"Autonomous Acts of Things" in Quebec Law — Legal Adventurism versus Legal Conservatism

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In every system of law there is tension between the fault principle of liability for personal injuries and the risk principle. The question is whether liability should follow strictly upon proof that the defendant caused the harm (variously termed objective, causal, or strict liability), or whether it should depend further on evidence that the defendant was culpable in some way (sometimes termed subjective liability).

It can safely be said that the general tendency since the first decades of this century has been to strengthen the risk principle at the expense of the fault principle. But the means used to achieve this result have not been uniform from one country to another. In many countries, certain areas of activity in which physical danger has been a prominent feature have occasioned so much social agitation as to bring about legislative changes to improve the prospects of compensation.

Notably in the field of industrial injuries, statutes have been introduced to deal with the problem of workmen's compensation on an administrative basis rather than through litigation in the ordinary courts. Discarding the fault principle, statutory schemes of compensation either displace the civil remedy entirely, as in Quebec, or, as in the United Kingdom, supplement it. The major defects of this system have been the inadequacy of the scales of compensation and, in so far as the common law remedy survives, the continuing hazards of proof.

Similar pressures are at work in regard to highway accidents, although the legislation in this case has for the most part been neither as comprehensive nor as widespread as industrial injury legislation. Moreover — and this is of far greater importance — the legislation in this regard has tended to leave the fault principle

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formally intact,[1] contenting itself with ensuring, through some form of insurance, that the victim is not defeated by the anonymity or the indigence of the wrongdoer. Detailed studies have, however. revealed the inadequacies of this type of legislation as a solution to the enormous problem of reparation for the victims of road accidents.

The remedial deficiencies of the law governing reparation for injuries in industry and on the roads have led to proposals for the total displacement of the normal civil remedy by insurance schemes, administered either by the state as a part of a national scheme of social security, or under the aegis of private insurance companies. In these schemes, reparation is to be wholly independent of proof of fault. In effect, they recognise that industry and transport in modern conditions expose so large a part of the population to the risk of injury that it becomes a matter of elementary social justice that all persons injured in these ways should receive compensation as of right.[1a]

There is, beyond doubt, a powerful case to be made out upon these lines for radical legislative reform. But these projects are for the future. At present in Quebec, the workmen's compensation legislation [2] is neither comprehensive nor excessively generous. And even if it were, that would not justify disregarding the plight of those persons who do not come within its terms. And Quebec legislation regarding liability for accidents on the roads,[3] whilst it greatly assists the accident victim by raising a *prima facie* case against the owner and the driver of the vehicle involved in the accident, nevertheless clings to the principle of fault, allowing the defendant to escape liability, *inter alia,* where he is able to prove that the damage is not imputable to the fault of himself, the driver, or a person on board.[3a] It is especially essential to take account of the cases where the circumstances of the injury take it out of the

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[1] In the practice of the courts, however, the fact that the true defendant in really an insurance company undoubtedly influences judge and jury alike, creating a secret sphere of influence for the risk principle, screened by the verbal formulae of fault liability.

[1a] The most far reaching proposals of this kind are those contained in the report of the Royal Commission on Compensation for Personal Injury, New Zealand, 1967, recommending that all physical injuries, wherever and however sustained by any citizen of the country, should confer upon such citizen, as of right, a claim to reparation by the State, the normal remedies of Common Law being totally superseded by a national scheme of social benefits.

[2] Workmen's Compensation Act, R.S.Q. 1964, c. 159.

[3] Highway Victims Indemnity Act; R.S.Q. 1964, c. 232.

[3a] *Ibid.*, s. 3(a).

present industrial and road accident legislation. In all such matters, the victim must look to his civil law remedies. It is desirable, therefore, to bring under review, from time to time, the manner in which the provisions of the Civil Code are interpreted and applied in those cases in which the plaintiff is dependent upon them.

The Jand'heur Jurisprudence of French Law

In the interpretation of articles of the Quebec Civil Code which are inspired by the Code Napoleon, the developments in French jurisprudence an ddoctrine are always relevant. This is especially true of those provisions for delictual responsability which, in both Codes, are stated in very general terms. Most particularly, Art. 1054 of the Quebec Code must run the gauntlet of French legal thinking regarding the corresponding provision, i.e. art. 1384, of the Code Napoleon, which has engendered in France the remarkable judicial activity known as the *Jand'heur* jurisprudence.

