

FROM PRESUMPTIONS OF FACT TO PRESUMPTIONS OF CAUSATION: REFLECTIONS ON THE PERILS OF JUDGE-MADE RULES IN QUEBEC MEDICAL MALPRACTICE LAW

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Volume 32, numéro 1, 2001

URI : <https://id.erudit.org/iderudit/1107666ar>
DOI : <https://doi.org/10.17118/11143/12324>

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Éditeur(s)

Revue de Droit de l'Université de Sherbrooke

ISSN

0317-9656 (imprimé)
2561-7087 (numérique)

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Citer cet article

Kouri, R. P. (2001). FROM PRESUMPTIONS OF FACT TO PRESUMPTIONS OF CAUSATION: REFLECTIONS ON THE PERILS OF JUDGE-MADE RULES IN QUEBEC MEDICAL MALPRACTICE LAW. *Revue de droit de l'Université de Sherbrooke*, 32(1), 213–241. <https://doi.org/10.17118/11143/12324>

Résumé de l'article

Certains jugements québécois rendus dans des causes de responsabilité civile médicale contiennent des affirmations sur les circonstances où la causalité se présume. Bien que la Common law admette l'élaboration de principes par induction, l'établissement de la causalité par présomption de fait en droit civil dépend essentiellement d'un raisonnement déductif. L'auteur s'interroge sur l'opportunité d'admettre en droit civil québécois, certains principes qui semblent ressortir plutôt de la jurisprudence de Common law.

**FROM PRESUMPTIONS OF FACT
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par Robert P. KOURI*

Certains jugements québécois rendus dans des causes de responsabilité civile médicale contiennent des affirmations sur les circonstances où la causalité se présume. Bien que la Common law admette l'élaboration de principes par induction, l'établissement de la causalité par présomption de fait en droit civil dépend essentiellement d'un raisonnement déductif. L'auteur s'interroge sur l'opportunité d'admettre en droit civil québécois, certains principes qui semblent ressortir plutôt de la jurisprudence de Common law

Several Quebec judgments rendered in cases involving medical malpractice contain pronouncements alluding to circumstances under which causation may be presumed. While the Common law is amenable to the elaboration of principles derived from a process of inductive reasoning, the Civil Code relies on deductive reasoning in order to establish causation by presumption of fact. The writer queries whether dicta apparently originating from certain Common law decisions should be received in Quebec Civil law.

*. Professeur à la Faculté de droit de l'Université de Sherbrooke. L'auteur désire remercier ses collègues Me Charlotte Lemieux et Me Nathalie Vézina qui ont lu et commenté le texte. Toutefois, les opinions exprimées sont celles de l'auteur seulement.

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Introduction

According to statistics, successfully suing a physician for malpractice in Quebec represents a somewhat daunting challenge. One writer states there are no more than four or five judgments per year in favour of plaintiffs¹. Since one of the causes of this phenomenon obviously relates to difficulties inherent in discharging the burden of proof of causation, this factor appears to have induced the courts to adopt more resilient attitudes in order to not unduly disadvantage victims of medical malpractice seeking redress. Indeed, Sopinka J., speaking of behalf of the Supreme Court in *Snell v. Farrell*², has gone so far as to assert that if he were convinced defendants having substantial connection to the injury were escaping liability because plaintiffs could not prove causation under currently applied principles, he would not hesitate to adopt a more flexible approach to the question³.

This need for flexibility has made itself felt in Quebec where the courts have, on various occasions, decided that in three different sets of circumstances, the causal relationship between fault and injury could be presumed. The first relates to proof that the patient's record has been altered or left incomplete⁴, the second involves situations where, by their wrongful acts or omissions, defendants, either voluntarily or involuntarily, have put plaintiff in the position of being unable to prove causation⁵, and the third occurs when a danger materializes following a fault which presents a clear risk for the health and security of the patient.

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1. M. Boulanger, "Les tribunaux et la responsabilité médicale : assisterait-on à une ère moins conservatrice en matière de procédure, preuve, prescription et quantum?", in Formation permanente du Barreau du Québec, *Développements récents en responsabilité médicale et hospitalière* (1999), (Cowansville, Qc : Yvon Blais, 1999) 137 at 151. This figure is somewhat conservative.
 2. [1990] 2 S.R.C. 311, rev'g (1988), 84 N.B.R. (2d) 401 (C.A.), aff'g (1986), 77 N.B.R. (2d) 222 (Q.B.) [hereinafter *Snell*].
 3. *Ibid.* at 326-327. See also E. Picard, G. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed., (Scarborough, Ont. : Carswell, 1996) at 226.
 4. *Houde v. Côté*, [1987] R.J.Q. 723 (C.A.) aff'g [1982] C.S. 902 [hereinafter *Houde*].
 5. *Gburek v. Cohen*, [1988] R.J.Q. 2424 (C.A.) [hereinafter *Gburek*].

For reasons which will appear evident in the discussion that follows, it would be appropriate to dispose immediately of the first two instances, namely the hypothesis of the modified or incomplete medical record and that dealing with increased difficulty of proving causation due to the fault of defendant. The third situation - fault presenting a clear danger- although giving rise to a similar predicament, will be dealt with subsequently and will form the crux of this article due to the more fundamental issue which it raises.

1 - Medical liability and presumptions of causation of judicial origin

Starting with the hypothesis of an altered or incomplete medical record, this issue was raised in *Houde v. Côté*⁶ involving the liability of an anaesthetist and a hospital for damages resulting from paralysis of the lower limbs of a patient following an epidural. One point in contention was whether the physician had inadequately monitored the patient's blood pressure during the intervention. In his concurring opinion condemning the physician, Beauregard J. of the Court of Appeal wrote :

Or je n'ai pas la preuve de signes cliniques établissant si cette pression était simplement basse ou trop basse. La raison pour laquelle je n'ai pas ces signes cliniques, c'est que le défendeur Houde n'a pas tenu correctement son dossier.

La question est donc la suivante : lorsque le patient ne peut pas faire la preuve de la cause d'un dommage et, cela, par l'omission du médecin de lui faire un rapport complet de l'intervention, y a-t-il une présomption contre le médecin?

Il me semble que oui.⁷

6. *Supra* note 4.

7. *Ibid.* at 729.

