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## Faultless Reasoning: Reconstructing the Foundations of Civil Responsibility in Quebec Since Codification

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David Howes\*

Faultless Reasoning:  
Reconstructing the Foundations  
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S'il pouvait arriver quelque cas qui ne fût réglé par aucune loi expresse ou écrite, il aurait pour loi les principes naturels de l'équité, qui est la loi universelle qui s'étend à tout.<sup>1</sup>

I.

In *The Civil Law System of the Province of Quebec*, Jean-Gabriel Castel writes,

To know the Quebec law of contract, it is sufficient to read the articles of the Civil Code dealing with this topic and the cases decided since its enactment. If in the common-law system it is absolutely necessary to know history to understand, for instance, the essential division between law and equity . . . this is not the case in France or in Quebec. There, the civil law is logically organized, it is not the product of a historical evolution or of a long line of decided cases.<sup>2</sup>

Castel's conception of the Civil Code of Lower Canada (1866) as *the* "common law" (*droit commun*) of Quebec, and *the* antithesis of the English common law, is typical of the contemporary Quebec jurist.<sup>3</sup> But as John Brierley has suggested in a recent article entitled "Quebec's 'Common Laws' (*droits communs*): How many are there?" this conception is unjust. There is not one Quebec *droit commun* but three, and of those three the Code ranks third.

Which ranks first? According to Brierley: "those principles, variously described as universal, general or super-eminent, that enacted law itself

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1. M. Domat, *Les lois civiles dans leur ordre naturel, le droit public, et legum delectus*, t. 1, liv. préliminaire (Paris: Knapen, 1767) at 4.

2. J.-G. Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962) at 34.

3. See e.g. Office de Révision du Code Civil, *Projet du Code Civil* (Québec: Editeur Officiel, 1978) at xxvi-xxvii; J.-L. Baudouin, "L'interprétation du code civil québécois par la Cour suprême du Canada" (1975), 53 Can. Bar. Rev. 715.

supposes.”<sup>4</sup> The evidence for such an *ius commune non scriptum* as being the foundation on which the Code itself rests is found in the remarks of one of its draftsmen, Charles Dewey Day,

Every Code of Laws however full and complete it may be necessarily presupposes not only the existence but also the knowledge of certain primary and fundamental principles. These are Laws of God, of Nature, and of common sense which must underlie and sustain all positive legislation.<sup>5</sup>

Further evidence of the “common sense” dimension of Quebec’s *droit commun(s)* can be found in the Code itself, in such provisions as article 11 C.C.: “A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law” (i.e. the enacted *droit commun*). It can also be found in the numerous provisions of the Code which are designed to infuse current community values and standards into the law, for example, the reference to “the principles of natural equity” in article 429 C.C., to “public order and good morals” in article 13, to “fault” in article 1053, and so on.

The second *droit commun*, according to Brierley, is that residing in “historical fact”. Unlike the French *Code Napoléon* (1804), the Quebec Code did not pretend to be a total statement of the existing law, only a partial statement. Nor did it presume to abrogate the pre-existing law. In fact, according to article 2613 (now article 2712) C.C., the former law continues in force, except in cases of duplication or inconsistency.

The sources of this second *droit commun* (which could be called “historic” to distinguish it from the “general” and the “enacted”) are heterogeneous. They consist of the elements of Roman Law, *ancien droit français*, royal decrees, doctrinal opinion, judicial decisions, and much else, in force in the Quebec of 1866.<sup>6</sup> As Brierley has underlined, all those sources, archaic as they may be, remain susceptible of application in Quebec today, *à titre de droit commun*.

If Brierley is correct, it follows that the prevailing contemporary conception of “the civil law system of Quebec” is unfounded. Contrary to Castel, it is absolutely necessary for the jurist to “know history” to understand the “system” within which he/she operates. Furthermore, if

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4. J.E.C. Brierley, “Quebec’s ‘Common Laws’ (*droits communs*): How many are there?” in *Mélanges Louis-Philippe Pigeon* (Montréal: Wilson & Lafleur, 1989) 109 at 114.

5. Cited in Brierley, *ibid.* at 115. The inspiration behind these remarks seems to have come from Portalis, “Discours préliminaire prononcé lors de la présentation du projet” in P.A. Fenet, ed., *Recueil complet des travaux préparatoire du Code civil*, vol. 1 (Paris: Au Dépôt, rue Saint-André-des Arcs, 1827) 463.

6. See J.E.C. Brierley, “Quebec’s Civil Law Codification: Viewed and Reviewed” (1968), 14 *McGill L.J.* 521.

the “system” is to preserve its integrity, the jurist *must* remain open to sources of law which transcend the perimeters of the Code, not closed to them on account of the “threat” they pose to its (i.e. the Code’s) alleged “purity.”<sup>7</sup>

This essay attempts to recapture some of the lost integrity of the civil law system of Quebec by comparing how judges reasoned in the closing decades of the nineteenth century with how they reason today. As we shall see, the text of the Code has taken the place of the dictates of Day’s “common sense” as the ground of legal reasoning.<sup>8</sup> The effects of that displacement are nowhere more apparent than in the domain of “la responsabilité civile” — hence the focus of the present essay.

It bears underlining that this essay is written in defense of the proposition that under the civil law of Quebec there can be liability independent of fault for acts causing damage. That proposition goes against the drift of contemporary doctrine. According to most modern commentators, in Quebec “la responsabilité repose sur la faute” — end of discussion!<sup>9</sup> That opinion is based on the words of article 1053 C.C.:

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill

and a particular reading of the articles which follow.<sup>10</sup>

The articles in question impose responsibility for damage caused by the acts of things under one’s care, of children, of insane persons, of servants and of workmen (art. 1054), of animals and of buildings (art. 1055). It is assumed that those are cases where fault is “presumed” by the legislator (i.e. fault in the surveillance of the child or animal, in the maintenance of the building, etc.), and that this presumption can be rebutted. Hence, according to the prevailing wisdom, the régime of responsibility for the acts of others and of things is no more “objective” (risk-based), but just as “subjective” (fault-based), as the regime of responsibility for an agent’s own acts. As a corollary, it is understood that article 1057 C.C., which

7. See J.-G. Castel, “Le juge Mignault — défenseur de l’intégrité du droit civil québécois”, (1975), 53 Can. Bar Rev. 544.

8. See D. Howes, “La domestication de la pensée juridique québécoise” (1989), 13(1) *Anthropologie et Sociétés* 103 for an account of some of the reasons for this shift.

9. J. Pineau and M. Ouellete, *Théorie de la responsabilité civile*, 2nd ed. (Montréal: Thémis, 1984) at 6-12; J.-L. Baudouin, *La responsabilité civile délictuelle* (Montréal: Presses de l’Université de Montréal, 1973) at 262; P.-A. Crépeau, “Liability for Damage Caused by Things From the Civil Law Point of View” (1962), 40 Can. Bar. Rev. 222 at 231-33.