Article 1053 of the Civil Code of Quebec[4] (corresponding to articles 1382 and 1383 of the Code Napoleon) embodies the basic principle of fault liability which seems to have been the common law of the Province prior to the codification. As the Quebec legislation referred to above indicates, art. 1053 was not felt to measure up to the social needs of the twentieth century in regard to industrial and highway accidents. In the fulness of time, more adequate laws may find their way onto the statute book. Meanwhile the question is to what extent other provisions of the Quebec Code, in particular the provisions of article 1054, provide at least a palliative until such time as the legislative millennium arrives.

Art. 1054 reads as follows:

> He is responsible not only for damage caused by his own fault, but also for that caused by the fault of persons under his control and by things he has under his care;
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> The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;
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> Tutors are responsible in like manner for their pupils;
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> Curators or others having legal custody of insane persons, for the damage done by the latter.
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> Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

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[4] Art. 1053: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill".

> The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.
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> Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

Now the first paragraph of this article contains the possibility of a refuge for those who are defeated by the fault requirement of art. 1053 — or at least it must have seemed a possible refuge ever since the time, nearly a century ago, when the French law first sought to discover in its art. 1384 some relief from the fault principle embodied in arts. 1382 and 1383 of the Code Napoleon.[5] Traditionally art. 1384, al. 1, C.N. was treated as merely adumbrating the specific presumptions of fault, relating to damage caused by an animal or by the disrepair of a building, which were set out in the two succeeding articles, 1385 and 1386 (corresponding to Art. 1055, Quebec C.C.). The subsequent liberation of art. 1384, al. 1, C.N., from this limitation is so well known that we may content ourselves with a summary account here.

It is commonly accepted that the strongest impulse towards the re-examination of art. 1384, C.N., came from the industrial revolution, with its increasing toll of injury and death amongst French industrial workers, and the resultant agitation of the victims or their dependants for a more effective remedy than existed up to then. Some courts began to see in the words of art. 1384, C.N., which rest responsability, *inter alia*, on "le fait... des choses que l'on a sous sa garde", a basis for giving judgment in favour of injured workmen without fault having been proven against their employers. This development was interrupted by the enactment in France of the Law on Industrial Accidents, (1898), which assured to injured workmen some compensation, however meagre. But the judicial activity regarding damage caused "by the act of... things that he has under his care", while losing some of its impetus, was not halted. It gathered renewed force with the advent of the motor car and its grim harvest of road injuries and fatalities, and culminated

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[5] «Art. 1382. Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.

Art. 1383. Chacun est responsable du dommage qu'il a causé non-seulement par son fait, mais encore par sa négligence ou par son imprudence.

Art. 1384. On est responsable non-seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde...».

in the great legal battle in the *Jand'heur* case,[6] in which the Cour de Cassation finally established the new jurisprudence. Art. 1384 C.N. was there interpreted to mean that the liability of the *gardien* of a thing to the person damaged by that thing was defeasible only on very limited grounds, namely, positive proof of the decisive intervention of a cause external to the defendant and not imputable to him (*cas fortuit, force majeure,* or the act of a stranger or of the plaintiff himself). Moreover, the cause must be *external to the thing itself,* so that a defect in the thing which makes it harmful, whether known or knowable, or not, does not rank as *force majeure* or *cas fortuit,* so as to exonerate the custodian. In short, art. 1384 C.N. was deemed to sanction not simply a presumption of fault, displaceable by proof of absence of fault, but a presumption of *responsibility,* that is to say strict liability, defeasible in no way at all other than by disproof of the causal nexus in the requisite manner.[7]

The risk principle thus enthroned reached its pinnacle in the years which followed — "the age of adventures", as Rodière called it.[8] And indeed the triumph of the causal principle did threaten to dismantle much of the jurisprudence based upon the fault requirement of art. 1382 C.N., and to reduce that article to a very subsidiary role in the law of civil responsibility. The high water mark in this development might well be taken to be the first decision of the Cour de Cassation in *Cannot* v. *Franck.*[9] It was there held that the *gardien* continues in law to be the *gardien* of the thing even after it had been stolen, so that he remains responsible to a person injured by his car whilst it is being driven by the thief. Since then, there have been some retreats. Thus the reasoning in *Connot* v. *Franck* no longer prevailed in the Cour de cassation when the same case came before the Chambres réunies some five years later.[10] The court now held that the *gardien* in such cases had no longer any power of surveillance over the thing, and, being deprived of the use, direction and control of the car, could not rightly be regarded as the *gardien* any longer.

In this new attitude there is seemingly some revival of fault theory: an implicit argument that, having regard for the theft of

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[6] *Jand'heur* v. *Les Galeries Belfortaises,* Cour de cassation, Chambres réunies, 13 Feb., D. 1930.1.57.

