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Civil Liability in a Mixed Jurisdiction: Quebec and the Network of *Ratio Communis*

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I. *RATIO COMMUNIS*, COMPARATIVE LAW AND MIXED LEGAL SYSTEMS

A. *Comparative Law and the ‘Better Law’*

According to Zweigert and Kötz, all comparative research must be followed by a critical evaluation involving the decision of which possible solution is the most suitable and just¹ or, as Rheinstein asks, whether the norm in question serves its purpose adequately or is another norm a better fit for society’s expectations.² Finding the best solution, whatever that means, seems to be an inseparable part of comparative law³ because “all legal systems share the common goal of finding and applying the best and most just legal rules”.⁴ Some comparatists have tended to find a better law in the ‘nature of the thing’ (Natur der Sache), stating that comparative law can lead one to universal, common principles, i.e., to inherently correct solutions or ‘ideal types’ of law.⁵

Some authors prefer an economic approach in finding a better law. The movement of law and economics seeks an efficient law that maximizes economic welfare.⁶ Magnus points out the economic context

1. Konrad Zweigert & Hein Kötz (Tony Weir trans.), *An Introduction to Comparative Law*, 3d rev. ed. (Oxford: Clarendon Press, 1998) at 46-47.

2. Max Rheinstein, *Einführung in die Rechtsvergleichung* (München: Beck, 1987) at 26.

3. See also Harald Koch, Ulrich Magnus & Peter Winkler von Mohrenfels, *IPR und Rechtsvergleichung*, 4th rev. ed. (München: Beck, 2010) at 278.

4. Jan Smits, “Comparative Law and Its Influence on National Legal Systems” in Mathias Reimann & Reinhard Zimmermann eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford Univ. Press, 2006) 513 at 528.

5. Cf. the analysis of Michaels: Ralf Michaels, “The Functional Method of Comparative Law” in Reimann & Zimmermann, *supra* note 4, 339 at 346-47, 357, 373, with skeptical remarks at 374-75. Smits also mentions the natural law approach, cf. Smits, *supra* note 4, at 528.

6. Anthony Ogus, “The Economic Approach: Competition Between Legal Systems” in Esin Öricü & David Nelken eds., *Comparative Law, a Handbook* (Oxford, Portland: Hart Publishing, 2007) 155 at 155.

of liability law which grants or excludes compensation and thereby provides potential tortfeasors or potential victims with economic incentives to avoid damage. Although it is doubtful that economic aspects alone can set the standards of law or provide the criteria for finding a better law, this approach “contributes useful considerations and adds to rationalized decisions on tort law issues”.⁷ A different concept of economic approach and efficiency is proposed by Jan M. Smits. He prefers the evolution of law by free market and a free competition of legal cultures; if the market functions well and there is a free accessibility to the largest possible array of solutions, “one rule will always be singled out by the ‘buyers’ as the best”, “competition will ultimately allow one rule to triumph”.⁸ A permanent free movement of legal rules supplemented by the free choice of the courts between different rules resulted in uniformity in those areas of law where it was much needed while preserving cultural diversity,⁹ provided that the rules and methodology of common law and civil law “collide as hard as possible” and that the advantages and disadvantages of the rules in question are seriously considered.¹⁰

There are also other theories focusing on more or less universal (and better) rules using comparative methodology. Alan Watson’s *Legal Transplants* is among the most thought-provoking theories in this field. According to him, law develops through legal borrowings, i.e., by the moving of legal rules from one country to another since rules “can be successfully integrated into a very different system and even into a branch of the law which is constructed on very different principles from that of the donor”.¹¹ He also considers the theory of legal transplants within the context of law reforms attempting to achieve the best possible rule.¹² Joachim Zekoll draws one’s attention to the so-called system-neutral rules and to the possibility of implementing blocks of another legal system without disturbing the dominant legal principles and values of the adoptive system.¹³ In a recent publication Jaye Ellis searches for general principles of law and sets the double requirement of generality

7. Cf. Ulrich Magnus, “Tort Law in General” in Jan M. Smits ed., *Elgar Encyclopedia of Comparative Law* (Cheltenham, Northampton: Edward Elgar, 2006) 719 at 721.

8. Cf. Jan Smits, *The Making of European Private Law, Toward a Ius Commune Europaeum as a Mixed Legal System* (Antwerp, Oxford, N.Y.: Intersentia, 2002) at 62.

9. *Id.* at 64.

10. *Id.* at 148-49.

11. Alan Watson, *Legal Transplants, An Approach to Comparative Law*, 2d ed. (Athens, London: The University of Georgia Press, 1993) at 21, 55, 95-96.

12. *Id.* at 92.

13. Joachim Zekoll, “The Louisiana Private-Law System: The Best of Both Worlds” (1995) 10 TUL. EUR. & CIV. L.F. 1 at 13, 18 and 30.

and representativeness. Aside from the two opposite theories on general rules, natural law and positivism, she focuses on borrowing between jurisdictions.¹⁴ According to Öricü, discovering general principles of law is clearly one of the objectives of comparative law.¹⁵

Considering all of the above-mentioned theories and different academic views, we are convinced that each field of law has its own fundamental rules or principles based on human and natural reason, which can be identified as *ratio communis*. *Rationes communes* aim at showing the way towards just and efficient law. Even if a rule carrying a *ratio communis* undergoes significant changes in the process of transplantation, the nucleus of the rule, the *ratio communis* itself remains. To put it in the context of comparative law, Rheinstein is right to note that there is a global stock of solutions open for the comparatist.¹⁶ Comparative law research “can provide a pool of models from which to choose.” If the same issues are common to the legal systems concerned and they attempt to solve these issues in “better ways or more efficient ways”, the reformer can learn and derive answers from them.¹⁷ If a solution appears to be useful, it is of no significance which country it originated from. The key component is that the rule is of superior quality (i.e., *ratio communis*).¹⁸ However, there is at least one issue that can hardly be avoided by the comparatist, which is that “the systems chosen for study may have no proper relationship, and the conclusions will be lacking in significance”.¹⁹ The significance of mixed legal systems becomes obvious at this point. Mixed jurisdictions are the ‘living laboratories’ of interaction between two (or more) legal systems and of innovation through mutual influence. The encounter of solutions from different legal systems can be observed in a real and genuine legal environment. If mixed legal systems are examined, the proper relationship between the systems chosen is *per se* given.

B. *Mixed Legal Systems and the ‘Better Law’, Identifying Rationes Communes*

According to Vernon Palmer, a legal system must fulfill three criteria to be classified as a mixed legal system. First, it has to be “built

14. Jaye Ellis, “General Principles and Comparative Law” (2011) 22 EUR. J. INT’L L. 949 at 955, 957, 970-71.

15. Esin Öricü, “Developing Comparative Law” in Öricü & Nelken, *supra* note 6, at 55.

16. Rheinstein, *supra* note 2, at 26.

17. Öricü, *supra* note 15, at 55.

18. Smits, *supra* note 8, at 45, 147.

19. Watson, *supra* note 11, at 11.

upon dual foundations of common law and civil law materials”. Second, this duality must be obvious to an ordinary observer (quantitative threshold), i.e., a large number of principles and rules are of “distinguishable pedigree, even including non-substantive aspects of the law, such as the nature of institutions and the style of legal thinking.” Third, private law is to be derived from the civil law, whereas public law is to be of Anglo-American origin.²⁰ Alan Watson’s theory of legal transplants is also mentioned in connection with mixed legal systems: Jan Smits underlines that these legal systems owe their *mixité* mostly to legal transplants.²¹ It is Öricü who states that mixed jurisdictions are the comparatist’s laboratories. “They are fascinating systems to study and to analyse and they help us to increase understanding of law and its function in society.”²² Other well-known scholars share this opinion, e.g., Reinhard Zimmermann describes this phenomenon as a “living interaction between civil law and common law”.²³ Zweigert and Kötz also emphasize the rare chance to observe the interaction of different styles of law, and they characterize Louisiana and Quebec as “fascinating models of a symbiosis of Civil Law and Common Law.”²⁴ Reid states that “mixed jurisdictions demonstrate some of the possibilities for selection, combination and rationalization of existing rules drawn from a variety of sources.”²⁵ Palmer himself highlights the continuous interaction between divergent components at the level of substantive rules, methodology and ideology in general, and Quebec for the coherent magnitude of this juxtaposition in particular.²⁶ He stresses that mixed legal systems are able to blend the best of both worlds and to create better rules than either system could offer on its own.²⁷

20. Vernon V. Palmer, “Introduction to the Mixed Jurisdictions” in Vernon V. Palmer ed., *Mixed Jurisdictions Worldwide, The Third Legal Family* (Cambridge: Cambridge Univ. Press, 2001) 3 at 7-9.

21. Jan Smits, “Introduction: Mixed Legal System and European Private Law” in Jan Smits ed., *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia, 2001) 1 at 9.

22. Esin Öricü, “Mixed and Mixing Systems: A Conceptual Search” in Esin Öricü, Elspeth Attwool & Sean Coyle eds., *Studies in Legal Systems: Mixed and Mixing* (The Hague, London, Boston: Kluwer Law Int’l, 1996) 335 at 345.

23. Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law, The Civilian Tradition Today* (N.Y.: Oxford Univ. Press, 2001) at 128.

24. Zweigert & Kötz, *supra* note 1, at 115, 118.

25. Kenneth G.C. Reid, “The Idea of Mixed Legal Systems” (2003) 78 TUL. L. REV. 5 at 26.

26. Vernon V. Palmer, “Quebec and Her Sisters in the Third Legal Family” (2009) 54:2 MCGILL L.J. 321 at 340.

27. Vernon V. Palmer, “A Descriptive and Comparative Overview” in Palmer, *supra* note 20, 17 at 33.

Recently, the examination of mixed legal systems also sought to establish whether their being intermediaries between civil law and common law can be of significance for legal harmonization in general and regarding the private law of the European Union in particular. As Hector MacQueen summarizes, the European Civil Code has to be “equally accessible to the Common and the Civil Law traditions; in other words, it will have to be mixed.”²⁸ Esin Öricü shares this view as she states that all European legal systems will eventually mix to some degree through permanent cross-fertilization and horizontal transfers.²⁹ Thus, existing mixed legal systems deserve to be put to the test,³⁰ and “could serve as a possible source of inspiration to European legislators,”³¹ offering “an enlightening example for a future European private law.”³² Springboard is their feature again being “potential models of procuring a gradual approximation of civil law and common law,”³³ in other words they are able to bridge the gap between the civil and common law,³⁴ while selecting rules from both the civil law and the common law traditions.³⁵ There are at least two reasons why mixed legal systems can provide useful patterns for European legal harmonization. First, these systems, while being constantly challenged by both traditions and finally blending them into an original legal system producing “authentic bijuridicism”, preserve their originality and their identity.³⁶ Thus, mixed legal systems provide models of managing legal diversity while producing a certain degree of unity. Second, as Mathias Reimann ascertains, mixed legal systems can show how much private law uniformity one really needs in a common market and how much one can hope to achieve despite centrifugal forces.³⁷ Smits is also of the opinion that one expects the

28. Hector L. MacQueen, “Mixed Jurisdictions and Convergence: Scotland” (2001) 29:2 INT’L J. LEGAL INFO. 309 at 322.

29. Esin Öricü, “A General View of ‘Legal Families’ and of ‘Mixing Systems’” in Öricü & Nelken, *supra* note 6, 169 at 179.

30. MacQueen, *supra* note 28, at 322.

31. Jean-Louis Baudouin, “Mixed Jurisdictions: A Model for the XXIst Century?” (2004) 63 LA. L. REV. 983 at 989; Hein Kötz, “The Value of Mixed Legal Systems” (2003) 78 TUL. L. REV. 435 at 435. Likewise Öricü, *supra* note 29, at 179.

32. Smits, *supra* note 8, at 1, 71.

33. Zimmermann, *supra* note 23, at 127; *see also* Jacques Du Plessis, “Comparative Law and the Study of Mixed Legal Systems” in Reimann & Zimmermann, *supra* note 4, 477 at 504.

34. Mathias Reimann, “Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues” (1999) 73:4 TUL. L. REV. 1337 at 1337.

35. Smits, *supra* note 8, at 71.

36. Baudouin, *supra* note 31, at 984, 988.

37. Reimann, *supra* note 34, at 1341.

most efficient rules to be borrowed in mixed legal systems.³⁸ Moreover, he agrees with Reimann on the possibility of discovering the degree to which civil law and common law were successfully mixed.³⁹ As a result, through the spontaneous legal evolution by free choice from the rules derived from both jurisdictions in an uncodified way, “uniform law will only come about in those areas where it is really needed” and required by the internal market.⁴⁰

Hein Kötz expresses his hope that European law will become a mixed jurisdiction combining the best of both worlds.⁴¹ MacQueen does not exclude this possibility either; furthermore he seems to have accepted this characteristic of mixed legal systems supported by examples taken from the Scots law of contracts.⁴² Magnus considers mixed jurisdictions, while drawing a parallel with the CISG, as examples of combinations and mergers of influences from the major legal systems not necessarily resulting in a perfect solution but probably in the best solutions one can expect with the least weaknesses. It is about a “relative optimum” assembling advantages of different legal systems and largely avoiding their disadvantages.⁴³ Other scholars are more reserved. Du Plessis for example describes mixed systems as legal battlefields “where rules from different systems have to fight for their survival so that only the fittest survive.” The broader variety of the rules however does not imply “that the best rule necessarily is going to be selected.” Therefore, the task is to maximize the benefit or promise of being able to select the best rules and to minimize the risk of selecting the worst ones.⁴⁴ The optimistic understanding represented by Kötz, MacQueen, and Magnus are convincing, moreover, we do postulate that mixed legal systems are very efficient at identifying or producing a *ratio communis*. During the blending process in mixed legal systems, the chosen solutions are not necessarily the best solutions because of historical (political) factors.

38. He defines efficiency in a flexible manner focusing on the best solution for the cultural and socio-economic constellation of that time. *Cf.* Smits, *supra* note 21, at 11. According to Ogus, hybrid legal systems are more open to importing transplants from other legal systems than jurisdictions of a single dominant legal culture for a mixed system is already flexible enough to accommodate different cultures. *Cf.* Ogus, *supra* note 6, at 165-66.

39. Smits, *supra* note 8, at 104; Smits, *supra* note 21, at 5.

40. Jan Smits, “A European Private Law as a Mixed Legal System” (1998) 5:4 MAASTRICHT J. EUR. & COMP. L. 328 at 338.

41. Kötz, *supra* note 31, at 439.

42. MacQueen, *supra* note 28, at 313, 315.

43. Ulrich Magnus, “The Vienna Sales Convention (CISG) between Civil and Common Law—Best of All Worlds?” (2010) 3:1 J. CIV. L. STUD. 67 at 69, 95-97.

