

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF BEDFORD

No.: 460-17-000260-034

DATE: March 30, 2005

THE HONOURABLE MARTIN BUREAU, J.S.C. PRESIDING

THE SUCCESSION OF THE LATE MARIE-LOU LECLERC, represented herein by ROLAND LECLERC, LIQUIDATOR, domiciled and residing at 106 Napoléon, in Lévis, Quebec G6V 6A2, District of Québec
Petitioner

v.

CARL TURMEL, domiciled and residing at 719 Laurie Street, in Granby, Quebec J2J 2T4, District of Bedford
Defendant

and

REGISTRAR OF THE SHEFFORD REGISTRATION DIVISION, 77 Principale Street, Suite 129, in Granby, Quebec J2G 9B3
Mis en cause

JUDGMENT

[1] On November 2, 2002, Marie-Lou Leclerc and her 20-month-old son, Shawn Turmel, were in the same motor vehicle when they were involved in an accident.

[2] About one hour after the head-on collision in which they were involved, the emergency room physicians at the Centre hospitalier de Granby, where they had been brought by two different teams of ambulance attendants, established their death.

[3] Marie-Lou Leclerc's father, Roland Leclerc, in his capacity as liquidator of her estate, asks the Court to find that it is impossible to determine which one of Marie-Lou Leclerc or her son, Shawn Turmel, survived the other, and therefore declare that they are deemed to have died at the same time.

[4] The relevance of determining whether Marie-Lou Leclerc or her son survived the other resides in the fact that she was not married to the defendant Carl Turmel, the child's father, and that she died intestate (art. 613, para. 2 C.C.Q.).

[5] Under the circumstances, if Marie-Lou Leclerc and her son died or are deemed to have died at the same time, neither will inherit from the other. This is set out in article 616 of the *Civil Code of Québec*, which applies in such a case:

Where persons die and it is impossible to determine which survived the other, they are deemed to have died at the same time if at least one of them is called to the succession of the other.

The succession of each of the decedents then devolves to the persons who would have been called to take it in his place.

[6] If that is the case, the property of Marie-Lou Leclerc, including the undivided half of the immovable that she owned in undivided co-ownership with the defendant at the time of her death, as well as her share of the couple's movable property, devolves to her legal heirs by way of succession (art. 674, para. 1 C.C.Q.). This also applies if Shawn Turmel died before Marie-Lou Leclerc.

[7] If, on the other hand, it can be proved that Shawn Turmel survived his mother, even briefly, he becomes her sole heir. Since he himself died afterwards, all the property that he inherited then devolves to his father, the defendant Carl Turmel (art. 674, para. 1 C.C.Q.).

THE RELEVANT FACTS

[8] On November 2, 2002, Marie-Lou Leclerc and her son were in the same motor vehicle, on their way to Quebec City and driving behind the defendant's vehicle.

[9] At some point, the defendant noticed that an accident had occurred behind him. He immediately turned around and realized that a very serious collision had occurred between the car driven by Marie-Lou Leclerc and a truck travelling in the opposite direction.

[10] The defendant and the first witnesses who arrived on the scene discovered the extent of the accident. Marie-Lou Leclerc was literally trapped in the wreck of her car, and it was practically impossible to help her. Her son, who was in a child's car seat in the back of the car, was hunched forward and, like his mother, was motionless.

[11] The defendant saw that Marie-Lou Leclerc was not moving or breathing. He observed neither a heartbeat nor respiration, and her eyes were open and staring fixedly.

[12] The child was not moving either. Unidentified witnesses reported that he was breathing. He appeared to be seriously injured, but they managed to get him out of the car and place him on the ground on the side of the road.

[13] For a few moments, the child no longer seemed to show any cardio-respiratory activity. The defendant, who was familiar with basic cardio-pulmonary resuscitation (CPR) techniques, having learned them while studying police science, cleared his son's airway, applied the appropriate techniques, and observed that he was breathing on his own and that his heart was still beating.

[14] Although Marie-Lou Leclerc was difficult to reach, as soon as the first ambulance attendants arrived on the scene a few minutes after the impact, they noted that she showed no vital signs. They also found that the child was breathing on his own and that he exhibited autonomous cardiac activity. Both the child's respiratory activity and heart rate showed signs of distress, however, indicating that he was seriously injured.

