

CANADA / JUDGMENT

Therrien v. Dionne

[1978] 1 SCR 884

COURT

Supreme Court of Canada

DECIDED

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Therrien v. Dionne

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Date

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Report

[1978] 1 SCR 884

Judges

Martland, Ronald; Judson, Wilfred; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean

On appeal from

Quebec

Subjects

Insurance

Decision Content

Supreme Court of Canada

Therrien v. Dionne, [1978] 1 S.C.R. 884

Date: 1977-09-30

Germain Therrien (Plaintiff) Appellant;

and

Amédée Dionne (Defendant) Respondent.

1977: March 14; 1977: September 30.

Present: Martland, Judson, Pigeon, Dickson and Beetz JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Insurance—Fire insurance—Non-disclosure by broker—Nullity of contract of insurance—Mandate—Fault of broker—Damages—Causal connection—Burden of proof—Civil Code, arts. 984, 1062, 1203, 1701.

Appellant (Therrien) was the owner of a building that burned to the ground in 1956. The loss at that time was covered by insurance, and Therrien rebuilt. Since his insurers declined to renew his policies, he discussed his difficulties with respondent (Dionne), an insurance broker, and asked him to insure his building for \$32,000. After contacting several companies without success, Dionne managed to obtain five policies providing coverage of \$26,000 through another broker, but he failed to disclose the fact of the 1956 fire and the fact that several companies had refused to insure the building. In 1959 the building was completely destroyed by a second fire. The insurers refused to pay on the ground that Dionne's non-disclosure voided the policies. Therrien instituted proceedings against his insurers but the appellate courts dismissed his claim. In the action at bar, Therrien claims from Dionne the \$26,000 stated in the policies plus legal expenses incurred in the proceedings against the insurers, plus interest. The Superior Court allowed his claim to the extent of \$57,404. The Court of Appeal reversed this decision because in its view Therrien had failed to establish that, had Dionne disclosed all the facts, the insurers would have accepted the risk.

Held: The appeal should be allowed.

The Court of Appeal erred in two respects: (i) in failing to distinguish between absence of cause, on the one hand, and impossibility of performance of an obligation, on the other; (ii) in placing upon Therrien a burden of proof which properly rested upon Dionne.

Therrien had to establish fault, damage and causality. There can be no doubt that fault and damage were established. The nexus between the fault (Dionne's failure to make due disclosure) and the damage (Therrien's loss of compensation) exists even though Dionne alleges impossibility of performance of an obligation, because no company would have written a policy if all the facts had been disclosed. Such an allegation of impossibility is not equivalent to absence of causal connection. Therrien was unable to recover the insured value of the building because the contracts of insurance were null, and this was a direct result of Dionne's breach of the obligation to make due disclosure.

The relationship between Therrien and Dionne was contractual, since a contract of mandate existed between them. This contract was subject to the general rules of contract, and under arts. 1062 and 984 C.C. the object of the contract had to be possible. Since Dionne was alleging impossibility of performance, he had the onus under art. 1203 C.C. of proving this impossibility. The Court of Appeal erred in placing on Therrien the burden of disproving impossibility. Dionne

succeeded in proving the difficulty of performing the obligation but not the impossibility of doing so.

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, distinguished; Car & General Ins. v. Therrien, [1969] Que. Q.B. 144, leave to appeal denied [1968] S.C.R. x; Therrien v. Dionne. [1972] C.A. 800; Blackburn v. Bossche, [1949] Que. Q.B. 697; The Montreal Rolling Mills Company v. Corcoran (1896), 26 S.C.R. 595; Tooke v. Bergeron (1897), 27 S.C.R. 567; Shawinigan Engineering Company v. Naud, [1929] S.C.R. 341; Montreal Tramways Company v. Léveillé, [1933] S.C.R. 456; Litjens v. Jean, [1973] S.C.R. 723, referred to.

APPEAL from a decision of the Court of Appeal of Quebec^[1] reversing a decision of the Superior Court. Appeal allowed.

G.M. Charbonneau, for the appellant.

Léonce Roy and Bernard Cliche, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—Germain Therrien was the owner of a building located in the Village of St. Joachim-de-Tourelle in the Province of Quebec. He carried on there a general store, hardware, restaurant and gas station business. Part of the building was used as housing for Therrien and his family. In September, 1956, the building burned to the ground. The loss was covered by insurance and Therrien rebuilt. On August 5, 1959, there was a second fire. The building and contents were completely destroyed.

The Village of St. Joachim-de-Tourelle is a high risk area, particularly to the east of the Church, where Therrien's building stood. Insurance companies are reluctant to do business there. Some refuse to do so. After the 1956 fire Therrien's insurers declined to renew his policies.