10. For an alternative reading see D. Howes, “Dialogical *jurisprudence*” in W.W. Pue and B. Wright, eds., *Canadian Perspectives on Law and Society: Essays in Legal History* (Ottawa: Carleton University Press, 1988) at 71.

concerns obligations which result “from the operation of law solely,”<sup>11</sup> such as those “of owners of adjoining properties,” or those which “in certain cases arise from fortuitous events,” are exceptions to the régime set forth in articles 1053, 1054 and 1055 C.C.

If to know the Quebec law of civil responsibility it were sufficient to read the articles of the Code dealing with that subject and the cases which mention those articles decided since its enactment, there would be no reason to disturb the prevailing wisdom. But if the Code presupposes knowledge of the laws of God, of nature, and of common sense — not to mention history, — then there is every reason to be deeply disturbed by the extent to which modern Quebec judges and commentators rest so secure in the knowledge that in Quebec “la responsabilité repose sur la faute.”<sup>12</sup> As we shall see, the concept of “faute” was not clearly distinguished from the idea of “fait” causing damage, before the 1920s. As a result, legal actors were required to conform to significantly higher standards of civil responsibility than those with which we moderns are familiar. This essay describes the break-up and dispersal of those standards.

## II.

One of the first published commentaries on the Civil Code of Lower Canada was written by T.T.J. Loranger, a judge of the Quebec Court of Appeal. In his *Commentaires*, Loranger (unlike Castel) displayed a lively sense of how the legal culture of Quebec differed from that of France. He stressed the fact that the Quebec Code (unlike the French) did not abrogate pre-existing law. As a result, the Quebec judge and commentator must hold “en conférence continue” all of the sources that lay behind the Code (and then some). As for the French judge and commentator: “Le rôle de ce dernier n’est pas de chercher en dehors du texte, les lois sur lesquelles sont fondées ses explications, la matière de son commentaire. Il ne remonte pas plus haute que le Code, qui est son unique source, le premier comme le dernier mot de sa paraphrase.”<sup>13</sup>

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11. Part of the argument of this essay is that to confine the meaning of the term “law” as used in article 1057 C.C. to “a positive enactment of the legislature” robs it of its proper resonance.

12. This slumber was disturbed by Nadeau J.’s decision in *Lapierre v. P.-G. Québec* (1979), C.S. 907. Nadeau J. upheld a proposition analogous to the one advanced in the present essay. Of the many case comments on *Lapierre*, the two that stand out the most for their defense of “traditional” civilian doctrine are: P. Legrand, “Vaccination par l’Etat: droit de la santé et théorie des obligations juridiques” (1981), 26 McGill L.J. 880; and M. Goudreau, “L’affaire Jacques Lapierre c. Procureur Général du Québec et al. devant la Cour d’appel — Commentaire d’arrêt” (1984), 15 R.G.D. 443.

13. T.T.J. Loranger, *Commentaires sur le Code Civil du Bas Canada* (Montréal: Brassard, 1873) at 3. See also T. McCord, *The Civil Code of Lower Canada* (Montréal: Dawson Bros., 1867).

Loranger J.A. may be cited as one of the first exponents of the “nomadic” method of codal interpretation, as opposed to the “paraphrastic” or “linguistic” method (on which more later). His approach was in keeping with the open texture of the Code itself (see the discussion of article 2712 C.C. above). The nomadic method also found support in one of the first privately printed editions of the Code, Lorimier and Vilbon’s *La Bibliothèque du Code Civil*, published in 1871. The purpose of that edition was to “réunir dans un cadre, comparativement restreint [i.e. two volumes of close to 500 pages each], un ensemble assez complet des principales discussions sur chaque article de notre Code, présentant successivement les données du droit Romain, du droit Français et du droit Anglais, quelquefois même du droit Américain.”<sup>14</sup> The “discussions” in question were the sources identified in the *Reports* of the Codification Commission as embodying the existing law of Quebec. As the diversity of sources attests (Roman, French, English, American — one could add: German, Scots), the law of Quebec was not particular to Quebec but rather a *syncretis* (the word “synthesis” would be too strong) of the legal wisdom of the North Atlantic world.

Loranger J.A.’s judicial decisions were consistent with the method he espoused in his commentaries. Take the case of *St. Charles v. Doutré*. That case involved an action in damages against the proprietor of a sausage factory for the diminution of rent suffered by an adjacent proprietor as a result of the offensive (and allegedly insalubrious) odours emitted by the plant. The factory-owner argued, in part, that he had the right to dispose of his property in “the most absolute manner” (the exact words of article 406 C.C.), and that in any event he was authorized to carry on his business by the municipality. Summing up the law on nuisances caused by industrial establishments, Loranger J.A. wrote,

A mon sens, la loi sur ce point, est claire et se déduit des principes les plus élémentaires du droit civil, je pourrais dire des notions les plus simples du droit naturel. Le droit est fondé sur trois principes, disait [the Roman jurisconsult] Ulpien, dont le second consiste à ne pas faire de tort à autrui, *nominem laedere*, et c’est l’application de ce second principe qui doit décider cette cause. Ne faire tort à personne, et réparer ce tort quand il est fait; tel est le principe fondamental de tout droit, qui fait en grande partie la base du pacte social, et sur lequel sont fondés les articles 1053 et 1054 de notre Code, et la théorie des délits et quasi-délits.<sup>15</sup>

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14. C. de Lorimier & C. Vilbon, *La Bibliothèque du Code Civil de la Province de Québec* (Montréal: Le Minerve, 1871) at 13.

15. *Saint Charles v. Doutré* (1874), 26 Rap. Jud. 25 at 27.

Having dismissed the factory-owner's claim to an absolute right to dispose of his property, Loranger J.A. went on to characterize the issue raised by the case in his own way:

il s'agit de mesurer l'étendue de la tolérance que se doivent réciproquement les maîtres d'héritages voisins. . . . Voyons d'abord quels sont les inconvénients résultant de la contiguïté de leurs héritages que les propriétaires doivent supporter mutuellement, et quand nous aurons trouvé la règle qui fait la ligne de démarcation entre le fait imputable, c'est-à-dire la faute, et celui qui ne l'est pas, nous verrons si elle s'applique à la contiguïté d'un établissement industriel avec une propriété bourgeoise, qui est le cas actuel.<sup>16</sup>

Two things stand out about Loranger J.A.'s reasoning: the first is the attention he paid to the principles of natural law, and the second his inattention to what the Code says. The one follows naturally from the other. What is meant here by "inattention to what the Code says" is that Loranger J.A. was wrong to think that articles 1053 and 1054 can support an action for damages independent of fault, or at least that is the opinion of most modern commentators.<sup>17</sup> But then they base their interpretation on the words of the articles in question, whereas Loranger J.A. (who did not bother to quote the articles, and perhaps for that reason confused "fait" and "faute") based his decision on Ulpian's second principle.