[7] Contrast Quebec law: «en vertu de l'article 1054, c'est la faute qui est présumée, et non pas la cause...» — *Dame Bouchard* v. *The Yorkshire Insurance Co. Ltd.* [1970] C.A. 734, *per* Brossard, J., at 735. See further below.

[8] Rodière, in Ch. Beudant, *Cours de droit civil français,* (2e éd.), Tome IX *bis,* No. 1497.

[9] D. 1936.1.81 (note Capitant).

[10] *Connot* v. *Franck,* D.A. 1941.J.369.

the car, no *blame* could attach to the erstwhile *gardien.* Other pointers in the same direction are to be found in decisions denying responsibility in the case of mental illness, and denying responsibility in the case where the thing is said to play a purely passive role.[11] On the surface, the line of reasoning in this last class of case is causal — the assertion that a purely passive thing is not a "generating cause" of the damage. This does not mean, however, that an *inert* thing cannot be a cause within the sense of Art. 1384 C.N.; for a distinction is made between that which is inert and that which is purely passive, the latter alone affording the defendant an answer to the plaintiff's claim. But the significant point is that the test of "pure passivity" is sometimes said to turn upon the *normality* of the thing, its position and behaviour. For it is easy enough to associate normality with proper control by the *gardien,* abnormality marking some deviation from the norms of the community — and instantly one is poised once again upon the brink of fault liability.

Despite these straws in the wind, the *Jand'heur* jurisprudence remains substantially intact in France. Perhaps, as has been often said, it maintains its position because of the continued lack of adequate special laws to ensure the compensation of victims of highway accidents. Carbonnier, for instance, suggests that it may one day be said of the celebrated jurisprudence on art. 1384, al. 1, C.N., that it was "an immense waste of intelligence and time" — one good law on responsibility for car accidents, like the German (3 May 1909) or Swiss (15 March 1932), would do the job at least without having to embrace within the same formulae physical and social realities of the most diverse kind.[12] However that may be the *Jand'heur* jurisprudence does still dominate the scene, and affords a truly striking illustration of the living process of interpretation of a code in a manner responding to the felt need of the times. It represents a remarkable adventure in judicial creativity, yielding an interpretation of a provision of the Code Napoleon which, as everyone agrees, the legislators of 1804 could never have imaginated.[13]

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[11] See cass.-civ. January 21 and February 19, S. 1941.1.49., and the note by F.M. at pp. 49-51; as well, see the note by Flow, D.C. 1941.1.85-90.

[12] Carbonnier, *Droit Civil,* Vol. 2, no. 192.

[13] See Mazeaud et Tunc, *La Responsabilité Civile* (5th ed.), vol. II, no. 1144. Cf. the discussion before the legislature by Tarrible, Tribunat, in 15 Fenet, *Recueil complet des travaux préparatoire du code civil* (1827), p. 478: "In no case is liability imposed if it be proved that the act causing the damage could not have been prevented" — the very provision which is, in substance, embodied in the Quebec Code, art. 1054, para. 6.

Quebec Jurisprudence: the "autonomous acts" of things

It is plain that the *Jand'heur* jurisprudence depended upon the firm rejection of the argument that a "thing" in terms of art. 1384, al. 1, C.N., meant only a thing which was in some way self-activated, and that this provision therefore excluded all cases (including the paramount case of a motor car in motion) where the act of a thing is in some way associated with human conduct. This "autonomous" behaviour of things, if it can be understood at all, (for even the fact that the thing is wherever it happens to be at the time of the accident is normally attributable to human behaviour), must surely be confined to a very limited number of cases indeed. *In the ordinary way*, a thing, being inanimate, does not "act". If it is in motion at the time when it causes damage, it moves under human propulsion, guidance or control. If it is inert when it causes damages, it is nonetheless under human control or surveillance. "Self-activity" in any meaningful sense would seem to be confined to internal chemical or physical changes, like those giving rise to spontaneous combustion or explosion,[14] and even then, only if such changes could not be traced to the culpabale act or omission of a human being. Thus even if one could make an intelligible category of self-activated things, the effect would be to narrow the scope of a provision such as art. 1384, al. 1, Code Napoleon, to the point where it could only be applicable in very rare cases. Yet this is precisely what has been done by Canadian courts in the interpretation of art. 1054 of the Quebec Civil Code. Professor Crépeau has remarked: [15]

> Quebec courts unlike the French courts, have always tried to maintain a sharp distinction between, on the one hand, the 'act' (le fait) of a thing, in which case the plaintiff has the benefit of the legal presumption of liability attached to paragraph 1 of article 1054, and on the other hand, the 'act' (le fait) of a person through the mere instrumentality of the thing, in which case the plaintiff can only sue under article 1053 and must, therefore bear the onus of proof.

