Judges' personal convictions

The Honourable André DENIS[1]

Justice includes all virtues

Aristotle[1]

C'est en vain que (les magistrats), pour déguiser leur révolte contre la Règle, osent quelquefois combattre la Justice sous le voile spécieux de l'équité. Premier objet du Législateur, dépositaire de son esprit, compagne inséparable de la loi, l'équité ne peut jamais être contraire à la loi même.

D'Aguesseau[2]

We can hardly be at issue with Aristotle although there are probably as many definitions of the word "Justice" as there are participants to this conference.

Then again, I admire the conviction of Chancellor d'Aguesseau and although I am altogether in accord with him, we must keep in mind that he was living at a time when the Charter of Human Rights was not in force. The legislator has chosen to entrust responsibilities and accrued intervening possibilities to the judge by purposely adopting interventionist laws.

The Honourable Justice Charles D. Gonthier, of the Supreme Court of Canada, has on March 11th, 1993 expressed the following comments at a meeting of the Canadian Bar, Quebec division:

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[1] Superior Court of Québec, Montreal, Quebec.

> *La charte a inscrit sous l'égide du droit un vaste domaine où le législateur n'osait s'introduire sauf de facon très circonscrite, des domaines dont la société confiait la gouverne à la seule morale personnelle et les seules contraintes de la conscience, de la famille et de l'Église.*
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> [...] *cette évolution est un pas important, un pas nécessaire dans l'évolution de notre société et du monde contemporain, ceci en raison de la complexité croissante de la société et des relations sociales qui comportent le besoin de définir des lignes de conduites alors que les valeurs individuelles montrent une diversité de plus en plus grande*.[3]

This brings me, as a judge of civil background, to take a particular interest in a facet of the present conference, which is the importance of former knowledge, values, convictions, training, and even the judge's prejudice in the appreciation of the elements of proof that are submitted to him.

When I was a lawyer, I often wondered how the judge reached his decision. Now that I am a judge, I still wonder, when, in some cases, the complexity of the world in which we live is evident.

I will refer to two recent judgements that I have rendered, which are examples where there is a risk that the appreciation of the elements of proof may be influenced by the judge's cultural background.

In the first case,[4] an hospital asks the Court to authorize one of its physicians to practice, on the defendant, an axial thoracic tomodensitometry and a needle biopsy, in accordance with article 19.4 of the *Civil Code of Lower Canada.* The hospital is a psychiatric center and the Public Curator is curator to the defendant who has no family. The defendant is suffering from chronic schizophrenia and has lost practically all contact with reality.

The first witness is a chest specialist employed by the hospital who explains that the two tests he wants to perform on the defendant are essential to confirm his diagnosis of lung cancer. Once these tests are done, the physician will be able to establish a program of curative or palliative

care according to the progression of the illness. These treatments will relieve the sufferings of the patient.

The patient is fiercely opposed to these two tests and is convinced that the chest specialist will try to kill him during the intervention. The intervention is minor but if the patient refuses to collaborate, sedatives will have to be administered to oblige him to submit to these tests. The chest specialist explains to the Court that those two tests will help to establish a diagnosis in order to give a choice to the defendant to be treated or not.

The second witness is the defendant's psychiatrist who has been treating him for about 12 years. He explains that his patient has made some important progress over the past years and that he now agrees to take his anti-psychotic medication under appropriate surveillance. This medication has however little effect on his comprehension and his connection with reality. The defendant is not in a position to understand that he might eventually be afflicted with lung cancer. The defendant is solely convinced that if he accepts to undergo the tests proposed by the chest specialist, he will be assassinated. He is absolutely terrorized by the idea of undergoing these tests.

The psychiatrist suggests that the decision of his patient not being treated be respected. Taking into account the scanty chances of recovery from his lung cancer the witness considers that the patient's decision is not different from that of numerous other persons of sound mind.

The psychiatrist also explains that the bond of confidence that he has established over the years with the defendant will break, if he is forced to submit to the tests requested by the hospital center. He also fears that the defendant will, in the future, refuse all anti-psychotic medication. In short, this intervention risks losing all the gains that the defendant has made over the 12 years of therapy.

