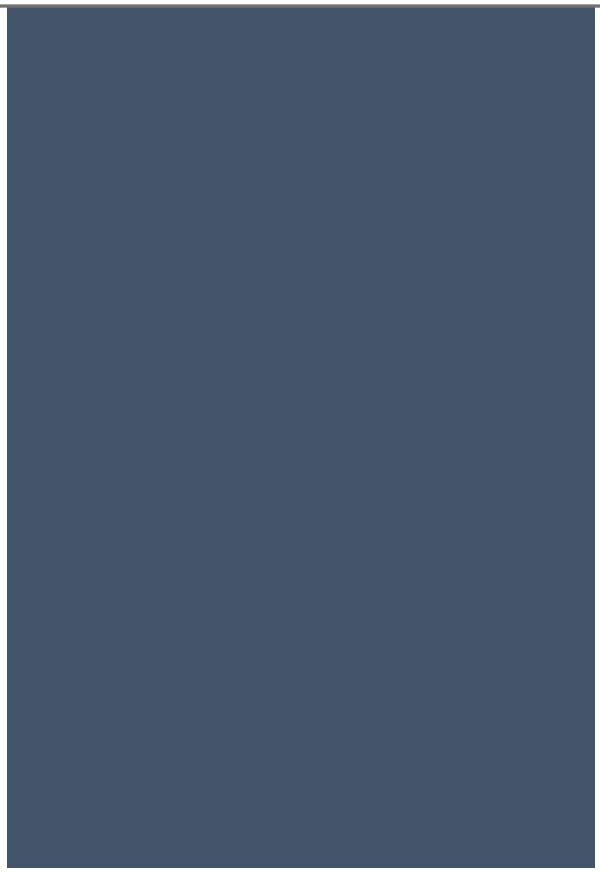

Comparative Law Review

2019

ISSN: 2983 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.
Office address and contact details:
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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE LAW REVIEW VOL. 10/1

THE NOTION OF CAUSATION AND THE TORT OF NEGLIGENCE (COMMON LAW) / EXTRA-CONTRACTUAL PERSONAL LIABILITY (CIVIL LAW) IN CANADA: A COMPARATIVE LEGAL STUDY

Marel Katsivela *

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The purpose of this study is to present the principles that govern causation in both legal traditions in Canada. In this regard, we seek to identify the similarities and differences specific to this notion. Given the complexity of the subject matter and the comparative aspect of the study, the analysis presents several challenges. In both legal traditions, causation is proven by the claimant on a balance of probabilities and not with scientific precision. Usually, causation is not subject to lengthy judicial commentary as it is easily established by the facts. The present study aimed to identify these similarities and differences. Despite the divergence and convergence of applicable rules, causation remains an area where judicial discretion is very present and constitutes a source of legal uncertainty as to the applicable rule.

I. INTRODUCTION

This article focuses on the comparative analysis of causation in the context of extra-contractual personal liability in Quebec civil law (article 1457 CCQ[84]) and the common law tort of negligence in Canada[85]. Causation is a common concern in both legal traditions.

In order to study causation in common law we must examine factual causation and remoteness. Factual causation establishes the relationship between the wrongful act and the damage suffered by the victim; it is a question of fact[86]. Several terms (i.e. causation, *causa sine qua non*, *cause in fact*) are used to qualify it. Remoteness does not render the defendant liable for any damage, even remote, related to negligence but only for the damage which has a legal relationship with it[87]. Several terms (i.e.

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[84] It is in 1955 that the Duplessis government commences the reform of the *Civil Code of Lower Canada*. Réseau Juridique du Québec, « Une vue d'ensemble du nouveau Code civil du Québec » online: http://www.avocat.qc.ca/public/iiccqvachon.htm#. The CcQ enters into force on January 1st 1994.

[85] The present study will use the term 'causation' in common law with respect to factual causation and remoteness in order to make the comparison with civil law. We will also use the terms 'injury' and 'damage' interchangeably. The elements of the tort of negligence are: the duty of care, the standard of care, factual causation, remoteness and damage where as those of the personal extra-contractual liability are: fault, causation, damage.
In civil law, written laws constitute the primary source of law, case law is a secondary source. C. de Secondat Montesquieu, *Esprit des Lois*, Paris, Firmin Didot, 1845, p. 327. On the contrary, common law common law is marked by the doctrine of precedent. Common law**:** D. Poirier, A.-F. Debruche, *Introduction Générale à la Common Law* (Cowansville, Canada : Yvon Blais) pp. 394, 353-354.

[86] *Snell c. Farrell*, [1990] 2 R.C.S. 311(*Snell*) cited by common law and civil law.

[87] For an illustration of this legal relationship see B. Franklin, "A little neglect may breed great mischief," in *Poor Richard's Almanack* (1758) :
"For want of a nail, the shoe was lost.

immediate cause, *causa causans*, proximate cause) are used in case law to qualify it. Remotenesse is a question of law[88].

Civil law makes no distinction between factual causation and remoteness[89]. Article 1457 CCQ requires the presence of a causal link between the injury and fault without specifying its content, leaving this task to case law and doctrine. Case law tends to use different expressions to describe the cause of damage - *causa proxima* (proximate cause), *causa causans* (direct cause), necessary, decisive, certain, determining cause -[90]. The causal link is a question of fact[91]. However, according to eminent writers, causation is, in fact, a mixed question of law and fact: when it comes to physical causation alone - determining the facts that constitute the material cause of the injury - it is a question of fact[92]. When reference is made to legal causation and the standards applicable in law in order to demonstrate the existence of the causal link, then it is a question of law[93].

In both legal traditions, causation is proven by the claimant on a balance of probabilities and not with scientific precision[94]. Usually, causation is not subject to lengthy judicial commentary as it is easily established by the facts.

The purpose of this study is to present the principles that govern causation in both legal traditions in Canada. In this regard, we seek to identify the similarities and differences specific to this notion.

For want of a shoe, the horse was lost.
For want of a horse, the rider was lost.
For want of a rider, the battle was lost.
For want of a battle, the kingdom was lost,
And all for the want of a horseshoe nail."
This excerpt poses the question of whether the negligence of a black-smith **(**causing the loss of a nail**)** was, in legal terms, the cause of the loss of the kingdom. This encompasses justice and policy considerations such as the fear of opening the floodgates of litigation, the presence of indeterminate liability, the need to compensate the victim, dissuasion, equity, the nature of the injury, the parties' characteristics.

