COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027790-187
(500-17-082817-142)

DATE: September 12, 2019

CORAM: THE HONOURABLE NICHOLAS KASIRER, J.A.
JOCELYN F. RANCOURT, J.A.
STEPHEN W. HAMILTON, J.A.

SOCIÉTÉ DU VIEUX-PORT DE MONTRÉAL INC.
APPELLANT – Defendant
v.

PRITIE PATEL
VANITABEN CHHAGANBHAI PATEL
RESPONDENTS – Plaintiffs
and
CANADIAN NATIONAL RAILWAY COMPANY
MONTREAL PORT AUTHORITY
IMPLEADED PARTIES – Defendants

JUDGMENT

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[1] The Société du Vieux-Port de Montréal inc. appeals a judgment of the Superior Court, District of Montreal (the Honourable Madam Justice Marie-Claude Lalande), rendered on July 25, 2018, which declared the Société du Vieux-Port de Montréal inc. liable for 90% of the damage suffered by Pritie Patel and Vanitaben Chhaganbhai Patel. The judge also declared that Pritie Patel was liable for 10% of that damage.

[2] Judicial costs were ordered to follow.

[3] For the reasons of Hamilton, J.A., with which Kasirer and Rancourt, JJ.A. concur, **THE COURT**:

[4] **DISMISSES** the appeal, with judicial costs on appeal.

NICHOLAS KASIRER, J.A.

JOCELYN F. RANCOURT, J.A.

STEPHEN W. HAMILTON, J.A.

Mtre Dominic Naud
Mtre Alexandra Fadel
CLYDE & CIE CANADA
For Appellant

Mtre Michael Earl Heller
HELLER & ASSOCIÉS
For Respondant Pritie Patel

Mtre Arthur Jay Wechsler
Mtre Jonathan Gottlieb
KUGLER KANDESTIN
For Respondant Vanitaben Chhaganbhai Patel

Mtre Michael Peter Goodhue
GASCO GOODHUE ST-GERMAIN
For Impleaded Party Montreal Port Authority

Mtre Stéphane Nobert
DSL
For Impleaded Party Canadian National Railway Company

Date of hearing: May 3, 2019

REASONS OF HAMILTON, J.A.

[5] At issue in this appeal is the apportionment among the parties of liability for a train accident with tragic consequences. The trial judge apportioned 90% of the liability to the Appellant and 10% to the Respondent, and she did not consider the potential liability of the Impleaded Parties, which had settled with the Respondents on the eve of the trial.

CONTEXT

[6] The Respondents are the victim of the accident and her mother.[1] The Appellant managed the Old Port sector within the Port of Montreal and was responsible for security in the Old Port. The Impleaded Parties Canadian National Railway Company (CN) and the Montreal Port Authority (the MPA) were respectively the owner of the train and the operator of the train while it was in the Port of Montreal.

[7] The context surrounding the tragic accident is summarized by the trial judge:

> [5] L'endroit où l'accident s'est produit se situe dans un parc récréotouristique qui reçoit plus de 6 millions de visiteurs par année. Ce lieu est traversé par un chemin de fer régulièrement utilisé par des trains de marchandises se rendant dans le Port de Montréal ou en sa provenance. Il y a six entrées par lesquelles les usagers peuvent accéder au site. Celle où l'action de la présente affaire se déroule se trouve à l'extrémité est. Il s'agit de l'entrée du Quai de l'horloge.
>
> [6] La SVPM [the Appellant] est l'entité responsable de la sécurité sur le site.
>
> [7] Le soir du 11 juin 2013, vers 23 h, Mme Patel [the Respondent], alors âgée de 30 ans, sort avec ses amies Helen Posborg et Sara Bendoudouh. Elles se rendent ensemble dans un bar de la rue St-Laurent, pour y écouter un groupe de musique. Mme Posborg est la conductrice désignée, pour l'occasion.
>
> [8] Après un moment, le trio décide de rejoindre d'autres copains dans le Vieux-Montréal. Avant de quitter les lieux, Mme Patel invite une autre de ses amies, Cyndie Augustin, à se joindre à elles. Il est alors convenu de passer la prendre à la station de Métro Place d'armes.