Beauregard J. further added :

Mais, au départ, à cause de son obligation de rendre compte, c'est au médecin qu'incombe le fardeau de prouver d'une façon précise tout ce qui s'est produit au cours de l'anesthésie. Autrement, le recours du patient serait illusoire et la défense du médecin trop simple.⁸

It should be noted that Mr. Justice Beauregard felt that the trier of fact had not erred when he concluded that there were sufficient elements of proof to allow him to rule in favour of plaintiff, even though the primary cause of the paralysis was not as obvious to him as it was to the trial judge⁹. Viewed in context, it would appear evident that the above statements concerning presumptions of causation in cases where the patient's record is incomplete were *obiter*. More importantly, the other two justices sitting in appeal (Monet, Chouinard JJ.) did not voice any opinion regarding Justice Beauregard's *dicta* on presumed causation. From a more practical point of view and in a stricter sense, if one *were* to adopt Mr. Justice Beauregard's thesis on the presumption of causation under these circumstances, this could only occur if the falsified or incomplete entry in the medical record was instrumental in preventing plaintiff from proving causation. Any inaccuracy in recording information otherwise unrelated to issues of fault and causation in a suit would obviously render any such presumption irrelevant.

The second hypothesis relating to the difficulty of proving causation due to acts or omissions of defendant was evoked in a second case before the Court of Appeal, *Gburek v. Cohen*¹⁰, which involved the treatment of a patient requiring the administration of a strong antibiotic having the potential of adversely affecting renal function and hearing. During treatment, the physician failed to order renal function tests and audiograms in order to monitor the effects of the drug, with the result that the patient lost a significant portion of his hearing. Due to the fact that the physician had not prescribed the requisite controls, plaintiff was placed in the position of being unable to prove that the

8. *Ibid.* at 730.

9. *Ibid.* at 728.

10. *Supra* note 5.

physician's fault had indeed caused his deafness. According to Mr. Justice Beauregard :

À mon avis, même si généralement on caractérise l'obligation générale du médecin comme une obligation de moyens, lorsque le médecin, en plus de donner des soins fautifs, empêche son patient d'être en mesure de prouver la relation causale entre les soins fautifs et un préjudice qui a pu être causé par ses soins fautifs, il incombe au médecin de prouver l'absence de lien de causalité.¹¹

On this occasion as well, the other two Justices (Mailhot, Chouinard JJ) decided the case in plaintiff's favour, without adopting Beauregard J.'s contention that the burden of proof should be reversed¹².

At first blush, it would seem eminently fair to state that a theory or opinion advanced by the same judge in two cases, especially when his opinion has not been supported by the other two members of the panel, cannot be considered as forming jurisprudence¹³, particularly when the consequences of any reversal of the burden of proof could have a significant effect on the outcome of a trial. Although Mr. Justice Beauregard cited no authority for this reversal of burden, it would appear to reflect an inchoate principle of fundamental justice expressed in the moral and unwritten precept that no one should profit from his or her bad faith or wrongdoing¹⁴. Yet, one must not lose

11. *Ibid.* at 2447.

12. Indeed, Mr. Justice Chouinard had recourse to presumptions of fact in order to decide that the deafness would not have occurred had there been no fault of defendant in failing to order the necessary tests, *ibid.* at 2429.

13. This point was raised by Madam Justice Deschamps, writing on behalf of the Court of Appeal panel in *Zanchettin v. De Montigny*, [2000] R.R.A. 298 at para. 87, aff'g [1995] R.R.A. 87 (Qc. Sup. Ct.) [hereinafter *Zanchettin*]. She also noted that the opinion of Beauregard J. in *Gburek*, *supra* note 5 and *Houde supra* note 4, were decided prior to the Supreme Court decision in *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, rev'g [1989] R.J.Q. 27, 49 C.C.L.T. 309 (C.A.) [hereinafter *Lawson*].

14. *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3 at para. 65, rev'g [1996] R.D.J. 126, [1995] A.Q. No. 762 (C.A.Q.), online : QL (A.Q.), aff'g J.E. 90-875 (Qc. Sup. Ct.). Interestingly enough, the Supreme Court in *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, refused to confirm the Ontario Court of Appeal which had reversed the onus of proof on the defendant hospital because a nurse had omitted to record the Patient's vital signs just prior

sight of the fact that at most, the rule proposed by Mr. Justice Beauregard does not constitute a *fin de non-recevoir*¹⁵ or a rule of substantive law but rather a rebuttable presumption relating to adjective law, more particularly the law of evidence¹⁶. These observations notwithstanding, there are additional reasons to question the acceptance of this presumption in Quebec law. In light of two more recent cases decided by the Quebec Court of Appeal, namely *St-Jean v. Mercier*¹⁷ and *Zanchettin v. De Montigny*¹⁸, it would seem fair to state that attempts to introduce judge-made presumptions of causation as a means of facilitating proof are encountering firm resistance. Yet, at the outset, it would be premature to affirm that these cases constitute a full-blown *revirement jurisprudentiel* since, as will be pointed out, the fact-situations in each did not, in the opinion of the Court of Appeal, readily lend themselves to evoking certain presumptions.

to his death. And yet, Picard and Robertson, *supra* note 3 at 221 feel that this position has been somewhat attenuated by the Supreme Court in *Hollis v. Dow Corning Corp.* (1995), 27 C.C.L.T. (2d) 1 at 41, [1995] 4 S.C.R. 634 [hereinafter *Hollis* cited to C.C.L.T.], *aff'g* (1991), 81 B.C.L.R. (2d) 1, 103 D.L.R. (4th) 520, [1993] 6 W.L.R. 609, (1993), 16 C.C.L.T. (2d), 140 (C.A.) in that when a victim's power of proof has been "seriously undermined" due to defendant's fault, the onus of proof of causation should not be as onerous as to prove how, hypothetically, a physician would react.

15. One must avoid the temptation of using the expression "estoppel" to translate "*fin de non-recevoir*" into English. As Mr. Justice Mignault stated in *Grace and Company v. Perras* (1921), 62 S.C.R. 166 at 172 : "[The] doctrine of estoppel as it exists in England and the common law provinces of the Dominion is no part of the law of the Province of Quebec. This, however, does not mean that in many cases where a person is held to be estopped in England, he would not be held liable in the Province of Quebec. [...] May I merely add, with all due deference, that the use of such a word as 'estoppel', coming as it does from another system of law, should be avoided in Quebec cases as possibly involving the recognition of a doctrine which, as it exists to-day, is not a part of the law administered in the Province of Quebec." See also L. Baudouin, "Conflits nés de la coexistence juridique au Canada" (1956), 3 McGill L.J. 51 at 57-58.
16. Indeed, poorly kept case notes could call into question the credibility of a defendant physician's recollection of events rather than provoke a reversal of burden of proof, see *Tremblay v. Maalouf*, [2000] J.Q. No. 2370 at para. 78 (Qc. Sup. Ct.) online : QL (JQ).
17. [1999] R.J.Q. 1658 (C.A.), leave to appeal to S.C.C. granted [2000] 1 S.R.C. xx [hereinafter *St-Jean*].
18. [2000] R.R.A. 298 (Qc. C.A.), *aff'g* [1995] R.R.A. 87 (Qc. Sup. Ct.).