[88] R. M. Solomon, M. McInnes, E. Chamberlain and S. G.A. Pitel, *Cases and Materials on the Law of Torts* 9me ed. (Toronto: Carswell, 2015) p. 635. There is an approximation between remoteness and the duty of care. Both constitute a mechanism of liability limitation and a question of law. The principal tool of liability limitation today constitutes the duty of care.

[89] Nevertheless, there is a distinction between material causation (causalité « matérielle ») based on facts and legal causation (causalité « juridique ») which is more restricted and underlines the determining cause of damage. Jusrisclasseur, Fasc. 21 'Lien de Causalité', para 2.

[90] J.-L. Baudouin, P. Deslauriers and B. Moore, (BDM), *La responsabilité civile*, 8th ed, Vol 1, (Cowansville : Yvon Blais, 2014) p.719-720. According to the authors, the use of multiple terms constitutes a serious obstacle in the study of causation.

[91] *St-Jean c. Mercier*, [2002] 1 RCS 491 (*Mercier*) para 98 cited, in general, in common law.

[92] V. Karim, *Les Obligations,* vol 1, (Montréal : Wilson & Lafleur Lté, 2015) p. 1214.

[93] *Ibid.* According to Pr. Tancelin, nothing in *Mercier* allows to conclude that causation is a question of fact. Proof by presumptions of fact constitutes a mode of proof which raises a question of law. M. Tancelin, *Des Obligations en Droit Mixte du Québec*, 7th ed, (Montréal : Wilson & Lafleur, 2009) p. 567.

[94] Civil law: *Mercier, supra* note 8 para 28, *Laferrière c Lawson*, (1991) 1 SCR 541 (*Lafarrière*) cited by common law and civil law. Both decisions cite *Snell* in common law. Common law : *Snell supra* note 3.

Given the complexity of the subject matter and the comparative aspect of the study, the analysis presents several challenges. For this reason, we do not aspire to cover all aspects of causation or to be exhaustive in our remarks[95].

In undertaking this study, we join the line of comparatists who opine that the responsibility of comparative law is to make clear to what extent the convergence of applicable rules is present[96]. From this point of view, the convergence of applicable rules in tort and extra-contractual liability is not the objective to be attained. Rather, examining the rules applicable in the two legal traditions and determining the degree of convergence or divergence of these rules is what needs to be examined. This will lead to a better understanding of the rules applicable at the national level and will allow to better function in a world that is increasingly seeking the interaction of the rules of law in different legal systems.

II. FACTUAL CAUSATION (COMMON LAW) AND CAUSATION IN CIVIL LAW.

In order to establish factual causation in common law, the "but for" test (sometimes referred to as *sine qua non* criterion) is mainly used[97]: 'but for' the breach of the standard of care by the defendant, would the damage have occurred? If yes, the negligence is not the cause of the damage. If not, factual causation is established. In *Kauffman v Toronto Transit Commission (Kauffman)*[98] the court did not hold the defendant liable since 'but for' its negligence – the fact that it did not place a rubber handrail on an escalator - the injury of the plaintiff would probably have occurred. The advantage of this criterion is that it is easy to apply[99]. It has, however, been criticized for inviting speculation and for being, at times, over-inclusive[100]. Despite criticism, it constitutes, at present, the main tool for establishing factual causation in common law in Canada[101].

In civil law, case law analysis reveals that the permanent feature of all Québec decisions is that the

[95] We are not going to examine in detail, for example, *novus actus interveniens,* independent sufficient causes or the *thin skull* rule.
[96] A.T. von Mehren, "The Rise of Transnational Legal Practice and the Task of Comparative Law" (2001) 75 Tul.L.Rev. 1215 p. 1215, 1216.
[97] *Clements (Litigation Guardian of) c Clements*, 2012 CSC 32 para8, 9s (*Clements*) cited in common law and in civil law (for the latter the citation is general).
[98] [1959] OR 197 (ON CA) confirmed by the Supreme Court of Canada (1960) 22 DLR (2e) 97 (CSC).
[99] *Sacks v. Ross*, 2017 ONCA 773 para 45.
[100] *March v. E. & M.H. Stramare Proprietary Ltd.*, (1991) 171 C.L.R. 523 (Austl.) paras 22- 23.
[101] *Clements*, *supra* note 14.

injury must be the logical, direct and immediate consequence of the fault (direct link)[102]. Different legal theories may establish this causal link[103]. Among these, and even though it is a common law requirement, the "but for" test is regularly used by Quebec courts[104]. It was, thus, held that had it not been for the absence of a handrail or a ramp along the stairs of a building creating a dangerous situation, the victim would not have been involved in an accident[105]. The liability of the defendant was retained in this case.

The equivalence theory, which constitutes a jurisprudential trend in civil law to establish causation in medical liability cases (i.e. in the case of lack of information of the patient by the doctor), also approximates the *but for* test in common law[106]. This theory considers as causal any occurrence without which the damage would not have taken place: if, among the occurrences which contributed to the realization of the damage appears the fault of a person (condition *sine qua non*), the causal link is established[107]. Civil courts may thus hold a doctor liable if, but for the lack of information provided to the patient regarding the proposed treatment or procedure, the patient would not have consented to the proposed treatment[108]. The advantage of this theory lies in its simplicity: it considers as causal any fact without which the damage would not have occurred. Critics criticize it for failing to make a qualitative and quantitative selection of the causes of the injury, a criticism similar to the one of the *but for* criterion in common law[109].

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[102] Articles 1457, 1607 CcQ. *Caneric Properties Inc c Allstate, compagnie d'assurances*, [1995] RRA 296 (QCCA)(*Caneric*), *Promutuel Dorchester c Automobiles Île-Perrot Inc.*, 2003 CanLII 25829 (QCCS) para 13, 15 citing doctrine. BDM, *supra* note 7 p. 720. The term 'immediate'does not refer to the chronological order of things but to the close relationship that must be established between he damage and the fault. *Promutuel Bagot, société mutuelle d'assurances générales c. Boutique du foyer de Saint-Hyacinthe inc*., 2014 QCCA 1314 para 32.

[103] BDM, *ibid* pp.720-721.

[104] L. Khoury, Jurisclasseur, Fascicule 21 (lien de Causalité) para 14.1.