Another case in which "common sense" can be seen to have triumphed over the express words of the Code is *Doolan v. Corporation of Montreal*. The plaintiff in that case was a delivery man who had the misfortune to be arrested and roughed up in the course of a police operation to quell a public disturbance (in which Doolan himself had no part). His action was for damages to his carriage and reputation. Given the words of article 365 C.C. — corporations "cannot sue or be sued for assaults, battery or other violence to the person" — Doolan's case ought to have been dismissed. But as MacKay J. noted regarding an identical rule (deriving from William Blackstone's *Commentaries on the Laws of England*) which formed part of the English common law,

"Many of the old technical rules affecting corporations are being condemned and discarded," said Chancellor Kent. . . . He asked, why? and he answered, because inconvenient and impolitic, leading sometimes to mischief and injustice. Blackstone, and art. 365 of our code merely give definitions. As in England, actions may be brought against corporations for assaults by their servants, notwithstanding Blackstone and the common law doctrine, so the same may be instituted here, notwithstanding the

16. *Ibid.* at 28. See also *Marcotte v. Hénauld* (1898), 13 Rap. Jud. 453.

17. See *supra* note 9.

Code. Surely, under the generality of our Code corporations are not free to assault by deputation, and to trespass at pleasure!<sup>18</sup>

As the *Doolan* case illustrates, the Code was not a controlling authority in the legal culture of the late nineteenth century: it “merely gave definitions”! Judges tended to reason by analogy, not by the book.<sup>19</sup>

Perhaps the best example of the distances in time and space such analogical reasoning can travel is Cimon J.A.’s judgment in *Cité de Québec v. Mahoney*. The facts in *Mahoney* were as follows: in order to stop a fire from spreading the municipal authority ordered the demolition of Mahoney’s house. As things turned out, the fire was brought under control and extinguished before it reached the dwelling, but the latter had already been demolished. The question was whether Mahoney was owed any indemnity by the city. (It will be appreciated that he had lost something — his house — but there had been no corresponding gain — the demolition made no difference to the outcome of the fire, which was brought under control despite it.)

In responding to this question, Cimon J.A. took the litigants on a tour of Roman law, natural law, the *vieux droit civil français* and the Code Napoléon, our statutory law, and the law of England and America. At the end of his odyssey, he held the city liable for the damages, even though its functionaries could not, strictly speaking, be said to have committed any fault. All they did was act on the basis of what they perceived to be a state of necessity.<sup>20</sup>

In reaching his conclusion, Cimon J.A. merrily dismissed the most obvious textual argument in favour of his point — namely the argument from article 407 C.C.:

No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid.

18. *Doolan v. Corporation of Montreal* (1868), 13 Lower Canada L.J. 71 at 73.

19. This is not to say that there are no cases in which the Code’s provisions were examined with the minute sort of attention we moderns would expect. See e.g. *McElwaine v. The Balmoral Hotel Co.* (1891), 7 Montreal Law Reports 139. However, for every example of such paraphrastic reasoning, there can be found a counterexample of reasoning in the nomadic mode. Consider, for example, how Meredith J. concluded his judgment in *Hogan v. The Grand Trunk Railway Company of Canada* (1878), 2 Quebec Law Reports 142: “as well upon the reason of the thing, as upon general principles, and according to the foregoing authorities [the Code is not listed among those authorities, though “Redfield on the Law of Railways,” “Bell’s justly esteemed Commentaries on the Laws of Scotland” and “Pothier, Depot, No. 23” are considered in some depth], it seems to me . . .” See further D. Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929 (1987), 32 McGill L.J. 523 [hereinafter “Polyjurality”].

20. *Cité de Québec v. Mahoney* (1901), 10 B.R. 378. This point cannot be too heavily emphasized. At 414 Cimon J.A. states: “Cette démolition, même si elle a été une erreur de jugement, n’est pas une illégalité, ni un délit ou quasi-délit, car la loi l’autorisait.”



Cimon J.A. noted that there had been a case before the French Cour de cassation where “une démolition est, en pareil cas, appelée ‘expropriation’ (D.P. 66.1.75). Je crois cette qualification impropre. Mais qu’importe l’expression!”<sup>21</sup>

If the case was not one of expropriation, what was it then? Cimon J.A. agreed with some of the most august authorities of all time — Labéon Puffendorf and Demolombe — that the case ought to be assimilated to that of *jet à la mer*. That is, it was permissible, a “devoir public” even, to demolish the house, for as a “poète juriste” of the *vieux droit civil français* once said,

*Ta cause y va quand tu vois la muraille  
De ton prochain brûler ainsi que paille,  
Le feu ardent malaisément se dompte,  
Si d’y pourvoir à temps on n’y tient compte.*<sup>22</sup>

However,

des interprètes de cet ancien droit français — et des meilleurs et des plus autorisés — se sont dit: mais abattre ainsi une maison pour arrêter le progrès d’un incendie, c’est agir dans l’intérêt des maisons voisines, et, de là, ils ont conclu qu’il fallait assimiler ce cas à celui du *jet à la mer*, et faire indemniser le propriétaire de la maison démolie, par les propriétaires des maisons voisines sauvées, par contribution.

C’est la ce que Puffendorf a dit être l’opinion commune et la plus conforme à l’équité.<sup>23</sup>

It should be noted that Cimon J.A. made no mention of article 2450 C.C. in his discussion of the case of *jet à la mer*. That article provides:

Freight is payable upon the goods cast overboard for the preservation of the ship and of the remainder of the cargo, and the value of such goods is to be paid to the owner of them by contribution on general average.

The reason for his oversight is simple: article 2450 forms part of the enacted *droit commun*. Cimon J.A.’s argument was pitched at a higher level, that of the general *droit commun*, or as he put it, “les vrais principes de justice et de notre droit civil”.<sup>24</sup>

The “generality” — or better, anti-positivism — of Cimon J.A.’s style of reasoning becomes apparent when one examines how he circumvented the problem that in none of the statutes that touch upon the incorporation of the City of Quebec was there any provision stipulating that individuals in Mahoney’s position ought to be compensated. In fact, the only

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21. *Ibid.* at 401.

22. *Ibid.* at 398.

23. *Ibid.*

24. *Ibid.* at 410.

provisions of any pertinence explicitly exempt the functionaries responsible for ordering the demolition from liability for their decision. Thus, Cimon J.A. reasoned on the basis of *the silence* of the various statutes to the conclusion that because they did not prohibit indemnification they must allow it. In this way he gave effect to the historic *droit commun* of Quebec.