For instance in *St-Jean*¹⁹, plaintiff was struck by a car while hitchhiking along a major highway. Transported by ambulance to a local hospital, he was initially treated in the emergency department by Dr. Couture, who noted compound fractures in both legs, head-wounds and abrasions on his abdomen. Although X-rays of the back showed no abnormalities, Dr Couture noted that he suspected a fracture of vertebrae D7 and mentioned in the record that the patient complained of back-pain. Dr Mercier, an orthopedist summoned to treat the patient, reduced the leg-fractures under general anaesthesia. A second intervention was performed three days later on the right leg. Meanwhile, since the patient was still experiencing back-pain, Dr Mercier suspected sciatic nerve injury. When the patient was subsequently seen by Dr Mercier on an out-patient basis, signs of spastic paraplegia were noted. Further investigation revealed that there were fractures to the D8 and D9 vertebrae with medullary compression thus occasioning permanent paraparesis. Following his accident, St-Jean applied to the Quebec Automobile Insurance Board for compensation but his request was refused since the Board felt that there was no direct causal link between the paraparesis and the automobile accident. Action was initiated against Drs Couture and Mercier as well as against the hospital. Eventually, the suit against the hospital was settled out of court. As for the remaining defendants, while in fact the Superior Court found no fault on the part of defendant physicians, it indicated that in any case, plaintiff failed to discharge his burden of proving a causal link between his paralysis and the alleged fault of the physicians. The Court of Appeal confirmed the decision of the Superior Court but for different reasons regarding Dr Mercier. Unlike the trier of fact, the Court of Appeal held that Dr Mercier had indeed committed several faults²⁰ but these faults were held not to have caused the injury suffered. Although plaintiff argued that the burden of proof should be reversed since Dr Mercier's failure to order further x-rays and neurological examinations placed the victim in a situation where he was deprived of the information necessary to determine whether he had been properly treated and thus lacked the means of proving a causal relationship between the negligent omissions and the prejudice they had caused, the Court held that the traditional rules of causation should not be set aside :

19. *Supra* note 17.

20. *Ibid.* at 1662, 1665.

Il ne suffit pas de démontrer qu'un défendeur a créé un risque de préjudice et que le préjudice survienne dans l'aire du risque pour imposer à ce défendeur le fardeau de réfuter l'existence du lien de causalité.²¹

In this case, the Court found that the spinal cord injury had likely occurred the night of the accident and not as the result of any subsequent negligence on the part of Dr Mercier.

The second decision, *Zanchettin v. De Montigny*²², involved the near-drowning of a 20 month-old child. The child's parents discovered him floating face down in a pond behind their house at about 7 :45 a.m. It would appear that the child had been in the water for approximately five to seven minutes. After being pulled from the pond, the child was placed on the kitchen table and cardiopulmonary resuscitation was attempted. Although an ambulance was summoned, it was decided to save time by taking the child by car to the residence of Dr De Montigny, located 7.3 km from their home. Dr De Montigny did not attempt to resuscitate the child, but instead declared him deceased in light of the clinical signs he observed during his brief examination. He directed the parents to proceed to the emergency department of Ste-Croix Hospital in Drummondville. Upon arrival at the hospital, the emergency room team undertook advanced resuscitative measures and at 8:47 a.m., cardiac activity was noted. The child managed to survive but suffered permanent and severe neurological damage.

Although suit was brought against Dr De Montigny, the Ste-Croix Hospital and its emergency-room physician, Dr Lemay, it was eventually abandoned against the latter two defendants. Plaintiff argued that the remaining defendant, Dr De Montigny, failed to recognize that the child could have been suffering from hypothermia and that he should have initiated cardiopulmonary

21. *Ibid.* at 1666. Citing *Lawson, supra* note 13, more particularly at 608, and *Morin v. Blais*, [1977] 1 R.C.S. 570 at 580, (1975), 10 N.R. 489 [hereinafter *Morin* cited to S.C.R.] the Court stated it could only presume causation “[...] s’il estime que la faute comportant un danger et que ce danger s’est manifesté [...] sous réserve d’une démonstration ou d’une forte indication contraire” at 1666.

22. *Supra* note 13.

resuscitation. However, the Superior Court held that Dr De Montigny's refusal to undertake active treatment was a reasonable exercise of his professional judgment and no fault was proven.

Before the Court of Appeal it was again strongly suggested by plaintiff-appellant that the child was in a state of hypothermia and that had resuscitative measures been performed by Dr De Montigny, he would probably not have suffered permanent harm. In addition, appellant felt that the failure to attempt reanimation deprived him of the possibility of proving that the child's present condition resulted from the physician's fault.

Madam Justice Deschamps, speaking on behalf of the Court of Appeal, felt that since the trier of fact's analysis of the evidence was not beyond reproach, a full review of the evidence adduced was necessary. Although in an admission, Dr De Montigny acknowledged that although normally in cases of drowning involving a child, a general practitioner should automatically attempt to resuscitate, in the present circumstances, his own failure to act would not have changed the outcome since when he saw the child, the massive neurological and irreversible sequelae had already been suffered.

An exhaustive review of the evidence failed to convince the Court of Appeal that the child was in a state of protective hypothermia since he had not been immersed in freezing water. Also, because cardiopulmonary resuscitation was not initiated immediately upon the onset of pulselessness, the chances of providing adequate circulation to the brain would at best have been minimal. Consequently, there was no proof that Dr De Montigny's intervention would have changed the course of events.

Appellant's claim that he be entitled to benefit from presumptions of causation was rejected out of hand, the Court of Appeal preferring to reaffirm that causation should be established according to a preponderance of probabilities in light of the factual, statistical or presumptive evidence²³. In the present case, the scientific evidence failed to support appellant's contentions.