[105] *Jobin c Union canadienne, Cie d'assurances*, 2004 CanLII 17594 (QCCQ) para 10. *Desbiens c Casino de Montréal*, 2002 CanLII 29307 (QCCQ), to compare with *Kauffman* in common law, *supra* note 15.

[106] *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé* 2019 QCCA 358 para 667 (*Tobacco WL*) : the «but for » criterion constitutes an application of the equivalence theory. For this test in civil law: BDM, *supra* note 7 p. 722, 714. Jurisclasseur, *supra* note 6 paras 6, 45s. However, in general, this theory is rejected in civil law. In effect, in retaining all the conditions *sine qua non* as the cause of the injury, it does not reflect the criterion of the direct causal link.

[107] BDM, *ibid* p. 714, 722. *Langevin c. Ross*, 2009 QCCQ 1302 para 123 citing BDM, *Deguire Avenue c Adler*, [1963] BR 101 - - the fault of the painters who failed to connect the gas stove to the supply pipe in an apartment, and the fault of the janitors who, more than a month later opened the meter which directed the gas in the feeding pipe causing, soon after, an explosion and wounding inhabitants in the adjacent apartment, are, both, causes that contributed to the production of the damage -. This case mentions the equivalence theory.

[108] *Pelletier c. Roberge*, 1991 CarswellQue 190 (CA) which cites common law cases (Hopp c. Lepp, [1980] 2 R.C.S. 192 and Reibl c. Hugues, [1980] 2 R.C.S. 880) but which nuances also its position.

[109] BDM, *supra* note 7 p. 714. *Supra* notes 17 and accompanying text for the common law.

However, the approximation or convergence of the criteria used in common law and in civil law is only relative. Indeed, in civil law, the theories mentioned do not establish factual causation as their correspondents in common law but the causal link in general (different conception of causation)[110]. In addition, several theories - and not just the two described so far - exist to establish causation in civil law[111]. Civil law judges may also not rely on a theoretical foundation or a logical explanation, but, rather, on their sovereign and subjective appreciation, as well as the application of their *bon sens* (common sense)[112]. Cases may refer to the cause ("real", "determining" etc.) of injury without applying a specific criterion of causation[113]. While having the advantage of being flexible, this subjective evaluation of causation creates uncertainty[114]. As such, it contrasts the *but for* criterion as the basic tool for establishing factual causation in common law which creates more legal certainty as to the applicable rule in this legal system.

Inference (unfavorable) of causation (unfavourable inference) (common law): in some complex, technical cases, factual causation may be inferred in common law on the basis of "very little affirmative evidence on the part of the plaintiff" and in the absence of evidence to the contrary[115]. Inference is consistent with the *but for* test[116] and occurs when the latter criterion is difficult to apply. For example, in *Snell*[117], Ms. Snell's loss of vision in her right eye months after an eye surgery could not, following the but for test, be attributed to medical negligence. The court could, however, infer causation on the basis of the plaintiff's limited evidence (i.e., the negligent continuation of the surgery after the retro-ocular

Another causation theory with sporadic application is the *proximate cause* theory. This theory retains as causal the event that arises last in time and which could have objectively sufficed to produce the total damage. It poses a strict, injust rule for the victim. BDM p. 715-716.

[110] *Supra* note 6 and accompanying text.

[111] See *infra* notes 70s and accompanying text for the primary tests.

[112] L. Khoury, « The Liability of Auditors Beyond their Clients : a Comparative Study » (2001) 46 MCGLJ 413, 452. Jurisclasseur, *supra* note 6 para 5. As the author notes, this reality is criticized. This reality is magnified by the plurality of tests present for establishing causation in civil law and the fact that these tests are not always attributed the same importance in civil law.

[113] This was the case of *Volkert c Diamond Truck Co.* [1940] SCR 455 (*Volkert*)- a case that would be governed today by the *Automobile Insurance Act* RLRQ, c A-25 article 108 : no fault liability -, *Kenneth Cavanagn c Bibeau* (1975) CA 239. In the case of medical negligence, the application of the equivalence theory in *G.M. v Pinsonneault* (2014) QCCS 1222 para 361s is not as evident as the use of the *but for* criterion in a similar case in common law : *MacGregor v Potts,*180 ACWS (3d).

[114] Khoury, *supra* note 29.

[115] *Snell supra* note 3.

[116] *Clements, supra* note 14 para 10 confirming *Snell.*

[117] *Supra* note 3.

bleeding occurred, favored the production of the injury)[118]. In terms of inference of causation, the burden of proof is always on the claimant but it is less onerous[119]. The discretion left to the judge to infer causation is considerable.

In civil law, causation may be proven by presumptions[120], a mode of proof with an established theoretical framework, contrary to common law. According to article 2846 CCQ: "A presumption is an inference drawn by the law or the court from a known fact to an unknown fact.**"**. In the case of presumptions in civil law, the burden of proof falls on the plaintiff but his/her task is less onerous[121]. There is a distinction between legal presumptions[122] and presumptions of fact. The latter are left to the discretion of the court - judicial discretion is very present in this area - which must take into consideration those which are serious, precise and concordant (article 2849 CcQ). According to case law, presumptions are serious when the relation of the known fact to the unknown fact is such that the existence of one establishes, by a powerful induction, the presence of the other; are precise, when the inductions which result from the known fact tend to establish directly and particularly the unknown fact; are concordant, when, whatever their origin, they tend, as a whole, to establish the

[118] *Ibid*.The presence of factual presumptions in common law is a related concept to the inference of causation and depends on the frequence of the occurrence. Lara Khoury, *Uncertain causation in Medical Liability* (Québec, Yvon Blais, 2006) p.40, 41. The author favors these notions which allow for flexibility in establishing causation (p. 226) in medical liability.

[119] In *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 para 15, 38 (*Fraser*) – cited by common law/civil law – the plaintiffs were technicians who worked in a hospital laboratory. They were diagnosed with breast cancer and were compensated on the basis of exposure to cancer genic substances in the work place, to which was added the statistically important group of breast cancer cases of laboratory personnel. According to experts each of these elements does not, in itself, establish causation. To compare with *Benhaim,* in civil law see *infra* note 41.

[120] *Laferrière, supra* note 11.

[121] Presumptions do not reverse the burden of proof and do not overrule the traditional rules of proof of causation which are based on the balance of probability. Tancelin, *supra* note 10 p. 442-443, 567.

