his action upon delictual fault. The facts of that case were such as to relieve the Court of the necessity of a thorough examination of the locus of the cause of action. Wabasso therefore does not offer much assistance in the interpretation of art. 68(2) C.C.P. However, neither does Trower and Sons, Ltd. prove helpful in the interpretation of art. 68(2) C.C.P. in the case at bar. The Privy Council found that the respondent's (plaintiff's) action was based on a contract between the parties. Because the contract had been concluded in London, England, it could not be said that the whole cause arose in Montréal. Lord Wright stated at pp. 263-64:

The action, however, was based on a contract, and, in their Lordships' opinion, it is impossible to treat the place where the original contract was made as immaterial . . . It was, in their Lordships' view, an element in the definition of the whole cause of action.

The ratio decidendi of that case, therefore, is that where an action is based upon a contract, the place where the contract was made is an element in the whole cause of action. This principle can be of little use where, as in the case at bar, the action is based upon a quasi-delict.

Conclusion

For the reasons indicated above, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant The Deutsch Co.: Guy & Gilbert, Montréal.

Solicitors for the appellant McDonnell Douglas Corp.: Martineau Walker, Montréal.

Solicitors for the respondents: Lavery, O'Brien, Montréal.

* See Erratum, [1990] 2 S.C.R. iv

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Prepared on 29 October 2026 · Esheria