[15] Given the seriousness of the accident and the fact that three people had been involved, the ambulance workers quickly applied the standard triage method for injured persons, the S.T.A.R.T. protocol. This protocol, which is used on the scene of an accident to determine the priority to assign to victims, was established to ensure that the most seriously injured victims who nevertheless have a chance of recovery are treated before those who are not very likely to recover or who are less seriously injured.

[16] Marie-Lou Leclerc was quickly categorized as "black" because she had no vital signs and it was difficult to reach her. According to the S.T.A.R.T. protocol, black means that the person is dead.

[17] The driver of the truck was also injured during the accident, but because his injuries clearly seemed to be less serious than the child's, the first ambulance attendants focused on the latter. Like the defendant and other witnesses, they noticed that the child still had vital signs. They detected respiration and a heartbeat. They immobilized him and began to transport him immediately to the hospital.

[18] During transport, blood that risked blocking his air passages was suctioned out several times. His vital signs, which were already quite weak, deteriorated substantially. When the ambulance arrived at the hospital parking lot, the ambulance attendants observed that the child was in complete cardio-respiratory arrest. A few moments later, he was brought into the emergency room and physicians intervened rapidly to try to

resuscitate him. Their efforts were in vain and they were forced to acknowledge that he was dead.

[19] Moments before the first group of ambulance attendants left the scene of the accident with the child, Roger Privé, another ambulance worker who was not officially on duty that day, arrived on the scene. His co-workers informed him that the driver of the car was beyond help and they suggested that he take care of the truck driver instead.

[20] Roger Privé went to Marie-Lou Leclerc's vehicle with a yellow blanket to shield her from the stares of onlookers. He asked the people near the vehicle to move back, telling the defendant to do the same, without knowing who he was. The defendant informed him that he was her spouse.

[21] Roger Privé did not perform a physical examination of Marie-Lou Leclerc. When he approached her, however, he saw no movement or breathing. He noted that her face was white and waxy, and he testified that at that moment, he knew that there was nothing anyone could do for her.

[22] A second team of ambulance attendants arrived on the scene. Shortly afterwards, they contacted Dr. Patrick Laplante, a physician at the emergency room in Granby, and obtained his permission not to attempt to resuscitate Marie-Lou Leclerc. They were granted authorization after they had explained Marie-Lou Leclerc's condition and the fact they would not be able to free her from the wreck for a few more minutes.

[23] In actual fact, getting her out of the car probably did not take as long as expected, as Marie-Lou Leclerc arrived at the emergency room around 3:07 p.m. Around 3:25 p.m., she was pronounced dead by the physicians.

RESPECTIVE SUBMISSIONS OF THE PARTIES

A) Submissions of the Petitioner

[24] Based on the expert report and testimony of Dr. Alexandra Dansereau, a doctor specializing in emergency medicine, the petitioner claims that it is impossible to determine whether Marie-Lou Leclerc or Shawn Turmel died first.

[25] The petitioner pleads that even if the child showed signs of life after the accident through his respiration and pulse, it should still be found that in all probability he was already dead at that moment.

[26] The petitioner maintains that the death of a human being should be defined on the basis of the cessation of brain functions. Since there was no longer any cerebral cortex activity, the child had already died in the moments following impact, even though

there still might have been some respiratory or cardiac activity being controlled by the brain stem.

B) Submissions of the Defendant

[27] The defendant claims that the child survived his mother because, on a balance of probabilities, she no longer exhibited any vital signs in the moments following the impact, whereas the child did have vital signs at that time.

[28] The defendant argues that the child's autonomous cardio-respiratory activity reveals that there was at least some activity in the child's brain stem. There was no longer any such activity in the mother, however, as she had no vital signs, thereby confirming the cessation of brain stem activity.

ANALYSIS AND DISCUSSION

[29] Over the years, a consensus has developed in both the legal and medical professions regarding the definition of death. It is now clearly established that death is determined on the basis of brain death. There no longer seem to be any fundamental differences of opinion on this point.