[122] According to 2847 CcQ : « A legal presumption is one that is specially attached by law to certain facts; it exempts the person in whose favour it exists from making any other proof. ». Legal presumptions will not retain our attention. For an example in civil law see article 1465 CcQ. Legal presumptions also exist in common law. Lynda Collins, "Material Contribution to Risk and Causation in Toxic Torts" (2001) 11 J. Env. L. & Prac. 105, 131; Khoury, *supra* note 35. Proof of causation by presumption also refers to the violation of a law or regulation that contains an elementary standard of care - i.e. defective red light on the left rear wing of a tractor forcing the vehicle in the back to make a maneuver producing an injury - immediately followed by an accident that the law or regulation seeks to prevent. In this case, the court may presume causation in the absence of proof to the contrary. *Morin c Blais*, [1977] 1 RCS 570 – case cited in common law and which would be governed today by *Automobile Insurance Act*, RLRQ, c A-25/no fault liability in civil law-. Karim, *supra* note 9 p. 1217 for another example. This type of presumption is rare and does not create a new liability regime. Jurisclasseur, *supra* note 6 para 30. To our knowledge, there is no similar presumption in common law.

fact that should be proven[123]. In *Cohen v. Coca-Cola Ltd.* (Coca-Cola[124]) - a case cited in common law and in civil law - the liability of the manufacturer of bottles of carbonated beverage was established with regards to the injury of a restaurant employee who, while handling a bottle normally, it burst spontaneously injuring his eye. On the basis of presumptions of fact (i.e. no mishandling of the bottle by the employee, a defective bottle could easily pass inspection control) the court found that the defective bottle was the probable cause of the injury.

Presumptions of fact in civil law are the equivalent of the (unfavorable) inference of causation in common law[125]. As the above-mentioned cases (Snell/common law-Coca-Cola/civil law) affirm, both mechanisms establish the cause of injury on the basis of factual evidence and alleviate the burden of proof of the claimant. Similar judicial conclusions in this area are not lacking. Thus, in quoting *Snell*, common law and civil law courts conclude that statistical evidence is one of the evidence to be considered in inferring causation, but not a conclusive evidence in itself[126]. Despite the convergence of judicial findings in some cases, the discretion left to judges to establish presumptions of fact in civil law/ inference of causation in common law creates legal uncertainty. For example, the criterion of the increased risk of harm that some common law decisions seem to favor in medical cases in the post-*Snell* period, has not been consistently followed by common law or civil law courts[127].

Material Contribution Test (common law): In common law, *Clements* did not only assert the overriding role of the common law *but for* test in establishing factual causation. It also noted that the latter could exceptionally be established by the material contribution test, - where the defendant's negligence makes a material, that is to say, more than a minimal contribution to the injury sustained-[128] according

[123] *Investissements Mont Écho Inc. c. Banque Nationale du Canada,* 2008 QCCA 315 para 60s.
[124] [1967] SCR 469. Some common law decisions citing it mention the inference. In *Lacasse c. Octave Labrecque ltée*, 1995 CanLII 5539 (QC CA) the court inferred causation based on the facts present. In a more recent case, *Benhaim c St Germain* 2016 SCC 48 (*Benhaim*) – cited by common law and civil law cases – the Supreme Court of Canada refused to infer medical causation on the basis of statistical evidence. On their own, statistics do not establish causation. – For a similar conclusion in common law see *supra* note 36.
[125] *Benhaim, ibid* para 59.
[126] Common law: *Fraser, supra* note 36. Civil law: *Benhaim, ibid*.
[127] Khoury, *supra* note 35 p. 164-174.
[128] *Athey c Leonati*, (1996) 3 RCS 458 (*Athey*) paras 15, 44 (the court concluded that a 25% contribution to a herniated disc is more than *de minimis*). The test is based on considerations of policy (equity, justice) allowing the plaintiff to be compensated even if he/she cannot establish the causal link based on the *but for* test. Before *Clements* - *supra* note 14- this test had a relatively limited impact on the causation analysis. Solomon et al, *supra* note 5 p. 602-603. Cases that marked the evolution of this test before *Clements* are: *Cook c Lewis,* [1951] R.C.S. 830 (*Cook*)- said to

to criteria[129] which recall the facts of *Cook v Lewis*[130]. In this case, two hunters fired simultaneously on the plaintiff hit by a single bullet. Being unable to determine which of the hunters caused the injury, the court held the two hunters jointly and severally liable towards the victim.

Although some civil law cases refer to the test of material contribution to assess causation, one may doubt its usefulness in civil law[131] which bases causation on the principle of direct causal link. Despite this fact, the type of situations evoked by *Cook* in common law finds an equivalent in civil law, originally in case law and later in article 1480 CCQ. which provides:

> 1480. Where several persons have jointly participated in a wrongful act or omission which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily bound to make reparation therefor.

Although the language used by article 1480 CcQ (civil law) and the criterion of material contribution described in *Clements* (common law) differ, - more formal and abstract in the civil code, more pragmatic in common law -, the similarity of the applicable rules is obvious. In both cases, there are several negligent authors and the cause of the damage cannot be identified. In both cases, we refer to an equitable solution and to a burden of proof favoring the claimant[132]. However, in civil law it is the code that establishes a rule which has an impact on causation and not precedent that prescribes the criteria or theories establishing factual causation as is the case in common law.

In total, similarities exist between the *but for* test (common law, civil law)/equivalence theory (civil law); inference of causation (common law)/presumptions of fact (civil law); the criterion of the material contribution under *Clements*/article 1480 CcQ. The importance of the noted comparisons remains, however, relative because of the different conception of causation in the two legal systems

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be at the root of this test-, *Walker Estate c York Finch General Hospital*, 2001 1 CSC 647 (*Walker*), *Resurfice Corp. c Hanke*, 2007 CSC 7 (*Resurfice*).

[129] *Clements, supra* note 14 para 46 on the criteria to be followed: « (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone"**.**

[130] *Supra* note 45. See a similar commentary: *Book Reviews and Review Essays* (2017) 59 CBLJ 245 under 3. *Cook* operates a reversal of the burden of proof: *Hollis v. Birch*, 1995 CarswellBC 967 para 85, 86.

[131] Jurisclasseur, *supra* note 6 para 15.

[132] More specifically, we talk about a reversal of the burden of proof in common law and in civil law. Common law, *supra* note 47. Civil law : *Mercier*, *supra* note 8 para 118 where the court approximates *Cook* (common law) and civil law cases.

