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Mignault J.

even though an agreement to purchase the lots might have been made between the purchaser and the company.

I do not attach any importance to the numerous letters written in connection with the assessment of these lands by Mr. Nichol, the representative of the respondent. Although these letters refer to the respondent as owner of the land, it is obvious that no such expression could give it a title or interest which it did not possess under the order in council. And there is no room here for the application of the doctrine of estoppel.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Banks & Stewart.*

Solicitors for the respondent: *Patrick, Doherty & Cumming.*

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*Oct. 22, 23.
*Dec. 21.

THE FIDELITY & CASUALTY CO. OF NEW YORK (DEFENDANT)..... APPELLANT;

AND

VICTOR MARCHAND (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—Automobile—Insured injuring own child—Action by tutor against father—Damages paid without consent of company—Right to recover—Arts. 165, 250, 1053 C.C.

The appellant company issued in favour of the respondent an automobile insurance policy against loss from liability imposed by law upon him for damages resulting from any accident caused by reason of the use of the respondent's automobile. The respondent, while backing his car from his residence to the public highway, ran over and injured his minor son. The respondent took the necessary steps to have a tutor appointed to enable an action to be brought by his son against himself for damages and was condemned to pay $5,000. The respondent paid this amount to the tutor before the delay for appealing had expired and while the appellant company was considering the advisability of so appealing. The liability of the appellant under the policy was subject to certain conditions amongst which were condition A. which provided that the assured should "at all times render to the company all co-operation and assistance within his power," and condition E. which provided that "the assured shall not * * * settle any claim * * * without the written consent of the company previously

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

given." Upon an action by the respondent to recover from the insurers the amount of $5,000 paid by him to the tutor.

Held, Idington J. dissenting, that the respondent was not entitled to recover on the policy, as such payment by him without the consent of the company was a voluntary payment and constituted a settlement of the claim made in violation of condition E. of the policy.

Per Davies C.J. and Duff J.—Such payment was moreover made in violation of condition A. of the policy.

Held also that the respondent was guilty of actionable negligence against his own child for which he was liable under Art. 1053 C.C. Anglin J. *semble.*

Per Idington J. (dissenting).—Such payment was not such an acquiescence in the judgment as to bar an appeal by the company, if it had been desirous to take it.

Judgment of the Court of King's Bench (Q.R. 35 K.B. 5) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court and maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *Crépeau K.C.* for the appellant. A minor son has no right of action against his father for damages caused by a *quasi-délit* (a tort) of the latter. *Newton* v. *Seeley* (2); *Clark* v. *Bonsal* (3); *Hensley* v. *McDowell Furniture Co.* (4); *Hewlett* v. *George* (5); *McKelvey* v. *McKelvey* (6); *Roller* v. *Roller* (7); *Taubert* v. *Taubert* (8).

The accident in question was not caused "by reason of the use, ownership or maintenance of the automobile" within the terms of the policy.

Conditions of the policy had been violated by the respondent, as he has not at all times rendered to the company all co-operation in his power, contrary to condition A. and he has paid the amount of the judgment to the tutor without the appellant company's consent, contrary to condition E. of the policy.

(1) [1923] Q.R. 35 K.B. 5.
(2) [1919] 177 N.C. 528.
(3) [1911] 157 N.C. 270.
(4) [1913] 164 N.C. 148.
(5) [1891] 68 Miss. 703.
(6) [1903] 111 Tenn. 388.
(7) [1905] 37 Wash. 243.
(8) [1908] 103 Minn. 247.

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The Chief Justice.

Pélissier K.C. for the respondent. A minor child has the right to sue his own father for tort, as the general rule of liability contained in article 1053 C.C. is in as wide terms as possible and renders every person responsible for damage caused by his fault to another.

The respondent has complied with all his obligations under the policy.

THE CHIEF JUSTICE.—This is a very curious and unique case and nothing similar to it has occurred in my experience. The plaintiff respondent in the course of using his automobile while backing from his gate into the public highway ran over and seriously injured his own little son, aged five and a half years. The respondent was in my opinion clearly guilty of actionable negligence for which he was liable under the civil law of Quebec, article 1053 C.C. Respondent took the necessary steps to have a tutor appointed for his little boy to enable an action to be brought against the respondent for damages for his negligence. He had previously taken out an automobile assurance policy with the appellant company indemnifying him against loss "from the liability imposed by law" for damages on account

of bodily injuries or death suffered by any person or persons as the result of an accident occurring by reason of the use, ownership or maintenance of any of the automobiles described in this policy.