[30] In its 1981 report on the criteria for the determination of death, the Law Reform Commission of Canada writes the following:

Medical science since the late 1960's has developed an impressive series of precise and dependable scientific criteria for determination of death, of which those of the Harvard school were the first. Moreover, the public and medical science now accept the proposition that total disappearance of all brain functions is equivalent to the death of a person. Finally a good number of jurisdictions have experienced legislation on the subject and none of them has had the effect of eliminating medical judgment.¹

[31] In 1997, the French author Bruno Py wrote:

[TRANSLATION]

From now on, the death of a person in the legal sense has officially become brain death in the medical sense. "All European legislations, except for Denmark, recognize that the irreversible destruction of the brain is equivalent to the death of a human being." It would be incorrect, however, to state that the Decree of December 2, 1996 introduced a new definition of death into French law, as the concept of brain death has been "functional" since April 24, 1968. The

¹ Law Reform Commission of Canada, *Criteria for the Determination of Death* (Ottawa: Law Reform Commission of Canada, 1981) at 10.

contribution of the Decree of December 2, 1996 is that it specifically defined the conditions of observing this irreversible passage."²

[32] In their specialized work, authors Robert Kouri and Suzanne Philips-Nootens describe North American developments on the subject:

[TRANSLATION]

The concept of total brain death has been unanimously accepted since the famous Harvard criteria of 1968: in the pithy phrase from the *Journal of the American Medical Association*, "a dead brain is a dead person". The challenge therefore lies rather in how to determine this condition quickly and without risk of error, before removing any organs or interrupting any artificial means of life support.

Some would like to go a step further, however, and have the disappearance of all communication faculties, namely cerebral cortex death, signal the death of an individual. This approach is still very controversial, however, and it appears that it is nowhere near to being endorsed."³

(Emphasis added.)

[33] Legal and medical opinions differ, however, on how to define brain death.

[TRANSLATION]

123. As previously mentioned, some authors today advocate a change in this standard to include persons in a permanent neurovegetative state or those with anencephaly.

Neocortical death would thus become the criterion for death. There are two types of obvious benefits: savings in terms of medical and hospital resources, since these persons would no longer require care for long periods; and the removal of organs and tissue from a "living" organism, thereby improving the chances of transplant success. Inevitably, according to Lesage-Jarjoura, [TRANSLATION] "...this would require us to perceive death no longer as the cessation of a biological process but rather of a psychological one. In this sense, the body is still alive, but the person is not."⁴

[34] In her expert report, Dr. Dansereau states that: [TRANSLATION] "the condition of death is generally described in medical terms as an irreversible cessation of vital,

² Bruno Py, *La mort et le droit* (Paris: Presses Universitaires de France, 1997) at 21-22.

³ Robert P. Kouri & Suzanne Philips-Nootens, *Le corps humain, l'inviolabilité de la personne et le consentement aux soins* (Sherbrooke: Les Éditions Revue de droit de l'Université de Sherbrooke, 1999) at 141-143.

⁴ *Ibid.* at 147-149.

respiratory, and circulatory functions and/or an irreversible cessation of brain functions..."⁵

[35] In her testimony, she stated that a human being may be dead even if he or she still has vital signs such as cardio-respiratory activity. She added that if the cerebral cortex becomes irremediably non-functional, it means the human being is dead even if the brain stem maintains vital signs such as respiration and heartbeat. Dr. Dansereau's expert report concludes that life no longer exists without cerebral cortex activity.

[36] The defendant agrees with the generally recognized current interpretation that a dead brain is a dead person. He argues, however, that brain death implies the irreversible cessation of all cerebral functions including those of the brain stem and not only those of the cerebral cortex.

[37] In the case at hand, evidence shows that even if the child perhaps had no cerebral cortex activity, there was still brain stem activity, as demonstrated by his autonomous cardio-respiratory activity without medical or technical assistance.

[38] Dr. Dansereau's opinion is based on what would be currently taught in the faculties of medicine in Quebec. She added that her opinion would be endorsed by the Quebec medical community.

[39] Dr. Dansereau refers to excerpts from specialized works to establish her line of reasoning. It is useful to reproduce some of these excerpts:

Determination of Death

Cardiopulmonary resuscitation need not be instituted if the patient is "dead". The difficulty arises in differentiating this from reversible "cardiac arrest". The Uniform Determination of Death Act states: "An individual who has sustained either irreversible cessation of circulatory and respiratory functions, or irreversible cessation of all functions of the entire brain, including the brain stem, is dead."