It is ironic that, as Nadeau had observed,[16] art. 1384 of the Code Napoleon, which speaks of *le fait des choses*, lends itself much more readily to the Quebec theory of *un fait autonome* than does art. 1054 of the Quebec Civil Code, which drops the phrase *fait des choses* (the act of things) and speaks, instead, simply of "dommage...causé par les choses" ("damage caused by things"). Be that

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[14] Gas, electricity, steam, and «tous les éléments délétères ou insalubres» are instanced by Bissonnette, J., in *Federal Store Ltd.* v. *Tomy*, [1954] B.R. 232, at p. 245.

[15] "Liability for Damage Caused by Things", (1962) 40 C.B.R. 222, at p. 234.

[16] *Traité de droit civil du Québec* (1949), Vol. 8, p. 382.

as it may, the distinction is made and reiterated in a number of cases by Anglin C. J. in the nineteen-twenties. Thus in *Curley* v. *Latreille*,[17] his Lordship said that responsability under art. 1054, para 1 "arises only when the occurrence is due to the thing itself, not when it is ascribale to the conduct of the person by whom it is put in motion, controlled or directed..." The learned Judge bases himself upon the earlier French decisions, which were destined to be submerged, in the decade that followed, by the *Jand'heur* jurisprudence. This theme is repeated by Anglin, C. J., in two cases in 1928. In the first of these, *Lacombe* v. *Power*,[18] having made the distinction between an automobile starting "... of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine...", and one whose "...movement was due to an act of the deceased...", the Court holds that it is to the former case alone that art. 1054 applies. This line of thinking appears again in *Pérusse* v. *Stafford*,[19] which reaffirms that art. 1054, 1, has no application, "...where... the real cause of the accident is the intervention of some human agency...". Hence Taschereau J., declares in the Supreme Court that "la jurisprudence reconnue est aujourd'hui [i.e. 1951] à l'effet que pour que cette dernière partie du premier paragraphe de 1054 C.C. s'applique, il faut nécessairement que le dommage ait été causé *par le fait de la chose elle-même sans aucune intervention humaine*".[20] (Emphasis his own.)

This would mean that even a natural force which activates a thing (e.g. the force of gravity) will not bring the matter within the terms of art. 1054 (1), if some human agency has previously set the stage by bringing about the situation which made that natural force potentially operative.[21] On the other hand, a natural force which is not thus "triggered" by preceding human conduct would probably rank as *force majeure* or *cas fortuit*, so that the plaintiff

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[17] (1920), 55 D.L.R. 461 at 467. Cf. *Montreal Tramways* v. *LaPointe*, (1921), 31 B.R. 374, at 375, where Lamothe C.J. said: «Si au contraire, l'accident est dû à un vice de la chose même, l'art. 1054 s'applique; il s'applique aussi lorsque le dommage est causé par la chose elle-même, sans aucune intervention extérieure.»

[18] [1928] S.C.R. 409.

[19] [1928] S.C.R. 416, at 418.

[20] *Alain* v. *Hardy* [1951] S.C.R. 540, at 549. The onus of proving that the damage was caused by the autonomous act of the thing is on the plaintiff — *Dame Bouchard* v. *The Yorkshire Insurance Co. Ltd.* [1970] C.A. 734.

[21] *Raymond* v. *Com. des accidents* [1957] B.R. 780 — plaintiff injured by a loaded wheelbarrow falling down a shaft.

would fail in that case too. As Josserand remarked, the greater the potentiality for harm (arising from human intervention), the lower the coefficient of responsibility. "Pour une fois, la politique de Gribouille est couronnée de succès; il suffit, à qui veut éviter la pluie, de se jeter en pleine eau".[22] In short, in point of legal risk, the more you have to do with the thing in your care, the better off you are, which in a curious outcome for a system of responsibility based upon personal fault.