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1 References in this judgment to "the Respondent" refer to the victim of the accident.

[9] Une fois Mme Augustin à bord, le quatuor se dirige vers la rue de la Commune pour y garer la voiture. Mme Posborg stationne sa voiture sur le côté nord de cette rue, vis-à-vis l'entrée du Quai de l'horloge.

[10] Le groupe qu'elles vont rejoindre les attend aux Terrasses Bonsecours. Ce bar est situé à l'extrémité est du territoire du parc récréotouristique.

[11] Le quatuor arrive à l'établissement après une marche d'environ 5 minutes, soit un peu après minuit. Les amies restent moins d'une heure et repartent des lieux un peu passé 1 h.

[12] Sur le chemin du retour, il tombe une petite pluie.

[13] Les quatre femmes, marchant deux par deux, longent le Hangar 16, comme lors de leur arrivée, avant d'atteindre l'entrée du Quai de l'horloge.

[14] À partir de cette partie du récit, des bandes vidéo permettent de suivre avec exactitude, les mouvements des différents protagonistes.

[15] Le premier duo formé de mesdames Augustin et Patel arrive en premier.

[16] À cet endroit, elles constatent que l'accès par lequel elles sont venues est obstrué. Un train y est immobilisé, bloquant la sortie, tant pour les voitures que pour les piétons.

[17] Juste à l'extérieur de la zone hachurée blanche au sol, une voiture patrouille de la SVPM est stationnée avec ses gyrophares allumés. Dans celle-ci se trouve un agent de sécurité de la SVPM, Franz Duteau.

[18] Mesdames Augustin et Patel se dirigent vers l'auto-patrouille. Seule Madame Augustin s'adresse à l'agent de sécurité pendant que Madame Patel attend à distance, de l'autre côté du véhicule. Peu après, le deuxième duo arrive. Mesdames Posborg et Bendoudouh s'approchent à leur tour de la voiture pour participer à l'échange.

[19] Une fois la discussion terminée, le quatuor marche d'un bon pas, mais sans précipitation, vers le train.

[20] Tout d'abord, Mme Augustin traverse entre les wagons situés le plus à l'est de l'entrée puis Mme Bendoudouh s'exécute à son tour entre les deux wagons situés plus à l'ouest. Une fois la manœuvre de Mme Augustin complétée, Mme Patel entreprend de faire de même. Au moment où elle se trouve sur le sommet du lien attachant les wagons les uns aux autres, sans avertissement, le train redémarre subitement, causant une importante secousse, et provoquant la

> chute de Mme Patel au sol entre deux wagons. Le train, en continuant sa progression, traîne celle-ci sur plusieurs mètres et lui sectionne les deux jambes.
>
> [21] Il ne s'écoule que 100 secondes entre le moment où le premier duo débouche à l'intersection du Hangar 16 et le moment du tragique accident.[2]

[8] The Respondents instituted proceedings against the Appellant and the Impleaded Parties, alleging that each of them committed faults that caused the accident. The Respondents initially claimed $510,000 in damages. Following the latest amendment, they are claiming $7,060,000.

[9] At the request of the Respondents, the suit was split at the outset into a first phase dealing with fault and a second phase dealing with damages.

[10] In the days leading up to the trial on fault, the Respondents reached out of court settlements with the Impleaded Parties. The Transaction, Release and Discharge with CN was signed June 8 and June 14, 2018, and a Notice of Discontinuance was filed June 12, 2019. With respect to the MPA, the Release and Discharge was signed June 8, 2018 and a Declaration of Settlement was filed on June 19, 2019. Neither settlement agreement was filed in the Court record until this appeal.[3]

JUDGMENT UNDER APPEAL

[11] The trial judge mentions at the outset that the Impleaded Parties settled with the Respondents, but other than that she makes no mention of either Impleaded Party in her judgment.

[12] She summarizes the issues as follows:

> 1. Est-ce que la SVPM a manqué à ses obligations vis-à-vis Mme Patel?
>
> 2. Le cas échéant, Mme Patel doit-elle supporter une part de responsabilité dans le préjudice subi?