23. According to *Lawson*, *supra* note 13 at 608.

The third situation in which a presumption of causation has been judicially created is one proposed by the Supreme Court in *Lawson v. Laferrière*²⁴, involving a woman whose diagnosis of breast cancer had not been revealed to her by her physician. She sued claiming that had she known the truth, she would have sought out more aggressive treatment for her disease, and that by failing to inform her of the nature of her condition, she was deprived of the opportunity of optimizing her chances of remission. In fact, plaintiff died during the suit and her action was continued by her testamentary executrix. Defendant physician argued that no matter whether he failed to inform her or not, the odds were strongly against her surviving the illness, and thus his alleged fault did not cause her death. Mr. Justice Gonthier, speaking on behalf of the Court, expressed the view that “[in] some cases, where a fault presents a clear danger and where such a danger materializes, it may be reasonable to presume a causal link, unless there is a demonstration or indication to the contrary”.²⁵

Several Quebec cases subsequently followed this lead and were decided on the basis of the presumption created by *Lawson*. *Stéfanik v. Hôpital Hôtel-Dieu de Lévis*²⁶ is a case in point involving the failure to diagnose the state of distress and the need to be delivered without delay of the surviving foetus of a jumellary pregnancy. As a result of this error, the child in question was born severely handicapped and eventually died at the age of seven after a life of great suffering. The evidence established that two physicians had committed a fault of omission in failing to recognize that a foetal development problem had arisen during the pregnancy. Citing *Lawson*, Mr. Justice Morin of the Superior Court asserted that :

[d]ans de telles circonstances, il est raisonnable de présumer du lien de causalité entre la faute et les dommages, pour reprendre les termes utilisés par le juge Gonthier. Or, une telle présomption entraîne un renversement du fardeau de la preuve quant au lien de causalité.²⁷

24. *Ibid.*

25. *Ibid.* at 609.

26. [1997] R.J.Q. 1332; [1997] R.R.A. 566 (summary), J.E. 97-820 (Sup. Ct.), [hereinafter *Stéfanik* cited to R.J.Q].

27. *Ibid.* at 1354.

Morin J. appears also to have adopted Mr. Justice Beauregard's opinion as expressed in *Gburek*²⁸ :

Il est bon de rappeler que c'est une faute d'omission, dans leur processus diagnostique, qui est reprochée aux défendeurs. Si ces derniers avaient effectué les tests suggérés par les demandeurs et si ces tests n'avaient rien indiqué permettant de justifier un accouchement prématuré, ils pourraient alors invoquer la cause inconnue pour justifier leurs agissements. En l'absence de tels tests, ils ne peuvent invoquer ce moyen de défense qui reviendrait à placer les demandeurs dans une situation impossible, soit celle de tenter de prouver que les événements ne sont pas dus à une cause inconnue.²⁹

The same year (1997), in *Prat v. Poulin*³⁰, involving the suit of a patient who had suffered a thromboembolism causing partial paralysis and aphasia following surgery for a bowel obstruction, the question of causation played a pivotal role. At the time of her surgery, the patient, who was a smoker, was taking anovulants. Despite government reports warning of the potential danger of performing elective surgery on a patient using such medication, the surgeon did not advise her to use alternate means of contraception. A fundamental issue that had to be resolved was whether her paralysis was caused by the use of anovulants or whether it was the result of a purely fortuitous event. Mr. Justice Beauregard, writing on behalf of the panel of the Court of Appeal raised a presumption of causation against the surgeon :

À mon humble avis, devant le fait que la thrombose cérébrale a pu être causée par l'effet des anovulants et de la chirurgie et que l'appelant a commis une faute en ne recommandant pas à l'intimée d'arrêter de prendre des anovulants avant la chirurgie, le fardeau incombe à l'appelant de démontrer l'absence de la relation entre la prise

28. *Supra* note 5.

29. *Stéfanik*, *supra* note 26 at 1354.

30. [1997] R.J.Q. 2669 (C.A.), on appeal from [1995] R.J.Q. 2923, [1995] R.R.A. 1160 (Sup. Ct.) [hereinafter *Prat*].

d'anovulants, la chirurgie et la thrombose cérébrale. Voir *Laferrière*
c. *Lawson* [...].³¹

More recently, the Superior Court in *Mainville v. Cité de la Santé de Laval*³² followed the lead of the Court of Appeal in *Prat*³³ and applied the presumption advanced in *Lawson*³⁴. Plaintiff *Mainville* was diagnosed as suffering from a ruptured spleen. Upon admission to the *Cité de la Santé de Laval* hospital, a Foley catheter was installed. Following surgery, the treating physician ordered that the Foley catheter be removed. This was attempted by a student nurse acting under the supervision of a qualified nurse acting as her preceptor. Encountering some difficulty and because of the the pain experienced by the patient, the student asked her preceptor to help. The latter withdrew the catheter without difficulty. However, plaintiff was left with a stenosis of the ureter which required further hospitalization and treatment.

The Court found that the student nurse had committed a fault in attempting to withdraw the catheter while the bulb holding it in place had not been properly deflated. Once the evidence revealed that the stenosis could have been caused by the catheter and that a fault had been committed in the course of its removal, the burden of proving absence of causation devolved to the hospital³⁵, which would have had to prove that the nursing student had indeed acted according to the standards of practice and that external factors explained how the injury occurred³⁶. In the present case, the hospital failed to overcome this onus.

31. *Ibid.* at 2693.

32. [1998] R.J.Q. 2082, [1998] R.R.A. 865 (summary) (C.S.) [hereinafter *Mainville*].

33. *Supra* note 30.

34. *Supra* note 13.

35. *Mainville*, *supra* note 32 at 2099.

36. *Ibid.* at 2099-2100. In the case of *Bérubé v. Cloutier*, [2000] R.R.A. 484 (Qc. Sup. Ct.), involving a patient who suffered the consequences of toxic shock syndrome following a breast reduction, the Superior Court felt that she was entitled to benefit from a presumption of causation against defendants according to *Lawson* but that defendants had overcome this burden of proof.

As one may see, unlike the other presumptions alluded to above, this particular presumption of causation has certainly taken root in Quebec liability law. Because of the important consequences for the parties involved, it would be interesting, at this point, to attempt to retrace its obscure origins before discussing the validity of this type of approach.

2 - The ambiguous sources of certain presumptions of causation

It would appear that common law jurisprudence of both English and Canadian origin has influenced certain decisions rendered under Quebec law. After examining these common law sources, we will review those of the civil law in order to verify the accuracy of this initial impression.

a - English and Canadian Common law sources

As one may discover from a perusal of the case-law, the first modern application of presumed causation occurs in the English Court of Appeal decision of *Vyner v. Waldenberg Brothers Ltd.*,³⁷ where a worker had part of his thumb cut off by a circular saw which he was utilizing in the course of his duties. Contrary to regulation, the safety guard had not been properly adjusted. In finding for plaintiff, the Court advanced the proposition that, “[if] there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause”.³⁸

The subsequent case of *Bonnington Castings Ltd. v. Wardlaw*³⁹ involved a claim in damages resulting from an employee, Wardlaw, contracting the

37. [1946] K.B. 50; [1945] 2 All E.R. 547 (C.A.) [hereinafter *Vyner* cited to K.B.].