Purely Passive Role

French law, in applying art. 1384, al.1, of the Code Napoleon, has refused to distinguish between movables and immovables, and between things which are in motion and things which are stationary or inert, holding that all these fall equally within the notion of a "thing" in terms of that article. Thus a stationary motor car, a wall, a staircase, or the ground itself, are all "things" within the article. Basically, this view is still maintained by the French law, although somewhat modified in recent years by the development of the position, repeatedly taken by the courts since 1940, that the defendant may exonerate himself by showing that the thing has played a *purely passive role.*[23]

As we saw above, the reasoning here is once again causal, arguing that, in such a case, the thing is not a *"cause génératrice"* of the damage done.[24] Nonetheless it remains true for French law that a thing is not *disqualified* from the terms of Art. 1384, al.1, either by reason of being immovable or by reason of being inert. In Quebec law, however, it would seem impossible for property which is "immovable by nature" such as land or buildings or for an inert object, to qualify as a "thing" in terms of art. 1054, para. 1. The requirement "that the damage be caused by the act of the thing itself without any human intervention", that is to say, the requirement of an autonomous act of the thing, sets up two requisites for the application of art. 1054, para. 1: first, the absence of human intervention, which was discussed above; second, the

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[22] Chronique D.H. 1927, p. 66.

[23] See *supra,* footnote 11, and text thereto.

[24] Note, however, that *rôle passif* is a distinct ground of exoneration from *cause étrangère.* The Deuxième Chambre, though tempted earlier to merge the two ideas (see Boré, J.C.P. 1964, 13,607, under Cass. civ. 2e, *Bachelard et Autres* v. *Carra,* 11 juillet 1963) has returned, in a number of decisions, to asserting that they are distinct. See Durry, «Responsabilité civile», 1968 Revue trimestrielle de droit civil, 711, at p. 722.

activity or movement of the thing. This second requirement clearly excludes land and buildings inert fixtures, and stationary objects.[25]

As in French law, the argument here is essentially causal; but the inertness of the thing is taken, in Quebec law, as a *conclusive* causal argument, with the result that the exclusion is much more comprehensive than is the case in the French law. Thus if the plaintiff falls through a board placed over a hole in the floor of a building in construction, neither the floor nor the board are deemed to be things causing the accident; they are regarded as playing merely a passive role.[26] Similarly a barrier on the defendant's property with which the plaintiff collides is deemed to be "merely the occasion" of the accident, and not its cause.[27] In the same way it has been held that if things in the defendant's care are set alight by a fire of unknown origin, resulting in the spread of the fire to the premises of the plaintiff, such things do not fall within art. 1054, para 1: they are merely a passive agent, i.e., the material upon which the fire feeds, as opposed to a thing which contributes directly and initially to it by some autonomous act of its own.[28]

Text and Jurisprudence

Professor Crépeau [28a] brings out very clearly the dual character of the "autonomous act" required by Quebec law in the following passage, which shows the narrowing effect of the jurisprudence:

> What then is the 'autonomous act' of a thing causing damage? This is not an easy problem of characterization, but it would seem that such an act can be described both in negative and in positive terms. In negative terms, it would mean that paragraph 1 of article 1054 cannot be applied if, at the moment of the accident, the thing was in a state of inertia, of complete passivity. The damage then was not caused by a thing and liability must be proved under article 1053. For instance if a person slips

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[25] Crépeau says: "...the term 'things' under art. 1054, paragraph 1, of the Civil Code may comprise any inanimate object, whether corporeal or incorporeal, movable or immovable, except such immovables as may come within the terms of art. 1055, paragraph 1, of the Civil Code". — (1962), 40 C.B.R. 222, 233-4. In practice, the "inertness" of land and buildings would seem to defeat this. *i.e.* things "immovable by nature" (aliter things "immovable by destination" as defined by art. 379, Quebec C.C., since these are not necessarily inert).

[26] *Gravel* v. *Tragriault* [1959] B.R. 61.

[27] See *Dame Haskell* v. *Aubry* [1967] C.S. 44, See, too, *Côté* v. *Labrie* [1969] B.R. 690, where a four-year old child fell through balcony railings for lack of a vertical bar.

[28] See *Federal Store Ltd.* v. *Tomy* [1954] B.R. 232.

[28a] *Supra*, fn. 25, at pp. 234-5.

> on a sidewalk [*Cité de Montréal* v. *Chapleau* [1960] B.R. 1096; *City of Montreal* v. *Chapleau* [1958] B.R. 445; *Brodiak* v. *Gauvin* [1960] B.R. 258] or trips on the root of a tree, [*Rosler* v. *Curé de N.D. de Mtl.* (1937), 75 C.S. 91] the sidewalk or the root cannot be said to be 'things within the terms of paragraph 1 of article 1054; any action must then be taken under article 1053 where the burden of proof is on the plaintiff. In positive terms, the application of paragraph 1, of article 1054, requires that a thing have actively caused the damage as a result of its own dynamism, of it own motion, without the direct intervention of man.