(which included the one in question).

The liability of the company under the policy was expressly subject to certain conditions amongst which were conditions "A" and "E," the latter reading as follows:

The assured shall not voluntarily assume any liability nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor, except at his cost, settle any claim, nor incur any other expense without the written consent of the company previously given; except that he may provide at the time of the accident, and at the cost of the company, such immediate surgical relief as is imperative.

The tutor appointed for the injured boy was so appointed at the instance of the respondent plaintiff and brought an action against the latter to recover damages for the boys' injuries in which $5,000 was recovered against the respondent. I do not rest my judgment upon the action of respondent in causing a tutor to be appointed and bringing an action against himself for damages, but it

seems to me beyond reasonable doubt that the plaintiff in settling the action and paying to the tutor the damages found in the action before the time for appealing the same had expired and while the matter of appeal from the judgment was being considered by the company, acted in violation of condition "A" which *inter alia* provided that the assured should

at all times render to the company all co-operation and assistance within his power,

and in direct violation of condition "E" as above set forth.

The question of the company's appealing from the judgment against the respondent for damages was under consideration by the company at the very time the respondent plaintiff paid the claim. It was a voluntary payment on his part and it was a settlement of the claim

without the written consent of the company previously given.

The excuse put forward that the plaintiff respondent feared an execution might be issued against him cannot be considered for a moment in view of the fact that he himself while defendant in the action was really *dominus litis* and so controlled all the proceedings therein. The payment was made without the appellant company's consent and not only contrary to the provision in condition "A" that he should at

all times render to the company all co-operation in his power,

but also to the express conditions of condition "E" above set forth.

So far from co-operating with the company he acted without their knowledge or written consent in paying the judgment recovered against him before the time for appealing such judgment had expired.

On these latter grounds I would allow the appeal and dismiss the action with costs.

IDINGTON J. (dissenting).—I agree with the reasons assigned by the learned trial judge and those of the learned judges in the Court of King's Bench (save the items of dissent on the part of Mr. Justice Howard relative to the construction he puts upon the verdict of the jury in the case of *Marchand* v. *Marchand*) in their answer to the

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fourth question, and the conclusion reached by the trial judge to allow the respondent's claim, and by the Court of King's Bench to dismiss the appeal therefrom.

I cannot agree with said dissenting item in Mr. Justice Howard's opinion judgment.

It is to be observed that the learned trial judge in that case was perhaps in a better position to interpret and construe that answer than any other judge who has had to consider it and hence his view should have great weight in that regard.

The several objections taken by the appellant before us seem to have been all taken in the courts below and so thoroughly dealt with as to cover everything involved in this appeal and furnish a complete answer thereto.

Counsel for appellant before us seemed to lay more stress upon the payment, of the judgment in the case of *Marchand* v. *Marchand,* by the defendant therein and now respondent herein, before the expiration of the time for appealing had actually expired in that case, and hence deprived appellant of its rights under the conditions in its policy, than on some of their other objections.

I may therefore be permitted to remark that anything and everything material in way of legal objection that could have been taken in such an appeal has been argued over again in this case both in the trial court determining this case, and in the Court of King's Bench, and decided against the present appellant's contention.

And if the majority of this court take the view that I do, as expressed above, it will be thus demonstrated that the appellant never had anything in law or fact to appeal about and hence has in no way been damaged, but saved costs of an unfounded appeal—if it ever had intended to appeal—which I do not believe it ever had.

Of course I am of the same opinion as some of those dealing with the point below who seemed inclined to hold that the payment made, under the circumstances, was not such an acquiescence in the judgment as to bar an appeal and hence if appellant had been sincerely desirous of appealing and believed to be so, it could have got an appeal therefrom notwithstanding such payment.

I hold that this appeal should be dismissed with costs.