(i.e. the distinction between factual causation/remoteness in common law does not exist in civil law), the different sources of law[133], the different emphasis given to the criteria chosen to govern causation in the two systems (i.e. the importance of the *but for* test in common law in relation to the civil law) and the considerable judicial discretion present. The latter creates legal uncertainty as to the applicable rule.

III. Remoteness (Common Law) and Causation in Civil Law

Another element of the tort of negligence establishing a close link between the injury and negligence is remoteness. General policy considerations (i.e. fairness, compensation, the fear of opening the floodgates of litigation) shape judicial reasoning regarding this element[134]. In addition, courts use the following criteria to establish remoteness without choosing necessarily one of them as being the best one[135]: reasonable foreseeability (*Wagon Mound No.1*), foreseeability of the type of damage (*Hughes*) and the foreseeability of the real risk of damage (*Wagon Mound No.2*). The first criterion (*Wagon Mound No.1*) is quoted most often by the courts[136].

In the English case *Overseas Tankship (UK) Ltd. c Dead Dock & Engineering Co Ltd.* (*Wagon Mound No.1*)[137] dock owners commenced an action against the charterers of Wagon Mound because its employees dumped a large amount of fuel into the water which caught fire, damaging the dock of the plaintiff. By adopting the reasonable foreseeability test - the defendant can only be held liable for the reasonably foreseeable consequences of his/her actions (foreseeability of the sequence of events)[138] - the court rejected the direct link criterion proposed by *Re Polemis & Furness, Withy & Co*[139]. A direct

[133] *Supra* note 2.
[134] *Supra* note 4.
[135] L. Bélanger-Hardy, « Les délits » in Louise Bélanger-Hardy et A. Grenon, dir, *Éléments de common law canadienne : comparaison avec le droit civil québécois*, Toronto: Thompson Carswell, 2008, p. 403. Also, courts may decide causation without name the criterion used. Solomon et al, *supra* note 5 p. 640.
[136] M. Linden, Allen, B. Feldthusen, *Canadian Tort Law,* 9th ed, (Toronto: LexisNexis Butterworths, 2011) p. 375 (LF).
[137] (1961) AC 388 (CP).This case serves as precedent in Canada. In this case, the employees of the plaintiff stopped welding work with the dumping of the oil but restarted their work soon after, when the supervisor informed them that there was no danger. A piece of molten metal fell into the water and ignited a rag which ignited the oil and the fire started**.**
[138] G. HL Fridman, *The Law of Torts in Canada,* 2e ed, (Toronto, Ont: Carswell, 2002) p. 424.
[139] (1921) 3 KB 560 (C.A. Ang).

injury may not be foreseeable and an indirect injury may be foreseeable. According to the court, it would be unfair to hold the defendant liable in the first case and not liable in the second case. As, at that time, the defendant did not know and could not reasonably know that combustion oil could ignite when spread over water, foreseeability could not be established.

The reasonable foreseeability test was diluted[140] by the English decision *Hughes v Lord Advocate*[141]. In this case, two children (eight and ten years' old) explore the unsupervised site of a post office with a lamp they find on the spot. One of the children stumbles on the lamp that breaks and the vaporized paraffin produces an explosion resulting in more severe burns to the children than those that could reasonably be expected. The court holds the defendant liable because the damage is of the same type - burns in our case – that a reasonably prudent person could foresee.

Another qualification of the *Wagon Mound No. 1*[142] was put forward by *Wagon Mound No.2*[143], a case based on the same facts as *Wagon Mound No. 1* except that in this case the plaintiffs were not owners of the nearby dock - as in *Wagon Mound No. 1* - but owners of the boats moored nearby. When the spilled oil caught fire, the boats were damaged. In the ship owners' action against the *Wagon Mound*'s charterers, the Privy Council decided that it was necessary to establish the foreseeability of a real risk - a possible, real, not farfetched risk - of damage. In this case, the plaintiffs provided evidence allowing the court to conclude that the fire hazard was a possibility that could only be realized in very exceptional circumstances: the foreseeability of a real risk of damage was established and the defendants were held liable[144].

Some authors criticize *Wagon Mound No.2*, claiming that it extended the foreseeability requirement

[140] LF, *supra* note 53 p. 366.

[141] [1963] 1 All ER 705 (Ch.L). See also *Assiniboine South School Division No. 3 c Greater Winnipeg Gas Co.*, (1971) 4 W.W.R. 746 (C.A.Man) – apportionment of liability between a negligent gas company and a negligent child who lost control of his snowmobile and hit a gas pipe resulting in an explosion causing material damage -. A reasonable person could foresee the type of damage that occurred.

[142] LF, *supra* note 53 p. 373.

[143] (1966) 2 All ER 709 (CP). The court noted that the limits of an action based on nuisance and on negligence are the same.

[144] As the court noted, in *Wagon Mound No. 1*, the plaintiffs were dock owners and it was not in their interest to insist on the foreseeability of the injury because if the injury was foreseeable for the defendants it would also be foreseeable for the plaintiffs which would render them liable since contributory negligence at that time was a complete defense. In *Wagon Mound No. 2* the plaintiffs had not contributed to the production of the damage. Consequently, they could insist on its foreseeability by producing additional proof allowing the court to adopt a different holding.

and reinstated the *Re Polemis*' direct link test[145]. However, recent case law cites it[146]. It follows that the real risk of damage test and the multiplicity of foreseeability criteria to establish remoteness offer considerable discretion to judges but lead also to confusion[147].

Quebec civil law makes no distinction between factual causation and remoteness[148]. Moreover, in this legal tradition, causation is the main tool for restricting extra-contractual personal liability whereas in common law it is the duty of care that plays the corresponding role and, incidentally, remoteness[149]. In civil law, the injury must be the logical, direct and immediate consequence of the fault (direct link)[150]. This criterion is similar to remoteness in common law[151]. Indeed, the two criteria seek to establish the cause (s) most closely related to the injury. However, causation in civil law is stated by the CCQ and is specified by case law whereas in common law the two elements of the tort of negligence (factual causation, remoteness) are established by precedent[152]. Further, common law has rejected the direct link criterion (*Wagon Mound No.1*) in favor of the reasonable foreseeability one to establish remoteness unlike civil law which uses the direct causal link as the basic standard of