(Emphasis added.)

...

Independent brain death cannot be easily determined in the emergency setting. Although state statutes vary regarding the determination of brain death, most require serial examinations over many hours and the exclusion of the presence of certain drugs and hypothermia. These criteria are difficult to meet in the emergency department. So resuscitation of patients with apparent severe brain trauma or global ischemic injury is in order."⁶

⁵ Expert medical report, Dr. Alexandra Dansereau, February 12, 2004, at 14.

⁶ *Ibid.* at 3.

[40] This excerpt, which Dr. Dansereau relied upon and which, according to her testimony, accurately summarizes what is taught in Quebec and endorsed by the Quebec medical community, refers to a piece of U.S. legislation: *The Uniform Determination of Death Act*.

[41] In recent years, several U.S. states have passed laws or regulations defining what should be considered the death of a human being or how it may be ascertained.

[42] In the work cited above, Kouri and Philips-Nootens carry out a detailed and highly instructive survey of all the American states that have passed legislation defining death.⁷

[43] In Canada, there is no legislation on the subject except for a statute in Manitoba, which states that:

For all purposes within the legislative competence of the Legislature of Manitoba the death of a person takes place at the time at which irreversible cessation of all that person's brain function occurs.⁸

[44] Although the Law Reform Commission suggested that the Canadian Parliament enact a definition of death, its recommendations have been ignored.

[45] In Quebec, the legislator deliberately chose not to include a legal definition of death in the revised *Civil Code of Québec*. Rather, it preferred to leave it up to the constantly evolving scientific community to provide a definition of death.

[TRANSLATION]

It was not deemed appropriate to provide a definition of death, since death is a fact whose assessment is based on criteria other than legal. Furthermore, such a definition could only be provisional given the developments in science.⁹

[46] Since it now seems clear that death is defined as brain death, whether in Europe, the United States or elsewhere, numerous legislative definitions have been adopted. They all accept the concept of brain death.

[47] What is the precise meaning, however, that should be given to brain death? Is it the cessation of all brain functions, including brain stem functions, as some scientists and legal professionals claim, or is it the irreversible cessation of all communication faculties, namely cortical death or cerebral cortex death?

⁷ Kouri & Philips-Nootens *supra* note 3 at 164.

⁸ *Vital Statistics Act*, C.C.S.M. 1987 c. V60, s. 2.

⁹ Quebec, Ministère de la Justice, *Commentaires du Ministère de la Justice; Code civil du Québec*, t. 1 (Quebec: Publications du Québec, 1993) at 40.

[48] Dr. Dansereau, the only expert heard by the Court, maintains that it is the destruction of the cerebral cortex. Cardio-respiratory activity may therefore be witnessed in individuals who are nevertheless dead because their communication centre has been irremediably affected, i.e. there is no longer cerebral cortex activity.

[49] This would be the case of anencephalic infants. Although they exhibit autonomous cardio-respiratory activity lasting a few minutes, hours, or in exceptional cases, days, there is no real cerebral activity, as they are incapable of any cognitive contact whatsoever.

[50] Dr. Dansereau's position, however, is not supported by the very definition of death that she uses in her expert report. In the conclusions of the report, Dr. Dansereau goes against the recommendations of the Law Reform Commission, which recommended the following position:¹⁰

The Commission recommends that:

(2) the Parliament of Canada adopt the following amendment to the *Interpretation Act*, R.S.C. 1970, C I-23:

Section 28A – *Criteria of Death*

For all purposes within the jurisdiction of the Parliament of Canada,

(1) a person is dead when an irreversible cessation of all that person's brain functions has occurred.

(2) the irreversible cessation of brain functions can be determined by the prolonged absence of spontaneous circulatory and respiratory functions.

[51] Dr. Dansereau's conclusions do not correspond to the vast majority of definitions passed by the legislatures of numerous governments that have had to make a ruling on the subject and have adopted a legal definition of death.

[52] Of course, everyone now recognizes that brain death is equivalent to a person's death, but it must be total brain death, namely, the cessation of all cerebral activities including those of the brain stem, and not only those of the cerebral cortex.

[53] In the present case, the Court cannot find that the child was dead as long as he exhibited autonomous cardio-respiratory activity, even though the irreversible cessation of his cortical functions was possible or perhaps likely.