Therrien discussed his difficulties with Amédée Dionne, an insurance broker of long experience, with whom he had done business previously. Therrien asked Dionne to obtain insurance coverage for the building in the amount of \$32,000. Dionne told him not to worry:

[TRANSLATION] "Rest assured you can take my word—you can relax, I will protect you," he said, to which Therrien replied: [TRANSLATION] "I have confidence in you—go ahead." The confidence was misplaced.

Dionne communicated with several companies in an attempt to obtain coverage for Therrien but without success. He then got in touch with Dale & Co., a Montreal insurance broker, and succeeded in obtaining through Dale & Co. five policies providing coverage of \$26,000. But Dionne was not straightforward with Dale & Co. He did not make full disclosure. In particular, he failed to disclose the fact of the 1956 fire and the fact that several companies had refused to insure the building. Nor was Dionne straightforward with Therrien. Therrien was led to believe that the building was insured for \$32,000 whereas in fact there was a shortfall of \$6,000. North American Accident Insurance Company refused to renew a policy of \$8,000 which fell due July 6, 1959; Dionne was able to cover only \$2,000 of this amount with another insurer. He did not tell

Therrien what had happened. Shortly thereafter the second fire occurred. Therrien lost everything. The building was worth over \$60,000, but Therrien failed to recover even the \$26,000 insured value. Therrien sued the five insurance companies. They refused to pay on the ground that Dionne's non-disclosure voided the policies. Therrien was successful at trial but he lost on appeal[2]. A motion to appeal to this Court was denied, May 21, 1968[3].

Therrien sued Dionne for failing to obtain the \$6,000 coverage and for falsely representing that such coverage was in force. Dionne pleaded that in spite of repeated efforts he had been unable to obtain coverage for the shortfall of \$6,000. The trial judge, Mr. Justice Letarte, of the Quebec Superior Court, held that Dionne had assumed an obligation of means but not an obligation of result; that as a mandatary he was bound to exercise reasonable skill and all the care of a prudent administrator (*bon père de famille*) (art. 1710 C.C.). The judge concluded that Dionne had taken all means possible to place the risk and had therefore fulfilled his obligation as broker. He said:

[TRANSLATION] The evidence raises a most conclusive presumption that another broker would not have succeeded, much less the plaintiff.

The Court of Appeal agreed.[4]

Therrien then instituted the present action in which he claims from Dionne damages of \$58,598 on the ground that the policies issued to him were annulled due to non-disclosure by Dionne to Dale & Co. The sum claimed represents the \$26,000 stated in the policies plus legal expenses incurred in the proceedings against the insurance companies, plus interest. The trial judge, Mr. Justice Fournier, allowed the claim to the extent of \$57,404, plus interest. He referred to *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[5] and held that the honest but negligent representation of Dionne gave rise to an action for damages on the part of Therrien; Dionne was aware of the fire of 1956 and failed to disclose it in applying to Dale & Co. for the insurance; this omission was of a nature such as to affect materially the acceptance of the risk by the insurers; the evidence did not show that Dionne had acted in bad faith but his error was aggravated by the fact that he had long experience in the insurance business; he was negligent in the discharge of his mandate. That is what the trial judge declared. The Court of Appeal reversed.

Mr. Justice Montgomery, who wrote the leading judgment in the Court of Appeal, agreed with the trial judge on the important point, that Dionne by failing to disclose material facts to Dale & Co. committed a fault. Mr. Justice Montgomery held, however, that in order to succeed Therrien was obliged to establish, at least on a balance of probabilities, that if Dionne had disclosed the material facts Dale & Co. would have accepted the risk, perhaps at an enhanced premium, or that the insurance might have been placed with some other insurer. He noted that this question had been expressly raised by Dionne in his detailed plea, para. 19 of which reads:

[TRANSLATION] Had it not been for Dale & Company Ltd., it would have been impossible for the plaintiff to obtain insurance.

Mr. Justice Montgomery found that this defence had been supported by the judgment in the earlier action in which Mr. Justice Letarte held that Therrien had suffered no damage as a result of the fault of Dionne because the insurance could not have been placed by Dionne, or by any other broker. Mr. Justice Montgomery said:

I find nothing to suggest that Mr. Justice Letarte was not correct in his assessment of the near impossibility of placing insurance on Therrien's property, in view both of his own unsatisfactory record and of the bad experience of insurers of properties in that vicinity.

He concluded with these words:

In my opinion, Therrien failed to establish, that, had all the facts been fully disclosed, Dale & Company or some other insurer would have accepted the risk. I find that the evidence is all to the contrary. I am therefore of the opinion that Therrien was not entitled to recover damages, so that his action should have been dismissed with costs.

Dionne was denied costs in the Court of Appeal for the reason that in their factum in appeal Dionne's counsel had concentrated on attempting to establish that Dionne was without fault. The argument that his fault caused no damage to Therrien was not raised.

In my opinion, the Court of Appeal erred in two respects: (i) in failing to distinguish between absence of cause, on the one hand, and impossibility of performance of an obligation, on the other; (ii) in placing upon Therrien a burden of proof which properly rested upon Dionne.