[13] She reviewed the testimony of the four women and the security guard and described the video footage of what happened that night. She concluded as follows:

> [137] En somme, la preuve prépondérante permet de conclure que l'agent Duteau n'a jamais informé les quatre amies que le train pouvait repartir à n'importe quel moment. Il s'est contenté de dire qu'elles avaient le choix

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2 *Patel c. Canadian National Railway Company*, 2018 QCCS 3312, paragr. 5-21 (references omitted).

3 The Appellant filed these documents in the appeal record without the prior authorization of the Court. A verbal motion to admit new evidence was made at the hearing and was not contested. The amounts of the settlements were redacted from the documents filed.

> d'attendre, sans préciser la durée moyenne d'un tel arrêt ni depuis combien de temps le convoi était immobilisé. Ensuite, il les a avisées qu'elles pouvaient marcher vers l'ouest pour contourner le train et a également indiqué qu'elles pouvaient, à leurs risques, enjamber le convoi entre deux wagons.

[14] She therefore concluded that the Appellant was at fault :

> [144] Le 12 juin 2013, la SVPM n'a pas pris les mesures nécessaires pour empêcher la réalisation d'un risque dont elle avait pleinement connaissance et de ce fait a commis une faute d'omission.

[15] The judge also concluded that the Respondent was at fault and assumed the risk that she might fall and suffer minor injuries but that she did not know that the train might start to move at any time and without warning and therefore did not assume that risk. Rather, the judge accepted her evidence that if she had been sufficiently informed, she would not have attempted to cross the train.

[16] The judge therefore concluded that the Appellant was 90% liable and the Respondent 10%. She did not consider the possible liability of the Impleaded Parties.

GROUNDS OF APPEAL

[17] The grounds of appeal can be summarized as follows:

1. Whether the judge erred in finding that the Appellant had any liability for the Respondent's damage;

2. If not, whether she erred in the apportionment of liability between the Appellant and the Respondent;

3. Whether the release of CN had the effect of releasing the Appellant; and

4. Whether the judge erred in failing to apportion liability to the Impleaded Parties and, if so, what liability should have been apportioned to them.

ANALYSIS

1. Appellant's liability

[18] The Appellant attacks the judge's conclusions that it was at fault and that its fault caused the accident. The Appellant argues that it did not commit a fault and that the Respondent is solely responsible for her damages.

[19] The determination of a fault in extra-contractual civil liability is a question of mixed fact and law.[4] The establishment of a causal link and the apportionment of liability are questions of fact.[5] These are matters where the Court should only intervene if the Appellant demonstrates a palpable and overriding error.[6]

[20] In my view, the Appellant has not succeeded in discharging its burden of proof.

[21] There is no error in the judge's analysis of the facts. The Appellant was responsible for security on the site. The trains that pass through the site pose an obvious danger to the public and the Appellant had the obligation, both as the manager of the site and pursuant to its contractual obligations with the MPA, to take measures to keep the public safe. The Appellant knew that there was a risk that people would try to cross a stationary train because it had happened in the past. The Appellant adopted a security protocol that evolved over a 10 year period to deal with that risk. The protocol provided for security guards to be dispatched to each level crossing when there was a train passing though the site or stopped on the site, and required the security guard to take the following steps:

> ✓ Immobiliser le véhicule d'intervention ou de service au centre des deux voies et en diagonale avec phares et gyrophares et/ou les feux d'urgence (hasard) allumés;
>
> ✓ Se tenir debout au centre des deux voies d'accès et en dehors de la zone de garde (peinte en jaune ou blanc et hachurée);
>
> [...]
>
> ✓ Si le train est immobilisé, l'employé assigné doit indiquer aux gens de ne pas franchir ou, escamoter le train / wagons en vue d'espérer passer par-dessus le train;
>
> [...]
>
> ✓ Informer la clientèle que le train peut se remettre en marche à tout moment, le risque de chute entre les wagons serait alors inévitable; [...]