[145] See, for example, H. Glasbeek, "Wagon Mound II - *Re Polemis* Revived: Nuisance Revised" (1967) 6 U.W.O.L. Rev. 192 aux 199-200.
[146] The *Wagon Mound No. 2* criterion was affirmed, for example, by *Mustapha c Culligan,* (2008) 2 SCR 114 and other cases. LF, *supra* note 53 p. 375-376. On *Mustapha* in common law and in civil law see M.Katsivela, « La notion du dommage dans le cadre du délit de négligence (common law) et de la responsabilité extracontractuelle du fait personnel (droit civil) au Canada: une étude en droit comparé » (2018) 96 Rev du B Can. 605.
[147] Some authors propose a new approach to remoteness : the negligent author should be exonerated only if the result of his negligence is freakish, far-fetched, fantastic or highly improbable, 'one in a million'. LF, *supra* note 53 p. 377s.
It is interesting to note that the notion of reasonable foreseeability is found in the duty of care, the standard of care, and in remoteness in common law. According to the Australian case *Minister administering an Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd.* (1983) 2 N.S.W.L.R. 268, 295-296 (C.A .) the test serves different functions for the different elements of the tort of negligence : "[…]The proximity upon which a *Donoghue* type duty rests, depends upon proof that the defendant and plaintiff are so placed in relation to each other that it is reasonably foreseeable as a possibility that careless conduct of *any kind* on the part of the former may result in damage of *some kind* to the person or property of the latter…The breach question requires proof that it was reasonably foreseeable as a possibility that the *kind of carelessness* charged against the defendant might cause damage *of some kind to the plaintiff's* person or property…The remoteness test is only passed if the plaintiff proves that *the kind of damage* suffered by him was foreseeable as…[an] outcome *of the kind of* carelessness charged against the defendant».
[148] *Supra* note 6.
[149] Civil law : *Elliott v Entreprises Cote-Nord Ltee,* [1976] AZ-76011170 [1976] C.A. (*Elliott*), *CSL Group c St-Lawrence Seaway Authority,* 1996 CarswellQue 1110 (CA) para 124, *Canadian National Railways Co. V Norsk Pacific Steamship Co.(Norsk),* [1992] 1 SCR 1021 p. 1143-4, a common law case commenting on civil law. Jean Louis Baudouin, « La Responsabilité civile comparée: droit civil et common law » Rev. Jur. Thémis 2014 48 R.J.T. 683 p. 692 (JLB). Common law: *supra* note 5. It is also to be noted that cases with similar facts may be decided in civil law at the level of causation (*Volkert, supra* note 30) and in common law under the duty of care [*Rankin (Rankin's Garage & Sales) c. J.J.*, 2018 CSC 19]. See also *infra* note 86 (*Hercules, Wittingham*).
[150] *Supra* note 19.
[151] Mariève Lacroix, «La relativité aquilienne en droit de la responsabilité civile — analyse comparée des systèmes germanique, canadien et québécois» (2013) 59 :2 McGill L.J 427, 446.
[152] *Supra* note 2.

causation.

The causation criteria which are in line with the principle of direct causal link and mostly followed by civil law cases in order to establish it are adequate causality and reasonable foreseeability[153]. The objective of the adequate causality theory is to identify the true cause(s) of injury by removing those which are incidental (mere opportunities or circumstances)[154]. This means that occurrences that contribute to the realization of the injury, in other words, causes *sine qua non* (without which the damage would not have occurred) are not necessarily adequate causes[155]. An adequate cause makes objectively possible the production of the damage or, in the ordinary course of events, substantially increases the likelihood of the occurrence of the damage[156]. In *Caneric*[157], both the fault of the owner of a building who did not act as a prudent and diligent landlord at the time of the incident, and the fault of city officials who could have prevented the infiltration of water in the neighbor's basement, were deemed adequate to produce the damage (infiltration), leading to apportionment of liability. A third general maintenance fault of the owner of the building was not considered a direct cause of the damage.

In determining causation in *Caneric*, the judge did not only rely on the theory of adequate causality but also on the theory of reasonable foreseeability. The latter establishes a causal link between the fault and the damage where the type of injury produced is ordinarily foreseeable by the person whose liability is under scrutiny[158]. This criterion is used by case law independently[159] or in conjunction with[160] the theory of adequate causality. In the latter case, the question is to determine the occurrence that objectively caused the damage and, when the occurrence is linked to a fault, to determine whether

[153] *Caneric, supra* note 19*, Gaudreault c Club de Neiges Lystania* [2000] RRA 904 affirmed on appel : 2002 CarswellQue 535(*Lystania*). *Fortin c Mazda Canada Inc.*, 2016 QCCA 31 para 158, BDM, *supra* note 7 pp. 720-721. For other applicable theories see *supra* notes 21-26 and accompanying text.
[154] BDM, *supra* note 7 p. 714-715. This theory is frequently used. *Tobacco, supra* note 23, para 666.
[155] *Ibid* (BDM) p. 715. Following this theory, the evaluation of the adequacy of the causal link is made in a manner that is more restrictive than under the equivalence theory. Jurisclasseur, *supra* note 6, para 9.
[156] *Ibid* (BDM). This theory contains a dose if uncertainty. Determining what could happen in the normal course of events contains a good deal of arbitrariness. BDM, *supra* note 7 p.715.
[157] *Supra* note 19.
[158] BDM, *supra* note 7 p.716.
[159] *Automobile Cordiale ltée c. DaimlerChrysler Canada inc.*, 2010 QCCS 32 paras 123-124, *Vidéotron ltée c Bell Expressvu lp*, 2015 QCCA 422, 2015 CarswellQue 1731 paras 27, 75-76. In these cases, mention is made of the adequate causality test but the emphasis is put on the reasonable foreseeability.
[160] *Caneric, supra* note 19, *Lystania, supra* note 70. *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122 para 156.

its consequences were reasonably foreseeable[161]. In *Lystania*[162], two spouses rode a snowmobile in the defendant's premises, on a trail that was not closed to snowmobilers due to the negligence of the defendant. Given the state of the trail, one of the spouses fell off the snowmobile and died shortly after being struck by the other spouse (plaintiff) who was driving with excessive speed and little visibility. The latter spouse was also seriously injured. Applying the adequate causality theory coupled with that of reasonable foreseeability test, the court found that the defendant's negligence made the accident objectively possible and that the defendant could foresee the consequences. There was, however, an apportionment of liability because of the plaintiff's fault.