Cimon J.A. clinched his argument by acknowledging that in England and America municipal corporations are not held responsible in like circumstances unless their charters decree it, and immediately adding:

Mais, tout de même, aux Etats-Unis, comme en Angleterre, les partisans de la non-responsabilité des corporations, en pareil cas, parce que leur charte ne la décrète pas, ne peuvent s'empêcher de remarquer que l'équité exigerait le contraire; aussi, nombre de législatures aux Etats-Unis ont adopté des lois déclarant que les municipalités devront une indemnité, démontrant par là la fausseté et l'injustice de la doctrine qui refuse une indemnité.<sup>25</sup>

Thus, very much as in *Doolan*, "equity" and "common sense" prevailed over more positivistic constructions of the "intention" of a silent legislature, and compensation was awarded on the basis of the historic *droit commun*.

### III.

Would Cimon J.A.'s decision carry the same authority today as it did when it was written? It seems not, judging from the decisions of both the Quebec Court of Appeal and the Supreme Court of Canada in *Lapierre v. P.G. Québec*. Saving the facts of the *Lapierre* case for treatment later, let us examine how those courts responded to *Mahoney*, beginning with the Court of Appeal.

As will be recalled, Cimon J.A. based his argument partly on equity and partly on the analogy between the Mahoney situation and the case of *jet à la mer*. Concerning the argument from equity, McCarthy J.A., speaking for the Court of Appeal, wrote:

Dans notre système l'équité en soi n'est pas une source d'obligations. Dans certains cas exceptionnels, tels les articles 429, 1024 et 1044a *et seq.* C.C., il en est question, mais ce sont de ce fait des cas d'obligations qui procèdent de la loi seule.<sup>26</sup>

Evidently, McCarthy J.A.'s conception of "la loi seule" was much narrower than Cimon J.A.'s. In fact, it was derived straight from the definition of the term "loi" given in article 17 C.C.: "actes, statuts ou lois de la province."

25. *Ibid.* at 408.

26. *P.-G. Québec v. Lapierre* [1983] C.A. 631 at 634 [hereinafter "*Lapierre* (C.A.)"].

One can imagine Cimon J.A.'s response to that: "Je crois cette qualification impropre. Mais qu'importe l'expression!" The reason "words" or "definitions" mattered so little to Cimon J.A. is clear enough: he was a "man of principles." Thus, he would have been astonished at the opposition between law and equity McCarthy J.A. set up, and the way the latter limited the field of operation of equity to those cases where it is explicitly mentioned in the Code. To Cimon J.A. our civil law was the living embodiment of equity, or derived from equity, not opposed thereto.<sup>27</sup>

The narrowness of McCarthy J.A.'s understanding of the term "loi" (law = a positive enactment) helps to explain the narrowness of the interpretation he gave to article 2712:

Cet article n'a pas pour effet, toutefois, d'introduire dans notre droit des obligations de l'ancien droit français ou du droit romain. . . . Si des obligations de l'ancien droit français ou du droit romain se retrouvent dans notre droit, c'est uniquement parce qu'elles ont été reprises par notre législature.<sup>28</sup>

McCarthy J.A. was correct to observe that article 2712 C.C. did not "introduce" the obligations of the historic *droit commun* into our civil law (for they have *always* been there), but wrong to claim that such obligations have to have been "adopted" by the Quebec legislature if they are to enjoy any application in the present. Quite the contrary, such obligations apply automatically, "unless positive enactment has provided otherwise."<sup>29</sup>

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27. Cimon J.A. could have found support for his position in Marcadé's commentary on article 1370 of the Code Napoleon (the French equivalent of 1057 C.C.): "Quoique l'on fasse . . . une classe à part des obligations venant *de la loi*, il est bien clair que, en définitive, toutes les autres obligations, sans distinctions, viennent également de la loi: toute obligation civile, quelle qu'elle soit, vient d'un principe de l'équité naturelle, sanctionné par la loi positive. — Ainsi, l'obligation que l'on dit venir du quasi-contrat de réception de l'indu provient de ce principe d'équité, consacré par la loi, que nul ne doit s'enrichir au détriment de l'autre. Dans les quasi-contrats, dit Pothier lui-même, a qui est due la classification du Code, *c'est la loi seule*, ou *l'équité naturelle* (il fallait dire *après l'équité, comme sanction* de l'équité), qui produit l'obligation, en rendant obligatoire le fait d'où elle résulte (no 114)." V. Marcadé, *Explication théorique et pratique du code civil*, vol. 5 (1873) at 249. Marcadé goes on to show how delictual and quasi-delictual and even contractual responsibility derive from equity, the former from the principle that "tout dommage causé par un fait condamnable doit être réparé par l'auteur de ce fait," the latter from the "principe d'équité que tout homme doit tenir sa parole et remplir ses promesses." Is it not strange that whereas for Marcadé equity was the source of law, for McCarthy J.A. law is the source of equity?

28. Lapierre (C.A.), *supra*, note 26 at 633-34.

29. Brierley, *supra*, note 2 at 119. The trick is to invoke them, and they are very rarely invoked. Why? Because there is no time for the law student to take courses in legal history anymore, and the skills of a historian are irrelevant anyway. To function as a lawyer now, all the student need develop is skill at "cross-referencing codal articles." See D. Howes, "The Origin and Demise of Legal Education in Quebec (or Hercules Bound)" (1989), 38 U.N.B. L.J. 127.

As the preceding discussion reveals, McCarthy J.A.'s interpretation of article 2712 C.C. was more "backwards" than it was "narrow." That reversal helps to explain why he was unable to perceive in Cimon J.A.'s discussion of *jet à la mer* anything more than a reference to the content of article 2450 C.C. (i.e. to the enacted *droit commun*).<sup>30</sup> But what Cimon J.A. was referring to by means of that discussion was the general *droit commun* (i.e. the principle for which the case of *jet à la mer* could be said to stand). It would seem, therefore, that Cimon J.A.'s reasoning passed "over the head" of his present-day counterpart.

That such was the case becomes apparent when one considers the *ratio* McCarthy extracted from *Mahoney*: "Tout en se référant aux principes de droit naturel et du droit civil français, le Tribunal a semblé s'appuyer plutôt sur une loi particulière qui, dans une version antérieure du moins, aurait pourvu à l'indemnisation en telles circonstances."<sup>31</sup> It will be observed that McCarthy J.A. has inverted the relative importance Cimon J.A. attached to the general and enacted *droit commun* respectively, and, what is especially telling, surmised that Cimon J.A. based his decision on "une loi particulière" when the latter did nothing of the sort! This leads us to conclude that at some point between 1901 (the year *Mahoney* was decided) and McCarthy J.A.'s judgment in *Lapierre* the whole legal system (or in any event, the hierarchy of *droits communs*) got turned upside down, with no one being the wiser.