38. *Ibid.* at 55, per Scott, L.J. Speaking for the Court, Scott L.J. relied on Lord Goddard’s opinion in *Lee v. Nursery Furnishings Ltd.*, [1945] 1 All E.R. 387 at 390 (U.K. C.A.): “In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident”.

39. [1956] A.C. 613 (H.L.) [hereinafter *Bonnington Castings Ltd.*].

disease of pneumoconiosis while working in a foundry operated by Bonnington Castings. Pneumoconiosis is caused by inhaling air containing minute particles of silica. During his employment over a period of eight years, Wardlaw was exposed to exceedingly fine particles of silica produced by machinery including pneumatic hammers and swing grinders used in the smoothing or dressing of the castings. It was admitted that while there were no means of collecting or neutralizing the dust from the hammers, the dust generated by the swing grinders escaped into the air of the workshop because the dust-extracting vents for these grinders had not been kept free from obstruction. Bonnington Castings admitted it was in breach of regulations by failing to properly maintain the swing grinders but argued that the pursuer failed to prove that the dust from these grinders actually caused his disease. Overruling *Vyner*⁴⁰ on the issue of the onus of proof of causation, the House of Lords preferred to reaffirm the orthodoxy of ordinary standards concerning the evidentiary burden. According to Lord Reid :

It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury. [...] I can find neither reason nor authority for the rule being different where there is breach of statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal farther to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must in all cases prove his case by the ordinary standard of proof in civil actions : he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury.⁴¹

Lord Reid found that the disease had indeed been caused by the cumulative effect of inhaling silica particles from non-culpable (the pneumatic hammers) and culpable sources (the swing grinders), both of which materially

40. *Supra* note 37.

41. *Bonnington Castings Ltd.*, *supra* note 39 at 620.

contributed to the disease. In order to be causative, according to him, the contribution must have been more than negligible.

The notion of material contribution, as set out in *Bonnington Castings Ltd.*⁴², was applied in *McGhee v. National Coal Board*⁴³ involving a worker employed to clean out brick kilns, who had contracted dermatitis, an irritation of the skin. Plaintiff invoked two grounds of fault, firstly that the kilns should have been allowed to cool sufficiently before he was sent to remove the bricks from them, and secondly, that his employer failed to provide adequate washing facilities to enable workers to remove the dust and grime from their persons. As a result, McGhee was obliged to bicycle home at the end of each working day covered with brick dust which increased the possibility that dermatitis would occur. While the first contention failed, the second was viewed more favourably. In the words of Lord Reid :

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.⁴⁴

For his part, Lord Wilberforce resolved the question of proving causation in the following terms :

But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail - a logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the

42. *Ibid.*

43. [1972] 3 All E.R. 1008 (H.L.) [hereinafter *McGhee*].

44. *Ibid.* at 1010.

present, with this logical approach. In my opinion, there are further considerations of importance. *First, it is a sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.* Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more : namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, *ex hypothesi*, must be taken to have foreseen the possibility of damage, who should bear its consequences.⁴⁵

This apparent reliance in *McGhee*, upon the *ratio* of *Bonnington Castings Ltd.*⁴⁶ is not beyond reproach since, as one writer, Jane Stapleton, points out, *Bonnington Castings Ltd.* involved injury (an accumulation of silica in the lungs), resulting from *cumulative* contributions from both culpable and innocent sources, whereas in *McGhee*, the dermatitis had *multiple* possible sources, an innocent cause and a culpable cause⁴⁷. In the latter case, there was no proof that the injury was actually “triggered” by the lack of washing facilities.⁴⁸ Although Stapleton’s critique of *McGhee* appears to have been accepted by the House of Lords in *Wilsher v. Essex Area Health Authority*⁴⁹, the Lords admitted that there would be nothing irrational in drawing certain

45. *Ibid.* at 1012 [emphasis added].

46. *Supra* note 39.

47. J. Stapleton, “Law, Causation and Common Sense” (1988) 8 Oxford Journal of Legal Studies 111 at 127.

48. *Ibid.* See Lord Reid’s speech, *McGhee*, *supra* note 43 at 1010.

49. [1988] 2 W.L.R. 557 at 567 (H.L.) Lord Bridge of Harwich, rev’g [1987] Q.B. 730, [1987] 2 W.L.R. 425, [1986] 3 All E.R. 801 (U.K. C.A.) [hereinafter *Wilsher*].

inferences as a matter of common sense. The inference in question related to the fact that the consecutive periods during which brick dust remained on McGhee's person probably contributed to causing the dermatitis.

In *Wilsher*, the issue was whether the retrolental fibroplasia suffered by a prematurely born infant had in fact been caused by the excessive administration of oxygen since there was conflicting expert evidence whether an error of this type had caused or materially contributed to the blindness of the child. The Court of Appeal decision was reversed in the House of Lords and a new trial ordered since the lower decisions were rendered on the basis of a reversal of the burden of proof according to *McGhee*. With the approval of the other Law Lords, Lord Bridge stated that *McGhee* had laid down no new principle of law whatsoever and merely reaffirmed that the onus of proving causation rested upon the plaintiff :

Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defender's negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.⁵⁰

In cases involving appeals from provincial Common law jurisdictions before the Supreme Court of Canada, inferences of causation were discussed in

50. *Ibid.* at 569. Lord Bridge also pointed out, at 571, "We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases." Commenting *Wilsher* in his article "Risk Exposure as Injury : Alleviating the Injustice of Tort Causation Rules", (1990) 35 McGill L. J. 797 at 828, D. Gerecke writes, "One can easily understand Lord Bridge's aversion to the common interpretations of *McGhee*. Lord Wilberforce's approach represents precisely the sort of falsification of causation requirements which risk-based probability is intended to replace. To shift the burden to the defendant is simply to decide for the plaintiff, for the defendant has no greater knowledge."

light of English case-law. The issue, in *Snell v. Farrell*⁵¹ arising from the loss of sight in one eye following cataract surgery, was whether the fault of the surgeon while injecting a local anaesthetic had caused optic nerve atrophy. Speaking in the name of the Court which rendered judgment in favour of plaintiff, Sopinka, J. reviewed the pertinent principles concerning proof of causation. Approving *Wilsher's* interpretation of *McGhee* by the House of Lords, the Court felt that the traditional rules should be followed in determining causation :

I have examined the alternatives arising out of the *McGhee* case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connexion between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.⁵²

The *Snell* decision was followed in *Athey v. Leonati*⁵³ where one of the questions raised was whether the medical problem suffered by the plaintiff was caused by injuries sustained in previous accidents or whether it was ultimately

51. *Supra* note 2.