DUFF J.—The claim of the respondent against the appellants was under a policy of insurance by which the appellants agreed to indemnify the respondent against loss from the liability imposed by law upon him for damages on account of bodily injuries or death resulting from an accident caused by reason of the use of the respondent's automobile. A most distressing accident having occurred, in which a young child of the respondent was injured by the respondent's automobile, proceedings were taken on behalf of the child and judgment recovered against the father, and the respondent's claim in the action out of which this appeal arises was for indemnity in respect of this judgment. One ground of defence was that in point of law an infant child has no right of action against his father by the law of Quebec in respect of injuries caused by the father's tort. As regards that contention, I will merely say that in face of the unrestricted terms of article 1053 I could not give my adherence to it in the absence of some text of law or some very decisive authority. No such text or authority has been referred to, and my conclusion is that the contention cannot be maintained.

The appellant company is, however, I think entitled to succeed on other grounds. By two conditions of the policy, (*a*) and (*e*), the assured is required, upon the occurrence of an accident, immediately to give the fullest information obtainable to the company, in writing, and if a claim is made on account of the accident, to give notice of it with full particulars. If a suit is brought, the assured is required to forward to the company every summons or other process as soon as the same has been served on him. It is expressly declared that the company "reserves the right to settle any claim or suit." The assured is required, when requested by the company, to give aid in securing information, in affecting settlements, and in prosecuting appeals; and it is specifically declared that

> the assured shall at all times render to the company all co-operation and assistance within his power.

Further, the assured undertakes not to assume voluntarily any liability, nor to interfere in any legal proceedings conducted by the company on account of any claim, nor,

> except at his own cost, to settle any claim * * * without the written consent of the company previously given.

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The respondent, acting as he conceived, no doubt, in pursuance of his duty to protect the interests of his child, took steps by calling a family council and obtaining the appointment of a tutor, and in instructing attorneys to have legal proceedings instituted; and it is not seriously disputed that in the course of these legal proceedings the respondent did all he thought he could honestly do to further the interests of the plaintiff in the litigation. The appellant company at an early date, before, indeed, filing a plea to the action, advised the respondent that it proposed to take up the defence of the tutor's action as entitled to do by the terms of the policy; that the company would appear and defend in the respondent's name, but that in doing so it had no intention of renouncing any of its rights as against the respondent under the terms of the policy. The respondent is notified that the company is entitled to expect from him the assistance guaranteed by him, and he is at the same time advised that in view of his conduct, the company is entitled by reason of breach of conditions of the policy on his part to repudiate responsibility, and that it reserves the right to do so after judgment in the action. Judgment was recovered, and while the appellant company was considering the advisability of appealing the respondent paid the amount of the judgment. I think it is not open to serious question that this payment was a voluntary payment. In form, no doubt, it was a payment made under pressure of execution or imminent execution, but that pressure was applied, not only with the consent of the respondent, but, one can have no manner of doubt, by his instigation. Pressure and payment were alike aimed at the same purpose, that of enabling the respondent to advance against the appellant company a claim for indemnity.

This transaction is within the letter of the conditions above mentioned as being a " settlement " of the plaintiff's claim without the written consent of the company, and it is within the object and the spirit of the conditions mentioned, in that it was an act of a kind plainly within the contemplation of those conditions, namely, a collusive act, having for its purpose to assist the recovery of reparation from the insurance company through means of a judgment

against the respondent. It is of no relevancy that the claim against the respondent was a valid one, and one which, in the ordinary course, if the conditions of the policy had been complied with, the appellant company would ultimately have been obliged to pay. The conditions are perfectly reasonable conditions, framed with the object of protecting the insurance company against risk of collusion between the automobile owner and persons claiming damages for alleged torts. Such conditions would be robbed of nearly all practical value if in applying them the question of the validity of the professed claim must be investigated. For the purpose of protecting the company against collusion in relation to fabricated or unfounded claims, it is necessary that the conditions should exclude the possibility of such conduct in connection with any claim of any character.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—I am satisfied that the injury to the plaintiff's minor son was a "bodily injury caused by reason of the use of" the insured's automobile within the meaning of clause no. 1 of the policy sued upon.

The answer to the question whether a minor can maintain an action for an offence or quasi-offence against his father depends in this case upon the civil law of Quebec. The numerous American opinions cited by counsel for the appellant (to which I might add a reference to Eversley on Domestic Relations (3rd ed.), p. 578) are not authoritative. The case appears to fall within article 1053 C.C. and I am by no means convinced that considerations of public policy require the courts to refuse to entertain such an action. However, it is not necessary to determine that important question on this appeal.