¹⁰ *Criteria for the Determination of Death*, supra note 1 at 24-25.

[54] Quebec society is still not ready for human beings to be declared dead if they still exhibit autonomous cardio-respiratory functions, regardless of the brain injuries suffered.

[55] It is obviously otherwise when cardio-respiratory activities are maintained artificially by life support equipment and there is also no cortical activity. In such cases, death has clearly occurred.

[56] The circumstances surrounding the death of Shawn Turmel show that he was severely injured immediately after the accident. Indeed, his injuries were fatal and his chances of survival were virtually non-existent. He was not yet dead, however, since there was still brain stem activity, as demonstrated by his autonomous breathing and heartbeat.

[57] Although his vital signs were drastically reduced and brain communication activity had most likely ceased, he may be said to have died only once his autonomous cardio-respiratory activity ceased.

[58] The evidence establishes that immediately after the impact, Marie-Lou Leclerc showed no external signs of life. The initial observations made by inexperienced people were that there was no cardiac or respiratory activity. These observations were then corroborated by trained individuals capable of making such observations, namely, the ambulance workers.

[59] Both the defendant and the ambulance attendants made specific observations concerning Marie-Lou Leclerc's condition. They noted that she showed no reaction of any kind whatsoever. They could not detect a pulse or respiration. Her eyes were open and unmoving.

[60] Although it was difficult to reach Marie-Lou Leclerc to administer emergency treatment and to perform standard resuscitation techniques, the ambulance workers realized, unequivocally and based on their experience, that there was no longer anything that could be done for her.

[61] Given her obvious condition and the fact that they could not get her out quickly, they sought and obtained permission not to apply resuscitation techniques even though, as a general rule, they are applied despite the obvious condition of the patient.

STANDARD OF PROOF REQUIRED

[62] The petitioner claims that the standard of proof required under article 616 of the *Civil Code of Québec* is more stringent than what is normally required in civil matters, namely, that of a balance of probabilities. The petitioner argues that the legislator, in

using the term "*établir*" (or in English, "determine"), wished to impose a higher standard of proof than a balance of probabilities.

[63] This argument is not accepted. The legislator has used the term "*établir*" in many places in the *Civil Code of Québec*, without the resulting conclusion that the aim was to increase or change the criteria relating to the quality of the evidence required. For instance, the verb "*établir*" is used in articles 2811 and 2849 of the *Civil Code of Québec** without it being possible to reasonably claim that the legislator intended to be more stringent with respect to the quality of the evidence.

[64] Article 2804 C.C.Q. applies to the standard and quality of proof, and the use of the term "*établir*" (or in English, "determine") does nothing whatsoever to change this requirement.

[65] The normal rules of evidence must be applied in order to decide whether it may be determined on a balance of probabilities that one of the parties died before the other.

CONCLUSION

[66] The petitioner has failed to demonstrate, on a balance of probabilities, that it cannot be determined who died first. On the contrary, according to the testimonies heard, including that of the petitioner's expert, as well as the generally accepted criteria and rules for determining the death of an individual, Marie-Lou Leclerc died instantaneously in the accident, whereas her son Shawn Turmel survived her by several minutes. He continued to show autonomous cardiac and respiratory activity for several minutes following the impact, which is definitely not the case for his mother.

[67] Death is not an evolving process, but a fact that occurs at a given moment. In the present case, this event, as it applies to Marie-Lou Leclerc, occurred upon impact of the motor vehicles, while for Shawn Turmel, it occurred several minutes after the accident, when his cardio-respiratory functions ceased while he was being transported by ambulance, right before arriving at the hospital. It was at that moment that all his brain functions, including those of the brain stem, ceased irreversibly and he died.

FOR THESE REASONS, THE COURT:

DISMISSES the petitioner's motion;

DETERMINES that Shawn Turmel survived Marie-Lou Leclerc, and that consequently, they are not deemed to have died at the same time;

* [TRANSLATOR'S NOTE] In the English version, the terms "to make proof" (art. 2811) and "to establish" (art. 2849) are used as the equivalent of the French term "*établir*".

THE WHOLE WITH COSTS against the petitioner.

MARTIN BUREAU, J.S.C.

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Date of hearing: November 30 and December 1, 2004