The psychiatrist ends his testimony by affirming that he will never administer the sedatives that should be given to the defendant and that the general practitioner of the defendant will also refuse to do it. A stranger will have to be called in.

The Public Curator supports the approach of the hospital center, but has seen it fit to appoint a lawyer to make the defendant's point of view known.

Section 19 of the *Civil Code of Lower Canada* reads as follows:[5]

> Art. 19. *The human person is inviolable. No one may cause harm to the person of another without his consent or without being authorized by law to do so.*

Sections 19.1 to 19.4 of the *Civil Code of Lower Canada* are of "droit nouveau" and read as follows:[6]

> Art. 19.1 *No person may be made to undergo care of any nature, whether for examination, specimen taking, removal of tissue, treatment or any other act, except with his consent.*
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> *Where the person concerned is unable to consent to or refuse care, a person authorized by law or by mandate shall replace him.*
>
> Art. 19.2 *Where the inability of a person of full age to consent to care required by his state of health is ascertained, consent is given by the mandatory he designated when he was able to do so, or by his tutor or curator. If he is not so represented, consent is given by his spouse or if he has no spouse or his spouse is prevented from giving it, by a close relative or by a person who shows a special interest in the person of full age.*
>
> Art. 19.3 *A person who consents to or refuses care for another person is bound to act in the sole interest of that person taking into account, so far as possible, any wishes expressed by that person.*

If he consents to care, he must ensure that the care is beneficial despite its effects, that it is advisable in the circumstances and that the risks assumed are not disproportionate to the anticipated benefit.

Art. 19.4 *The authorization of the court is required where the person entitled to consent to care for a minor or a person of full age unable to give his consent is prevented or refuses without justification; such authorization is also required where a person of full age unable to give his consent refuses categorically to receive care, but it is not required in case of emergency or of hygienic care.*

As you can see, this is a case where the decision could have been rendered one way or the other. Unfortunately, no appeal has been presented against my decision.

The cultural background of a judge is indeed important in a case of this kind or in cases of the same type which are not hard to imagine. What is the judge's conception of life? What are his moral, religious convictions? Does he think that life must be preserved at all costs? Is he more sensitive to the limitation of the patient's suffering? Is he in favour of active or passive euthanasia? Of course, all these questions do not have the same acuteness in a given case but could possibly appear in other cases, namely in the field of bio-ethics. We are conscious that our courts are experiencing the first steps in this matter.

What evidence will the courts accept, in future, faced with such problems. Here, the Public Curator protects the right to live in spite of the patient's will, but in the same breath, appoints a lawyer to defend the point of view of the defendant who, all will agree on this point, cannot make a well-informed judgement. Should other experts have been heard or appointed by the court?

As things turned out, I decided to refuse the request of the hospital center. I believed that the manifestation of the patient's will, even imperfect, should be respected. In my opinion, the effects of the treatment seemed to have too little chance of succeeding compared to the disastrous psychological effects described by the psychiatrist. I believed that the balance of inconvenience

acted in favour of the patient's fear and that the hospital had not satisfied the burden of proof imposed by article 19 C.C.L.C.

A decision evidently rendered with great humility.

In my second case,[7] a married couple brought proceedings against a doctor following an incorrect tying of tubes which has brought about the birth of an unplanned and non-desired child. I would like to point out that this case has been appealed and I will mention the facts only for pedagogical purposes, leaving to the Court of Appeal of Quebec and ultimately the Supreme Court of Canada, should the occasion arise, the pleasure of dealing with this matter.

Firstly, I came to the conclusion that the tube section had been incorrectly executed. This point is not useful to our actual reflections. The principles to which we have referred earlier can be applied in the determination of the damages to be attributed to the plaintiffs. More precisely, our concern was to determine if the act of granting an indemnity for the support of a child was contrary to public interest. We rather think that the notion of public interest has greatly evolved throughout the years in Canada. Besides, this evolution stresses the importance of personal convictions, formation and the values of different judges who have to make a decision on cases involving the notion of public interest.