While I am not satisfied that the steps taken by the respondent to enable an action to be brought against himself on behalf of his son avoided the policy sued upon, his payment of the judgment recovered in that action before the time for appealing against it had expired was, in my opinion, the settlement of "a claim * * * without the written consent of the company previously given" in violation of condition (E) of the policy, which precludes recovery.

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I cannot think that the plaintiff stood in any real danger of a seizure being made in execution of the judgment against him. His obvious control of the proceedings in the action brought in the name of the tutor of his son makes it reasonably certain that he did not.

On this ground I am, with respect, of the opinion that this appeal must be allowed.

MIGNAULT J.—The case submitted for our decision is certainly an extraordinary one.

The respondent, owner of an automobile, obtained from the appellant an automobile liability policy, whereby the appellant agreed to indemnify him

against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons as the result of an accident occurring while this policy is in force by reason of the use, ownership, or maintenance of any of the automobiles described * * * while used * * * within the limits of the United States of America and Canada.

The appellant also agreed

to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons within the limits designated in the preceding paragraph and under the circumstances therein described and as the result of an accident occurring while this policy is in force.

The policy was made subject to certain conditions of which the two following are material to the issue:—

A: Upon the occurrence of an accident the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company at its home office or to the agent who has countersigned this policy. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the assured to enforce such a claim, the assured shall immediately forward to the company at its home office every summons or other process as soon as the same shall have been served on him. The company reserves the right to settle any claim or suit. Whenever requested by the company, the assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The assured shall at all times render to the company all co-operation and assistance within his power. E: The assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor, except at his own cost, settle any claim, nor incur any other expense without the written consent of the company previously given; except that he may provide at the time of the accident, and at the cost of the company, such immediate surgical relief as is imperative.

The amount of the policy was $5,000 for loss from an accident resulting in bodily injuries to or in the death of one person.

While the policy was in force, on the 6th June, 1919, at St. Genevieve, Quebec, the respondent, when backing his car along a semi-private road leading from his residence to the public highway, and when moving reversely on the highway in order to turn the car in the direction of the village where he desired to go, had the misfortune to very seriously injure his minor son, Sarto, aged five and a half years, who was running or playing in the vicinity of the automobile. As required by his policy he promptly notified the appellant of the accident. Of course, the respondent secured medical and surgical care for his child and disbursed therefor certain sums of money. This he could do under the policy without admitting liability or affecting his recourse against the appellant. Some negotiations appear to have been carried on between the respondent and the appellant, the former seeking to have the latter pay the amount stipulated under the policy, but the appellant disputed its liability.

The respondent then conceived what I may describe, without using the term offensively, as a most extraordinary scheme in order to obtain from the appellant the amount of his policy. He took the initiative of having a tutor appointed to his minor son in the person of his brother, Alphonse Marchand, and had the family council summoned for that purpose and on its advice Alphonse Marchand was made tutor, and Adrien Marchand, another brother, subrogate tutor. This was clearly done in order that the respondent might have an action instituted against himself by the tutor acting for the child. And unnecessarily, because no judicial authorization is required by a tutor in order to take an action on behalf of his ward (article 304 C.C.), the tutor was authorized, on the advice of the family council, to institute an action claiming $5,000 from the respondent by reason of the injuries sustained by his minor son. The respondent assisted at the family council and took part in its deliberations.

Action claiming $5,000 as damages was then taken by the tutor on behalf of Sarto Marchand against the respond-

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ent upon whom the action was duly served. The respondent, as required by the policy, sent the papers served on him to the appellant, and the latter decided to defend the action, as it was bound to do, and so notified the respondent in writing. Defence was entered by attorneys employed by the appellant in the name of the respondent and, option for a jury trial having been made, the trial took place in October, 1920. The respondent gave his testimony and the jury found that he had not taken the required precautions to avoid the accident, their answer being

Il aurait pu éviter l'accident en éloignant l'enfant de l'auto de quelque manière.

and they assessed the damages at $5,000.

On this finding, which was taken to be a finding of negligence, judgment was entered on the 7th of October against the respondent in favour of the tutor for $5,000. It may be added, because the appellant laid some stress on this point, that when the respondent desired to take advice as to these proceedings and his dealings with the appellant, he invariably consulted Mr. Pélissier K.C., who was the attorney of the plaintiff in the damage suit.