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4 *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, paragr. 35; *St-Jean v. Mercier,* 2002 SCC 15, paragr. 48; *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122, paragr. 76.

5 *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122, paragr. 78; *Crevette du Nord Atlantique inc. c. Conseil de la Première Nation malécite de Viger*, 2012 QCCA 7, paragr. 86.

6 *Site touristique Chute à l'ours de Normandin inc. c. Nguyen (Succession de)*, 2015 QCCA 924, paragr. 11 (motion for leave to appeal to the Supreme Court dismissed (S.C. Can., 2016-03-17), 36566).

[22] On the night in question, the Appellant was informed that a train was passing through the Old Port. Pursuant to the security protocol, it dispatched one of its security guards to the level crossing where the accident would later occur. He went to the scene but he did not follow the procedures in the security protocol: he parked his vehicle perpendicular to the tracks, not on a diagonal as required by the protocol, and after the train stopped across the level crossing, he returned to his vehicle and sat in the vehicle, again contrary to the protocol.

[23] The Respondent's friends approached his vehicle and spoke to him. At that time, he knew or should have known that the train had been stopped for a few minutes already and that trains typically stopped for 5 to 15 minutes, such that it was likely that the train would move at any time within the next few minutes. He also knew or should have known that the train would move without warning.

[24] There was conflicting evidence as to what the security guard told the Respondent and her friends. He testified that he warned them against trying to cross the stationary train. The Respondent and her friends testified that he had a nonchalant or laid back attitude, and that he told them that he did not know when the train might move, that they should "Do as you please" and that it was at their discretion or at their risk. They testified that he did not warn them that the train might move at any time without warning. The trial judge believed the Respondent and her friends, and did not believe the security guard.

[25] There was ample basis for these conclusions of fact and the Appellant does not contest them in appeal.

[26] Rather, the Appellant argues that the conduct of its security guard did not constitute a fault and did not cause the accident. It submits that it took sufficient action to warn the Respondent and her friends of the intrinsic danger of the train (the security guard's patrol car with flashing lights, an "X" shaped sign on the right side of the crossing and white hatched road markings in front of the crossing) and, in any event, the danger of crossing a train was foreseeable. The Appellant cites the *Grand Trunk* judgment rendered by the Supreme Court in 1923, on appeal from the Alberta Court of Appeal. Justice Duff, as he then was, writes, in a concurring opinion for the majority:

> At all events I am quite clear that the object of having a watchman is to warn people that they are in presence of a railway and that the tracks are in use, to call their attention to the risks in order to give them an opportunity of exercising that prudence which people usually display in such circumstances; and not at all to protect people by forcible means from the consequences of their own folly and recklessness in refusing to take warning and observe the usual precautions in the presence of such risks.[7]

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[7] *Grand Trunk Pacific Railway Co. v. Earl*, [1923] SCR 397, p. 400.

[Emphasis added]

[27] In *Grand Trunk*, a cyclist decided to cross a railway line even though he had seen a train coming, mistakenly thinking that the train would go in a different direction. The Supreme Court concluded that the absence of a guard near the railway line did not cause the accident because it was not proven that the railway company could have avoided the consequences of the cyclist's negligence.

[28] Whatever the relevance of common law jurisprudence in civil law generally, *Grand Trunk* has no application in the present case because the facts are very different. In *Grand Trunk*, there was no warning of the oncoming train, but the cyclist knew it was coming and decided to cross the railway line. In the present case, the train was stationary. The Respondent and her friends sought advice from the security guard. Not only did he fail to warn them about the risk that the train might start moving at any time and without a warning, but he specifically told the women that they could cross the train "at their risk". He was seated in his vehicle and took no steps to prevent them from crossing the train. His behavior influenced the Respondent and her friends' decision to cross the train. While their behaviour was reckless, as discussed below, there is no basis for us to intervene in the judge's conclusion that the Appellant was at fault.

[29] Further, on the issue of causation, the judge accepted the Respondent's evidence that she would not have attempted to cross the train if she had known that the train might start to move at any time and without warning. This is a matter of appreciation of the evidence and in particular of the Respondent's credibility and there is no basis for us to intervene. This finding is sufficient to establish a causal relationship between the Appellant's fault and the accident.