This jurisprudence needs to be set against the phrasing of art. 1054, para. 1, since,

> ... still, the first step, the indispensable starting-point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources.[29]

Now, if we "take the Code itself" there is, with respect, no warrant for reading the words "things" in art. 1054, para. 1, in this restrictive fashion. The article makes the clearest contrast between, on the one hand, damage caused by a person's own fault, and on the other hand, damage caused either by the fault of person under his control, or by things he has under his care.

It is unfortunate, from the point of view of clarity of thought, that the concepts which are here contrasted as causes of damage are of a different order, namely, on the one hand, *fault*, which is a normative concept, connoting the evaluation of human conduct; and on the other hand, *things*, which is a collective noun — indeed the widest in the language — to describe all inanimate objects. But however inelegant the phrasing may be, it is at least plain that article 1054 is drawing a contrast between two situations involving civil responsibility.[30] Textually speaking, the first deals with damage which can be causally linked to such conduct of the defendant as the law recognises as fault; it is the type of responsibility designated in the immediately preceding art., 1053, and *as to which the nature of the immediate instrument of thing causing the harm is not relevant.* The second deals, *inter alia*, with damage which can be causally linked to things which the defendant has under his care *;as to this type of responsibility, the presence of absence of fault on the part of the defendant is not relevant.* The sole qualification of "things" in this article is that they are "under his care", and if they are, then they are within the plain meaning of the words. For the

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[29] *Quebec Railway, Light, Heat and Power Cor.* v. *Vandry* [1920] A.C. 662, P.C., *per* Lord Summer, at p. 672.

[30] "He is responsible not only... but also..." — Art. 1054, para. 1.

courts, therefore, to introduce the further qualification that the things must be self-activated is clearly to take a great liberty with the wording of the article.

What is worse, the category of self-activated things is not only narrow, it is also senseless. Art. 1054, like art. 1055, is, after all, concerned with situations in which the legislators thought it desirable to stiffen the defendant's responsibility. The rational basis for this policy, in relation to paragraph 2, 3, 4, 5 and 7 of art. 1054 is very plain — they form a coherent scheme of vicarious liability in circumstances where the defendant stands in a special relationship to the wrongdoer, which characteristically involves an element of control. But what rational basis is there for marking off self-activated things for the purpose of imposing stricter liability? If this class of things were, for example, synonymous with "specially dangerous things", the rationale of the classification would be readily apparent. But these two classes are not synonymous; [31] the class of things which act autonomously is able to include the most innocent things, like a bottle of Coca-Cola or a brand new motor car tire, and to exclude the most dangerous ones, like a loaded revolver. From this point of view the category is random and does not necessarily embrace either dangerous things or culpable activity.[32] In effect then, Quebec jurisprudence drastically limits the field of responsibility for "things he has under his care" using a classification which is notable mainly for its ineptness as an expression of any rational policy.

It must be said, however, that any analysis of art. 1054 of the Quebec Civil Code in purely literal terms, divorced from the motivations of judicial policy, is bound to be unrewarding. Nor is there any serious advantage to be gained, in the case of the Quebec Code, any more than in the case of the French Code, from an attempt to discover in the work of the Codifying Commission some useful light on the intention of the legislators. Even if there had been something in the reports of the Commissioners — which there is not — to elucidate this particular matter, it is clear that the decisive factors behind the diversity of interpretation of the provisions of art. 1384, al.1., of the Code Napoleon, and art. 1054 para. 1, of the Quebec Civil Code, have been the discrepant

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[31] Thus Mazeaud et Tunc, *supra*, n. 13, no. 1240: «Le critère du dynamisme propre est en réalité entièrement distinct du critère du danger».

[32] Cf. Bériault, «La responsabilité du fait des choses inanimées en vertu du premier alinéa de l'article 1054 du Code civil», 66 Justinien, p. 65, at pp. 76 and 77.

social pressures in the two countries. The different solutions propounded by, for example, the French, Belgian and Quebec courts, in regard to damage caused by things in the defendant's care, demonstrate — if such demonstration were needed — how readily similar words may be made to yield widely different constructions, and that the attempt to wrest a "true meaning" out of the four corners of the article is, at least in this case, a fruitless quest. The truth is that at this level of abstraction, you get what you want.