52. *Ibid.* at 326-327. In fact, the Quebec Court of Appeal in *St-Jean*, *supra* note 17 at 1666 stated that as a result of the Supreme Court decisions in *Lawson* and *Snell*, the influence of *McGhee* on Quebec law has been greatly attenuated.

53. [1996] 3 S.C.R. 458, rev'g [1995] B.C.J. No. 666 (B.C.C.A.), online : QL (BCJ), aff'g (1994), 44 A.C.W.S. (3d) 908 (Sup. Ct. B.C.).

attributable to a pre-existing condition. In that case, plaintiff, who had a history of back problems and who had been subsequently injured in two road accidents, suffered a herniated disc while taking part in a medically-authorized exercise program. While reaffirming the principle that in order to succeed plaintiff must prove causation on a balance of probabilities, the causation test was not to be applied too rigidly. According to Major J., speaking on behalf of the Court, “[...] in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.”⁵⁴ In the present case, it was reasonable to infer a causal connection between the road accidents, both of which caused serious back injuries, and the herniated disc resulting from mild exercise.

b - Quebec Civil law sources

On occasion, the Supreme Court of Canada has inferred causation in cases originating in Quebec. For instance, in *Montreal Tramways Co. v. Léveillé*⁵⁵ it had concluded that as a presumption of fact under article 1242 *Civil Code of Lower Canada* [hereinafter C.C.L.C] (article 2849 *Civil Code of Quebec* [hereinafter C.C.Q.]), the deformity of a new-born child’s feet was caused by her mother’s fall from a tramway car during pregnancy. According to Lamont J.,

That such a fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury. These facts must be consistent one with the other and must furnish data from which the presumption can be reasonably drawn. It is not sufficient that the evidence affords material for a conjecture that the child’s deformity may have been due to the consequences of the mother’s accident. It must go further and be sufficient to justify a reasonable man in concluding, not as a mere guess or conjecture, but as a deduction from the evidence, that there

54. *Ibid.* at 467 .

55. [1933] S.C.R. 456; [1933] 4 D.L.R. 337 [hereinafter *Léveillé* cited to S.C.R.].

is a reasonable probability that the deformity was due to such accident.⁵⁶

The more recent case of *Lafferrière*⁵⁷, the facts of which are described above, provided an opportunity for the Supreme Court, not only to deal with the notion of “loss of chance” but also to clarify the rules concerning proof of causation. Rejecting the possibility of claiming for a loss of chance of surviving breast cancer, the Court acknowledged that the patient had nonetheless suffered psychologically. She had been deprived of the opportunity of pursuing earlier treatment which could have led to some improvement and would probably have provided for a better quality of life. Speaking for the majority, Gonthier J. insisted that proof of causation had to be established on a balance of probabilities taking into account “[...] all the evidence which is before it, factual, statistical and that which the judge is entitled to presume”.⁵⁸ Moreover, he issued the following *dictum* strongly reminiscent of *McGhee*, but citing the Supreme Court case of *Morin v. Blais*⁵⁹ as authority :

In some cases, where a fault presents clear danger for the health and security of the patient and where such a danger materializes, it may be reasonable for a judge to presume the causal link between the fault and such damage, ‘unless there is a demonstration or strong indication to the contrary’ [...]. If after all has been considered, the judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any actual damage to the patient, recovery should be denied. To do otherwise would be to subject doctors to an exceptional regime of civil responsibility.⁶⁰

56. *Ibid.* at 466.

57. *Supra* note 13.

58. *Ibid.* at 609.

59. *Supra* note 21 at 580, Beetz J.

60. *Lawson*, *supra* note 13 at 608. Cited with approval in *Stéfanik*, *supra* note 26 at 1350. Gonthier J. also states, at 606, that “[i]t is perhaps worthwhile to repeat that a judge will be influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings, but he or she is not bound by such evidence. Scientific findings are not identical to legal findings.” See generally on the question of causation and scientific evidence, D. Jutras, “Expertise scientifique et causalité”, (1992) Congrès annuel du Barreau du Québec 897.

In *Morin*, a road-accident case, the issue involved determining whether the absence of a left rear light on the back of a tractor was the cause of a fatal collision. On behalf of the majority, which apportioned fault equally between both drivers, Beetz J. wrote :

The mere breach of a regulation does not give rise to the offender's civil liability if it does not cause injury to anyone. However, many traffic provisions lay down elementary standards of care and make them binding regulations at the same time. Breach of such regulations constitutes civil fault. In cases where such fault is immediately followed by an accident which the standard was expressly designed to prevent, it is reasonable to presume that there is a causal link between the fault and the accident, unless there is a demonstration or strong indication to the contrary.⁶¹

Interestingly enough, Beetz J. referred to the Quebec Court of Appeal case of *Charest v. Ouellet*⁶² which dealt with a similar factual situation but which otherwise made no allusion to any inference of causation. Did the majority in *Morin* intend to judicially create a normative presumption, or was causation inferred from the circumstances of the accident? In his comment on this case, P.-G. Jobin concluded that the Court had merely applied the rules governing presumptions of fact in conformity with article 1242 C.C.L.C., which, as is also the case according to the *Civil Code of Quebec*, remains essentially discretionary in nature⁶³. This opinion appears to have been followed by J.-P. Ménard⁶⁴, as well as by J.-L. Baudouin and P. Deslauriers in the 5th edition of

61. *Supra* note 21 at 579-580. See also *Boucher v. Rousseau*, [1984] C.A. 85 at 96; *Blanchet v. Claveau*, [1990] R.R.A. 274 at 278 (Qc. Sup. Ct.).

62. [1971] C.A. 616, (Qc.) leave to appeal to S.C.C. refused [1973] S.C.R. vi.

63. P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile?", (1984) 44 R. du B. 222 at 229-230.

64. "La causalité dans les causes de responsabilité médicale depuis les affaires *Lawson et Farrell*", in Service de la formation permanente, Barreau du Québec, *Développements récents en droit de la santé*(1991) (Cowansville, Qc. : Yvon Blais, 1991) 1 at 28.

their book, *La responsabilité civile*⁶⁵. Originally, article 1242 C.C.L.C. read as follows,

Presumptions not established by law are left to the discretion and judgment of the court.

In the more recent *Civil Code of Quebec* at article 2849, the drafters retained the text of the *Civil Code of Lower Canada* while adding to it the phrase “[...] which shall take only serious, precise and concordant presumption into consideration”. Just how valid are these opinions when one considers that Beetz J. makes this affirmation in *Morin*⁶⁶ without any indication that he intended to infer causation by presumption of fact?