[30] I would dismiss the first ground.

2. Apportionment of liability between the Appellant and the Respondent

[31] The judge found that the Respondent acted somewhat recklessly ("une certaine témérité") in crossing the train and in the manner in which she crossed the train, by climbing over the coupling rather than using the steps, and was therefore partially liable for the accident. This is not contested in appeal.

[32] Pursuant to Article 1478 *C.C.Q.*, where an injury has been caused by several persons, liability is apportioned among them based on the seriousness of the fault of each. The judge apportioned 90% of the liability for the accident to the Appellant and 10% to the Respondent.

[33] The Appellant argues that the judge's apportionment is manifestly unreasonable and that the Respondent should bear much more than 10% of the liability. In support of its position, the Appellant cited a number of cases involving accidents with trains where

either the action by the victim was dismissed[8] or the percentage liability of the victim was higher than 50%.[9]

[34] There is a fundamental difference between those other train cases and the present case. In all of those cases, the victim was either crossing in front of a moving train or trying to jump on a moving train, or was struck by a moving train while he or she walked on the tracks. In each case, the victim knew or ought to have known that the train was moving or that there was a risk of a moving train.

[35] In the present case, the train was stationary and the judge concluded that, because of the Appellant's fault, the Respondent was not aware of the risk that the train might start to move at any time and without warning. The Respondent's conduct was risky, but she was not aware of the full extent of the risk. The only risk of which she was aware was the risk that she might fall from a stationary train and suffer minor injuries, not that she might be seriously injured by a moving train. The judge concludes that this goes to the seriousness of her fault, with the result that her fault was much less serious than the Appellant's.

[36] Again, there is no demonstration of a palpable and overriding error in any of the judge's factual conclusions.

[37] The apportionment of liability is a discretionary exercise. There is no mathematical formula to be applied. It is based on the judge's appreciation of all of the evidence and, unless there is a palpable and overriding error, the Court should show deference to the judge's conclusion. The Appellant has not demonstrated any palpable and overriding error in the judge's analysis. Moreover, and without necessarily agreeing with her conclusion on the 90/10 split of liability, I find it to be reasonable and consistent with the evidence. I would therefore not intervene.

[38] I would dismiss the second ground of appeal.

3. Effect of the CN Release

[39] The Appellant argues that the settlement with CN had the effect of releasing the Appellant from any liability.

[40] This argument is based on the nature of the relationship among the parties and the terms of the settlement agreement itself.

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8 *Grand Trunk Pacific Railway Company v. Earl*, [1923] 1 S.C.R. 397; *Compagnie Price Ltée c. Brousseau*, J.E. 81-915, AZ-81011156 (C.A.); *Bean c. Compagnie des chemins de fer nationaux du Canada* (1994), AZ-50074225 (C.A.);

9 *Gilmore c. Desrochers-Dubé*, J.E. 86-394, AZ-86011099 (C.A.) (victim 2/3 liable); *Burla c. Canadian Pacific Railways*, J.E. 2005-826, AZ-50300913 (C.S.) (victim 75% liable); *J.H. c. Canadian Pacific ltée*, 2015 QCCS 1040 (victim 75% liable).

[41] This argument was not made before the trial judge, who did not have the text of the settlement agreement. The parties have now filed the settlement agreement and they invite us to decide the issue. I believe that it is appropriate that we do so: the parties have invited us to decide the issue, it is a question of law and of interpretation of the settlement agreement which we are in a position to decide, and sending the matter back to the Superior Court would involve an unnecessary delay.

[42] The relationship between the parties is defined, at least at the outset, by the Respondents. They instituted proceedings against the Appellant and the Impleaded Parties, alleging that the accident "was caused by the fault, negligence, imprudence and lack of care and skill on the part of the Defendants" and claiming damages against all three defendants.