*Mahoney* received even poorer reviews in the Supreme Court of Canada. The late Justice Chouinard, speaking for the court, said simply: "this case does not constitute an authority for the case at bar in view of the fact that there was no statement of principle and it is not clearly indicated whether the decision was based on ancient or modern French law or on municipal law."<sup>32</sup>

The difficulty the Supreme Court had in grasping the principle in *Mahoney* is directly attributable to its current method of establishing "fundamental principles". That method consists in "cross-referencing codal articles",<sup>33</sup> an essentially *inductive* procedure, which is the opposite of the traditional *historico-deductive* procedure of holding "en conférence continue", as Loranger J.A. would say, *all* of the sources that lay behind the Code.

In keeping with modern method, the question Chouinard J. posed for himself was whether there was any

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30. See *Lapierre* (C.A.), *supra*, note 26 at 633-34.

31. *Ibid.* at 634.

32. *Lapierre v. P.-G. Québec*, [1985] 1 S.C.R. 241 at 250 [hereinafter "*Lapierre* (SCC)"]

33. See R.A. Macdonald, "Understanding Civil Law Scholarship" (1985), 23 *Osgoode Hall L.J.* 576.

support provided by extrapolating [various] provisions of the Civil Code . . . [for] a general principle of the civil law that damages suffered or costs incurred by an individual for the benefit of the community must be borne by the latter.”<sup>34</sup>

Following counsel for the appellant’s suggestion, Chouinard J. proceeded to examine four categories of articles dealing with general average contribution (arts. 2007, 2383, 2385, 2387, 2399, 2042, 2450, 2677, 2680, 2691, 2692 and 2709 C.C.), privileges and in particular the question of expenditures in the common interest (arts. 1980, 1981, 1982, 1994, 1996, and 2009 C.C.), the reimbursement of necessary expenses (arts. 4217, 1046, 1052, 1539, 1546, 1775, 1812, 1813, and 1973 C.C.), and expropriation (art. 407 C.C.) respectively.

The “theory of general average contribution” (i.e. *jet à la mer*) as expressed in article 2450 C.C. was found, not surprisingly, to be “entirely special to maritime law”; article 407 C.C. was found to be “a specific application of the theory of unjust enrichment”; and so on for the other two categories. In the final analysis, the four categories or “theories” did not, therefore, add up to a “general principle” of the kind the appellants were arguing for. (One wonders whether *any* principle could be established by simply massing articles in that way.)

Following the lead of Pierre-Gabriel Jobin,<sup>35</sup> it is of interest to note that Chouinard J. referred *inter alia* to 47 different codal articles, but less than half as many doctrinal works (21), and only 8 cases, whereas in *Mahoney*, Cimon J.A. referred to 3 articles, 15 doctrinal works, and an indefinite number of French, American and English cases (over 20 anyway). It is uncertain what significance can be attached to those figures, for counting sources is no substitute for analysis of whether (or not) they were undertood. But the disproportionate emphasis on codal articles in *Lapierre* must point to something. What it suggests to me is that at some point between 1901 and 1985 (the years the two cases were decided) there occurred a *positivization* of the common sense of judges, with regrettable consequences. As suggested previously, both the general and historic dimensions of the *droits commun(s)* of Quebec appear to have been forgotten.

#### IV.

When did this positivization take place and from whence did it proceed? As discussed elsewhere, the decades of the 1920s and '30s appear to have

34. *Lapierre* (S.C.C.), *supra*, note 32 at 257-59, citing *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67.

35. P.-G. Jobin, “Les Réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d’une affaire de famille” (1980), 21 C du D. 257.

constituted a watershed.<sup>36</sup> Those decades saw the elaboration and enforcement of a new method of interpretation, which may be called the “linguistic method.” That method was the invention of the Judicial Committee of the English Privy Council (the ultimate court of appeal for Canadians down to 1949), and in particular Lord Sumner. According to Lord Sumner, “the first step, the indispensable starting point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources.”<sup>37</sup>

The justification for the linguistic method was derived from the Privy Council’s experience with the English *Bills of Exchange Act*, and then extended to the Quebec Civil Code. As Lord Herschell remarked in relation to the former: “The purpose of such a statute surely was that on any points specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities.”<sup>38</sup> Hence the doctrine that “the Law is determined by what is found in the Code,” not behind it.<sup>39</sup> Those words obviously ruled out the possibility of any further elaboration of the *nomadic* method of interpretation.

It is ironic that the best-known critic of the new method, Pierre-Basile Mignault, who sat on the Supreme Court of Canada from 1918 to 1929, was also its most rigorous enforcer.<sup>40</sup> The other Supreme Court luminaries of that era, Justices Lyman Poore Duff and Francis Anglin, could hardly be expected to have seen through the new method, since they were common lawyers by training, and never succeeded at internalizing the civilian way of thinking. As Anglin J. frankly admitted in *Shawinigan Carbide Co. v. Doucet*:

The master is not an insurer of the safety of his workmen, or servants, and *I am unable to understand the principle* upon which some of the Quebec decisions proceed, in which, apparently without invoking the provisions of art. 1054 C.C., the employer has been held liable for injuries [caused by machinery] due to latent defects.<sup>41</sup>

Anglin J.’s inability to understand the principle of the decisions in question is attributable to a variety of assumptions, all of which would

36. See Polyjurality, *supra*, note 19.

37. *Quebec Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662 at 672 [hereinafter “Vandry”].

38. Cited in *Despatie v. Tremblay*, [1921] A.C. 702 at 709.

39. *Ibid.*

40. See, on the one hand, P.-B. Mignault, “Le Code civil de la province de Québec et son interprétation” (1935), 1 U.T.L.J. 104 or Castel, *supra*, note 6; and on the other Mignault J.’s judgment in *Regent Taxi v. Congrégation des Petits Frères de Marie*, [1929] S.C.R. 650 or *Mile End Milling Co. v. Peterborough Cereal Co.* [1924] S.C.R. 120.

41. *Shawinigan Carbide Co. v. Doucet* (1909), 42 S.C.R. 281 at 337 (emphasis added).

make perfect sense to the modern commentator, but were foreign to the legal culture of the time. Thus, he assumed that an agent is responsible only for injuries caused by his fault, and that a particular set of facts must be comprehended by a particular article of the Code for there to be liability. But as we have seen, Quebec judges were as likely to deduce responsibility from such “general principles” or “vérités juridiques” as “rien de ce qui appartient à quelqu’un ne peut nuire impunément à un autre,” as to base their reasoning on a particular text of the Code.<sup>42</sup> In fact, they frequently neglected even to mention the latter — that is, they failed to descend to the level of the enacted *droit commun*.