It is interesting to note that a Quebec Court declared in 1904 that the Honoré de Balzac's Comédie Humaine[8] was contrary to morality. In 1960, the Montreal "Cour des Sessions de la paix" declared obscene the work of D.H. Lawrence, *Lady Chatterley's Lover*. The Court of Appeal of Québec unanimously confirmed this judgement of the Supreme Court of Canada, though a judgement of five against four reversed these decisions and rejected the finding of obscenity.[9]

The courts have always been reluctant to grant an indemnity to parents who complain of the birth of a non-desired child, and when a court of justice agrees to compensate the parents for the support of their child, they would reduce the compensation by the value of moral and financial

benefits the parents would derive from the presence of a child in their home. This notion of compensation is known in common law under the name of the "benefit rule".

The judgement rendered in the present case undertakes a review of the jurisprudence of most industrialized countries in the world on this question. We quickly realize that the courts are divided between two opinions diametrically opposed. On the one hand, it would be against public interest to grant a certain sum of money to a married couple for the birth of a non-desired child. The granting of such compensation risks denying maternal instinct, encouraging abortion and denying the intrinsic value of the birth of a child. On the other hand, some courts have determined that without denying the seriousness of the aforesaid remarks, such principles did not allow the parents to feed a child they do not have the means to support.

An attentive lecture of all this jurisprudence and of the authors who are supporting it, proves that for each statement asserting that compensating the parents for the birth of an undesired child is contrary to public interest, there is an opposite theory which is just as acceptable as the first one. Each group appeals to a diametrically opposed social consensus. However, it is evident that most of the jurisprudence seems to indicate a preference for the second theory.

Once again, we realize that in the matter of public interest, the jurisprudence has evolved and taken into account societal changes and, in some measure, the personal convictions of judges.

In my judgement, I came to the conclusion that the expenses related to the support of a child from birth to 18 years of age could validly be claimed by the parents and that they were not contrary to public interest. I also concluded that the sufferings and the joys of a non-pecuniary nature related to the birth of a child are not convertible into money.

I will now refer to two other cases that will illustrate the fact that future problems submitted to the court will require a different approach from all parties involved.

In the case *Jean-Guy Tremblay* v. *Chantal Daigle*,[10] the petitioner asks for an interlocutory injunction against his common law wife to prevent her from getting an abortion following matrimonial problems between the parties. The petitioner is the biological father of the child to be born.

The Court deals more particularly with section 1 and 2 of the *Quebec Charter of Human Rights and Freedoms*:[11]

> Chapter I
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> 1. *Every human being has a right to life, and to personal security, inviolability and freedom.*
>
> *He also possesses juridical personality.*
>
> 2. *Every human being whose life is in peril has a right to assistance.*
>
> *Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.*

and section 7 of the *Canadian Charter of Rights and Freedoms*[12]

> 7. *Everyone has the right to life, liberty and security of the person except in accordance with the principles of fundamental justice.*

The Superior Court of Quebec issued an interlocutory injunction forbidding the respondent to get an abortion. The majority of the Court of Appeal confirmed the decision. The Supreme Court of Canada quashed the judgment declaring among others that:

- the rights of the foetus and of the biological father to a child to be born are non-existent;

- the foetus is not included in the definition of "human being" of the Quebec Charter and does not enjoy the right to life as stated in section 1;

- the Quebec Charter, as a whole, shows no clear intention on the part of the legislator to take into consideration the existence of the foetus;

- according to the Quebec Civil Code, the foetus is not a "human being";

- in anglo-canadian law, the foetus must be born alive to claim rights; and

- the biological father cannot impose a veto against a woman's decision concerning the foetus that she is bearing.

First remark: the judgment of the Superior Court of Quebec was rendered on July 17, 1989 and the final judgment of the Supreme Court of Canada was rendered on August 8, 1989, three weeks later. Meanwhile the Court of Appeal had rendered its judgment. One must ask if our courts can and must render their judgments in such a short period of time.