[43] If the Respondents are correct and the Appellant and the Impleaded Parties committed faults that caused the damages, then the Appellant and the Impleaded Parties would be solidary debtors under Art. 1526 *C.C.Q.*:

1526. The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.	**1526.** L'obligation de réparer le préjudice causé à autrui par la faute de deux personnes ou plus est solidaire, lorsque cette obligation est extracontractuelle.

[44] The Appellant pleads that the release of CN is presumed to be complete and that the complete release of one solidary debtor results in the complete release of the other solidary debtors.

[45] I do not agree.

[46] Article 1687 *C.C.Q.* establishes the presumption that the release by the creditor is complete:

1687. Release takes place where the creditor releases his debtor from his obligation. Release is complete, unless it is stipulated to be partial.	**1687.** Il y a remise lorsque le créancier libère son débiteur de son obligation. La remise est totale, à moins qu'elle ne soit stipulée partielle.

[47] This means that where a creditor receives a payment from the debtor and releases the debtor, it will be presumed that the release is for the full amount of the debt, unless the creditor specifies that the release is limited to a portion of the debt.

[48] As between the Respondents and CN, the release is therefore presumed to be complete. That is consistent with the language of the Transaction, Release and Discharge, which refers to a "full and final settlement" and calls for the filing of a discontinuance.

[49] However, the granting of a complete release to one solidary debtor does not have the effect of completely releasing the other solidary debtors:

> **1690.** Express release granted to one of the solidary debtors releases the other co-debtors only for the share of the co-debtor who has been discharged; if one or several of the other co-debtors become insolvent, the shares of the insolvents are apportioned rateably between all the other co-debtors, except the co-debtor to whom the release was granted, whose share is borne by the creditor.
>
> Express release granted by one of the solidary creditors releases the debtor only to the extent of the share of that creditor.
>
> **1690.** La remise expresse accordée à l'un des débiteurs solidaires ne libère les autres codébiteurs que pour la part de celui qui a été déchargé; et si l'un ou plusieurs des autres codébiteurs deviennent insolvables, les portions des insolvables sont réparties par contribution entre tous les autres codébiteurs, excepté celui à qui il a été fait remise, dont la part contributive est supportée par le créancier.
>
> La remise expresse accordée par l'un des créanciers solidaires ne libère le débiteur que pour la part de ce créancier.
>
> [Emphasis added]

[50] The authors Baudouin, Jobin and Vézina write:

> **1104 - Effets en matière de solidarité** – Le remise de dette accordée à l'un des débiteurs solidaires produit des effets différents selon qu'elle est expresse ou tacite.
>
> Si le créancier accorde une remise de dette expresse à l'un des codébiteurs solidaires, cette remise ne libère que ce dernier et non les autres (art. 1690, al. 1 *C.c.Q.*)[32]. Si le créancier réclame l'exécution de l'obligation à un autre des codébiteurs, il convient de déduire du montant réclamé la part de celui auquel il a fait remise, même si le montant versé par le débiteur pour être libéré est inférieur à cette part[33]. Lorsque la part du débiteur libéré correspondait à la totalité de la dette – une hypothèse que le législateur évoque explicitement en matière de solidarité (art. 1537, al. 2 *C.c.Q.*) – l'impact de la remise est drastique, puisqu'il prive alors le créancier de tout recours contre les autres débiteurs[34].

> Il s'agit là d'un risque non négligeable associé à la remise dans le contexte d'une obligation solidaire. [...][10]
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> ---
>
> 32. Cette règle diffère de celle du droit français : « La remise ou décharge conventionnelle au profit de l'un des codébiteurs solidaires, libère tous les autres, à moins que le créancier n'ait expressément réservé ses droits contre ces derniers » (art. 1285, al. 1 *C.c. fr.*). En revanche, lorsque cette présomption est renversée, la part du débiteur solidaire qui profite de la remise est déduite de la totalité due par ses codébiteurs (art. 1285, al. 2 *C.c. fr.*).
>
> 33. *Allan c. Boutin,* [2002] R.J.Q. 1875, REJB 2002-32904 (C.A.).
>
> 34. *Syndicat de Beaucours c. Leahy,* [2008] R.D.I. 718, REJB 2008-151118 (C.S.), conf. par [2009] R.J.Q. 648, EYB 2009-155751 (C.A.).
>
> [Emphasis added]