One is thus confronted by the inevitable question - are the principles concerning proof of causation in *Morin* and its offspring *Lawson*, unacknowledged throw-backs to *McGhee* whose own lineage has been cast into doubt by the House of Lords, or are they indeed merely teleological⁶⁷ applications of civilian presumptions of fact? In order to provide a credible answer, one must first review the conditions which must be fulfilled in order to invoke proof of causation by presumption of fact before attempting to compare presumptions of fact to principles of presumed causation of jurisprudential origin.

65. (Cowansville, Qc. : Yvon Blais, 1998) at 360-361, para. 548 : “La règle générale qui se dégage de l’ensemble de ces situations est donc la suivante : les tribunaux n’exigent pas que le demandeur établisse le lien causal au-dessus de tout doute et d’une manière certaine. Il suffit simplement que la preuve rapportée rende simplement probable l’existence d’un lien direct. La preuve par présomption de fait est donc ouverte et, devant l’impossibilité d’une preuve directe, on admet le réclamant à procéder par élimination.”

66. *Supra* note 21.

67. See J.E.C. Brierley, “Bijuralism in Canada” in Canadian Comparative Law Association and Association québécoise de droit comparé, *Contemporary Law/ Droit contemporain, Canadian Reports to the 1990 International Congress of Comparative Law*, (Cowansville, Qc. : Yvon Blais, 1992) 22 at 37.

3 - Presumptions of fact and causation : the hazards inherent in the indiscriminate reception of a principle from another legal system

As pointed out, although the *Civil Code of Lower Canada*, unlike the *Civil Code of Quebec*, did not formally enunciate this requirement as to the quality of presumptions of fact, it had been generally admitted under the previous *Code* that the presumptions must be serious, precise and concordant. The Quebec Court of Appeal, in a case unrelated to medical liability, quoted with approval the French writer Larombière's analysis of these notions of "serious, precise and concordant" :

Les présomptions sont graves, lorsque les rapports du fait connu au fait inconnu sont tels que l'existence de l'un établit, par une induction puissante, l'existence de l'autre [...].

Les présomptions sont précises, lorsque les inductions qui résultent du fait connu tendent à établir directement et particulièrement le fait inconnu et contesté. S'il était également possible d'en tirer les conséquences différentes et mêmes contraires, d'en inférer l'existence de faits divers et contradictoires, les présomptions n'auraient aucun caractère de précision et ne ferait naître que le doute et l'incertitude.

Elles sont enfin concordantes, lorsque, ayant toutes une origine commune ou différente, elles tendent, par leur ensemble et leur accord, à établir le fait qu'il s'agit de prouver. [...] Si [...] elles se contredisent [...] et se neutralisent, elles ne sont plus concordantes, et le doute seul peut entrer dans l'esprit du magistrat.⁶⁸

With regard to the specific question of causation, in order to conform to the codal requirements that the presumption be serious, precise and concordant

68. *Longpré v. Thériault*, [1979] C.A. 258 at 262 (Qc.), quoting L. Larombière, *Théorie et pratique des obligations*, t.7, rev. ed. (Paris, A. Durand et Pedone Laurier, 1885) at 216 para. 7. See also *Farmer v. Canadian Home Assurance Co.* (1987), 5 R.D.J. 31 at 35 (Qc. C.A.) and several other cases in which the Court of Appeal approved this particular passage as applicable to Quebec law, as cited by P. Nicol, "Faute médicale : preuve par présomption de fait et exonération" (1996-97) 27 R.D.U.S. 139 at 155, n. 37.

once the fault of an identified defendant has been determined, this would imply that by a preponderance of the evidence, it is established that plaintiff suffered harm and, in the absence of direct proof, in all probability, defendant's fault indeed caused the harm suffered.

It should be noted that as in the case of other forms of proof⁶⁹ with the exception of presumptions of law, presumptions of fact cannot serve to create presumptions of fault or of causation. Only a text of law can create a legal presumption⁷⁰. Unlike legal presumptions, which exempt a party from having to provide complete proof, presumptions of fact serve as a means of proving certain factual elements⁷¹. Moreover, presumptions of fact are a form of inductive reasoning⁷² signifying that one proceeds from individual facts to arrive at general conclusions, or in other words, that one infers an outcome from the observation of particular circumstances. If one were to proceed on the basis of a general postulate set out in advance in order to infer a certain result in a given fact-situation, this would constitute a form of deductive reasoning and thus antithetical to civilian presumptions of fact.

Obviously, when the courts set out a rule of general application under which an inference of causation may be drawn, (as in the cases of *Morin* and *Lawson*), one is no longer in the realm of inductive reasoning but rather in the presence of a general legal presumption of praetorian origin which would appear, at first blush, to usurp the role of the legislator and to run counter to article 2811 C.C.Q. As L. Baudouin has written,

69. Art. 2811 C.C.Q.

70. L. Baudouin, *Le droit civil de la Province de Québec*, Montréal, Wilson & Lafleur, 1953 at 1268. A. Nadeau, L. Ducharme, *Traité de droit civil du Québec*, t.9 (Montreal : Wilson & Lafleur, 1965) at 437-438 para. 542; A. Bernardot, R. P. Kouri, *La responsabilité civile médicale*, Sherbrooke, Éditions RDUS, 1980 at 49.

71. According to R. Decottignies in *Les présomptions en droit privé* (Paris : Librairie générale de droit et de jurisprudence, 1950) at 287 para. 114, "[l]a présomption du fait de l'homme a des effets beaucoup moins énergiques [que la présomption légale]; elle n'est pas une dispense de preuve et n'opère pas de renversement de la charge de preuve."

72. Nicol, *supra* note 68 at 153.

Légales, les présomptions ne sont admises que s'il y a un texte spécial. On ne peut en conséquence en établir ou créer par voie d'interprétation, par identité de motifs ou de situation.⁷³

One can only surmise the causes of this phenomenon. The most obvious would appear to be a desire to level the playing-field in situations where the relative strengths of the parties to a medical malpractice suit are, over and above the basic rule governing the burden of proof, heavily weighted in favour of the defendant. Costs aside, the difficulty of establishing fault and causation in a field where scientific complexity, if not obfuscation, often obscures the truth, provides a powerful incentive for the courts to propose equitable solutions⁷⁴. This very likely occurs without consciously adverting to the more fundamental implications of the judicial creation of certain rules of proof.