Similarly to the adequate causality test, the reasonable foreseeability criterion is not exempt from criticism. It has been mostly criticized for analyzing the conduct of an individual leading, indirectly, to the identification of the fault itself[163]. In addition, reasonable foreseeability presupposes the presence of a fault and, consequently, it cannot apply in its absence, for example, in the presence of a force majeure event[164].

Apart from the approximation of the direct causal link (civil law) to remoteness (common law)[165], an approximation seems to exist between the criterion of reasonable foreseeability in determining causation in civil law and the notion of foreseeability (remoteness) in common law. Indeed, despite the multiplicity of foreseeability tests for establishing remoteness in common law, the notion of foreseeability constitutes their common denominator but also one of the criteria for establishing the direct causal link in civil law. It is interesting to note, in this regard, that the direct causal link criterion, rejected in common law in establishing remoteness, is adopted by civil law to establish the causal link and can be proven by the reasonable foreseeability test that compares with the notion of foreseeability in common law in establishing remoteness. Thus, the foreseeability criterion may sanction the direct causal link (civil law) or be distinct from it (common law-remoteness).

Despite the noted approximations, one may not draw general conclusions regarding the convergence

[161] BDM, *supra* note 7 p 725. As the authors note, case law uses the two tests as two separate filters of causation.
[162] *Supra* note 70.
[163] BDM, *supra* note 7 p. 717. For the criticism of the adequate causality test see *supra* note 73.
[164] *Ibid.* With respect to the presence of a fault and force majeure see also *infra* notes 94s and accompanying text.
[165] *Supra* note 68 and accompanying text.

of causation (civil law)/remoteness (common law) rules in the two legal traditions except, perhaps, to note that the discretion left to judges remains considerable in both legal traditions. On the one hand, in civil law, there is only one reasonable foreseeability criterion and not three as is the case in common law. On the other hand, there are criteria to establish causation in civil law which do not have an equivalent in common law (i.e. adequate causality). Further, as we have mentioned, causation in this legal culture is often not based on any theoretical basis but, rather, on a subjective assessment of facts based on common sense[166].

In this respect, a final point is worth noting: in common law, policy considerations underline the remoteness analysis[167]. In civil law, as honorable justice Baudouin notes, policy considerations are implicitly contained in the judge's analysis of causation[168]. In this way, a civil law judge may invoke a legal criterion (i.e. the direct causal link) to establish or not causation without having to resort to policy considerations[169]. This further highlights the discretion left to judges in both legal traditions to restrict, if needed, the scope of liability[170]. The judicial discretion renders more relative the approximations regarding causation noted in the two legal cultures and does not promote legal clarity.

[166] *Supra* note 29 and accompanying text.
[167] *Supra* note 4.
[168] JLB *supra* note 66 p.692. The approach in civil law remains conceptual, which does not render necessary any policy-oriented discussion. L. Khoury, *supra* note 29 p. 470 on the auditors' liability and *supra* note 35 p. 70. M.Katsivela, *supra* note 63 on this point.
[169] This was the case of *Wightman c Widdrington (Succession de),* 2013 QCCA 1187 (*Widdrington*) – leave to appeal refused - (direct causal link analysis), a case regarding auditors' liability towards investors which refused to follow *Hercules Managements Ltd c Ernst & Young*, [1997] 2 RCS 165 (*Hercules*-duty of care analysis) in common law but which reached – at least in part – the same conclusion on the basis of causation and not policy considerations as was the case in *Hercules*. These cases regarding similar facts were also decided on the basis of different elements of liability (duty of care in common law- causation in civil law), which renders more relative any approximation regarding causation between the two legal cultures. See also *Rankin, Volkert, supra* notes 66, 30 and accompanying text for cases based on similar facts in the two legal traditions but decided at different levels of liability. See also *Compagnie Miron ltée* c. *Brott (Brott)* (1979) C.A. 255, par. 11 **(**civil law) where the defendant at the root of an electricity failure producing a damage more important than one that could reasonably be foreseen due to the strike of Hydro-Québec delaying the repair for 10 days, was held entirely responsible for the damage. The court insisted on the direct causal link between the fault and the damage, also favoring an equitable solution in retaining the defendant's liability.
Further, civil law tribunals may help the victim in the analysis of causation as in the case of the hunters who fire simultaneously on the victim hit by a single bullet (case codified by article 1480 CcC). *Supra* notes 48s and accompanying text, BDM, *supra* note 7 pp. 718-719. As the authors note it (p. 719) case law is also influenced by the nature and the intensity of the fault in order to establish causation. The more serious the fault, the less the court will be demanding in establishing a causal link. *Beauchesne c Bélisle*, (1964) CS 171 paras 20-21 – the owner of a car who rents it knowing that the brakes are defective assumes liability -.
[170] Causation constitutes the principal tool of restriction of liability in civil law and one of the tools restricting liability in common law *Supra* note 66 and accompanying text.

IV. MULTIPLE CAUSES (COMMON LAW) (CIVIL LAW)

In both common law and civil law, there are several causes that can be at the root of a damage. Common law distinguishes between independent insufficient causes and independent sufficient causes producing an injury. Depending on the category, different causation criteria apply[171]. Within this distinction others follow, such as the one between tortious factors and non-tortious factors. For example, the negligence of an employee who did not disclose his health problem to the employer and the negligence of the employer who did not put any safeguards in place to protect the employee's injury while working at a height, are tortious causes insufficient in themselves to produce an injury (death of the employee in this case) but necessary to do so (*Cork c Kirby Maclean Ltd*)(*Cork*)[172]. In the presence of such causes, the criterion of factual causation and that of remoteness are applied to each one of them. In *Cork*, the negligent actions of the employee and the employer were found to be the cause of the damage which led to an apportionment of liability. In the presence of a tortious (negligence of the defendant) and a non-tortious cause (i.e. thunderbolt, infancy, predisposition of the victim) insufficient but necessary to produce an injury, the negligent author may not rely on the non-tortious cause to avoid or reduce its liability[173]. In this case, the negligent defendant must assume responsibility.