The legal delays for issuing execution on this judgment, fifteen days, expired on October 22, and, by the law governing the action, appeal could have been taken within two months from the date of the judgment. Nothing was done on either side until the 2nd of November, except that the attorneys employed by the appellant were asked if they intended to appeal, and the purport of the answer of a junior member of the firm, who was not charged with the case, is the subject of conflicting testimony.

On the 2nd of November, the respondent paid the amount of the judgment, with interest and costs, and on the same date a letter was written by Messrs. Pélissier, Wilson and St. Pierre, the attorneys for the tutor in the damage action, to the appellant advising it of this payment and stating that they were instructed by the respondent to take action against the appellant to recover the amount due under the policy. The answer of the appellant protested against this payment, which was made without notice, and at a time when, says the appellant, it was seriously considering the advisability of taking an appeal from the

judgment. The present action ensued, and the respondent succeeded before the Superior Court and the Court of King's Bench, Mr. Justice Howard dissenting in the latter court.

Mr. Lafleur, on behalf of the appellant, submitted three questions for the consideration of this court. 1. Has a minor son a right of action against his father for damages caused by a *quasi délit* (a tort) of the latter? 2. Assuming that a right of action exists, does the accident in question come within the policy? 3. Assuming that both these questions are answered adversely to the appellant, has the respondent fulfilled his contractual obligation to co-operate with the appellant?

I will deal with each of these questions in the order mentioned.

First question. Before this case was submitted, I may frankly say that I had never heard of a civil action by or on behalf of a minor child against his father or mother, claiming damages for injuries caused by the negligence of the latter. In its factum, the appellant refers to a very recent decision by a North Carolina court in which, on grounds of public policy, it was held that such an action does not lie, and the judgment mentions some American cases apparently to the same effect. Such decisions, however, are not authorities before our courts. In the absence of authority to the contrary, the question really is whether an exception founded on family relationship can be admitted in view of the very general rule of liability contained in article 1053 of the civil code. This rule is in as wide terms as possible and renders every person capable of distinguishing right from wrong responsible for damage caused by his fault to another. There is here no limitation, no exception of persons, and the class of those to whom compensation is due is as wide as that of the persons on whom liability is imposed. It seems, therefore, sufficient to say *lex non distinguit,* however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damage he has suffered. I

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think, therefore, that the first question must be answered in the affirmative.

Second question. This question calls for an examination of the terms of the policy and the circumstances of the accident. There is undoubtedly here a liability imposed by law, whether article 1053 C.C. be alone considered or whether it be supplemented by article 1406 R.S.Q. placing on the owner or driver of a motor vehicle the burden of proof that the loss or damage did not arise through his negligence or improper conduct. It is argued that the answer of the jury that the negligence of the respondent consisted in not having removed his minor child from the vicinity of the automobile shows that the accident was not caused "by reason of the use of the automobile" but by the failure of the respondent to take proper care of his child. The testimony of the respondent at the trial of the damage action is, however, to the effect that when he backed the car on the public highway, looking backwards to the left, he knew that his child was "à l'avant de ma machine, à droite." It was negligence of the grossest kind to turn his front wheels, as he says he did, knowing that his child was on the front of the car to the right while he looked backwards to the left. This undoubtedly was negligence in the use of the automobile, and the answer of the jury surely means that the respondent should not have moved his car when he knew that, instead of obeying his order to return to the house, the child was still in the vicinity of the front wheels, or, in other words, it was an act of negligence to set the car in motion without seeing that the child was away from the wheels. This question must therefore be answered in the affirmative.

Third question. This is really the determining inquiry as to the right of the respondent to recover from the appellant the amount of the policy. It was the duty of the respondent, under conditions A. and E., in the event of a suit taken against him on account of an accident; (*a*) to immediately forward to the company every summons or other process as soon as served on him; (*b*) when requested by the company to aid in securing information, evidence and the attendance of witnesses, in effecting settlements and in prosecuting appeals; (*c*) at all times to render to the

company all co-operation and assistance within his power; (*d*) not to voluntarily assume any liability or interfere in any negotiations or legal proceedings conducted by the company on account of any claim; (*e*) except at his cost, not to settle any claim, nor incur any other expense, except for immediate surgical relief at the time of the accident, without the written consent of the company previously given.