Risk v. *Fault*

The contrast between incommensurable qualities which is posed by art. 1054, para. 1, Quebec Civil Code, opens the way for the conflict, referred to at the begining of this article, between two theories of civil responsibility: on the one hand, the fault theory, which imposes liability upon proof of fault, whether real or presumed, on the defendant's part, plus a sufficient causal link between the culpable conduct and the damage; and on the other hand, the risk theory, based upon causation alone, namely, proof of a causal link between the thing in the defendant's care and the damage.[33] This conflict could be avoided by classifying all cases into two *mutually exclusive* categories: one category in which the defendant causes the damage in such a manner that no "thing" in his care participates, in which case the culpability of the defendant's conduct is to be the appropriate criterion of liability; another category in which a thing in his care causes, *i.e.* is the instrument of, the damage, in which case this causal nexus alone is relevant, and civil responsibility arises regardless of fault on the defendant's part, and subject only to such exoneration as the article allows for in paragraph 6.

Such a solution is logically valid and is in harmony with the text. But its consequences are profoundly unfavourable to the fault principle. For whilst one may readily conceive of damage caused without the instrumentality of a thing, e.g., by a blow struck with

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[33] On a more refined analysis, articles which admit a presumption of fault and prescribe ways of rebutting that presumption, really create an intermediate position between risk and fault principles: the legal presumption of fault expresses the risk aspect of the responsibility, while the mode of rebuttal expresses the fault aspect. Thus art. 1054 establishes a risk régime, but attenuates it in para. 6, by providing a method of exoneration where a certain kind of fault can be excluded by the defendant. The point is further developed below.

the bare fist,[34] or by a negligent omission to give warning of danger, nonetheless, in the great majority of cases, there is some physical object, a stick or stone, a car or machine, which is the tactual instrument of the damage. The result is that the great majority of situations fall within the second category, and since the second category is manifestly easier to prove than the first, dispensing, as it does, with the need to establish fault, the injured party is bound to prefer it in all cases where the damaging thing was under the care of the defendant. Disregarding for the moment the mitigating effect of art. 1054 paragraph 6, it would follow that causal responsibility would tend very largely to supersede the fault responsibility postulated by art. 1053, and by the opening phrase of art. 1054. In the result, the general belief that the civil code enshrines the fault principle as the primary basis of civil responsibility in Quebec would prove to be a delusion.

It is the fear of this outcome that has weighed conclusively in the formation in Quebec of an anti-*Jand'heur* jurisprudence, believed to be necessary for the defence of the fault principle. As we have seen, the courts achieve this result by a restrictive interpretation of the word "things" in the phrase "things he has under his care". It is, after all, only the generality of the class "things" which poses a threat to fault liability. "Things" is an open category — literally *every thing* passes through its wide portals. In order to shrink the category to the point where it no longer threatens the fault principle, it was only necessary to find and impose on art. 1054, paragraph 1, a criterion of "things" which is suitably selective. The criterion, adopted in Quebec, of autonomous action, is marvellously well suited to serve this purpose. The generic concept of things is thereby turned into a limited species of thing, and at one stroke the category is emptied of all but the rarest and most freakish specimens.

As long as the risk principle and the fault principle are thought of as starkly opposed alternative principles for the regulation of civil responsibility, then it is bound to seem that, whenever a thing in the defendant's care intervenes, as it nearly always does, in the infliction of physical injury, the only way to avert the triumph of the causal category of civil responsibility must be to ensure the triumph of the fault category. It is clear that, however much this

[34] Ripert, 13 Feb., D. 1930.1.57, at p. 59, suggested it would be necessary to imagine a collision between two nudists before art. 1382 C.N. would apply! And some contend that even the human skin and bones are "things" in this context!

may be disguised by recourse to the notion of a class of autonomously activated things, this is, broadly, the solution which has been adopted in Quebec. As has been suggested, this class is so narrow as to throw nearly every plaintiff back upon Article 1053, which embodies the fault principle unalloyed. It becomes as exceptional for Quebec law to find a true case of a self-activated thing, as for French law to find a true case of damage which is not caused by the act of a thing under the defendant's *garde.* The Quebec jurisprudence cuts to the bone the situations in which responsibility for "things he has under his care" can be invoked, and thereby reduces the contrast drawn in art. 1054 between the two categories of responsibility to the point where the independent force of para. 1 is marginal.

It may be suggested, however, that this emasculation of Art. 1054, para. 1, goes far beyond the defensive needs of the fault principle.[35] It is, in fact, untrue that the conflict or risk principle and fault principle imposes a choice between stark alternatives. There is a middle ground, in which the basis of responsibility is still linked to fault, yet an element of risk is allowed some play by requiring the *gardien* of property which causes damage to exculpate himself — he is made to run this risk, that, failing proof of facts which the law accept as exoneratory, he must bear the loss. And the Quebec code, unlike the Code Napoleon, provides exactly such exoneration in art. 1054, para. 6. This paragraph reads: "the responsibility attaches in the above case only when the person subject to it fails to establish that he was unable to prevent the act which has caused damage".