44. Jacques Du Plessis, “The Promises and Pitfalls of Mixed Legal Systems: The South African and Scottish Experiences” (1998) 9:3 STELLENBOSCH L. REV. 338 at 343.

This is why, among other circumstances, it is not an easy task to qualify a legislative or judicial solution (present in a mixed legal system) as a *ratio communis* as opposed to just a strategic or ad hoc compromise; various tests must be conducted and the conclusions drawn shall depend on their results.

The first one of these tests is the test of time. If a legal solution is accepted in another legal system and it survives for a relatively long time without being thrust out (through explicit refusal or sabotage by not applying it), it is a sign that it qualifies as *ratio communis*. Reid for example establishes a model comprising four stages of development. The first stage is the arrival of the foreign doctrine or rule, sometimes as a sudden event, sometimes gradually as a kind of “legal osmosis.” In the second stage it is followed by the period of reaction, which leads to the third stage, assimilation with the underlying law. Finally (and as Reid points out, depending on luck) the doctrine is reconstructed in a manner generally compatible with the underlying law and it is even ready for “re-export”. We share his opinion that by far not all transported doctrines reach the final stage: it rarely occurs, if ever.⁴⁵ This is why time can be considered a test, the probability of having found a *ratio communis* increasing with every day the doctrine survived in the recipient legal environment.

The second test is that of internal coherence; if the solution can be shown to adhere well to the structural elements of the recipient legal system by producing satisfactory results with respect to both the common law and the civil law traditions, it is more likely to qualify as a *ratio communis* than if such an adjustment or compatibility cannot be shown. Zweigert and Kötz should be quoted at this point; they stated that two questions must be asked if a foreign solution is to be adopted: whether it has proven satisfactory in its country of origin and whether it will work in the country where it is proposed to be adopted.⁴⁶ According to Baudouin, real bijuralism can be achieved only if the solutions and rationalizations taken from the imported legal system are compatible with the recipient system,⁴⁷ if they fit in the existing structure and do not upset the integrity of the structure as a whole.⁴⁸ A serious structural conflict with the existing law diminishes the prospects of successful

45. Reid, *supra* note 25, at 28-29.

46. Zweigert & Kötz, *supra* note 1, at 17.

47. Baudouin, *supra* note 31, at 990.

48. Du Plessis, *supra* note 44, at 344, 346-47 and also Zekoll, *supra* note 13, at 3, who disagrees with Watson on this point.

reception.⁴⁹ Many scholars underline however that taking a rule out of its native context and putting it into a foreign context inevitably leads to the transformation or even distortion of the rule,⁵⁰ or to put it in a more unbiased way, while undergoing a “comprehensive adjustment” in order to merge it successfully with the existing rules, the adopted doctrine often becomes “subject to substantial further change.”⁵¹ Cross-fertilization occurs indeed at the price of these adjustments and changes but this phenomenon is an organic part of legal borrowings in mixed legal systems and beyond, while on the other hand they leave the nucleus, the essence, or as we call it the *ratio communis*, within the rule untouched.

Consequently, *rationes communes* find their way into each legal tradition; thus one can hopefully expect to find them to a considerable degree in mixed legal systems where different legal traditions, in each of which some *rationes communes* are inherent, enrich each other. Actually, the only way to carry out the test of time and the test of internal coherence on an empirical basis in an organic legal environment (and not merely speculatively, getting stuck in theoretical models) is by analyzing mixed legal systems.

This Article seeks to identify as many instances of *ratio communis* as possible in the field of civil liability (in Quebec), which certainly belongs to the most complicated domains of private law. As Zweigert & Kötz stress, “The chief task of the law of delict is to select out of the enormous range of daily occasions when harm is caused those where, in accordance with the sentiment of justice and equity prevailing in society at the time, the victim should be allowed to transfer the loss to the defendant.”⁵² Civil liability is particularly interesting from the mixed legal systems’ point of view, because this field of private law (of civil law origin) belongs to the branches that have been most affected by common law.⁵³ As Palmer puts it, “precise tort rules had a relatively easy time insinuating themselves into the principles of *la responsabilité*. As compared to the English rules, the general Aquilian principle may seem to be mute on many sub-issues in connection with fault, causation and

49. Du Plessis, *supra* note 33, at 496-97, 511.

50. John Henry Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* (The Hague, London, Boston: Kluwer Law Int’l, 1999) at 40.

51. Jörg Fedtke, “Legal Transplants” in Smits, *supra* note 7, 434 at 435.

52. Zweigert & Kötz, *supra* note 1, at 621.

53. Du Plessis, *supra* note 33, at 505; Vernon V. Palmer, “The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana” (2000) 46:3 *LOY. L. REV.* 535 at 538.

damage,”⁵⁴ which is why the “subject of tort in a mixed jurisdiction is of greatest interest to the comparative lawyer and to those interested in the modern *ius commune*.”⁵⁵

C. *Impediments to the Research: Historical (Distorting) and Coincidental Factors*

Identifying *rationes communes* is a kind of academic gold-washing. First, an in-depth analysis of the selected legal field shall be conducted and even if some obvious similarities between the legal traditions concerned are found, it can never be ascertained that these findings are not merely coincidental. In addition to this coincidence factor, the political and economic situation of the mixed legal system examined should be taken into account. From the transplanted rule’s point of view, the transplant is most likely to succeed “if it was chosen and introduced without external pressure.” External pressure is likely to reduce the chances of legal transplants fitting in their new legal environment.⁵⁶ History shows however that in most cases the exchange of sovereignty and the adaptation of certain (foreign) legal institutions and laws were neither spontaneous nor voluntary. Almost all mixed systems were the products of “successive waves of colonization by powers governed by the civil law and the common law,”⁵⁷ thus “common law influence prevailed, not necessarily on account of superiority in quality, but as a consequence of political supremacy.”⁵⁸ The forced harmonization of law or even reception of another legal system in whole or at least in part, irrespective of its compatibility with the pillars of the ‘recipient’ system, is a deforming factor to the development of the legal system (becoming a mixed legal system back then). In that case, not all similarities and parallelisms can be regarded as results of the organic development of a mixed legal system and consequently as *rationes communes*.

The opposite practice also makes it difficult to identify a *ratio communis*. Quite often, if the political situation and the constitutional framework allow such a level of independence, the reception of an efficient and just legal instrument is refused even if it is compatible with the dogmatics, values, and structure of the recipient system, simply due

54. Palmer, *supra* note 27, at 55.

55. Palmer, *supra* note 53, at 535.

56. Fedtke, *supra* note 51, at 436.

57. Du Plessis, *supra* note 33, at 479, 494-95.

58. Reid, *supra* note 25, at 14.

to its evolution and emergence as part of another legal tradition.⁵⁹ Du Plessis regards this type of purism at least as destructive to organic development as the forced unification of law in favor of one legal tradition and to the detriment of the other.⁶⁰ Handling the Civil Code in Lower Canada as an untouchable (cultural) icon and a symbol of distinction is well known.⁶¹ Thus, there have always been scholars who perceived “common law assimilation as a sign of decay and degeneration, a loss of cultural integrity that should be halted and restored.”⁶²

Unfortunately, legal methodology has not yet accurately verified to what extent the adaptation or refusal of a legal instrument is based on an organic development tending to the elaboration or recognition of a *ratio communis* or rather, to what extent the adaptation or refusal is the result of the above factors. This recognition leads to handling all findings with the greatest possible care while determining whether they qualify as *ratio communis* or not. Thus, in the case of civil liability in the mixed legal system of Quebec it is necessary to perform both a very detailed internal analysis covering the origins and sources, the evolution and the competing solutions of Quebec law, and an external analysis on the tort law and contract law of the common law provinces by means of a functional comparative approach. Such an analysis can be specified and supported more profoundly if one scrutinizes not only one mixed legal system but several, ideally all of them in the legal field chosen. This method could be considered as the ‘control test’ comparing the results of the Quebec analysis with similar findings from other mixed jurisdictions.

We should not lose sight of the fact that the mixed legal system of Quebec was not really characterized by either of the distorting factors in the last fifty years. There was no real external (political) pressure to implement common law solutions and the patriotic reluctance seems to have decreased as well. If there was pressure at all, then it was economic in nature, to plug Quebec into North American trade. But is it not the free movement of legal rules shaped by internal markets that many scholars desire? Is it not organic development? Many *rationes communes* can be traced back straight to this latter period of free choice of legal solutions in Quebec as a mixed legal system.

59. H Patrick Glenn, “Quebec: Mixité and Monism” in Örüçü, Attwool & Coyle, *supra* note 22, 1 at 10.

60. Du Plessis, *supra* note 44, at 347.

61. Smits, *supra*, note 8, at 116.

62. Vernon V. Palmer, “Mixed Jurisdictions” in Smits, *supra* note 7, 467 at 469.

D. Structure of the Research—Five Groups

The findings of the research on civil liability in Quebec's mixed legal system can be divided into five groups. This is a rather methodical and didactic classification, which means that conclusions from all the specified groups can be drawn. The analysis of a legal instrument within the framework of all these groups can assist in determining whether we have encountered a *ratio communis*. The classification evolved subsequently in the course of a rather inductive research including the similarities, differences, and cross-jurisdictional encounters.

The first group covers legal solutions that are the same or very similar in both civil law and common law jurisdictions without any further explanations or signs of mutual influence. The two tests (test of time and test of internal coherence) seem to be fulfilled, though without the interaction of the legal traditions. In the case of the legal solutions concerned, the mixed jurisdiction experience does nothing else than verify that they qualify as *ratio communis*. They seem to belong to the basic common heritage of liability law as *original parallelisms*. This group consists of the distinction between factual and legal causation, the *novus actus interveniens* doctrine, the criteria of foreseeability and directness, the notion of *vis maior* as an irresistible, unforeseeable and external circumstance and the independence of civil from public law liability (i.e., statutory duty from the common law duty of care).

The second group represents cases where the common law *influence was explicitly rejected*. While there is no compelling evidence that the solutions concerned do not qualify as *rationes communes*, such a conclusion is made probable by the fact that they are only capable of functioning in one legal tradition (and not in the other). One such example was the distinction among invitee, licensee, and trespasser as the core aspect of the common law approach on occupiers' liability. In the first half of the 20th century, in some decisions the Supreme Court of Canada had taken into consideration the above-mentioned distinction within the framework of wrongful conduct.⁶³ Later on, it became obvious that only the general approach of *bon père de famille* shall apply, without any reference to the unclear common law categories.⁶⁴

63. *Hamel v Charté*[1976] 2 SCR 680, in particular at 688.

64. *Rubys v Gray Rocks Inn Ltd*[1982] 1 SCR 452, in particular at 468; see also Ariste Brossard, "Four Lectures on the Law of Torts in Quebec, 1" (1954-55) 5:16 R.J.T. o.s. 239 at 243; Jean-Louis Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec" in Joseph Dainow ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge: Louisiana State Univ. Press, 1974) 1 at 20-21; Brian

The third group called *influences towards ratio communis* comprises legal institutions where the impact of the other legal system is obvious and it changed the original rules and doctrines or at least modified them (II). In addition, the consequences of the influence contribute to the establishment or recognition of a *ratio communis*, thus, the interaction seems to play a significant (constitutive) role in producing or identifying *rationes communes* while being itself an organic process meeting real needs.

The fourth group covers the cases of the so-called *hermeneutical equalization*, which is a methodological pattern, i.e., a way or modality in which one system can influence another (III). From the systematical point of view, it is not different from the third group: all the solutions discussed here could be assigned to the *influences towards ratio communis* but it is worth analyzing them separately because of the interplay of different levels of abstraction. The two legal systems started to deal with legal questions at different levels of abstraction but the inductive approach of the common law system seeks general points of view which can be found in Quebec law, and the deductive approach of the civil law draws upon the common law system's case-by-case analysis. The abstraction levels equalize by mutual influence and often result in the same solutions somewhere in the middle between the special and the general approach.

Finally, the fifth group (*influence against ratio communis*) represents the uncommon cases where the mutual influence seems to have restrained the legal innovation (IV). In the cases concerned, the forced or voluntary implementation from another legal tradition resulted in a contradictory or obscure solution.

II. INFLUENCE TOWARDS *RATIO COMMUNIS*

A. *Common Law Impacts on Quebec Law*

1. Liability

a. Defamation

According to Palmer, the particular elements of common law defamation are often absorbed by the general principles of civil law.⁶⁵ In common law, the tort of defamation represents a case of strict liability, while in Quebec the general extra-contractual liability, definitely a fault

Dickson, "Federalism, Civil Law and the Canadian Judiciary: An Integrated Vision" (1994) 28:2-3 R.J.T. o.s. 467 at 476-77.

65. Palmer, *supra* note 27, at 57 n.130.

based liability, is applied to settle defamation cases. In common law, the tortfeasor is exempt from liability only if he can prove one of the well-known defenses (absolute privilege, qualified privilege, fair comment). In Quebec the statement need not necessarily be false to hold somebody liable, but there is no liability if the information was false but the defendant did not know and should not have known it either, i.e., there is no liability without fault. The question was whether the English constitutional tradition, in particular the defenses of fair comment and qualified privilege, managed to infiltrate the structure of Quebec's fault based liability.⁶⁶

In its rather complicated reasoning, the Supreme Court of Canada tried to ascertain whether qualified privilege belonged to public common law or to private common law, although there was no established criteria by which a public common law rule could have been identified, not least because of the lack of the public law-private law distinction in common law. However, if qualified privilege fell under public common law, it would supersede traditional liability in Quebec law. Although there is little doubt about the public law context of the examined legal instrument, the Supreme Court refused its direct application in Quebec for the reason that in civil law the defendant's good faith is presumed and the fault is to be proven by the plaintiff, while in common law once it is proven that the offensive words have been spoken, malice is presumed. Thus, the direct application would disturb the coherence of liability law in Quebec. On the other hand, it would reduce the applicability of liability to intentional conduct for defamatory remarks, while in Quebec negligent conduct also qualifies for liability. Finally, the court stated that "In Quebec civil law, the criteria for the defense of qualified privilege are circumstances that must be considered in assessing fault."⁶⁷

The other defense of fair comment was clearly assigned to the domain of private common law, so Quebec law would prevail in that regard. However, the result was the same as in the case of qualified privilege. The court stated: "The rules of civil liability already provide

66. *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 SCR 663 [*Prud'homme*], in particular paras. 35 and 38 of the reasons. On common law, cf. Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Butterworths, 2006) at 782; and "Defamation—Report of the Saskatchewan Commissioners" in *Proceedings of the Sixty-Ninth Annual Meeting (Uniform Law Conference of Canada), held at Victoria, British Columbia August 1987*, app. C, 113 at 118, 132. Cf. the comprehensive analysis of Joseph Kary, "The Constitutionalization of Quebec Libel Law, 1848–2004" (2004) 42:2 OSGOODE HALL L.J. 229, in particular at 266ff. See also recently *Bou Malhab v Diffusion Métromédia CMR Inc.*, 2011 SCC 9 paras. 15, 22.