That fact makes it difficult to attach much credence to Jean-Louis Baudouin’s reconstruction of “la découverte jurisprudentielle de l’article 1054(1) C.C.” based entirely on Supreme Court and Privy Council decisions referring to the article in question.<sup>43</sup> Baudouin sees the “discovery” as commencing with Taschereau J.’s dissent in *McArthur v. Dominion Cartridge Co.*, which inspired the Privy Council to recognize a régime of “presumption de fait (*res ipsa loquitur*)” for damage caused by things.<sup>44</sup> Before *McArthur*, according to Baudouin, “Le régime général de responsabilité des choses n’ayant pas une existence autonome, la victime devait prouver aux termes de l’article 1053 C.C. la faute du propriétaire de l’objet qui avait causé le dommage.”<sup>45</sup>

Baudouin’s account of the pre-1901 state of the law is unjust. Already in 1889 the Superior Court had decided that:

our law holds railways to repair damage caused by sparks from their engines, even if they have used all known precautions to prevent it.

This seems to me to be a perfectly just and reasonable doctrine. The railway company runs trains for their own profit; if the even inevitable consequence is loss to private proprietors adjoining their line of railway, it is the company, who makes the profit, that should bear such loss.<sup>46</sup>

As this quotation suggests, the decision of the court in *Leonard v. Canadian Pacific Railway Co.* (1889), where reference is made to various prior cases but *no* articles of the Code, not only points to the existence of a fully autonomous regime of responsibility for damage caused by things, but founds such responsibility on what is sometimes called “la théorie du *risque-profit*”.<sup>47</sup> There is a problem here since that theory is not supposed

42. *Ibid.* at 286-88. This statement of principle is derived from Fitzpatrick J.’s decision in *Doucet*.

43. See Baudouin, *supra*, note 9 at 284-90.

44. *Ibid.* at 284. See *McArthur v. Dominion Cartridge Co.* (1901), 31 S.C.R. 392; (1905) A.C. 72.

45. *Ibid.* at 284.

46. *Leonard v. Canadian Pacific Railway Co.* (1889), 15 Quebec Law Reports 93 at 96-97.

47. See Pineau and Ouellette, *supra*, note 9 at 9. The judges of the time would have called it “common sense”.

to have existed in Quebec law until Fitzpatrick J.'s decision in *Doucet* (i.e. the year 1909). Even then, it is supposed to have been imported from France, not to be indigenous. What is more, it is supposed to have been banished from Quebec law by the Privy Council in *Vandry*.<sup>48</sup> All of these suppositions are false, as will become clear presently.

To appreciate the full extent to which modern commentators have rendered foreign or extraneous all that was once integral to the highly cosmopolitan (and principled) legal culture of nineteenth century Quebec, it is necessary to go back to *Doucet* and retrace the path to *Vandry*.

The *Doucet* case concerned a workman who sustained various injuries as a result of an explosion in one of the company's furnaces, the cause of which it was impossible to ascertain. As Baudouin correctly pointed out concerning the Supreme Court decision in this affair, "Pour le juge Fitzpatrick, l'employeur ne peut dégager sa responsabilité que par la preuve d'un cas fortuit, d'une force majeure, ou d'une faute de la victime, la responsabilité étant fondé sur le risque d'exploitation."<sup>49</sup> However, when Baudouin claims that this case had the effect of substituting a "présomption de faute dans le garde de la chose" for the "présomption de fait" contemplated in *McArthur*, he errs. Such an interpretation is only supportable if one follows Anglin J.'s decision in *Doucet*, not Fitzpatrick J.'s.<sup>50</sup>

The next case to be considered is *Norcross Bros. Ltd v. Gohier*:

une action portée à la suite de la mort d'un ouvrier écrasé par un monte-charge. La majorité des juges fut d'accord pour retenir la règle fondamentale que l'article 1054(1) C.C. créait à l'encontre du gardien de la chose une présomption de faute susceptible d'être combattue par preuve contraire. Dans l'espèce, toutefois, la Cour en vint à la conclusion que la défenderesse n'avait pas réussi à repousser la présomption en prouvant la faute de la victime.<sup>51</sup>

The third case to be considered is *Vandry v. Quebec Railway, Light, Heat and Power Co.* (1920). That case involved an action for damages brought by a plaintiff whose house burned down as a result of a surge of electricity through its wiring. The surge was caused by a branch falling on

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48. See *Vandry*, *supra*, note 37 at 671-72.

49. Baudouin, *supra*, note 9 at 285.

50. In Fitzpatrick J.'s own words at 288: "La partie prétendu responsable peut n'avoir ni la connaissance du défaut de construction, ni le moyen de s'en rendre compte; mais, si elle en a le soin et la garde, alors, d'après les termes de l'article, elle est responsable des dommages causés par la chose." It did not bother Fitzpatrick J. in the least that he was basing his judgment on words which had "restés inaperçus, comme le dit Planiol, pendant près d'un siècle."

51. Baudouin, *supra*, note 9 at 285-86. See *Norcross Bros. Ltd. v. Gohier* (1918), 56 S.C.R. 415.



the cables distributed and exploited by the defendant. The fallen branch brought the cables into contact with the wires leading to plaintiff's house. The cause of the branch falling was an ice storm. Lord Sumner, speaking for the Privy Council, held the defendant responsible for the damage on the purely linguistic ground that "art. 1054 introduces a new liability . . . independent of that personal element of *faute* which is the foundation of the defendant's liability under art. 1053." And so it came to be established that liability under art 1054(1) was only defeasible "by proof of inability to prevent the damage" — that is, proof of *force majeure* or *cas fortuit* or fault of the plaintiff.<sup>52</sup>

In his commentary on *Vandry*, Baudouin remarked,

Le caractère sybillin de l'arrêt du Conseil privé allait amener une réaction. Il semblait en effet consacrer le principe que l'article 1054(1) C.C. loin de créer une simple présomption de *faute*, établissait une responsabilité objective ou, au moins, une présomption de responsabilité.<sup>53</sup>

Baudouin's view of *Vandry* was plainly influenced by Mignault J., who was in fact the leader of the attack on the objective theory of civil responsibility, hence the architect of the only régime of responsibility we know today (the subjective). By Mignault J.'s own admission, "I would be very slow to hold that the person having machinery under his care should resort to impracticable or unreasonable means to prevent injury occurring by reason of the normal working of the machinery."<sup>54</sup> Given this assumption, this new normalcy, it is not surprising that Mignault J. viewed the *Vandry* decision as one which "innove visiblement dans un domaine ou la doctrine de la nécessité de la *faute*, comme base de la responsabilité civile, paraissait solidement assise . . . Cette décision nous lie, mais je me garderais bien de l'étendre."<sup>55</sup> In fact, Mignault J. took such pains not to "extend" the *Vandry* decision that he ended up retracting it on behalf of the Privy Council.

The first step in this process of retraction involved reintroducing the notion of fault: "Perhaps I may be permitted to observe that holding that article 1054 C.C. establishes a legal liability does not entirely do away with the idea of fault, for this legal liability is evidently imposed because of a presumed fault, that is to say, a negligence in respect of the care of the thing which caused the damage."<sup>56</sup> The second step involved making the technical point that: "The extension [by the Privy Council] of the

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52. *Vandry*, *supra*, note 37 at 676-77.