[51] As a result, in principle, a complete release given to one solidary debtor releases the other solidary debtors only for the share of the debtor who was released. The release of one solidary debtor may have the effect of releasing the other solidary debtors completely, if the released debtor was 100% liable for the debt[11] or if the parties intend to release the other solidary debtors completely.[12] Such an intention will not be presumed, but rather depends on the nature of the settlement, the manner in which the settlement was arrived at and the language used in the settlement document.[13]

[52] The Appellant invokes the following language in the Transaction :

> WHEREAS Plaintiffs and CN (hereinafter the "Parties") <u>wish to settle the dispute</u> in the manner set forth hereinafter, without any admission whatsoever or recognition of liability by either party and with the sole view to avoid the costs and inconveniences associated with further litigation.

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10 Jean-Louis Baudouin, *Les obligations*, by Pierre-Gabriel Jobin and Nathalie Vézina, 7th ed (Cowansville : Yvon Blais, 2013), paragr. 1104. This paragraph was cited with approval by the Court in *Michon c. Dallaire*, 2019 QCCA 554, paragr. 24. See also Didier Lluelles and Benoît Moore, *Droit des obligations*, 3th ed (Montreal : Thémis, 2018), paragr. 2728; Jean Pineau and Serge Gaudet, *Théorie des obligations*, 4th ed (Montreal : Thémis, 2001), p. 681-682.

11 Article 1537, paragr. 2 C.C.Q.; *Syndicat de Beaucours c. Keahy*, 2009 QCCA 454, paragr. 30-33; *Michon c. Dallaire*, 2019 QCCA 554.

12 *Leduc c. Soccio*, 2007 QCCA 209, paragr. 48 (motion for leave to appeal to the Supreme Court dismissed (S.C. Can., 2007-09-06), 31968).

13 *Boutilier c. Alexopoulos*, 2010 QCCA 387, paragr. 19.

> [...]
>
> 2.1 In consideration of the terms and conditions set out herein, and in full and final settlement of the present Court file in capital, interest, and cost, CN hereby agrees to pay to Plaintiffs de sum of [...].
>
> [Emphasis added]

[53] Although this language may appear to support the position taken by the Appellant, it is clear, when the Transaction is read as a whole, that only CN is intended to be released:

> **Release and Discharge**
>
> 3.1 In consideration of the foregoing, Plaintiffs hereby releases CN as well its directors, officers, shareholders, representatives, employees, subsidiaries, related companies, successors, insurers and assigns, and discharges them of any and all rights., claims and actions, causes of action, debts, accounts, covenants, contracts, in principle, interest, costs and fees, that they have, had or may have, directly or indirectly, related to the Accident.
>
> **Discontinuance**
>
> 4.1 Plaintiffs hereby agree to discontinue their action against CN;
>
> 4.2 Following the signature of the present Transaction, Plaintiffs' attorneys will file a Discontinuance;
>
> [Emphasis added]

[54] Moreover, the surrounding circumstances make it clear that the Respondents intended to release only CN. The Respondents were negotiating at the same time a settlement with the MPA, which included the following language:

> It is understood that the Plaintiffs will continue the litigation for the entirety of their claims against the co-defendants Canadian National Railway Company and the Société du Vieux-Port Inc. but will discontinue the litigation against the Montreal Port Authority.

[55] Further, after the Respondents announced their settlements with the Impleaded Parties, they continued with the trial against the Appellant.

[56] This ground of appeal should be dismissed.

4. Liability to the MPA

[57] The Appellant argues that the judge should have apportioned some liability to the Impleaded Parties notwithstanding the fact that they settled with the Respondents.

[58] As set out above, the judge mentions at the outset of her judgment that the Impleaded Parties settled with the Respondents, but other than that she makes no mention of either Impleaded Party in her judgment. Specifically, she does not review their conduct to determine whether they were at fault and whether any liability for the accident should be apportioned to them.

[59] This is an error in law.