67. *Prud'homme*, 2002 SCC 85, [2002] 4 SCR 663, in particular paras. 51-60.

that a defendant may rely on all the circumstances that tend to demonstrate the non-existence of fault. Because the criteria for the defense of fair comment are precisely the circumstances to be taken into consideration in determining whether a fault has been committed, those criteria are already an integral part of Quebec civil law.⁶⁸

To sum it up, it is quite clear that the common law defenses and the circumstances that constitute them influenced the interpretation of fault in Quebec defamation cases.⁶⁹ There is also a legislative source of common law infiltration. The last sentence of art. 10 of the *Quebec Press Act* states that the express provisions of the act do not affect or diminish the rights of the press under common law.⁷⁰

The aspects constituting qualified privilege and fair comment by all means represent *ratio communis*, whether regarded as sui generis legal instruments (such as defenses in common law) or only as interpretation criteria related to fault (as in Quebec law). Although the cited judgments were delivered only within the last ten years, and thus cannot yet have passed the test of time, the process and the result of fitting with the liability structure of Quebec law (i.e., satisfying the test of coherence) are very persuasive in this context.

b. The Liability of Managing Directors and Officers

Scholars tackled recently that the common law fiduciary duty or duty of loyalty, as well as the duty of care regulated by section 122(1) of the *Canada Business Corporation Act* (CBCA) have a definite influence on Quebec's jurisprudence regardless of what legal provisions are applicable. Even the respective rules of the new civil code have been influenced by the common law doctrines concerned.⁷¹ On the one hand, there has always been a tendency to demonstrate the legal independence

68. *Id.*, in particular paras. 61-63. On the liability for defamatory remarks, see the following two delicate Quebec cases: *Lafferty, Harwood & Partners v Parizeau*, 2003 CanLII 32941 (QC CA), in particular paras. 13-20, 24-25, 40; and *Société Saint-Jean-Baptiste v Hervieux-Payette*, 2002 CanLII 8266 (QC CA), in particular paras. 26-36.

69. See also Frédérique Sabourin, "ULCC Acts and the Quebec Civil Code," *Uniform Law Conference of Canada—Civil Section, 21-25 August 2005, St. John's, New Foundland and Labrador* at 8.

70. *Press Act*, RSQ c P-19.

71. Cf. in general Cally Jordan, *The New Morality in Quebec Company Law: Directors' Liability After the Civil Code of Quebec* (2009), online: Social Science Research Network, <http://ssrn.com/abstract=1513642>; Paul Martel, "The Duties of Loyalty of Directors of Federal Business Corporations: Impact of the Civil Code of Québec" (2008) 42:1-2 R.J.T. o.s. 147 [Martel, "The Duties of Loyalty"]; Paul Martel, "The Duties of Care, Diligence and Skill Owed by Directors of Federal Business Corporations: Impact of the Civil Code of Québec" (2008) 42:1-2 R.J.T. o.s. 233 [Martel, "The Duties of Care"].

of Quebec by applying an autonomous regime of liability under the provisions on the mandates of directors as the mandataries of the company.⁷² On the other hand, there was a sometimes hidden but sometimes explicit recognition of the reason for the mentioned common law doctrines. Some judgments refused the reception of the duty of loyalty and duty of care but the courts interpreted the applicable provisions of the *Civil Code of Lower Canada* (CCLC) and later that of the Civil Code of Quebec (CCQ) in accordance with these doctrines. In a 1989 decision, the Supreme Court acknowledged the justification for the existence of fiduciary duty in Quebec's company law.⁷³

It is not difficult to understand why the courts tended to apply the common law doctrines. On the one hand, the relationship between companies and their managing directors does not fall under the notion of classical mandate, *inter alia*, for the reason that the mandant (the company) usually does not give instructions to the mandatary (managing director). On the other hand, it hinders interprovincial trade if the same liability measure is not applied to managing directors (depending on the province in which the company has its headquarters or performs its activities). The duty of loyalty and the duty of care are even applied to companies with their headquarters in Quebec if they fall under the scope of the federal act (CBCA).

The new civil code tries to cover all aspects of liability under company law by use of general and well known legal instruments. Arts. 1309-1314 (administration of the property of others, obligations of the administrator), 1366, 2088 (in the case of an employment contract) are applicable and art. 321 repeats the provision of the former provincial company act; the director is considered to be the mandatary of the legal person. In addition, arts. 322, 323, 2138 and 2146ff are worth mentioning. Despite the fact that the background materials of the new code do not mention the common law doctrines, both the content of the indicated provisions and even more so their interpretation in everyday judicial practice witness significant common law impact.⁷⁴ The courts in Quebec still refer to earlier judgments considering the common law duty of loyalty and duty of care delivered before the new code entered into force. Even the business judgment rule of U.S. origin found its way into

72. *Quebec Companies Act*, RSQ c C-38, s 123(83).

73. *Bank of Montreal v Kuet Leong Ng*, [1989] 2 SCR 429; Martel, "The Duties of Loyalty", *supra* note 71, at 162ff.

74. Martel, "The Duties of Loyalty", *supra* note 71, at 186-87, 220, 224ff, 229-30, 232; Jordan, *supra* note 71, at 15. The more important position the employee holds, the greater the expectations are towards him. This typical common law principle was implemented in Quebec as well.

Quebec's company law while interpreting the 'prudence and diligence' stated in art. 2088(2) (employment) and 322 (obligations of directors) of the CCQ.⁷⁵ The well-founded content of the duty of loyalty and duty of care enclosing necessary business regularities and reasonable handling of business risks managed to break down a wall of refusal. They appear to be included in the *ratio communis* of company law. The result of the coherence test is especially and remarkably persuasive for the reason that the common law elements broke through.⁷⁶

c. Culpability and Fault

Common law influence may be witnessed even beyond the above-treated, rather specific issues of liability, touching core elements like *imputability (culpability)* and *fault*. Although certainty in this field would require further evidence, one can presume that it was the encounter with the common law experience that diverted Quebec law from the French line. The solution of the French school regarding imputability or culpability as part of fault (*faute*) was overshadowed by the autonomous approach in Quebec considering this element as an independent condition of liability which is neither identical with 'fault' nor is a part thereof.⁷⁷ The question whether the tortfeasor was endowed with reason precedes the question whether the conduct was faulty or not.⁷⁸ This interpretation and the independence of culpability are

75. See also Martel, "The Duties of Care", *supra* note 71, at 242ff, 256-57, 300ff. See also the enlightening judgment of the Supreme Court of Canada considering the business judgment rule and its reception in Quebec, in particular its compatibility with the civil liability of Quebec: *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461, in particular paras. 56-71.

76. The new (Quebec) *Business Corporations Act* (entered into force on February 14, 2011) moved the liability of managing directors even closer to common law principles; they are expected to become entangled in the future. Besides art. 119, para. 1, referring to the provisions of the Civil Code, para. 2 expressly sets forth the duty to act with prudence and diligence, honesty and loyalty in the interest of the corporation. Concerning the detailed disclosure rules and the defences of managing directors and officers, the CBCA must have served as a model. According to art. 123.84 of the former provincial *Companies Act*, prudence and diligence were presumed only if the director relied on the opinion or report of an expert. The new act extended this presumption to cases, in which the director in good faith had reasonable grounds to rely on a report, information or an opinion provided by an officer or a committee of the board of directors. Cf. CBCA, RSC 1985, c C-44, ss 123(4)-(5); *Business Corporations Act*, RSQ c S-31(1), art. 121.

77. On the French law not having a separate requirement of imputability or culpability, *cf.* in a comparative approach, Christian von Bar & Eric Clive eds., *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, vol. 4 (Oxford: Oxford Univ. Press, 2010) at 3408, 3692.

78. Brossard, *supra* note 64, at 241; Nicholas Kasirer, "The infans as bon père de famille: 'Objectively Wrongful Conduct' in the Civil Law Tradition" (1992) 40:2 AM. J. COMP. L. 343, in particular at 349ff, 356-57.

persuasive. Otherwise to examine the questions covered by culpability within the framework of fault (on the basis of the ‘reasonable man’ or ‘*bon père de famille*’), would render the decision on fault much more difficult. To compare the conduct of minors and mentally disabled people with the ideal type of reasonable man is obviously unjust. To identify adjusted ideal types like the reasonable minor or the reasonable mentally disabled person is not feasible at all; because these persons cannot behave reasonably, these categories qualify as oxymorons.⁷⁹ Despite the fact that imputability and fault are notions which are not distanced from each other, it is reasonable to raise the question in a more general way, whether and when tortfeasors can take the consequences of their (specific) conduct into account, instead of desperately searching for comparable ideal types. Then, in the absence of imputability, the appropriate conduct under the given circumstances (namely fault) does not have to be examined any further and the judiciary is saved from taking sides in cases of fault by performing a comparison with the supposed conduct of non-existent ideal types. Regarding imputability (or culpability) as an independent element and the precondition of civil liability (and not as a criterion of fault), seem to qualify as *ratio communis*, passing both tests.

The common law impact on fault (*faute*) in Quebec law cannot be excluded either. The liability law of Quebec did not entirely follow the French judicial and jurisprudential tendencies towards a *faute objective* or *faute sociale*.⁸⁰ While contemplating whether the conduct of the tortfeasor meets the requirements set by society (reasonable man) or not, the principle of reasonable conduct under the given circumstances shall be scrutinized. In addition to external conditions like weather or the professional background of the tortfeasor, common law courts also take the tortfeasors’ personal characteristics into account, such as their age, intelligence, knowledge, experience, and physical (even mental) abilities or disabilities.⁸¹ In Quebec liability law, fault (*faute*) is comprehended as the dynamic and flexible compromise of both objective and individual

79. Cf. Kasirer, *supra* note 78, at 373; Shauna Van Praagh, “‘Sois Sage’: Responsibility for Childishness in the Law of Civil Wrongs” in Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel eds., *Emerging Issues in Tort Law* (Oxford–Portland: Hart Pub., 2007) 63, in particular at 70, 73. As to the similar judicial practice in the common law provinces, see Lewis N Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at 471; GHL Fridman, *The Law of Torts in Canada*, 2d ed. (Toronto: Carswell, 2002) at 471-72.

80. Daniel Jutras, “Factual Bases of Liability” in John E.C. Brierley & Roderick A. Macdonald eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: E. Montgomery Publications, 1993) 444 para. 487; Kasirer, *supra* note 78, at 363 (also as to the phenomenon ‘fait générateur de responsabilité’ or ‘objectively wrongful conduct’).

81. Linden & Feldthusen, *supra* note 66, at 144.

factors, which enables liability law to keep up with economic, social and moral changes.⁸² The more the tortfeasors' personal characteristics are taken into consideration, the more the fault requirement draws off the French approach of *in abstracto standard*, allowing the fault-based liability to become a less strict and more flexible regime of liability covering the complexity of life and fulfilling the requirement of fairness. European model laws seem to prefer an objective standard of care (that of the reasonable person in all legal systems),⁸³ but Widmer represents the viewpoint of the European Group on Tort Law stating that there are cases where it would be unjust and contrary to equity to always apply the strict objective standard of care, thus certain individual characteristics and conditions of the wrongdoer should be taken into account, foremost his or her age and disability, otherwise "the objective standard would turn fault-based liability into strict liability."⁸⁴ This tendency confirms the Quebec experience.

2. Damages as the Legal Consequence of Liability

a. Non-Pecuniary Damages

All conceptual and practical problems of *non-pecuniary damages* are rooted in the fact that moral injuries do not have a priori assigned values, i.e., they cannot be expressed in terms of monetary value. Moreover, these injuries cannot be undone at all; therefore, one of the essential objectives of the law of damages, reparation (in the narrowest sense) cannot be realized. For this very reason, the necessity of functional analysis arose: what is the purpose of paying damages for these injuries? For the very same reason, there is no a priori maximum or cap on damages, because we cannot refer to the principle of 'total compensation' or 'full compensation' meaning to compensate for the full injury (and only for the full injury) because in this regard the 'full injury' cannot be expressed in financial terms. Finally, it is not easy to determine the decisive aspects guiding the ascertainment of the exact amount of compensation, their weight and their relation to each other. The missing answers must be remedied artificially by the legislature or the courts in a way complying with the requirements of redress,

82. In connection with Quebec law, *cf. id.* at 821.

83. DCFR, *supra* note 77, at 3406; *cf.* Pierre Widmer, "Liability Based on Fault, Introduction" in European Group on Tort Law, *Principles of European Tort Law (PETL), Text and Commentary* (Wien, N.Y.: Springer, 2005) 64 at 65-66; Gerhard Wagner, "Comparative Tort Law" in Reimann & Zimmermann, *supra* note 4, 1003 at 1024-25.

84. Widmer, *supra* note 83, at 68; *cf.* PETL 4:102, Pierre Widmer, "Liability Based on Fault, Required Standard of Conduct" in European Group on Tort Law, *supra* note 83, 75 at 79.

flexibility, fairness and predictability, which is why interjurisdictional interferences are even more enlightening.

In the common law provinces, *the aim of paying damages for non-material injuries* is to provide injured parties reasonable solace for their misfortune. This is called the functional approach.⁸⁵ Considering the aim of non-pecuniary damages, especially in personal injury cases, the functional approach was refused in Quebec, as the hon. L'Heureux-Dubé J made it clear in *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*. In Quebec, the objective or conceptual approach shall be applied, which means that

the right to compensation for moral prejudice is not conditional on the victim's ability to profit or benefit from monetary compensation Preference should, therefore, be given to the objective characterization of moral prejudice in Quebec; this is also much more consistent with the fundamental principles of civil liability. . . . In fact, in Quebec civil law, the primary function of the rules of civil liability is to compensate for prejudice.⁸⁶

If moral prejudice was involved, damages shall be paid. Nevertheless, despite this explicit statement, the Quebec judgments bear the mark of the common law understanding of moral damages, in particular that of the functional approach. In the course of assessing the amount of damages, all aspects should be considered, even that of the functional approach based on the common law tradition. The joint application of the three approaches “encourages a personalized evaluation of moral prejudice.”⁸⁷

85. S.M. Waddams, *The Law of Damages*, 4th ed. (Toronto: Canada Law Book, 2004) para. 7.700. As to the other two approaches (conceptual and personal), see *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 [*Andrews*], in particular at 261-62. On the criticism of this approach, cf. Donna Benedek, “Non-Pecuniary Damages: Defined, Assessed and Capped” (1998) 32:3 R.J.T. o.s. 608, in particular at 619ff. Benedek commits herself to the personal approach, regarding the functional approach as depersonalizing and standardizing.