It is, of course, clear that Therrien must establish fault, damage, and causality. With concurrent findings in his favour there can be no doubt that Therrien established fault. Dionne's failure to disclose a material fact essential to the validity of the policies was conduct below the reasonable skill and prudent administration expected of a mandatory to whom has been committed the securing of an insurance contract: see *Blackburn v. Bossche*[6].

That there was damage seems equally clear. Therrien's loss stems from his failure to recover an amount equal to the insured value of the building. Therrien was led to believe that the building was insured. That turned out not to be the case. Therrien did not receive the insurance proceeds he expected to receive. In that respect he suffered damage.

Turning then to causality: the nexus between fault and damage seems patent. The link between cause and effect, i.e. the connection between null policies and the failure to receive the insurance proceeds, was direct and unequivocal. Counsel for Dionne invited the Court to hold that no lien de causalité had been established by Therrien and accordingly no civil responsibility could ensue. It was argued that no insurance company save Dale & Co. would have insured Therrien's building and, that being the case, there is a total absence of cause between Dionne's fault of non-disclosure and Therrien's damage. In support of the argument counsel cited five decisions of this Court: *The Montreal Rolling Mills Company v. Corcoran*[7]; *Tooke v. Bergeron*[8] *Shawinigan Engineering Company v. Naud*[9]; *Montreal Tramways Company v. Léveillé*[10]; and *Litjens v. Jean*[11].

These are personal injury cases and assist no further than in establishing the trite proposition that it is not sufficient to prove that a defendant has been negligent, it is necessary also to prove that the negligence has been the cause of the accident, or contributed to it. See Nadeau, *Traité de droit civil du Québec*, Vol. 8, at pp. 558, 561. In the present case, counsel's argument and the position taken by the Court of Appeal of Quebec, fail to distinguish between an allegation of absence of causal connection, which was of concern in the five cases cited, and an allegation of impossibility of performance of an obligation, which is of concern in the instant case. In essence, the submission on behalf of the respondent is that Dionne could not have performed the obligation to secure insurance because no company would write the policy. That is a very different thing from saying that Dionne's failure to make due disclosure bears no causal connection to Therrien's loss. Therrien's failure to recover an amount equal to the insured value of the building was directly caused by null contracts of insurance. The nullity resulted directly from Dionne's breach of the obligation to make due disclosure.

The relationship between Therrien and Dionne was contractual. At art. 1701 C.C. the special contract of mandate is provided for:

Art. 1701. Mandate is a contract by which a person called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it.

By art. 984 C.C. four substantive requirements to the validity of a contract are set out, including: "Something which forms the object of the contract." Article 1062 provides: "The object of an obligation must be something possible...". It is clear that the object of the contract between Therrien and Dionne was the obtaining of a contract of insurance on Therrien's building. In submitting that it was impossible to do so, Dionne essentially contends that the contract of mandate fails for want of compliance with arts. 1062 and 984 in that the object of the contract was impossible.

The relevant question therefore is, given the ambiguous nature of proven facts in this case, on whom lies the burden of proof that performance was impossible. The answer to that question is supplied by art. 1203 C.C. which reads:

...he who alleges facts in avoidance or extinction of the obligation must prove them....

Dionne pleaded impossibility. The Court of Appeal erred in placing on Therrien the burden of disproving impossibility. As Dionne seeks to avoid the obligation by reason that its object was impossible, he had the onus of proving the facts in support of that submission. He proved difficulty; he failed to prove impossibility. There is no evidence that Dale & Co. would not have insured, perhaps at an enhanced premium, if all the facts had been made known.

Therrien is entitled to recover the legal expenses incurred by him in the proceedings against the insurance companies. He was supplied with policies apparently valid. Before seeking recovery against Dionne it was necessary for him to have the validity of the contracts determined by the courts.

I would only add my view that the Hedley Byrne case, upon which the trial judge and counsel for Therrien strongly relied, has no application whatever to the facts of the case at bar. We are here concerned with mandate and contract law, not with the law of delicts.

I would allow the appeal, set aside the judgment of the Court of Appeal of Quebec and restore the judgment of the trial judge. The appellant is entitled to costs in all courts. Appeal allowed with costs.

Solicitors for the appellant: Roy & Charbonneau, Montreal.

Solicitors for the respondent: Dionne, Fortin, Roy & Associés, Quebec.

[1] [1975] C.A. 1.

[2] [1969] Que. Q. B. 144, sub. nom. Car & General Ins. v. Therrien.

[3] [1968] S.C.R. x.

[4] [1972] C.A. 800.

[5] [1964] A.C. 465.

[6] [1949] Que. Q.B. 697.

[7] (1896), 26 S.C.R. 595.

[8] (1897), 27 S.C.R. 567.

[9] [1929] S.C.R. 341.

[10] [1933] S.C.R. 456.

[11] [1973] S.C.R. 723.

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