In civil law, there is no distinction between independent insufficient causes and independent sufficient causes or a sub-distinction between tortious or non-tortious causes. If there are multiple faults, the above-mentioned principles, i.e. the direct causal link established by the adequate causality theory applied, as the case may be, in conjunction with the reasonable foreseeability test, will probably

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[171] In the presence of independent sufficient causes to produce an injury, the 'but for' test cannot apply because 'but for' the negligence (sufficient cause of damage), the injury would occur due to other independent sufficient cause(s). (factual causation**)**. This would lead to an absence of liability. To avoid this injust result, judges have recourse to the material contribution test to establish factual causation for each defendant. R. M. Solomon et al. *supra* note 5 p. 626s. This is the case of two motorcyclists who overtake a horse-drawn carriage on a public road. *Corey c Hanever*, 182 Mass 250 (C.S. 1902)(american decision) which notes that if the defendants contribute to the injury this suffices to render them liable. See also *Lambton v Mellish,* (1894) 3 Ch. 163. In the present study, independent sufficient causes will not retain our attention.

[172] (1952) 2 E.R. 402.

[173] *Athey, supra* note 45 – case cited on other grounds in Québec (i.e. the *crumbling skull* or *thin skull* rule also applicable in civil law): *D.S. c Giguère*, 2007 QCCQ 3847 para 55-. In *Athey*, the non-tortious cause was the predisposition of the victim.

take effect[174]. This was the case in the above-mentioned *Caneric* and *Lystania* cases[175] which reached a similar result to *Cork*[176] in common law (presence of faults - apportionment of liability). In the presence of a fault and of a *force majeure*[177] event at the root of an injury in civil law, there may be - according to a case law trend – co-existence of the causes of damage and a subsequent apportionment of responsibility. Thus, if the negligent defendant does not install well a nature-proof shelter and a strong wind assimilated to a force majeure event injure third parties, one may identify two causes of injury (negligence - force majeure) and a subsequent apportionment of liability between them[178]. A similar conclusion would probably not be reached in common law because in this legal tradition the apportionment of liability between tortious and non-tortious causes (*Athey*) is not allowed[179]. However, according to another case law trend in civil law, the notion of force majeure and fault are mutually exclusive**,** something that excludes an apportionment of liability[180]. In this way, in *Daudelin c Roy (Daudelin)*[181] the defendant, a negligent trucker, completely compensated a six-year-old victim non endowed with reason who rushed to the street and whose conduct was assimilated to a force majeure event because of his young age[182]. There was no apportionment of liability in this case,

[174] Karim, *supra* note 9 p.1224, *supra* note 70s and accompanying text.
In the presence of multiple faults causing an injury, solidarity – according to which each person liable must pay the totality of the sum to the victim – plays a role in the evaluation of the damage. For instance, in the presence of simultaneous faults such as the case of hunters who fire simultaneously on the victim hit by a single bullet (article 1480 C.c.Q, *supra* note 49 and accompanying text); contributory faults where one or several faults contribute to a single injury as in *Caneric* (*supra* note 19) ; or in the presence of common faults where two or several persons commit the same error/fault causing an injury to the victim (article 1526 C.c.Q.), solidarity applies. Solidarity does not apply in the presence of successive faults because these distinct faults cause separate injuries without, however, being able to determine the extent of the damage caused by each fault. In this case, case law aids the victim by attributing liability contributions (quotes-parts de responsabilté) to the persons at fault based on the circumstances. *Franc c Lacroix*, (1997) RRA 866 (C.Q.), 1997 CarswellQue 798 (CQ).
[175] *Supra* note 19, 70 and accompanying text.
[176] *Supra* note 89.
[177] Article 1470 para 2 CcQ defines force majeure as: «Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.»**.** In civil law, not every event may qualify as force majeure. This civil law concept approximates, without being identical to, the non-tortious causes in common law. On this civil law concept and its common law equivalent see M. Katsivela, "Canadian Contract and Tort Law: The Concept of Force Majeure in Québec and its Common Law Equivalent" (2012) 09:1 R du B Can 69.
[178] *Saint-Martin c Cournoyer,* (1962) C.S. 42, *Ethier c Lelarge,* (1968) CS 136 paras 9-12, *Parker c Corp du Canton de Hatley*, (1908) 33 C.S. 520. BDM, *supra* note 7 p. 748-749, Maurice Tancelin, Daniel Gardner, *Jurisprudence Commentée sur les Obligations* 12e ed (Montréal : Wilson & Lafleur Lté, 2017) p. 780. Contrary to other causation theories, reasonable foreseeability may not apply in the presence of a force majeure event. *Supra* note 81 and accompanying text.
[179] *Athey, supra* note 45 and accompanying text. However, *Athey* would probably be decided in the same way in civil law. *Supra* note 90.
[180] According to this trend, force majeure cannot co-exist with a fault – predominant case law trend under the C.c.B.C. – BDM *supra* note 7 pp. 96, 748-749.
[181] [1974] C.A. 95.
[182] For the cut-off age of no liability for children (more or less 7years of age in civil law and 6 years in common law see M.Katsivela, "Le manquement à la norme de diligence et la faute dans le cadre du délit de négligence (common

something that seems consistent with the conclusion in *Athey* in common law (combination of tortious & non-tortious causes). In a similar case in common law, *Williams (Guardian Ad Litem of) v. Yacub*[183], a negligent driver who hit a 3-year-old child, was held entirely responsible for the damage. Even though the court did not equate the child's behavior to a force majeure case- as was the case in civil law/*Daudelin* - her conduct did not give rise to liability**.** This position is consistent with the conclusion in *Athey* (common law) which held that there is no apportionment of liability between tortious and non-tortious causes.

The presence of similar judicial conclusions does not, however, imply convergence of the applicable rules regarding causation. We have seen divergent judicial findings at the level of multiple causes of damage in both legal cultures (i.e. presence of tortious and tortious causes). This, combined with the different conception of multiple causes and causation in general in common law and in civil law as well as the judges' discretion to establish causation in the two legal cultures makes the approximation of applicable rules and judicial conclusions relative.

V. Conclusion

Causation is a common concern in both Canadian legal cultures. Regarding the rules governing it, there are similarities and differences of treatment in civil law and in common law. The present study aimed to identify these similarities and differences. Despite the divergence and convergence of applicable rules, causation remains an area where judicial discretion is very present and constitutes a source of legal uncertainty as to the applicable rule. This, combined with the different conception of causation and tort/extra-contractual liability, the presence of diverging judicial findings and the different sources of law, render relative any approximation identified of the applicable rules.

law) et de la responsabilité extracontractuelle du fait personnel (droit civil) au Canada: une étude comparée" (2017) 95 R du B Can. 535.

[183] (1994), 1994 CarswellBC 2965 (B.C. S.C.); affirmed on appel (1995), 27 C.C.L.T. (2d) 282 (B.C.C.A.).