53. Baudouin, *supra*, note 9 at 287.

54. *Canadian Vickers Ltd. v. Smith* (1922), [1923] S.C.R. 203 at 212 [hereinafter "*Smith*"].

55. *Domintion Glass Co. v. Despins* (1922), 63 S.C.R. 544 at 555.

56. *City of Montreal v. Watt and Scott Ltd.* (1920), 60 S.C.R. 523 at 545.

‘exculpatory clause’ to the first paragraph of article 1054 may now give rise to new questions of construction.”<sup>57</sup> To avoid such questions, the Privy Council duly restated the meaning of their decision in *Vandry in City of Montreal v. Watt and Scott* (1922): “in their Lordships’ view ‘unable to prevent the damage complained of’ means ‘unable by reasonable means.’ It does not denote an absolute inability.”<sup>58</sup>

According to Baudouin, those words signalled a “retour en arrière” on the part of the Privy Council — that is, their Lordships ceased to regard art. 1054 as establishing a “présomption de responsabilité” (as in *Vandry*) and went back to viewing this article as entailing a “présomption de faute”.<sup>59</sup> But this is a misreading. Their Lordships’ position did not change a bit between *Vandry* and *Watt and Scott*, as can be inferred from the reference to *force majeure* and *cas fortuit* as causes of exoneration in the sentence which follows the ones quoted above:

If, therefore, the storm in question could be described as a *cas fortuit* or *force majeure*, and if the appellants had shown that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships’ view, have been a case where the exculpatory paragraph would have applied.<sup>60</sup>

As every civil law scholar knows, it *is* essential to adduce evidence of *force majeure* to negative a “présomption de responsabilité”, but it is *not* necessary to prove irresistible force to rebut a “présomption de faute”. In the latter case, it suffices to prove absence of negligence (i.e. due diligence), which entails much less. Thus, it was not their Lordships who substituted one “presumption” for the other. The author of this switch was Mignault J. who, in “interpreting” the Privy Council’s words for us in *City of Montreal v. Lesage*, slyly noted:

were the defendant constrained to go the length of proving that the accident which caused the damage was a *cas fortuit* or *force majeure*, he would be obliged to establish “an absolute inability” to prevent the damage complained of, and their Lordships are very careful to state that “unable to prevent the damage” does not denote such an inability, but means “unable by reasonable means”, which of course excludes the idea of irresistible force as a necessary element of exculpation.<sup>61</sup>

I would seem that the only contemporary jurist to detect Mignault J.’s subterfuge in *Lesage* is Maurice Tancelin, who rightly points out that: “En ne retenant de ce *dictum* [of the Privy Council in *Watt and Scott*] que

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57. *Ibid.* at 546.

58. *City of Montreal v. Watt and Scott*, [1922] 2 A.C. 555 at 563.

59. See Baudouin, *supra*, note 74 at 287 and 288-90.

60. *Supra*, note 80 at 563.

61. *City of Montreal v. Lesage*, [1923] S.C.R. 355 at 361-62.

la mention des moyens raisonnables et en passant sous silence la référence expresse au cas fortuit ou de force majeure, on dénature évidemment son sens.”<sup>62</sup>

The *Lesage* case concluded the “découverte jurisprudentielle” or more accurately the “*dévolution* jurisprudentielle” (when one compares that case with *Leonard*) of article 1054(1) C.C. It is important to recognize that what might appear on the surface to have been a change in procedure only — the substitution of one presumption for another — entailed a substantive change as well: namely, a change in the meaning of the word “reasonable.” Whereas prior to the 1920s it was “reasonable” to expect a person having machinery under his care to prevent it from causing damage, from that decade on it would “suffice for the defendant to prove that he was unable, by reasonable means, to prevent the damage complained of.”<sup>63</sup> But this substantive change could not have occurred had there not been a change in the method of interpreting the Code; namely, a shift from the nomadic to the paraphrastic method. That change is evident when one juxtaposes the following two quotations, the first from Loranger J.A. in *Doutre*, the second from Mignault J. in *Vaillancourt*:

*A mon sens, la loi sur ce point, est claire et se déduit des principes les plus élémentaires du droit civil, je pourrais dire des notions les plus simples du droit naturel.*<sup>64</sup>

[Q]uand le texte est clair et sans équivoque on n’a pas besoin de chercher ailleurs.<sup>65</sup>

There is one further case which warrants discussion by way of illustrating the link between the rise of the linguistic method and the demise (or dispersal) of objective standards of civil responsibility, the case of *Curley v. Latreille*. This case involved an action in damages for the destruction wreaked by a chauffeur who, without his master’s knowledge or consent, took the latter’s car on a “joy-ride” down boulevard St-Laurent. The Court of Appeal held the master responsible for the damages on the basis of article 1054(7), which speaks of masters being responsible for the damages caused by their servants “in the performance of the work for which they are employed”, words which the court

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62. Maurice Tancelin, *Théorie du droit des obligations* (Québec : Presses de l’Université Laval, 1975) at 221.

63. *Smith, supra*, note 54 at 213; Baudouin, *supra*, note 9 at 289.

64. See *supra*, note 15.

65. *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*, [1923] S.C.R. 414 at 428.

interpreted in the light of an analogous expression — “in the course of their employment” — as used in a Manitoba case.

In the Supreme Court, Mignault J. chastised the lower court for having “assimilé notre droit quant à la responsabilité des maîtres et commettants au droit anglais”.<sup>66</sup> It bears underlining that the Court of Appeal decision was consistent with the *jurisprudence* and *doctrine* under article 1384(3) of the French *Code Civil*, as Mignault’s confrère, Justice Brodeur, demonstrated in his dissenting opinion.<sup>67</sup> Mignault, however, based his decision “uniquement sur le texte de l’article 1054 . . . texte qui ne prête à aucun équivoque”.<sup>68</sup> According to Mignault J., the absence of any words corresponding to “in the performance of . . .” in the French or English sources rendered them irrelevant, or at best *negative* guides, to the interpretation and application of article 1054(7). The presence of these words in 1054(7), on the contrary, “me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l’occasion seulement de ses fonctions, si on ne peut dire que ce fait s’est produit dans l’exécution de ses fonctions”.<sup>69</sup>

It will be appreciated that as a result of this decision “our law” with respect to the liability of masters for the damages caused by their servants came unhinged from “the general law”. This raises the question of whether it was “the intention of the legislature” that the substantive law of Quebec should diverge from that of France in this particular area. But of course this question is beside the point. The point is rather that the difference between the two Codes only came to light as a result of the application of a new method of interpretation, the “paraphrastic.”