86. Cf. the comprehensive analysis in *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 [*St-Ferdinand*], in particular paras. 57ff, 65ff; see also Louise Lavallée, *Bijuralism in Supreme Court of Canada Judgments Since the Enactment of the Civil Code of Quebec* (2001), online: Department of Justice Canada, www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b3-f3/bf3b.pdf at 20; Benedek, *supra* note 85, at 613, 628ff.

87. *St-Ferdinand*, [1996] 3 SCR 211, in particular paras. 72ff, 81-82, and also cf. the summing-up evaluation of Kasirer J on *St-Ferdinand* in *Stations de la vallée de St-Sauveur Inc. c. M.A.*, 2010 CanLII 1509 (QCCA) para. 83: “This balanced method advanced by the Supreme Court allows for comparisons between the seriousness of injuries, without the judge becoming a prisoner of past findings by other courts, while at the same time giving full scope to a personalized analysis of each victim's own situation.”

The above seems conclusive in regards to the entire issue of non-pecuniary damages. While laying down the aim of non-pecuniary damages, the predominance of the objective approach would contravene the individual view, an essential feature of the law of damages, i.e., that the specific injury of the injured person concerned has to be compensated for. The subjective method however, finding out how and to what extent the wrongful act caused injury to the injured party in the particular case, creates an almost infeasible evidentiary task for the court.⁸⁸ The functional approach seems to be the synthesis of these two aspects, unifying and merging them. Reasonable solace can be regarded as a frame of reference for both the general estimation of the immaterial resource which has been damaged, and the detriment, pain, suffering of the particular injured party, not another person, felt in the particular case. Both objective and subjective aspects take place in the ‘fine tuning’ of reasonable solace. Moreover, one should attach importance to the objective and subjective aspects as correctional factors in cases in which one cannot establish damages by the functional approach. For example, solace or other benefits cannot be provided to injured persons laying in coma but one would not necessarily refuse their damage claim. The Principles of European Tort Law (PETL) underlines that not only the particular suffering of the victim but also the injury itself, the disability it causes should be taken into account, moreover the latter should represent the major part of the award, consequently damages may be awarded to a permanently comatose victim as well.⁸⁹ The integrated consideration of objective (conceptual) and subjective (personal) aspects represents an obvious case of *ratio communis* filling the gaps resulting from the immaterial nature of immaterial prejudices. This can be definitely traced back to the interaction of common law and civil law approaches in Quebec.

As there is no genuine upper limit on (non-pecuniary) damages, every legal system needs (at least artificial) points of reference or basis for comparison in order to adjust the amount of damages. If there is no explicit upper limit set by the legislator or by the courts (foremost by the highest court), spontaneous rough upper limits will emerge leading to a heterogeneous and fragmented judicial practice. Hence, the so called ‘*cap*’ on non-pecuniary damages in *personal injury* cases in Canada is considered to be a sound solution, which again seems to qualify as *ratio*

88. Kasirer J. in *Stations de la vallée de St-Sauveur*, 2010 CanLII 1509 (QCCA), para. 80.

89. Cf. the commentaries to PETL 10:301, W.V. Horton Rogers, “Non-Pecuniary Damage” in European Group on Tort Law, *supra* note 83, 171 at 176.

communis.⁹⁰ It does not standardize the injuries resulting from harm to corporal integrity and health, and does not determine fixed levels of compensation for particular injuries according to a scale, thus the possibility of individualization remains. Moreover, a rough upper limit contributes to the result aimed at in all legal systems: “like cases should be treated broadly alike”.⁹¹ Thus, at the same time, it moves the law of damages towards predictability, which is also considered favorable from the insurability’s point of view. The 100,000 dollar amount (at 1978 price level) is to be adjusted to the depreciation of currency.⁹² The truth content of this principle remains unaffected by the questions it raises, such as whether a kind of ‘scaling down’ routine shall apply, or whether aggravated damages are included.⁹³ The cap was accepted by Quebec courts without resistance,⁹⁴ although considering the reasoning in the Andrews case, it seems that they had no other choice.⁹⁵

90. *Andrews*, [1978] 2 SCR 229 at 233:

In the case of a young adult quadriplegic like Andrews the amount of \$100,000 should be adopted as the appropriate award for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities and loss of expectation of life. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.

Id. at 263: “Cases like the present enable the Court to establish a rough upper parameter on these awards.” See also *Thornton v School Dist. No 57 (Prince George) et al.*, [1978] 2 SCR 267 at 270, 284-85; *Arnold v Teno*, [1978] 2 SCR 287, in particular at 292-93.

91. Rogers, *supra* note 89, at 177.

92. *Lindal v Lindal*, [1981] 2 SCR 629, at 634, 639ff, 643.

93. If aggravated damages are excluded, the cap can be easily evaded by awarding a bigger amount of aggravated damages. Cf. Waddams, *supra* note 85, para. 3.650. Against ‘scaling down’, cf. Kasirer J, in *Stations de la vallée de St-Sauveur*, *supra* note 87, para. 78. Although not pronouncedly, Kasirer J seems to be of the opinion that a victim not having the physical infirmities of Andrews but not being able to enjoy life with the alert mind and cognitive sensibilities that he had before the accident due to the neurological injuries suffered constitutes grounds for similar amount of damages as in the *Andrews* case near to the ceiling. Cf. the reasons at paras. 85-86, 90-91.

94. Michael G. Bridge, “Contractual Damages for Intangible Loss: A Comparative Analysis” (1984) 62:3 CANADIAN BAR REV. 323 at 339-40; Benedek, *supra* note 85, at 608, 643ff; Patrice Deslauriers, “Injury, Causation, and Means of Exoneration” in Aline Grenon & Louise Bélanger-Hardy eds., *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) 384 at 402-03. He denies the common law impact and attributes it to the parallelism based on a similar scale of values and similarities between the two legal traditions (*id.* at 430). See some exemplary Quebec cases: *Drouin c Bouliane*, 1987 CanLII 705 (QC CA), with reference to the trilogy at paras. 21-22; *Hôtel-Dieu d’Amos c Gravel*, 1988 CanLII 1335 (QC CA); *Coronation Insurance Company Ltd c Juneau*, 1992 CanLII 3149 (QC CA), in particular paras. 15-16; *Lake c Carra*, 1995 CanLII 5281 (QC CA). On the compatibility of the cap with Quebec law, cf. Lamer J in *Snyder v Montreal Gazette Ltd.*, [1988] 1 SCR 494 paras. 27ff.

95. “The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular

b. Punitive Damages

The common law impact concerning *punitive damages* is well-marked.⁹⁶ There is no doubt that punishment, deterrence and denunciation are still organic parts of the law of damages, despite the separation of private law and criminal law in modern legal systems. As Wagner states it, “Rather, in every jurisdiction, there are two hearts of tort law—deterrence and compensation—beating simultaneously, albeit with varying strengths.”⁹⁷ Whether deterrence, punishment and denunciation are acknowledged openly and explicitly as objectives of liability law, or they come across hidden, in the guise of other openly formulated aims like prevention or behaviour control, is a different matter, depending on the particular legal system.⁹⁸ The common law tradition applies the first solution. In the civil law system there are principally no punitive damages awarded, at least not as an independent, autonomous legal instrument; though deterrence and prevention are recognized objectives of damages, punishment and denunciation are only secondarily present while assessing non-pecuniary damages for moral injuries, as for example the court considers the gravity of fault as a factor influencing the amount. The situation was similar in Quebec as well. Punitive damages were regarded as incompatible with Quebec law, Taschereau J refused their application even in 1955 in the *Chaput v Romain* decision of the Supreme Court.⁹⁹

Finally, it was deterrence or rather prevention as an acknowledged objective of damages that built a bridge between the common law and the civil law understanding. Prevention became an increasingly pivotal factor as fundamental rights increased in value or in situations where the defenselessness of one contracting party had to be counterbalanced.

individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss, but variation should not be made merely for the province in which he happens to live.” (*Andrews*, *supra* note 85, at 263-64.)

96. Deslauriers, *supra* note 94, at 411.

97. Wagner, *supra* note 83, at 1023.

98. The DCFR explicitly rejects punitive damages as not being consistent with the principle of reparation, assigning punishment altogether into the realm of criminal law. *Cf* DCFR, *supra* note 77, at 3724. The PETL is somewhat more permissive stating that the conduct of the tortfeasor is taken into account in determining just satisfaction in the case of non-pecuniary damages which involves a “drift” towards a punitive element. Rogers proposes to consider the tortfeasor’s (intentional or consciously reckless) conduct only if it contributes to the grievance suffered by the victim. *Cf* Rogers, *supra* note 89, at 175-76.

99. *Chaput v Romain*, [1955] SCR 834 at 841; *see also* Bridge, *supra* note 94, at 465; Benedek, *supra* note 85, at 656; Lavallée, *supra* note 86, at 14, 19; Stéphane Beaulac, “A Comparative Look at Punitive Damages in Canada” in Stéphane Beaulac, Stephen GA Pitel & Jennifer L Schulz eds., *The Joy of Torts* (Markham: Butterworths, 2003) 351 at 351f, 356.

Consequently, punitive damages were included in art. 49(2) of the *Quebec Charter of Human Rights and Freedoms* (QCHRF) and in some acts of consumer or environmental protective purpose.¹⁰⁰ But as punitive damages were once adapted in Quebec and in other civil law systems, many conceptional decisions are yet to be made. One such example would be whether such damages can be awarded in the case of all wrongful acts including negligence and breach of contract, or whether their scope should be restricted to malicious, vindictive and reprehensible conduct as a general rule. Furthermore, whether the cases wherein punitive damages can be awarded should be explicitly set forth. If these issues are solved, further questions arise, such as the problem of ‘ne bis in idem’ concerning whether other types of punishment, fines, etc. should be set off against punitive damages and, furthermore, what factors should be considered in the course of assessing the amounts of damages.

The drafts of the new civil code preferred a general approach, and would have enabled the court to award punitive damages in all cases of intentional and grossly negligent conduct if compensatory damages had not been sufficient considering the nature and weight of the wrongful act.¹⁰¹ Art. 1621 of the CCQ contains a different solution: it fixes the Quebec version of the so-called ‘if and only if test’ as it is known in the common law; thus, if the preventive purpose is fulfilled by compensatory damages, no punitive damages shall be considered;¹⁰² it then circumscribes the aspects that should be considered while assessing the damages.¹⁰³ However, the most important point is that punitive damages can be awarded if and only where the law explicitly sets it forth. There seems to be a strict *numerus clausus* on cases provided for by law

100. *Tree Protection Act*, RSQ c P-37, s 1; *Consumer Protection Act*, RSQ c P-40.1, s 272; *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, c A-2.1, s 167(2); *Act Respecting Collective Agreement Decrees*, RSQ c D-2, s 31; *Act Respecting Prearranged Funeral Services and Sepultures*, RSQ c A-23.001, s 56; *Act Respecting the Régie du logement*, RSQ c R-8.1, s 54.10(2); *cf. also* arts. 1899, 1902 and 1968 CCQ (lease).

101. *Report on Obligations*, *supra* note 89, art. 275, with commentaries at 351; Civil Code Revision Office, *Report on the Quebec Civil Code: Draft Civil Code*, vol. 1 (Québec: Éditeur Officiel Québec, 1977) art. 290; Civil Code Revision Office, *Report on Quebec Civil Code: Commentaries*, vol. 2, tome 1, books 1 to 4 (Québec: Éditeur Officiel Québec, 1977) [*Quebec Civil Code Report*, vol. 2] art. 290, with commentaries at 673.

102. “The amount of such damages may not exceed what is sufficient to fulfill their preventive purpose.”

103.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtors’ fault, their patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

wherein punitive damages can be awarded. On the other hand, art. 49 of the QCHRf counteracts this *numerus clausus* because it empowers the judge to award punitive damages by any unlawful and intentional interference with any right or freedom recognized by the Charter. The human rights recognized cover nearly all prejudices, provided that at least conditional (indirect) intent is provable in the case concerned. Both the reference to the preventive purpose in the first paragraph and to the extent of reparation already awarded in the second paragraph of art. 1621 point to the fact that a kind of overall set-off of sanctions by different fields of law must take place.¹⁰⁴

There is a debate among scholars as to whether the common law aspects of assessing punitive damages should be implemented or not.¹⁰⁵ The factors enlisted in the Supreme Court judgment *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand* reminds one of the aspects considered in common law judgments.¹⁰⁶ On the one hand, the factors taken into consideration are based on common sense, hence a common law or civil law specific connection does not necessarily exist. On the other hand, the list set forth in art. 1621 of the CCQ is not an exhaustive one, consequently there is no plausible counter-argument for not implementing reasonable criteria just because it was referred to in a common law judgment the first time. Moreover, it is sound to enlist the circumstances to be considered while assessing punitive damages,¹⁰⁷ at least as points of references for the judicial practice.

104. Although the punishment inflicted by the criminal court judge does not generally exclude the application of punitive damages, it must be considered while assessing the damages, especially regarding the preventive purpose, which could have been met by punishment alone. Cf. Deslauriers, *supra* note 94, at 417; *DS c Giguère*, 2007 QCCQ 3847 paras. 65-67 (available on CanLII).

105. For the application of the common law aspects, see Beaulac, *supra* note 99, at 372-73. For a more loyal approach on art. 1621 of the CCQ, see Deslauriers, *supra* note 94, at 417.

106. *St-Ferdinand*, [1996] 3 SCR 211, paras. 127-28:

The conduct of the party at fault, the prejudice suffered, the quantum of compensatory damages awarded to the victims, the preventive, deterrent and punitive aspect of the damages, the profit realized by the party who committed the interference and that party's financial resources. . . . [I]n class actions, the number of victims and their special vulnerability must also be taken into consideration.