[60] There are allegations of fault against the Appellant and the Impleaded Parties which may lead to solidary liability. As set out above, when the creditor settles with one solidary debtor, the effect is to release the other solidary debtors, not for the amount of the settlement but for the share of the solidary debtor who was released. This makes it incumbent on the judge to determine whether the Impleaded Parties CN and the MPA were at fault and, if so, to apportion liability to them.[14] She can then apportion the remaining liability between the Appellant and the Respondent in the 90/10 split that she established.

[61] The judge did not determine whether the Impleaded Parties CN and the MPA were at fault or apportion liability to them. The parties asked that the Court do so in its judgment rather than send the case back to the Superior Court for it to make that determination. They invoke the delays that have already been incurred in this matter: the accident occurred more than six years ago and the case is still at the liability stage of the trial. Since the settlements were entered into on the eve of the trial, much of the relevant evidence is in the record before us and that evidence is not contested and does not give rise to issues of credibility. Although the Court's power to deal with issues not dealt with in first instance is exceptional, there are circumstances where it will do so.[15] In my view, this is an appropriate case for the Court to exercise that power.

[62] The Appellant does not argue that any liability should be attributed to the CN. Thus, I will only consider the liability of the MPA.

[63] The Appellant submits that the MPA was at fault and that it should be liable for any liability not attributed to the Respondent, with the result that the Appellant would have no liability. If the liability apportioned to the MPA is less, the Appellant would still be liable but its liability would be reduced.

[64] Specifically, the Appellant argues that the MPA committed the following faults:

- It never should have blocked the level crossing in the first place;

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[14] *Hinse v. Canada (Attorney General)*, 2015 SCC 35, paragr. 138-140. See also *Canada (Procureur général) c. Hinse*, 2013 QCCA 1513, paragr. 189.

[15] See, for example, *Droit de la famille – 132765*, 2013 QCCA 1781, paragr. 10.

- It failed to check the security cameras before giving the instruction to move the train; and

- It failed to advise the Appellant or ask for the Appellant's authorization before giving the instruction to move the train.

[65] I do not agree.

[66] Stopping a train across a level crossing creates a danger for the public. The evidence establishes that it was not absolutely necessary to stop the train across the level crossing in this instance. Other steps could have been taken to avoid blocking the level crossing. However, that does not mean that the MPA was at fault.

[67] The Appellant is responsible for security within the Old Port. It was common for trains to cross the Old Port and to stop in the Old Port, generally for a period of five to fifteen minutes. It was agreed, between the Appellant and the Impleaded Parties, that when a train approaches the Old Port, one of the Impleaded Parties will contact the Appellant. As stated above, the Appellant adopted a security protocol to deal with trains crossing or stopping in the Old Port, which provided for security guards to be dispatched to each level crossing to ensure security. These measures should be sufficient, if they are properly followed.

[68] On the day of the accident, the MPA advised the Appellant of the arrival of the train. The train blocked the level crossing for only 15 minutes around 1:40 a.m., including 8 minutes when the train was completely stopped. In my view, the MPA acted prudently and any risk to the public would have been avoided if the Appellant, through its security guard, had properly followed the protocol. It did not.

[69] The MPA's employee responsible for giving the instruction to move the train did not check the security cameras and did not advise the Appellant or ask for the Appellant's authorization before giving the instruction. The evidence does not establish whether checking the security cameras would have avoided the accident, given that everything happened so quickly. Even the Appellant's expert recognized that it was not the practice for the MPA to advise the Appellant or ask for the Appellant's authorization before giving the instruction to move a train. Further, it should not have been necessary to take these additional steps given that the Appellant had someone on site who was supposed to ensure that no pedestrians attempted to cross the train.

[70] In my view, the cause of the tragic accident remains the fault of the Appellant and the contributory fault of the Respondent. The MPA did not commit a fault and is not responsible for the accident.

[71] As a result, the judge's error in failing to consider the liability of the Impleaded Parties is without consequence. I would dismiss the final ground of appeal.

[72] I therefore propose that we dismiss the appeal.

STEPHEN W. HAMILTON, J.A.