## V.

In closing, let us consider *Lapierre v. P-G. Québec*, the case in which it was definitively concluded that “une obligation indépendante de toute faute dans des circonstances telles celles du cas présent serait une excellente chose mais notre droit actuel ne la prévoit pas.”<sup>70</sup>

The plaintiff’s daughter, Nathalie, was vaccinated against measles in the context of a mass immunization campaign organized by the Quebec government. A few days later, the child suffered an attack of acute viral encephalitis, which left her mostly paralyzed and brain damaged. In the

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66. *Curley v. Latreille* (1919), 60 S.C.R. 131 at 136.

67. According to article 1384(3) of the French *Code Civil*, masters are responsible for the damages caused by their servants “dans les fonctions auxquelles ils les ont employés.”

68. *Ibid.* at 177, 178.

69. *Ibid.* at 176-177.

70. *Lapierre* (C.A.), *supra*, note 26 (cited with approval by Chouinard J.).

court of first instance, Nadeau J. recognized the causal link between the vaccine and the encephalitis. He also affirmed that neither the Quebec government nor the nurse who administered the vaccine committed any fault. There was the threat of a measles epidemic, so the government acted responsibly — one could say “out of necessity” — in mounting the campaign, and its surveillance procedures were above reproach. The nurse, for her part, had taken all the normal precautions. It was simply that where vaccinations of this kind are concerned, there is a one-in-a-million chance of the person vaccinated contracting encephalitis, and due to “un coup implacable et aveugle du destin,” Nathalie was that one.

Nadeau J. upheld the plaintiff’s action in virtue of article 1057(5) C.C., which concerns obligations which “in certain cases arise from fortuitous events.” Fortuitous events are normally causes of exoneration (see e.g. articles 1072, 1513 C.C.), but they can also be the occasion of “necessary acts”:

La vaccination est précisément ce genre d’acte nécessaire où on prévoit même que l’on pourra causer un dommage grave dans un cas sur un million et cet acte nécessaire est fait précisément à l’occasion d’un cas fortuit: le danger de l’épidémie. . . . Il n’est que normal, pour corriger les coups implacables et aveugles du destin, de faire porter sur la collectivité les risques d’une . . . vaccination qui profite à tout. . . . Il s’agit là d’une obligation découlant d’un cas fortuit, comme en dispose l’article 1057. Cet engagement résultant de l’opération de la loi seule n’est pas sans analogie avec celui d’une expropriation, que personne n’est obligé de subir sans indemnité.<sup>71</sup>

It bears underlining that Nadeau J. reasoned *by analogy to*, not by extrapolating from, article 407 C.C. (concerning expropriation).

Nadeau J. also found support for his decision in article 2712 C.C. which, as will be recalled, is one of the key articles distinguishing the Quebec Civil Code from its French counterpart:

Vu le texte de . . . [art. 2712] il nous faut considérer que les dispositions de l’ancien droit français de même que celles du droit romain constituent un droit supplétif auquel il faut avoir recours au cas de silence du code sur un sujet particulier. . . . Le *Code civil français*, en faisant table rase des données de l’ancien droit s’est de la sorte privé d’une source d’obligations provenant des règles de l’équité naturelle lorsqu’on peut les rattacher, comme la chose est possible chez nous, à des cas fortuits, comme ne peut manquer de l’être une épidémie probable à laquelle on entend parer par un programme massif de vaccination.<sup>72</sup>

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71. *Supra*, note 12 at 918-19.

72. *Ibid.* at 916.

Nadeau J. went on to observe the parallel between the case at bar and *Mahoney*, having already signalled the pertinence of the doctrine of *jet à la mer*. His reasoning may be summarized in the form of a table:

Proposition	<i>jet à la mer</i>	<i>Mahoney</i>	<i>Lapierre</i>
A fortuitous event occurs	storm at sea	fire	impending epidemic
A necessary act is performed	jettison of part of cargo	demolition of a house	mass immunization
A direct and predictable consequence of the act is a loss suffered by a particular individual	passenger's belongings	Mahoney's house	Nathalie's bodily integrity
The collectivity benefits from the individual's loss	rest of cargo saved	general conflagration prevented	"herd effect"
The collectivity owes a debt to the individual	granted	granted	

In my opinion, Nadeau J.'s reasoning was faultless, but this was not the opinion of the Court of Appeal or the Supreme Court, for reasons that will already be apparent. It would be futile to argue against either of those decisions, for the only grounds on which one could do so — the historic *droit commun* and the general *droit commun* — have been outlawed.<sup>73</sup>

Still, there are certain misconceptions concerning Nadeau J.'s decision in *Lapierre* which should be dispelled. Many of these are contained in the following passage from a case comment written by Pierre Legrand:

Il faut toutefois se demander de quelle 'justice' il est véritablement question lorsqu'est retenu la responsabilité d'un défendeur tout à fait innocent [i.e. the Quebec government]. . . . Toutefois, comment justifier, tant au plan juridique que rationnel, une prise de position favorable à la victime plutôt qu'à l'acteur innocent? Les intérêts en jeu ne sont-ils pas d'un mérite à tout le moins équivalent? Le Code Civil du Bas-Canada a tranché, dès 1866. Il ne s'est jamais démenti depuis. En modifiant l'état du droit, le tribunal s'est improvisé législateur. Nous ne pensons pas exagérer en affirmant que son geste met en péril la fragile stabilité de l'édifice de la responsabilité

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73. This claim should be qualified somewhat. Chouinard J. did leave the door open a crack when he wrote in *Lapierre* (S.C.C.), *supra*, note 32 at 258: "There is no question that what our civil law has preserved of the ancient law is not necessarily limited to what the legislator has expressly adopted and enacted."

civile même. A ce jour, la faute a été et est. Nous croyons pouvoir ajouter qu'elle doit être.<sup>74</sup>

It will be observed that Legrand would have the same law apply to the government as to the citizen.<sup>75</sup> We have encountered this argument before, in *Doolan*, only there it was used to opposite effect.

Legrand's second point is that Nadeau J. assumed the role of legislator in "modifying" the state of the law. As should be apparent from the discussion of the last part, it is not so much that Nadeau J. committed the "sin" of judicial law-making as that since the 1920s successive generations of judges and commentators have busied themselves *unmaking* the civil law of Quebec.

Legrand's final point is that fault has always been the basis of civil responsibility in Quebec, and that to suggest otherwise would be to jeopardize the delicate stability of the Code. If one assumes that the Code is "logically organized" and that it is not necessary to "know history" to understand its divisions, this point does seem eminently "reasonable" (but only in the modern sense of that term).

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74. *Supra*, note 12 at 922.

75. See R.A. Macdonald, "Jurisdiction, Illegality and Fault: An Unholy Trinity" (1985), 16 R.G.D. 69 for some of the difficulties with this system of loss allocation. See further Tribunal administratif de Bordeaux, 29 juin 1956, D.S. 1956.462; Tribunal administratif de Strasbourg, 9 novembre 1976, D.S. 1977.660.