107. (1) The defendant's conduct (duration of the conduct, evaluation of the gravity of the conduct, the need to prevent such conduct in the future). (2) The defendant's situation (the advantages derived by the defendant from the conduct, the defendant's financial resources, the other punishments ordered against the defendant). (3) The victim's situation (impact of the conduct on the victim, possible provocation by the victim). (4) The total amount awarded (the need to avoid awarding such damages if compensation has already been granted under another head). Cf. in the judicial practice, *Commission des droits de la personne et des droits de la*

Despite the generalizing effect of the Charter, punitive damages are still considered as an exceptional legal instrument in Quebec law.¹⁰⁸ The amounts are asserted to be lower than in the common law provinces.¹⁰⁹ The cautiously increasing tendencies are attributed to the common law influence (especially to the *Whiten* and *Hill* decisions upheld by the Supreme Court).¹¹⁰ The recognition of the autonomous nature of punitive damages and also the emancipation of denunciation as their third objective can also be traced back to taking the common law understanding into account.¹¹¹

All in all, the pharisaical rejection of the punitive approach with reference to the legal nature of damages or liability law should definitely be avoided. Channeling the deterrence, punishment, and denunciation into the law of damages in such a manner that this approach fits in to the structure and fundamental elements as well as the values of the legal system concerned is a sound solution, which definitely qualifies as a *ratio communis*. The Quebec experience testifies that punishment and deterrence are rightly acknowledged aims of the law of damages even in civil law systems. Coherence can be established through the accented significance of prevention and the effective protection of human rights in private law, i.e., in horizontal relations. However, it is beyond *ratio communis* whether punitive aspects are hidden or openly present; both solutions have advantages and disadvantages. If there is a hidden application disguised by non-pecuniary damages for example, the explicitly set objectives of damages will necessarily suffer distortions. Punitive aspects will be present even if one does not acknowledge or does not want to face them. If the legal system concerned prefers the explicit application of punitive aspects like the common law provinces or recently Quebec, the above-mentioned challenges must be met. In that case, the ‘if and only if’ test (punitive damages should be awarded only if

jeunesse c Hôpital général juif Sir Mortimer B Davis, 2007 QCTDP 29, para. 284 (available on CanLII).

108. On the exceptional nature, *cf. Béliveau St-Jacques v Fédération des employées et employés de services publics inc.*, [1996] 2 SCR 345 paras. XX, CXXXVI.

109. *Linden & Feldthusen*, *supra* note 66, at 828.

110. *Deslauriers*, *supra* note 94, at 417-18; *cf.* the aforesaid Supreme Court judgments: *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130; *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595.

111. *De Montigny v Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64 [*de Montigny*], in particular paras. 50ff. Punitive damages were awarded despite the tortfeasor's death. The justification of this position was the recognition of denunciation besides deterrence and punishment.

deterrence and prevention make it necessary) just as the set-off of the various sanctions¹¹² are more than worth consideration.

3. Quebec Law Impacts on Common Law

Quebec law can be referred to as a civil law island in the sea of common law. However clichéd this metaphor may sound, the influence of common law is much more likely than vice versa. However, three issues should be emphasized representing the opposite direction. The fact alone that cross-fertilization succeeded is a sign that the particular legal instruments may represent *rationes communes*. Furthermore the cited legal institutions pass the test of time and the coherence test.

a. Misfeasance in Public Office, *Roncarelli* and Its Impacts

The *misfeasance in public office* well known by then in English law was first applied in a Quebec case (*Roncarelli v Duplessis*) in Canada and was only later referred to in judgments delivered in the common law provinces. This cause of action arrived to Common law Canada through a Quebec redirection.¹¹³ It is said among scholars that Quebec has always been a pioneer in establishing unlimited governmental liability.¹¹⁴ According to the comments of Sheppard, the court referred to Dicey's treatise¹¹⁵ expressing that "public powers may be used only for the purposes for which they are conferred, and the purposive exercise of public power precludes its arbitrary use."¹¹⁶

112. *Cf.* however the fine tuning, *id.* para. 54: "[I]t must be borne in mind that each of these systems (notably the private law and criminal law) has its own role to play. One should not be substituted for the other where one of them is unable to perform its specific role"

113. *Roncarelli v Duplessis*, [1959] SCR 121. (The plaintiff sued the defendant personally for the damage incurred due to the cancellation of his licence to sell liquor by the Quebec Liquor Commission. The Court stated that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to do so in order to punish the plaintiff, a member of the Witnesses of Jehovah because he had acted as bailman for a large number of members of his congregation charged with the violation of municipal by-laws in connection with the distribution of literature.). *Cf.* also Linden & Feldthusen, *supra* note 66, at 707ff; Ken Cooper-Stephenson, "The Fairest of Them All: The Supreme Court of Canada's Tort Jurisprudence" in Beaulac, Pitel & Schulz, *supra* note 99, 1 at 38ff.

114. Linden & Feldthusen, *supra* note 66, at 679.

115. Claude-Armand Sheppard, *Roncarelli v. Duplessis: Art. 1053, C.C. Revolutionized* (1960) 6:2 MCGILL L.J. 75 at 89-90. According to him, the judgment revolutionized art. 1053 of the CCLC, because liability "lies in the usurpation of authority, not in the manner in which the usurped authority is exercised. Fault on the part of the author of the damages is not a prerequisite of liability". *Cf. id.* at 96 (see further his deduction in particular at 93, 95-97).

116. Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55 MCGILL L.J. 511 at 517-18.

The significance of *Roncarelli* was highly appreciated in Canada, scholars made many solemn statements considering the judgment. “It is often identified as the archetypal Canadian case on the rule of law”¹¹⁷ or similarly “the Canadian standard-bearer for the rule of law.”¹¹⁸ Others stress that “The principle of aversion to absolute discretion as articulated by Justice Rand in *Roncarelli*, has now become axiomatic in Canadian public law,”¹¹⁹ or “It is the ultimate triumph of citizens over unbridled government power exercised at the highest level: it is the operation of Diceyan principles in the best sense.”¹²⁰ Together with some other cases, it has been often articulated as part of the constitutional theory known as “implied bill of rights”.¹²¹

Mullan performed a subtle in-depth analysis considering whether *Roncarelli* really revolutionized the common law case law by establishing new principles of liability for abuse of public power and expressed doubts on that. He questioned whether an illegal public action of itself constitutes liability without malice or bad faith, and whether this interpretation of art. 1053 CCLC is transferable to the common law. Judgments after *Roncarelli* do not seem to support this possibility;¹²² on the contrary, bad faith was regarded as an essential component of liability in similar cases.¹²³ The content and interpretation of bad faith and malice became the core questions; and according to Mullan, bad faith was extended at least to recklessness as to the legality of a purported exercise of statutory power, as a general rule both in Quebec and the common law provinces.¹²⁴ Mullan concluded that there had once been strong voices in favor of a much broader concept of liability of public officials and that was the most important message of *Roncarelli*. These pursuits, however,

117. Derek McKee, “The Public/Private Distinction in *Roncarelli v. Duplessis*” (2010) 55 MCGILL L.J. 461 at 463.

118. Fox-Decent, *supra* note 116, at 513.

119. Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2010) 55 MCGILL L.J. 661 at 670.

120. David Mullan, “*Roncarelli v. Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and for What Does It Stand in 2009?” (2010) 55 MCGILL L.J. 587 at 589.

121. Eric M. Adams, “Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture” (2010) 55 MCGILL L.J. 437 at 439.

122. Mullan, *supra* note 120, at 599-602.

123. *Id.* at 605.

124. *Id.* at 606-10. However, the question remained unanswered as to whether this principle also applies to public officials’ liability in general or only in the very particular context of the legislative and policy making functions of a municipality (*cf.* at 610). Recklessness also includes the exercise of a power in a way that is “markedly inconsistent” with the relevant legislative context and purposes (*cf.* at 611).

must have been content with the extended reinterpretation of malice and bad faith.¹²⁵

Regardless of how one evaluates this process and the extension of liability through the reinterpretation of the notion of bad faith, *Roncarelli* was indeed a milestone. The reinterpretation in Canadian common law itself was much easier after the Diceyan principles collided first with the general fault-based liability regime of art. 1053 CCLC. The extension of liability in this field in one way or another is surely a *ratio communis* that can also be derived from the general principle of the rule of law present in both jurisdictions.

b. Prenatal Injuries

For a long time, damages for *prenatal injuries* were not awarded in the common law provinces in the absence of duty or proximate cause.¹²⁶ Again, it was a Quebec case wherein the Supreme Court acknowledged prenatal injuries (injuries caused to a foetus while injuring the pregnant mother) and awarded damages (*Montreal Tramways Co. v Léveillé* in 1933).¹²⁷ This decision was followed by the Ontario case *Duval v Seguin* (1972).¹²⁸ Later on this principle became part of the *Ontario Family Law Act*.¹²⁹

c. Contributory Fault

Last but not least, *the apportionment of liability in the case of contributory fault* is to be highlighted as the most significant civil law impact on (Canadian) common law.¹³⁰ Although there was no such explicit rule in the CCLC, the Quebec courts applied shared liability in proportion to the degree of fault if the injury was in part the effect of the victim's own fault.¹³¹ This rule is now included in art. 1478(2) of the

125. *Id.* at 611-13.

126. Fridman, *supra* note 79, at 336.

127. *Cf.* the analysis of Linden & Feldthusen, *supra* note 66, at 309ff.

128. Fridman, *supra* note 79, at 337.

129. *Family Law Act*, RSO 1990, c F.3, s 66. "No person is disentitled from recovering damages in respect of injuries for the reason only that the injuries were incurred before his or her birth." Nevertheless, the Supreme Court steadily refuses claims for damages raised by children against their mothers for causing accidents. This plain policy consideration also fits in with the concept of fault in Quebec; the factors considered in the common law could be evaluated within this basic prerequisite of liability due to art. 1457 CCQ. *Cf. Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753; *cf. Lavallée*, *supra* note 86, at 4-5.

130. Linden & Feldthusen, *supra* note 66, at 493.

131. Francis King, "Report of Committee on a Uniform Contributory Negligence Act. Proposal for the Division of Loss in Contributory Negligence Cases" in *Proceedings of the Seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in*

CCQ. In common law in general and in the common law provinces of Canada as well, a completely different approach prevailed. According to the so-called 'stalemate rule', the contributory fault of the victim constituted a complete bar to the claim for damages.¹³² The common law judicial practice attempted to reduce the sometimes very unjust consequences of the rule, among others by the so called 'last clear chance doctrine'. (The stalemate rule did not apply if the tortfeasor could have had a chance to prevent the injuries incurred.)¹³³

In the first half of the twentieth century, all the common law provinces in Canada as well as other common law states enacted specific laws providing that in the case of the victim's contributory fault shared liability was to apply in proportion to the degree of fault. Thus, the stalemate rule was overruled. It is remarkable that a Canadian province, namely Ontario, was the first to enact such a law in 1924, which suggests that this cannot have been a mere coincidence.¹³⁴ M.J. Gorman had already suggested, in 1917, to substitute the stalemate rule by the apportionment of damages according to the degree of fault and also made reference to the law in Quebec.¹³⁵ The *Grand Trunk Pacific Railway v Earl* decision of the Supreme Court (from 1923) is cited as evidence of the impact of Quebec law. Anglin J criticizes the harshness of the stalemate rule especially if the culpability of the plaintiff is comparatively slight and that of the defendant distinctly gross. He regards the civil law doctrine of apportionment as much more equitable.¹³⁶ Mignault J makes an explicit reference to the (much more equitable) doctrine of civil law as in force in Quebec (and in admiralty matters) wherein the liability of each party is measured by his degree of

Canada held at Quebec 2nd, 3rd, 4th and 5th July 1924, app. B, 34 at 44; Dorothea Wayand, "Seat Belts—A Comparative Study of the Law and Practice" (1981) 30:1 INT'L & COMP. L.Q. 165 at 168; Daniel Jutras, "Constituent Elements of All Claims in Civil Liability" in Brierley & Macdonald, *supra* note 80, 434 para. 481.

132. Linden & Feldthusen, *supra* note 66, at 486.

133. Also called 'last opportunity' or 'ultimate negligence' rule, *cf. id.* at 487ff and Klar, *supra* note 79, at 457-58, with critical remarks both on the stalemate and on the last clear chance rule.

134. Wayand, *supra* note 131, at 168: "Was it the influence of the practice in Quebec? To some extent it must have been." See also with obvious reference to the law in Quebec, Walter F. Schroeder, "Courts and Comparative Negligence" (1950):11 INS. L.J. 791 at 796. Similarly, Glanville L. Williams, "The Law Reform (Contributory Negligence) Act, 1945" (1946) 9:2 MOD. L. REV. 105 at 121-22. Even Quebec courts had difficulties with the application of their rule because the appellate courts had been more familiar with common law than with French authorities. He stresses the fact that the first act in common law Canada and in the common law world as a whole was enacted in Ontario, the neighbour of Quebec.

135. M.J. Gorman, "Negligence—Contributory, 'Ultimate' and 'Comparative,' with a Suggested Statutory Amendment" (1917) 37:1 CAN. L. TIMES 23 at 23, 31-32.

136. *Grand Trunk Pacific Railway v. Earl*, [1923] S.C.R. 397 para. 31.

culpability. He regards this, however, as a matter for the consideration of the legislator “for the Courts are obliged to apply the law however harsh it may seem.”¹³⁷ The Ontario law-maker seems to have listened to Mignault J’s call to action.¹³⁸ The preliminary studies written for the Conference of Commissioners on Uniformity of Legislation in Canada (now the Uniform Law Conference of Canada) preceded the above-mentioned legislation. In these studies acknowledged experts directed the attention of the Canadian legal community to the Quebec solution of the apportionment of liability.¹³⁹ The *Uniform Contributory Negligence Act* passed by the conference served as the basis for the above-mentioned provincial acts.¹⁴⁰ There is no doubt that shared liability is a more fair and just solution than the stalemate rule and allows greater discretion for judges, empowering them to adjust their judgment to the circumstances of the case.¹⁴¹ Its value and quality as *ratio communis* is not reduced by further questions arising in the common law provinces.¹⁴²

III. HERMENEUTICAL EQUALIZATION

In common law a case by case approach is preferred, construing first and foremost narrow rules “with a view to the concrete facts”,¹⁴³ although it also contains some general legal notions. Torts are historically defined by the manner of the wrongful conduct (how the injury was caused), and by the damage incurred and to be recovered (what kind of damage was incurred). The civil law approach consists of general liability structures shaped at a higher level of abstraction, containing more general elements like the universal notion of fault,

137. *Id.* para. 43.

138. Bowker indicates the impact of Quebec law, interpreting Duff, Angling and Mignault JJ as having wished to have power to apportion blame and hence the damages, as there was under the civil law. *Cf.* W.F. Bowker, “Ten More Years Under the Contributory Negligence Acts” (1964-66) 2:2 U. BRIT. COLUM. L. REV. 198 at 200.

139. King, *supra* note 131, at 34-35, 39ff on maritime law wherein shared liability was known as well, and *ibid* 44-45 on Quebec law. According to the conference records, the Alberta and Ontario delegates must have analyzed Quebec law.

140. New Brunswick 1925 and 1962, Nova Scotia 1926 and 1954, Alberta 1937, Saskatchewan 1944, Northwest Territories 1950, Newfoundland and Labrador 1951, Yukon 1955, British Columbia 1960, Prince Edward Island 1978. The *Law Reform (Contributory Negligence) Act* (UK), c 28 was only enacted in 1945.