All these contractual obligations of the respondent may be summed up by stating that it was his duty to co-operate with the appellant in the event of a suit being taken against him on account of an accident in the use of his automobile. Has the respondent fulfilled this duty?

He undoubtedly sent to the company a copy of the summons and process served on him and he does not appear to have refused to give information when required. But he caused the suit to be taken against him, and paid the amount of the judgment without the consent of the appellant. Is that rendering to the company all co-operation and assistance within his power?

It is said that it was his duty as a father to protect his minor child and to indemnify him for the damage he had caused him (article 165 C.C.). It may be observed that the duty to indemnify a person injured by the negligence of the driver of an automobile would exist even towards a stranger, and the maxim of the Roman law, *neminem laedere,* quoted by the learned Chief Justice of Quebec, merely expresses the universal duty which is laid down in general terms by article 1053 C.C.

But granting that this duty is of a more cogent character in the case of a father who negligently injures his own child, nothing prevented the respondent, who is a man of considerable means, from repairing the injury out of his own moneys. But the point is that nothing was further from the intention of the respondent; his idea was to make the appellant pay the indemnity, and for that reason the action which the respondent caused to be taken against himself was limited to the amount of the policy, no more and no less. To succeed against the appellant on the policy, the respondent must have fulfilled his contractual

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obligations, and it is no answer to say that he preferred his parental duty to his contractual one.

No one would contend that if the respondent had negligently injured the child of a neighbour, he could, consistently with his obligation to co-operate with the appellant, take the initiative of the action instituted against him. In my opinion, his relationship to the victim of the accident does not alter his contractual obligation towards the appellant, if he desires to recover on the policy. It is not the respondent's son who was insured but the respondent himself, and the appellant's contract was to indemnify him subject to the conditions of the policy. If the respondent has violated these conditions he cannot recover the insurance, even if his only object was to fulfil his duty towards his child. It merely obscures the issue to say that the respondent did what any father would have done, what one of the learned judges of the Court of King's Bench stated he would himself have done, had he negligently injured his child. The real question is whether the respondent has fulfilled his contractual obligation to co-operate with the appellant; and if he has not done so he cannot recover on the policy.

But even if the respondent's conduct in taking the initiative of the damage action instituted against him could be reconciled with his contractual obligations towards the appellant, I am of opinion that he clearly violated condition E when he paid the amount of the judgment without the written consent, or any consent, of the appellant. It is said that there was a judgment against him, that execution of this judgment was then due and that the respondent was not obliged to wait until his property was seized before settling it. It suffices to answer the respondent was in no danger of an execution or a seizure; he fully controlled the whole proceedings which he had initiated and was really the *dominus litis,* although nominally the condemned defendant. And a right of appeal still existed to which the voluntary acquiescence of the respondent put an end. The least that can be said is that the respondent should not have paid before notifying the appellant and giving it the opportunity to appeal from the judgment if it was so minded.

It may be objected that where a person insured under a liability policy negligently injures one of his own minor children, it is difficult to fulfil the conditions of the policy as to non-interference in a damage action and co-operation with the insurer. Even if that be so, the conditions of the contract must govern the contracting parties. Here the initiative of having a tutor named to the minor could have been taken by any relative (article 250 C.C.). And I entirely fail to see why collusion with the plaintiff should be allowed when the latter is a blood relative and forbidden when he is a stranger. In every case the contract, and not the relations between the insured and the injured party, must determine the right of recovery.

With all possible deference therefore I cannot concur in the reasoning which prevailed in the courts below on this crucial question. In my opinion, the respondent has not fulfilled the conditions of the policy and has therefore no right of recovery against the appellant.

I would allow the appeal and dismiss the respondent's action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Elliott & David.*

Solicitors for the respondent: *Pélissier, Fortier & Thibaudeau.*

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THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT).... } APPELLANT;

AND

DENNIS A. MURPHY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Railway—Injury to passenger—Announcement of stoppage—Stoppage short of station—Mistaken belief of passenger—Finding of jury.

M. was travelling to West Toronto on a G.T. train. When the last station on his journey had been passed an official went through the train calling out "next stop" or "next station" West Toronto. Before reaching that station the train had to stop for a few seconds in obedience

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