Second remark: in the Superior Court and in the Court of Appeal, only two parties were involved, Mr. Tremblay and Ms. Daigle. Present in the Supreme Court were: the Attorney General of Canada and the Attorney General of Quebec, the Canadian Abortion Rights League (CARAL), the Women's Legal Education and Action Fund (LEAF), the Canadian Civil Liberties Association, the Campaign Life Coalition, the Canadian Physicians for Life, the Association des médecins du Québec pour le respect de la vie, and the REAL Women of Canada. One may ask why all these people were not heard before the Superior Court and in the Court of Appeal.

Finally, here is a last example. While I was preparing this paper, Ms. Sue Rodriguez who is suffering from an incurable disease known as the Lou Gherig disease, is asking the Supreme Court of Canada to recognize her right to receive help to commit suicide when her condition

becomes unbearable. This is another emergency case (the Supreme Court of British Columbia dismissed the petition of Ms. Rodriguez) where several intervening parties were involved in Court.

We may observe that in these two cases, the Supreme Court of Canada allowed, in a very liberal way, several intervening parties to appear in Court in order to help the judges render their decision. Evidence given by these intervening parties was not available in the lower courts. One may question the pertinence, even the legality of this evidence. The Supreme Court accepted it. Lawyers and judges should keep in mind the teachings of our highest Court.

The social confusion that we have known these last few years and the great debates that have shaken society, particularly in ethical and public interest matters, will require from the judges and the litigants a different approach to the problems submitted to the court. If it is true that the rule of law remains final as stated by d'Aguesseau, it is also true that the rule of law becomes more and more difficult to grasp.

It seems that the litigants will have to be imaginative in the preparation and in the presentation of the evidence submitted to the court. Without undervaluing a case involving a car accident, we must admit that the evidence brought in such a case substantially differs from the one that must be made in the two cases to which I referred above.

The litigants will have to take into account the fact that the judges in those new and difficult fields have an evident cultural background. When I talk about imagination, I emphasize that the proof presented will have to permit the judge to go beyond his own convictions in order to know and appreciate ways other than his own.

> *If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.*
>
> *Yet it is as evident in itself, as any amount of argument that can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent*

> *ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.*[13]

The ethical and public interest problems that we are experiencing will also force the court to hear and allow much more elaborated evidence even, if this entails putting it aside hereafter.

It is quite obvious that this short paper brings no clear solution to the problem. It only raises questions to which lawyers and everyone involved in the justice system will have to think about. They will have to present to the Court the most original and complete evidence on the matter: original evidence because these are brand new problems in our society; evidence as complete as possible because these questions are always in evolution. Perfect evidence does not exist.

We often forget that a judgment is a collective work. It can never be better than the judge, lawyers, witnesses and experts. It is just too simple to let the judge assume, alone, the paternity of judgments. However, there will always remain a reality that does not change through the years and that is the sovereign liberty of the judge to decide according to his conscience.

FOOTNOTES

1. Criton, (50b), *Prosopopée de lois*.

2. A. Yverdun, *Oeuvres de Monseigneur le Chancelier d'Aguesseau*, vol. 1 (IX^{e} Mercuriale de 1706) at 204.

3. *Journal du Barreau* (Québec) vol. 24, no 9 at III.

4. *Douglas Hospital Center* v. *Tandy*, J.E. 93-715 (Sup. Ct.).

5. Art. 19 C.C.L.C.

6. Arts 19.1 to 19.4 C.C.L.C.

7. *Suite* v. *Cooke*, [1993] R.J.Q. 514.

8. *Sutherland* v. *Gariépy* (1905), 11 R.J.Q. 314.

9. *Brodie* v. *R.* (1961), B.R. 610, [1962] S.C.R. 681.

10. *Tremblay* v. *Daigle* (1989), R.J.Q. 1980 (C.S.), (1989), R.J.Q. 1735 (C.A.), *[Tremblay* v. *Daigle* 1989] 2 S.C.R. 530.

11. *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, ss. 1-2.

12. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.

13. J.S. Mill, *On Liberty and Considerations on Representative Government* (London: Oxford, 1946).