141. *Cf.* also Schroeder, *supra* note 134, at 792, referring among other things to the modern needs and concepts of society, to the requirements and habits of the age. He declares the apportionment of damages in the case of contributory fault to be the “essence of common sense”. *Cf. id.* at 794.

142. Does it apply to intentional torts too? What about shared liability in contractual cases? Is it applicable in breach of contract cases as well?

143. Reimann, *supra* note 34, at 1342.

causal connection, concept of damages, etc., which facilitate codification as well.¹⁴⁴

By itself neither approach succeeds in covering the complexities of life. In order to make the jurisdiction as predictable and at the same time as fair as possible, concepts, notions, and instruments based on all levels of abstraction are required. This is why it is a normal and inevitable development of the law that in addition to general and historically shaped concepts there is a permanent search for further and newer aspects even at a level of abstraction different from before. The more general approach seeks concrete key components which contribute to establishing case groups. These key components or decisive factors are constantly evaluated in light of the general notions and concepts used in the legal system concerned. There is a need for reasonable middle courses embracing reasonable policy arguments to keep the floodgates of unrealistic and absurd damage claims closed.¹⁴⁵ As the civilian concepts of fault, causation, and damage are often silent on many matters of detail, the “pointillism of the common-law approach permits it to penetrate” into the civilian principles;¹⁴⁶ abstractness and brevity “seem to provide an opportunity for common-law expansion.”¹⁴⁷ Thus, there has always been a dynamic hermeneutical commuting between the different levels of abstraction. As a result, common law doctrines provide “the ‘flesh’ for the continental European skeleton of tort law.”¹⁴⁸

The same process works the opposite way as well; legal systems preferring case groups, case by case approach and narrower circumscribed liability structures also need some general concepts, such as the duty of care or causal connection, etc.¹⁴⁹ These general notions are then evaluated in light of the particular tort. General principles can be of great convenience for the common lawyer who got stuck in the labyrinth of torts, doctrines and cases. The development of the *tort of negligence* as a rather general approach for damage resulting from negligence was itself a clear sign of the pressing necessity of general legal instruments in the field of tort law. The relatively broad interpretation of the duty of

144. *Id.*

145. Siewert D. Lindenbergh, “Damages (in Tort)” in Smits, *supra* note 7, 234 at 238.

146. Palmer, *supra* note 27, at 55.

147. *Id.* at 59.

148. Smits, *supra* note 8, at 243. A similar image is to be found at Kötz, *supra* note 31 at 438: “broad and generalized statements of principle upon which flesh is to be put by interstitial case law development.”

149. According to Evans-Jones, even Lord Atkin may have drawn his rule on the limits of tortious liability from the civil law, more closely from the “natural lawyers’ elaboration of Aquilian liability.” *Cf.* Robin Evans-Jones, “Mixed Legal Systems, Scotland and the Unification of Private Law in Europe” in Smits, *supra* note 21, 39 at 40-41.

care especially after the *Donoghue v Stevenson* judgment¹⁵⁰ was the next step.

Using different approaches to solve legal problems enables the civil law and the common law approaches to supplement each other smoothly,¹⁵¹ and to bring complementary rules together.¹⁵² This provides reasonable compromise between the aims of flexibility and fairness on the one hand and predictability of the law on the other.

While hermeneutical equalization may occur in any legal system, mixed legal systems often develop intermediary solutions¹⁵³ and evolve as a result of interaction “between cases and systematizing principles.”¹⁵⁴ All in all, the concurrence of two different legal systems catalyzes and accelerates these processes cherishing the objective of fair liability law, in which various *rationes communes* are present. Hermeneutical equalization is therefore a way to achieve *ratio communis*, though it can be considered as a methodical *ratio communis* by itself too, as a method of legal thinking and reasoning.

A. *Pure Economic Loss*

Hermeneutical equalization points towards a more general approach even considering *pure economic loss* in the common law provinces of Canada. Pure economic losses are traditionally regarded in common law jurisdictions as irrecoverable. As Major J summarized in the *D’Amato v Badger* case, there are four reasons for refusing these claims. “First, economic interests have been seen as less worthy of protection than bodily security and property.” Second, liability in an indeterminate amount for an indeterminate time towards an indeterminate class is feared. Third, “it may be more efficient to place the burden of economic loss on the victim. Pure economic loss is often seen as an ordinary business risk which can be expected and for which business people make plans. The fourth reason stated was that the restrictive approach discouraged a multiplicity of lawsuits, in favor of channeling claims into

150. *Donoghue v Stevenson*, [1932] UKHL 100 (26 May 1932).

151. Smits, *supra* note 8, at 66.

152. *Id.* at 243. Sacco even visions a uniform law in the western world which is in the middle “between a formula enunciating a general principle of liability and one founded upon particular types of injury.” Cf. Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)” (1991) 39:2 AM. J. COMP. L. 343 at 369.

153. Reinhard Zimmermann, “Mischrechtsordnungen” in Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann eds., *Handwörterbuch des Europäischen Privatrechts*, vol. 1 (Tübingen: Mohr Siebeck, 2009) 1068 at 1071.

154. Smits, *supra* note 8, at 149-50. According to him, this is the “only way to keep the masses of cases from the Member States of the European Union manageable.”

one action.”¹⁵⁵ Linden outlines five case groups, wherein pure economic losses can be recovered; these are negligent misrepresentation, negligent performance of services, defective products or buildings, independent liability of statutory public authorities, and last but not least, the so-called relational economic losses. Even within these case groups, in some cases some additional requirements have to be met in order to recover the damage.¹⁵⁶ The variety of cases and issues of life quite often challenge the judiciary, especially concerning whether the cases fall under one of the case groups or when an appropriate classification is not possible due to the complexity of the case. Sometimes the claim had to be rejected due to the rigidity of case by case analysis, even though the general consensus required recovery.¹⁵⁷

Therefore, it is no wonder that the (common law) judgments on pure economic loss are generally very long and elaborate. The classification of damage does not play such an important role in civil law. In Quebec, just like in French law,¹⁵⁸ according to art. 1607 of the CCQ, creditors are entitled to damages for bodily, moral or material injury, which is an immediate and direct consequence of the debtors’ default. There is no distinction between personal injuries, property damage and pure economic loss. Therefore, other legal instruments in general, such as the requirement of direct and immediate consequences, function as a floodgate against damage claim lawsuits entirely lacking merit.¹⁵⁹ In Canada, this general approach attracts the attention of common law judges and even Supreme Court judges with a common law background. McLachlin J made a comprehensive comparative analysis on pure economic loss in the *Canadian National Railway Co. v Norsk Pacific Steamship Co.* case. She voted against the so-called exclusionary rule and against insisting on narrow outlined case groups. She preferred a more general approach where the proximity should be a reasonable limiting factor. In her analysis, she referred to the civil law several times, detecting functional equivalence between the requirement of direct and immediate consequences in civil law and proximity in common law.¹⁶⁰

155. *D’Amato v Badger*, [1996] 2 SCR 1071 paras. 17-20.

156. Linden & Feldthusen, *supra* note 66, at 442-43.

157. *Id.* at 481ff.

158. On the French law in a comparative approach in this context, *cf.* Wagner, *supra* note 83, at 1013, 1015; Zweigert & Kötz, *supra* note 1, at 617; Lindenbergh, *supra* note 145, at 238.

159. Gérald R Tremblay, “Economic Loss: Legal Considerations” (1999) J. BUS. VALUATION 345 at 357ff; Lavallée, *supra* note 86, at 14f; *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, in particular para. 44.

160. *Canadian National Railway Co. v Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021. See the arguments of McLachlin J, paras. 2.d.), f.):

Of course the factors shaping the common law case groups need not be set aside completely but they should be considered within the framework of proximity, a more general notion. A general abstraction level is simply indispensable for covering the complexities of life reflected in the law of damages, though supplementary classification criteria developed in common law are also worth considering (special abstraction level) not incidentally to promote the predictability of law. The result, an achievement of hermeneutical equalization, certainly qualifies as *ratio communis*. It is not a coincidence that one of the achievements of the European law approximation, the PETL also proposes an intermediary solution: due to art. 2:102, para. 4, the proximity between the actor and the endangered person and the awareness of the fact of causing damage are to be considered in cases of pure economic loss.¹⁶¹

B. The Extra-Contractual Liability of Auditors Toward Third Persons

A very similar observation can be made regarding *the (extra-contractual) liability of auditors toward third persons*. The direction of hermeneutical equalization is the opposite; the common law aspects limiting liability attract the attention of Quebec judges interpreting fault and causal connection. As mentioned above, negligent misrepresentation in the case of experts (and that of auditors among them) is a case group within the tort of negligence, wherein even pure economic losses can be recovered if the specific prerequisites are met,¹⁶² the auditor and the plaintiff shall have a special relationship, the reliance on the auditors' (mis)representation shall be reasonable and this reasonable reliance shall be foreseen by the auditor. In addition, the defendant has to know the plaintiff or at least the class of plaintiffs and also "the use to which the statements at issue are put", as well as briefly the scope of the specific

The control mechanism against unlimited loss in the civil law lies not in the type of loss but in the factual determination of whether the loss is a direct, certain and immediate result of the negligence. It appears to have worked well in avoiding frivolous claims and the threat of unlimited liability.

Cf. further *id.* paras. 2.f.) and 3:

Viewed in this way, proximity may be seen as paralleling the requirement in civil law that damages be direct and certain. Proximity, like the requirement of directness, posits a close link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.

161. The commentaries to this art. seem to point at the common law case group of negligent misrepresentation. *Cf.* Helmut Koziol, "Damage, Protected Interests" in European Group on Tort Law, *supra* note 83, 29 at 29, 32.

162. Linden & Feldthusen, *supra* note 66, at 460-61. *Cf.* the detailed analysis of Lara Khoury, "The Liability of Auditors Beyond Their Clients: A Comparative Study" (2001) 46:2 MCGILL L.J. 413 at 439ff.

transaction. Damages are awarded in these cases only if “the defendant’s statements are used for the specific purpose or transaction for which they were made.”¹⁶³

Apart from the fundamental difference that either civil law does not apply this detailed classification of damages or it does not link any kind of classification with the scope of liability, the judicial practice in Quebec is similar to the common law approach applying the above-detailed prerequisites while interpreting causal connection, foreseeability, directness and certainty of damages as part of arts. 1457 and 1607. For example, claims were refused in cases where the plaintiff would have processed the transaction anyway or had been aware of the real financial situation of the company.¹⁶⁴ Reasonable reliance was considered, for example, in the shape of causal connection and mitigation in the *Garnet Retallack & Sons Ltd. c Hall & Henshaw Ltd.* case upheld by the Quebec Court of Appeal. Even though the court stated that these criteria are not part of Quebec law and there is no need for them to be adapted because it is sufficient to rely on causality, fault, and mitigation, they seemed to have considered them within the frame of these notions.¹⁶⁵

It has been proposed by scholars that reasonable reliance should be considered as a factor that renders causal connection likely, while the other criterion, being aware of the specific transaction, within the notion of fault. The refusal of common law aspects has been discouraged as long as they are compatible with the civil law concept and do not result in giving up its more general approach.¹⁶⁶ Finding some reliable references while interpreting fault and causal connection and by chance achieving more predictability in liability law as a result is by all means a positive effect of hermeneutical equalization and it qualifies as *ratio communis* as apparently passing both the tests of time and of coherence. European model laws obviously arrive to very similar results. The commentaries to the PETL specify the obvious reliance within the required standard of conduct and also the doctrine of special relationship and, again, reasonable reliance as factors of the “duty to protect others from damage.”¹⁶⁷ Art. VI.-2:207 DCFR regulates “Loss upon reliance on

163. *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 SCR 165, in particular paras. 27, 30, 37, 46ff; *Linden & Feldthusen*, *supra* note 66, at 449ff, in particular at 455, 463, 467. See also the critical standpoint of Cooper-Stephenson, *supra* note 113, at 56; according to him the scope of liability was too narrow.

164. Khoury, *supra* note 162, at 461f.

165. *Garnet Retallack & Sons Ltd v Hall & Henshaw Ltd.*, 1990 CanLII 3483 (QC CA).

166. Khoury, *supra* note 162, at 464ff, 467ff.

167. Widmer, *supra* note 84, at 78; *cf.* Pierre Widmer, “Liability Based on Fault, Duty To Protect Others from Damage,” in European Group on Tort Law, *supra* note 83, 86 at 88.

incorrect advice or information” as an autonomous cause of action. Prerequisites of liability are the reasonable reliance on incorrect advice, the fact that information is provided by a person in pursuit of a profession or in the course of trade, and finally the foreseeability of the reliance while making a decision of the kind made. The commentaries add that the person providing the information must have had a definite circle of persons in view, and furthermore the more serious the decision (made on the basis of the information given), the greater the dependence on the expertise because of informational imbalance.¹⁶⁸ The same factors are considered, either explicitly as an independent category of liability, or implied as parts of the evaluation and consideration related to general principles like fault or causation.

C. *Relational Losses*

Relational losses provide quite a clear example of hermeneutical equalization and show how to profit from studying the mutual influence in mixed legal systems. In the civil law of Quebec, because art. 1056 of the CCLC was not adopted by the new civil code, there is no legal provision setting forth which relatives are entitled to damages if their relative dies or suffers grave injuries (just like in French law).¹⁶⁹ These questions are answered by general legal instruments within liability law, such as causal connection, foreseeability, and the requirement of direct and immediate consequences. The same stands true for *solatium doloris*, the grief and sorrow felt upon the loss of a relative.¹⁷⁰ The development in the common law provinces is quite confusing by confounding several case groups like nervous shock on the one hand and grief and sorrow felt in the case of loss of a relative on the other hand.¹⁷¹

The fundamental question is whether the loss of a relative, by and of itself, substantiates damages. If so, it is of no significance whether the dependents were present when the accident occurred or they heard of it in the immediate aftermath or later. Consequently, it is absolutely

168. DCFR, *supra* note 77, at 3344-47.

169. On the French law in a comparative context, Zweigert & Kötz, *supra* note 1, at 617. Similarly DCFR, *supra* note 77, at 3231.

170. *Augustus v Gosset*, [1996] 3 SCR 268, in particular paras. 27-37; on the aspects determining the amount, *cf. id.* para. 50 (inter alia: the circumstances of the death, the ages of the deceased and their parents, the nature and quality of the relationship between the deceased and their parents, the parents' personalities and abilities to manage the emotional consequences of the death and the effect of the death on the parents' life in light of, inter alia, the presence of other children or the possibility of having others); *see also* Shauna Van Praagh, "Who Lost What? Relationship and Relational Loss," in Beaulac, Pitel & Schulz, *supra* note 99, 269 at 282-83; Linden & Feldthusen, *supra* note 66, at 427-28.