Another cause derives from the failure of the courts to recognize that what they perceive as the mere act of interpreting codal provisions is in fact judicial rule-making. Professor Jean-Louis Baudouin, (as he then was), readily acknowledged the reality of this phenomenon :

Although similar in legal theory, the role played by legislation in legal practice is different to a certain extent in Louisiana and Quebec from that of countries like France. That difference lies mostly in the attitude of the courts towards legislation as a source of law. One may feel that in Quebec [...], the degree of respect for legislation, and for basic principles implied by it, is less than it is in France. Moreover, the 'interpretation' of legislation will in certain circumstances be so broad as to allow under this disguise the introduction into the civil law of solutions devised by the imagination of the judiciary itself.⁷⁵

One must also take into account a certain leniency on the part of the courts in observing the differences between the common law and the civil law

73. *Supra* note 70 at 1268.

74. Ménard, *supra* note 64 at 32.

75. J.-L. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec", in J. Dainow, *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, Baton Rouge, Louisiana State University Press, 1974, 1 at 10.

approaches. Each legal system constitutes a complex entity with its own substantive rules, legal theories and principles of interpretation⁷⁶. When one borrows a principle from another legal system, it is imperative to not lose sight of the fact that the host system may unconsciously be importing notions derived from a sociologically, economically and juridically discrete reality⁷⁷. Each legal system possesses its own genius, the parameters of which may become obscured in a mixed jurisdiction such as Quebec. Prof. C. Lemieux underlines the perils of having a magistracy fulfilling its functions in a mixed jurisdiction, which would include the possibility of viewing the civil law as highly permeable, as well as exaggerating the relative importance to be attributed to jurisprudence as a source of law⁷⁸. She emphasizes the fundamental differences between the common law and the civil law in the following terms :

La *common law* repose sur la jurisprudence et obéit à un raisonnement inductif, allant ainsi du particulier au général, c'est-à-dire partant d'un cas particulier pour en tirer une règle applicable (sous forme de jugement). Le droit civil quant à lui repose sur la loi et obéit à un raisonnement déductif, allant ainsi du général au particulier, c'est-à-dire partant d'une règle générale (la loi) pour l'appliquer à un cas particulier. Le statut de la jurisprudence, qui est la première source du droit en *common law*, est donc hiérarchiquement inférieur en droit civil, où la jurisprudence ne sert officiellement qu'à interpréter le droit et non pas à le créer, ce qui est d'abord le rôle de la loi.⁷⁹

76. J.-L Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975) 53 Can. B.R. 715 at 717.

77. *Ibid.* at 717.

78. C. Lemieux, "Jurisprudence et sécurité juridique : une perspective civiliste", (1998-99) 29 R.D.U.S. 223 at 226. According to J.E.C. Brierley, R.A. Macdonald in M. Boodman, J.E.C. Brierley, R.A. Macdonald, *Quebec Civil Law; an Introduction to Quebec Private Law*, Toronto, Edmond Montgomery Publications, 1993 at 122, "Such institutional considerations, along with a judicial methodology and organization of courts derived from the Common law, have been present in Quebec Civil law for more than 200 years. For this reason, the decisions of courts have a vocation in Quebec that far exceeds the role they are traditionally ascribed."

79. Lemieux *ibid.* at 235.

As a result, the courts may indeed infer causation in certain situations through the rigorous application of presumptions of fact in conformity with the codal requirements that they be serious, precise and concordant⁸⁰. But by the same token, they must resist the temptation of adopting convenient *a priori* rules which circumvent the rather demanding requirements imposed by the *Civil Code*. Rather, the courts must determine whether the circumstances of a particular case clearly conduce to an inference of causation. Otherwise, in case of ambiguity, the burden of proof should be deemed not to have been met⁸¹.

Conclusion

Unless certain actions on the part of defendants are undertaken with the intention of destroying evidence, a failure to maintain accurate records or to perform certain tests cannot automatically lead to a reversal of the burden of proof of causation. Otherwise, such a reversal would almost always result in a determination of liability for wrongful conduct otherwise unrelated to the harm suffered. If a defendant *did* act with a view to covering his or her errors or omissions, an unfavourable inference could be drawn by the courts because one would be profiting from egregious conduct destined to subvert the discovery of the truth. Although generally utilized in other contexts, the maxim *malitiis non est indulgendum* would seem germane.

While in *Léveillé*⁸², causation was avowedly proven by presumption of fact, the obscure origin of the presumptions of causation posited in *Morin*⁸³ and subsequently in *Lawson*⁸⁴ raises the suspicion that they are of common law

80. Art. 2849 C.C.Q.

81. *Lachambre v. Perreault*, [1990] R.R.A. 397 (Qc. C.A.) at 399; *Kirschenbaum-Green v. Surchin*, [1993] R.R.A. 821, 20 C.C.L.T. (2d) 207 (Qc. Sup. Ct.), [1997] R.J.Q. 39, 44 C.C.L.T. (2d) 68 (Qc. C.A.), leave to appeal to S.C.C. refused 223 N.R. 396 (S.C.C.); *Bernier v. Décarie*, [1997] R.R.A. 729 (Qc. Sup. Ct.) at 737; *Bureau v. Dupuis*, [1997] R.R.A. 459 (Qc. Sup. Ct.) at 469, *Claveau v. Guimond*, [1998] R.R.A. 616 (summary), J.E. 98-1143 (Qc. Sup. Ct.).

82. *Supra* note 55.

83. *Supra* note 21.

84. *Supra* note 13.

inspiration⁸⁵, more particularly through the influence of *McGhee*⁸⁶, and introduced into the Civil law by way of the Supreme Court. Paradoxically, these presumptions have taken on a life of their own in Quebec law even though *Wilsher*⁸⁷ and *Snell*⁸⁸ have subsequently refused to follow *McGhee*.

Obviously, the criticisms expressed in this commentary are not intended to intensify the already onerous burden of proof assumed by plaintiffs in medical malpractice cases but rather to query the validity of any well-intentioned attempts by the courts to alleviate this burden through the application of certain judge-made presumptions of ambiguous origin. The choices are obvious; either the legislator must create a legal presumption relating to causation along the lines of the *dicta* in *Morin*⁸⁹ and *Lawson*⁹⁰, or Quebec courts, through a rigorous application of the rules relating to presumptions of fact, will have to infer causation from the circumstances of each case without reference to a general presumption which may have been concocted in the style of a common law binding precedent.

85. D. Howes, "From Polyjurality to Monojurality : The Transformation of Quebec Law, 1875-1929", (1986-87) 32 McGill L.J. 523 at 557-558. Compare S. Normand, "Un thème dominant de la pensée traditionnelle au Québec : La sauvegarde de l'intégrité du droit civil" (1986-87) 32 McGill L.J. 559 at 573.

86. *Supra* note 43.

87. *Supra* note 49.

88. *Supra* note 2.

89. *Supra* note 21.

90. *Supra* note 13.