171. Van Praagh, *supra* note 170, at 277ff; Waddams, *supra* note 85, para. 3.1460.

insignificant whether they suffered nervous shock or not. If they did, it is another injury which can give rise to damages or increase the amount of damages. The group or category of relatives who are entitled to damages can be expressly provided for by the degree of relationship, as in common law, or can be left to general legal instruments like the directness of the damage or the causal connection as is the case in civil law. If the legal system does not regard grief and sorrow alone as sufficient reasons for claiming damages, the problems of interpretation and demarcation appear.

Common law struggled with these problems for a long time, and the recognition of the loss of a relative as a prejudice worthy of financial compensation was put on hold. It started with the so-called impact rule, recognizing any psychological losses only if bodily injuries were sustained as well.¹⁷² This approach was replaced by the nervous shock doctrine applied in parallel with the reasonable foresight test. While answering the question whether the dependent was entitled to damages, the degree of relationship, emotional proximity, and whether the accident was directly witnessed or indirectly heard of were considered.¹⁷³ The issue of relational losses is obviously confused with the problems of witnessing an accident as a relative, as a rescuer, or just as a bystander. The confusion is striking even among scholars.¹⁷⁴ Linden draws the conclusion that relational losses give rise to damages only if the family member directly witnessed the accident.¹⁷⁵ In some common law provinces the rather complicated common law practice was replaced by special statutes, more specifically by certain legal provisions in family law and fatal accident legislation. The loss of a relative by itself entitles the bereaved, explicitly defined in the act,¹⁷⁶ to claim damages. The loss is called loss of guidance, care and companionship. Although there is seemingly no significant difference between this definition and that of

172. Linden & Feldthusen, *supra* note 66, at 421ff.

173. *Id.* at 424-25, 426-27, 429, 439; MH Ogilvie, "The Fly in the Bottle and Psychiatric Damage in Consumer Law" (2010) 2 J. BUS. L. 85 at 97; Kenneth C Mackenzie, "'Oh, What a Tangled Web We Weave': Liability in Negligence for Nervous Shock" in Beaulac, Pitel & Schulz, *supra* note 99, 125 at 125ff.

174. *Cf. id.* at 129ff, 134ff, and Ogilvie, *supra* note 173, at 93ff, analyzing the Canadian common law not following the English distinction between primary and secondary victims. *Cf.* also the case groups set up by Linden: Linden & Feldthusen, *supra* note 66, at 430-31, 433ff.

175. Linden & Feldthusen, *supra* note 66, at 435ff.

176. *Cf.* among others the *Ontario Family Law Act*, RSO 1990, c F.3, s 61(1): the spouse, the same-sex partner, the children and grandchildren, the parents and grandparents, the brothers and sisters are entitled to damages. Louisiana, despite being a mixed legal system with civilian roots, arrived at the same result as the common law provinces of Canada. It was the legislature who deconstructed the abstract principle into concrete liability rules enumerating the relatives entitled to damages. *Cf.* Palmer, *supra* note 53, at 554-56.

‘grief and sorrow’, the terminological distinction can be regarded as a residue of the insistence on not recognizing ‘grief and sorrow’ by themselves as recoverable losses. In some provinces even the amount of the damages to award is explicitly set forth by law.¹⁷⁷

In summary, the loss of a loved one, regardless of whether it is called *solatium doloris*, grief and sorrow, or loss of care, guidance and companionship, is moral prejudice. It is common in both legal systems that the closeness of the relationship between the petitioner and the deceased is of crucial significance; they deal with this decisive factor at different levels of abstraction. The family law and fatal accident acts of the common law provinces set forth which relatives are entitled to claim damages by the degree and (legal) nature of the relationship. This approach simplifies the judge’s task by replacing the careful and difficult judicial discretion with irrebuttable statutory presumptions; in the case of certain degrees of relationship the close ties of love and affection are presumed to exist. It makes the law more predictable, but at the same time it makes other relatives or persons without any legal connection to the deceased ineligible for damages even if a close tie of love and affection between them and the deceased definitely existed. Their only resort is to attempt to claim damages citing nervous shock according to the common law doctrine. In Quebec, all these circumstances, including emotional proximity, shall be considered within the notion of directness and adequate cause.¹⁷⁸ The degree and (legal) nature of the relationship is definitely taken into account, providing us with an excellent example of hermeneutical equalization. The judicial discretion at a higher level of abstraction seeks more specific criteria, which can be partly found in the common law legislation and judicial practice.¹⁷⁹

177. *Fatal Accidents Act*, RSA 2000, c F-8, s 8 (Alberta): the spouse and the parents can claim 75,000 dollars, the minor children 45,000 dollars. *Fatal Accidents Act*, CCSM c F50, s 3.1(2) (Manitoba): the parents, the children and the spouse can claim 30,000 dollars and the other relatives specified by the act are entitled to 10,000 dollars. *Saskatchewan Fatal Accidents Act*, RSS 1978, c F-11, s 4.1(2) entitles the spouse to claim 60,000 dollars, the children and the parents 30,000 dollars each.

178. Zweigert & Kötz refer to the French law in a comparative context, which requires very close relationship with the deceased and serious affliction by his death. *Cf.* Zweigert & Kötz, *supra* note 1, at 617.

179. Van Praagh, *supra* note 170, at 281-82, 284-85, means that there is no common law influence, considering the degree of relationship is rather an aspect of common sense, being apparent in every legal system (or as it is called in this Article: it is an ‘original parallelism’). However, the Quebec Superior Court awarded damages to the same relatives in the tragic *De Montigny c Brossard (Succession de)*, 2006 QCCS 1677 case (parent, grandparent, sisters) as it is explicitly recognized by the above mentioned statutory provisions. The claim of the boyfriend of the sister was rejected because he had not known the family long enough to feel the same grief and sorrow. *Cf.* in particular paras. 102-14. The Quebec Court of Appeal upheld the judgment,

It is sound to scrutinize emotional proximity and sufficiently profound sorrow if the beloved person dies¹⁸⁰ but it is apparently very difficult to uncover the emotional aspects. Recent European model laws also deal with this core question. Art. 10:301, para. 3 of the PETL refers to persons having close relationship to the deceased or seriously injured victims. According to the commentaries, there should be no fixed lists of persons who may claim damages, but there must be a relationship “which bears at least some resemblance to a ‘family’ one,” including de facto cohabitation or same-sex relationship as the case may be.¹⁸¹ Art. VI.-2:202 DCFR focuses also on the “particularly close relationship to the injured person” and regards this factor as the sole prerequisite of liability. The commentaries stress correctly that the claim does not depend on any mental suffering or medical condition of the claimant; these are different and separate items of non-pecuniary injuries caused by the wrongful conduct. According to the authors of DCFR, the close relationship can be either a formal legal one (parents, children, spouses) or de facto (cohabitation, step parents, etc.). Mere friendship or close professional or business relationship is not sufficient.¹⁸²

To our understanding, it is reasonable to presume emotional proximity in cases of certain degrees of (family) relationship. This should be the case if the children, the parents, the spouse, the same-sex or common law partner, the brothers or sisters, the grandparents or grandchildren claim damages.¹⁸³ Moreover, the degree of relationship, among other aspects, could also be weighed in the course of setting the amount of damages. This presumption should be rebuttable; no damages for loss of guidance, care and companionship should be awarded if there was no emotional proximity between the deceased and the claimant and even less so if the relationship was spoiled or hostile. This approach, starting from the general notion of directness and using the degree and legal nature of relationship as factors establishing the presumption,

cf. 2008 QCCA 1577, [2008] RJQ 2015, and the Supreme Court of Canada upheld this part of the judgment as well, *cf. de Montigny*, 2006 QCCS 1677, in particular para. 36.

180. Peter De Cruz, *Comparative Law in a Changing World*, 3d ed. (London, N.Y.: Routledge—Cavendish, 2008) at 339.

181. Rogers, *supra* note 89, at 175.

182. DCFR, *supra* note 77, at 3224-26. See in particular the following statement:

The emptiness which a person feels when a life partner, a child or a parent is killed or severely injured need not to be suffered without reparation, though the parties concerned do not suffer injury to their health. Should they in fact suffer such damage, then two bases of claim are available to them.

Id. at 3226.

183. De Cruz would restrict the scope of the presumption to parents, spouse and children. *Cf.* De Cruz, *supra* note 180, at 339.

permits the judge to award damages even in cases wherein there is no family relationship at all or it is rather distant, but the close ties of love and affection are obvious and proven. This combination appears to represent a case of *ratio communis* for the reason that the combination of elements of different levels of abstraction results in a just and flexible solution which can definitely be traced back to the interaction and mutual influence of the two legal systems.

IV. INFLUENCE AGAINST *RATIO COMMUNIS*

Being influenced by another legal system is not always an advantage. Taking a glance at the solution of another legal system can drive organic development off its course. That may have happened to the liability for injuries caused by things in Quebec.

It is sound to establish a special regime on liability for injuries caused by things. In these cases it is about technical procedures, self-movements of things which might multiply the risks and the damages if the damaging processes occur. Therefore, it is rather difficult if not impossible to identify a wrongful conduct behind the occurrences and even if it is successful, it is even more difficult to prove the fault. Hence, the overwhelming majority of legal systems decided on a special liability. In France it is a strict liability applicable to all damages caused by things (art. 1384(1) of the *Code civil*). In German law, the so-called “Gefährdungshaftung”, no fault liability only applies in cases explicitly set forth in specific acts. In some U.S. states, there is also a strict liability, especially in product liability cases. The English and Canadian common law seem to resist the introduction of a more or less general no fault liability. Although some kinds of damages caused by things are covered by the so-called *Rylands v Fletcher* doctrine, the courts have been settling these cases through the tort of negligence supplemented in some groups of cases under the broad interpretation of duty since the *Donoghue v Stevenson* case and under the *res ipsa loquitur* principle.

If there is a special liability for injuries caused by things, the question arises as to how and under what criterion the cases under this liability could be separated from other cases coming under the general fault-based liability. Among other criteria, due to immovables (and movables) or dangerous processes, etc. the case may fall under the special regime depending on the decision of the legislator. If there is no special criterion in place restricting the damages caused by things, it will be more difficult to decide whether the damage was really caused by a thing or by injurious (human) conduct behind the damaging occurrence.

Although art. 1054(1) of the CCLC was first considered as a mere table of contents, later on, following the French judiciary, it was handled more and more as an independent liability over and above a strict liability.¹⁸⁴ Finally, the judiciary of the Privy Council took a conservative turn, upheld art. 1053(1) of the CCLC as an independent and general liability provision for injuries caused by things but regarded it as a liability with presumed fault.¹⁸⁵ The adjudication of these cases became very similar to the common law practice, applying the tort of negligence (in some groups of cases) supplemented by the *res ipsa loquitur* doctrine¹⁸⁶ resulting in something similar to presumed fault. Art. 1465 of the CCQ contains an already explicit fault-based liability with presumed fault. Meanwhile, another element and precondition of liability was shaped by the Quebec jurisdiction: the damage must have been caused by the “autonomous act of the thing” (*fait autonome*), i.e., without any human conduct or intervention.¹⁸⁷ This criterion manifested itself even in the new civil code (art. 1465). The French law overstepped the

184. Art. 1384 para. 1, Code civil was originally also regarded as a mere table of contents not establishing liability alone but rather as a reference to rules establishing liability in situations explicitly determined by the legislator (art. 1385: damages caused by animals; and art. 1386: damages caused by buildings). Later the so called *Jand'heur* decision of the Cour de Cassation from 1930 reinterpreted Art 1384 and transformed it into a strict liability. That was the turn which was not followed in Quebec. On French law from a comparative approach, cf. Zweigert & Kötz, *supra* note 1, at 659-61; Wagner, *supra* note 83, at 1033; DCFR, *supra* note 77, at 3099.

185. Nathalie Vézina, “The Law of Civil Liability, Part One: Preliminary Notions, Duality of Regimes, and Factual Basis of Liability” in Grenon & Bélanger-Hardy, *supra* note 94, 325 at 331-32, John EC Brierley & Roderick A. Macdonald, “The Civil Code and the Sources of Civil Law” in Brierley & Macdonald, *supra* note 80, 98 para. 117, Jutras, *supra* note 80, paras. 502-03.

186. On the *res ipsa loquitur* in the English and Canadian tort laws, cf. with comprehensive case reports Klar, *supra* note 79, at 507; Fridman, *supra* note 79, at 405. According to the majority opinion among scholars, the *res ipsa loquitur* doctrine is a case of *prima facie* evidence, and there is no word on the reversal of the burden of proof and even less of presumed fault. Cf. Klar, *supra* note 79, at 521-22; Fridman, *supra* note 79, at 407-08. The *res ipsa loquitur* doctrine was to apply if the defendant had been in the sole management and control of the thing, the occurrence would not have ordinarily happened without negligence and the cause of the occurrence had not been known. On the case groups and on their uncertainties, cf. Klar, *supra* note 79, at 507, 508ff, 511-12, 514-15; Fridman, *supra* note 79, at 409-10, 412. In the Supreme Court decision *Fontaine v British Columbia (Official Administrator)*, [1998] 1 SCR 424, in particular para. 26, the *res ipsa loquitur* doctrine was regarded as expired and no longer a separate component in negligence actions. But even the Supreme Court affirms the justification of the *prima facie* evidence and circumstantial evidence, so the essence of the doctrine seems to survive even without the term *res ipsa loquitur*. Acknowledged scholars confirm the preservation of this concept. Cf. Klar, *supra* note 79, at 505-06, 523-24, in particular the case report at 524 n.135. Cf. Fridman, *supra* note 79, at 406-07, 416; Linden & Feldthusen, *supra* note 66, at 84.

187. On the development of this criterion, cf. Brierley & Macdonald, *supra* note 185, para. 117; Jutras, *supra* note 80, para. 503, in particular n.126; *Quebec Civil Code Report*, vol. 2, *supra* note 101, art. 100, with commentaries at 621-22. Cf. among others *Hamel v Charté* [1976] 2 SCR 680 at 686-87; *Rubis v Gray Rocks Inn Ltd.*, [1982] 1 SCR 452 at 457.

distinction between *fait de l'homme* and *fait de chose*.¹⁸⁸ The Quebec law seems to insist on this distinction as a decisive criterion as to whether art. 1465 or the general regime of liability shall apply. The interpretation of this criterion is rather controversial in the judiciary and among scholars.¹⁸⁹ The movement, breakage, or explosion of the thing must play an active role in causing the damage.¹⁹⁰ The act of the thing is not autonomous if the thing was merely the instrument of (direct) human conduct.¹⁹¹ The similarity between the tort of negligence supplemented by *res ipsa* resulting in something similar to presumed fault (common law) and liability with presumed fault for the injuries caused by the autonomous act of a thing (Quebec) is quite obvious, even if there is no evidence of common law influence, “just” a very high degree of probability which is supported by the judicial practice of the Privy Council.

In the cases concerned, the omission of someone in a broad sense is perhaps supposed to hide in the background surrounded by serious difficulties of proof. However, the conclusions seem to bear hardly resolvable contradictions and definitely do not seem to qualify as *ratio communis*. According to art. 1465, the fault of the custodian is presumed. However, how could fault be presumed and whose fault would be presumed if no human intervention or human conduct could be involved? If human conduct was involved, the occurrence could not be regarded as an autonomous act of the thing. Perhaps only the actual occurrence of the damage is meant and the wording does not exclude omissions which may have led to the autonomous act itself. If this is the correct interpretation, there is no reference to it in the wording, moreover, the act of the thing was not truly autonomous since it would not have occurred in the absence of human omission. Another interpretation could be that after all art. 1465 of the CCQ covers strict liability

188. Cf. Zweigert & Kötz, *supra* note 1, at 660.

189. Linden & Feldthusen, *supra* note 66, at 835, means that exemption from liability is possible only if the custodian manages to prove the real cause of the damage. Vézina, *supra* note 185, at 373-74, reports a much more lenient judicial practice allowing the exemption for instance in the case of the fall of an elevator if the custodian proves that a qualified contractor had been hired to maintain the equipment.

190. Vézina, *supra* note 185, at 373.

191. If a gun at full cock falls down from the table and damages somebody, art. 1465 is to apply, but it is not the case if somebody shoots down another person directly. If somebody slips on the iced sidewalk, it is not a case of art. 1465, but if icicles fall on one's head, the custodian is liable pursuant to art. 1465. Cf. Linden & Feldthusen, *supra* note 66, at 835. If a carpenter, working on a scaffold, drops his hammer on somebody's head, it is not '*le fait autonome de la chose*'. But the special liability with presumed fault is to be applied if during lunchtime, in the absence of the workers, someone is hurt by a falling hammer. Cf. Ariste Brossard, "Four Lectures on the Law of Torts in Quebec, 2" (1955-56) 6:18 R.J.T. o.s. 77 at 81-82.

disguised as liability with a presumed fault. However, this interpretation is strictly, and correctly, refused among scholars.

All difficulties of interpretation and circumscription seem to be traceable to the above-mentioned immanent contradiction of this special liability regime. Establishing the scope of special liability through the criterion of the 'autonomous act of the thing' and presuming fault cannot go hand in hand due to the inherent controversy between the two. It is certainly a fundamental question how the scope of the special liability rule should be defined. As seen, there are a number of feasible solutions (immovables, dangerous goods and activities, etc.) and, among them, even 'the autonomous act of the thing' can be chosen, but if one combines it with presumed fault, the above-mentioned problems occur. The autonomous act of the thing could for example establish strict liability, wherein only force majeure could lead to exemption and in that case the interpretation problems connected with presumed fault could be avoided.

If the regime of general liability is fault-based and the fault must be proven by the plaintiff, the special regime should be implemented at least as liability with a presumed fault. However, the scope of the special regime must be circumscribed by an appropriate factor, for example whether the damage was caused by the intervention of a thing or technical procedure or the damage was conveyed by things or technical procedures. If the general regime of extra-contractual liability is a fault-based liability system, wherein fault is always presumed, the special liability must be a strict (no-fault) liability differing from the general regime, i.e., always a grade higher. The stricter the special regime is, the more careful the legislator has to be in defining its scope. Vernon Palmer draws attention to the imperative criteria of real strict liability (from Louisiana as a mixed jurisdiction's perspective) as 'an inelastic concept of unlawful harm', 'a factual test of causation that disregards proximate cause and omissions' and 'causal defenses of reduced scope and number.'¹⁹² The first two criteria can be complied with only if the scope of the regime is adequately defined and if the risk covered by the activities and things in question is ascertained by the rule. The second criterion is highly incompatible with distinctions like the autonomous and not autonomous act of the thing. A restriction to dangerous goods, procedures or products and services of higher risk is more than

192. Vernon Palmer, "A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law" (1988) 62:6 TUL. L. REV. 1303 at 1309-10, 1324-28, 1337-41, 1353-55.

recommendable.¹⁹³ Establishing strict liability for all injuries caused by things without restriction would be almost equivalent to putting the entire tort law on a strict liability basis, which would definitely present a dangerous extension of liability causing the paralysis of all social and industrial activities, or force the judicial practice to restrict the scope of strict liability by *contra legem* interpretation.

Scholars, law reform commissioners and authors of European model laws unanimously support the restriction of the scope of strict liability one way or the other, most frequently focusing on abnormally dangerous activities or equipment representing a substantial risk of harm. The scope of strict liability must be an unambiguously delimitable one. Art. VI-3:206 DCFR covers strict liability for damages caused by dangerous substances or emissions. This regime specifies the notions of ‘substance’ and ‘emission’, and the professional keeper or operator can be exempted from liability only if they complied with the statutory standards of control.¹⁹⁴ Art. 5:101 of the PETL restricts the strict liability to “abnormally dangerous activities” provided the damage resulted from the risk characteristic to the activity. There must be a foreseeable and highly significant risk of damage (regarding the seriousness or the likelihood), “even when all due care is exercised in its management.” Strict liability does not apply for activities which are matter of common usage.¹⁹⁵ According to Gerhard Wagner, strict liability can be the appropriate regime only where “the activity in question causes a substantial risk of harm even if all reasonable measures of safety have been observed.” Thus, he agrees with the limitations of regimes of strict liability in English, American, and German law.¹⁹⁶ Paragraph 20 of the third restatement of torts establishes strict liability for damages caused by abnormally dangerous activities, creating a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors. Activities of common usage (like automobiles) are excluded from the scope of the regime.¹⁹⁷ In its 1978 reports, the Royal Commission on civil Liability and Compensation for Personal Injury

193. A restrictive interpretation (to dangerous objects) was proposed also among French scholars, but without success. *Cf.* the report of Wagner, *supra* note 83, at 1033.

194. DCFR, *supra* note 77, at 3538. One could argue, however, that this regime of liability is not about strict liability if there is a possibility of exemption referred to the compliance with statutory rules of control and not only *force majeure* makes exemption possible.

195. Bernhard A. Koch, “Strict Liability” in European Group on Tort Law, *supra* note 83, 101 at 101, 105-06.

196. Wagner, *supra* note 83, at 1034.

197. *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 20 (2010).

suggested strict liability be imposed on the controllers of things or operations in two categories. First, in the case of things or operations which are of an unusually hazardous nature requiring close, careful and skilled supervision (such as explosives, flammable gases or liquids); and second, which are normally perfectly safe due to their nature, but if they do go wrong are likely to cause serious and extensive casualties (such as bridges, dams, stores, stadiums or other buildings where large numbers of people may congregate). According to this proposal, there should be an exhaustive list set by the legislator with the activities and things falling within the scope of the regime of strict liability. These statutory instruments should define the thing or activity in question, the particular risk associated with them and the controller who is liable for them.¹⁹⁸

Quebec could have avoided all the above (interpretative) difficulties had it followed the French legal tradition applying strict liability to damage caused by things, but even so, it would still have faced other problems inherent in that solution. These experiences, however, show that there is a strong connection between the scope of the rule of special liability and the conditions of this regime of liability, and that the two factors should be harmonized with one another. We share the view restricting strict liability to damages caused by dangerous things and activities, but suggest avoiding the interpretative difficulties possibly stemming from the different interpretations for abnormally hazardous activities and simply hazardous (or dangerous) ones; moreover we cannot support the exclusion of dangerous activities of common usage from the scope of strict liability. The fact that they are of common usage does not change their dangerous nature and has no effect on the reasons establishing strict liability in general (prevention, possibility of control over the activities and things of a dangerous nature, the risk shall be borne by the same person who enjoys the advantages of the activity, etc.). By dangerous activities or things we mean both alternatives, either if the inherent dangerous nature of the activity (thing) gives grounds for strict liability or it is about things that are able to cause serious and extensive casualties if they do go wrong. The common denominator is that the slightest anomaly or irregularity, regardless of whether it is caused by men or by the technical characteristics of the activity or thing in question, can cause serious harms. Last but not least, the current legislator has to choose between a general clause or a regime of strict liability governed by statutory instruments, setting up an exhaustive list of things and

198. "Royal Commission on Civil Liability and Compensation for Personal Injury, Report" Cmnd 7054-I, vol. 1 (1978) 3, para. 318 at 75, paras. 1643-44, at 342-43, paras. 1649 and 1651, at 344, para. 1666, at 348 (Chairman: Lord Pearson).

activities that fall within the scope of the special regime. To our understanding, the choice will depend mostly on the structural features of the legal system in question. Does it prefer abstract solutions or rather particular doctrines and causes of action? How is the relation to judicial discretion in general? Legal solutions at a general level of abstraction result in a higher level of flexibility enabling the courts to adjust the law to the fast changing needs and socio-economic circumstances in society, attaining more justice. Particular causes of actions, like exhaustive lists of dangerous activities establishing strict liability are, however, associated with a higher level of predictability of the law, even if it must be accepted that the legislator cannot react as fast as the courts if a new source of dangerous activity appears or the dangerous nature of another activity comes to light.

V. CONCLUSIONS

1. *Rationes communes* are units of law and jurisprudence, transplantable nuclei of the rules and principles representing fair and just solutions as far as achievable, constituting the relative optimum of both worlds, civil law and common law.
2. They pass the *test of time* as they have survived for a considerable period after their discovery or transplantation, as well as *the test of coherence* if they are compatible with the structure and characteristics of the recipient legal system, be it common or civil law.
3. There is an *organic and real interaction* between the two legal traditions in mixed legal systems. This cross-fertilization and blending increases the chance of transplanting and discovering more and more *rationes communes*.
4. Ideally, there *is a balanced and voluntary legal development*, as seems to be the case in Quebec in the last decades. The scope, amount and limits of blending are determined by the needs and free choice based foremost on economic coefficients.
5. '*Responsabilité civile*' is regarded as a sensible and true to life area of private law simultaneously seeking flexibility, fairness, and predictability. The general approach of the civil law and the case by case analysis resulting in particular causes of action in the common law can be connected and attuned under the umbrella of liability law.
6. There are legal solutions that can be found in both legal systems and that are perfectly adapted into their own structures without any sign of interaction or influence between common law and civil law,

which we can identify as *original parallelisms*. Concerning this group, the mixed jurisdiction experience as well as the comparative analysis plays a *declarative role* only.

7. Two other groups (influence towards *ratio communis* and hermeneutical equalization) deserve particular attention, because in connection with the solutions analyzed the interaction of the two legal traditions seems to have a *constitutive effect* resulting in many *rationes communes*. In the absence of interaction, the *ratio communis* concerned may not have been established or recognized, or only at a later time.
8. In the case of some legal instruments the constitutive effect of qualifying as a mixed legal system *cannot be proven*, though it is presumed and seems quite *likely*. For example considering culpability as an independent precondition of liability and not as an element of fault and the loosening up of the French concept of 'faute objective' or 'faute sociale' through the inclusion of some personal and subjective factors.
9. There are numerous examples in which the constitutive effect *is definitely due to the interaction* of the common law and civil law traditions or at least it is highly likely. These are:
 - the inclusion of qualified privilege and fair comment defenses into the fault requirement of Quebec (defamation) law;
 - the duty of loyalty and duty of care having left their mark on the Quebec regime of liability of managing directors;
 - the comprehensive evaluation of the objective (conceptual), the subjective (personal), and the functional approach of non-pecuniary damages and their relation to each other;
 - recognition of the cap on non-pecuniary damages as a sound limitation of damages in Quebec which can definitely be traced back to the *Andrews* case of common law origin;
 - Ontario as the first province in Canada and in the whole common law world enacting a special statute on the apportionment of liability (and damages) in the case of contributory negligence;
 - the justification of punishment and deterrence in the (civil) law of damages through adapting punitive damages in certain cases set forth by statutes, with reference to prevention, deterrence, and defenselessness.
10. Vast evidence supports the constitutive effect that amalgamates different notions and factors of different levels of abstraction where one approach is represented by the common law and the other one

by the civil law increasing the levels of predictability and fairness of law. This method can be called ‘hermeneutical equalization’, because the solutions at different levels of abstraction equalize each other in the course of a hermeneutical interpretation process searching for a better understanding of law. As examples can be cited:

- McLachlin J considering the application of proximity as a general approach to pure economic loss in addition to common law case groups after analyzing Quebec law;
 - common law aspects like reasonable reliance and awareness of the scope of specific transaction apparently limiting the extracontractual liability of auditors towards third parties in Quebec, supplementing the general notions of adequate cause, directness, and fault;
 - the question of relational losses being solved by first applying general notions, such as adequate cause, directness, foreseeability (civil law approach) and then, in addition to this general framework, applying useful common law approaches like the presumption of causal connection (and emotional proximity) in the case of close family members.
11. The mixed jurisdiction experience contributes to a better understanding of law even if not the best solution (more specifically, an inherently contradictory solution) has been achieved, such as in the case of liability for damages caused by things. The analysis showed the close connection between the scope of the regime of special liability for such damages and the basis of exoneration from liability. This experience permitted a conclusion about strict liability for damages caused by inherently dangerous things including the things of common usage.
12. We propose to conduct the same research in every mixed legal system and then compare the conclusions in order to re-evaluate and to rid them of the distortions caused by historical and coincidental factors. Through this cross-comparative methodology a real network of *ratio communis* can be achieved as a common heritage and experience of mixed jurisdictions, which could serve as a basis for the ‘free movement of legal cultures’ supporting national law reforms, codifications and (European) harmonization of the law.¹⁹⁹

199. Vernon Palmer highlights the horizontal “cross-comparative focus” in his pioneer book, *cf.* Palmer, *supra* note 20, at 14. Concerning the Scots and South African law, *cf.* Reinhard Zimmermann ed., *Mixed Legal Systems in Comparative Perspective, Property and Obligations in*

Scotland and South Africa (Oxford: Oxford Univ. Press, 2004). The aspect of cross-comparing all mixed legal systems is considered also by Smits, *cf.* Jan Smits, “Scotland as a Mixed Jurisdiction and the Development of European Private Law: Is There Something to Learn from Evolutionary Theory?” (2003) 75 EJCL 1 at 4 (www.ejcl.org/75/art75-1.html).