Privy Council Interpretation

It is of passing interest to note that, prior to the decision in *Shawinigan Carbide Co.* v. *Doucet,*[36] the Canadian Supreme Court had not passed upon art. 1054 of the Quebec Civil Code, and the reference to that article in the decisions of the Quebec courts were indecisive.[37] In *Doucet's* case, and again later, in *Norcross Bros. Co.* v. *Gohier,*[38] Anglin J., took the view that the exculpatory provision of the sixth paragraph of Art. 1054 did not apply to the first

[35] Assuming, that is, that the fault principle deserves to be conserved at all in cases of physical injury, — a highly questionable assumption which is today under attack throughout the world, civil and common law alike.

[36] [1909] 42 S.C.R. 281.

[37] *Ibid.,* at p. 334.

[38] (1918), 56 S.C.R. 415, at p. 425.

paragraph thereof, but only to paras. 2 to 5 inclusive, and furthermore, that the responsibility created by the first paragraph rested upon a rebuttable presumption that an injury caused by an inanimate thing is attributable to fault on the part of the person under whose care it is.

The matter was, however, differently determined when the issue came before the Privy Council in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry*,[39] and *City of Montreal* v. *Watt and Scott Ltd.*[40] Lord Summer, in *Vandry's* case, says that

> There seems to be no doubt that Art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, *all of which are independent of that personal element of faute,* which is the foundation of the defendant's liability under art. 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute,* which the defendant may rebut by proving affirmatively that he was guilty of no *faute.* It establishes a liability, unless in cases where the exculpatory paragraph applies, the defendant brings himself within it's terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage.[41]

This means that once it has been proved that damage has been caused by things under the defendant's care, the defendant can escape liability in one way and in one way only, and that is by showing that he was "unable to prevent the act which has caused the damage". It is a specifically defined obligation "de résultat".[42]

At the time of *Vandry's* case, then, art. 1054, para. 1, was thought of as embodying the risk principle, but not in absolute terms, since it remained open to the defendant to escape if he was able to show that he could not prevent the act which caused the damage. We are put, in other words, in the middle ground between risk and fault. But if the compromise appeared a little too heavily weighted on the risk side for the taste of the Quebec judiciary, the balance was more than generously corrected by the Privy Council in *City of Montreal* v. *Watt and Scott Ltd.*[43] Here the Privy Council chose to interpret the phrase "unable to prevent the act which has caused the damage" to mean "unable *by reasonable means*

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[39] [1920] A.C. 662.

[40] [1922] A.C. 555.

[41] [1920] A.C. 662, at pp. 676-77 (italics added).

[42] An obligation «de résultat» expresses the risk principle, just as an obligation «de moyens» expresses the fault principle. See, generally, Mazeaud et Tunc, *La responsabilité Civile,* (5th ed.), vol. I, 103-2, 66.

[43] *Supra,* fn. 40.

to prevent the act which has caused the damage". Having regard for the plain words of the article, the qualification arbitrarily lightens the obligation "de résultat". In the light of this rider, it is not entirely clear what is left of Lord Sumner's statement in *Vandry's* case that there is a clear difference in law between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage.[44] At least, however, one may say that the defendant's rebuttal may not take the form of *any kind of evidence* going to show absence of fault;[45] it may only take the form of proof of inability by reasonable means to prevent the damage complained of. But it would not be sufficient, seemingly, for the defendant to show that he had used reasonable care in the management of the thing or that he had no reasonable grounds for anticipating that the thing would behave in the way that it did, so long as evidence of that kind leaves open the question whether he took reasonable steps to prevent the damage.[46]

Having regard to this exoneratory provision of the Quebec Code, which has no parallel in the Code Napoleon, it is plain that even had the Quebec courts chosen to follow the *Jand'heur* jurisprudence, the result would have been quite different and far less dramatic than in France. There, as we saw, no answer avails the defendant other than proof of an external cause not imputable to the defendant. But is this not, perhaps, the very reason why the Quebec courts might have tackled para. 1 of art. 1054 less timorously than they did, secure in the knowledge that the exoneratory clause continues, in a modified way, to tie this provision to the fault principle? For

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[44] Thus Nadeau, *supra*, n. 16, at p. 406, says of the case of *Watt and Scott Ltd.* that:

«...le Conseil privé ramenait le problème à ses véritables proportions et tout en gardant dans les termes une présomption de responsabilité ordinaire, il n'y a aucun doute qu'il assignait à la faute présumée du gardien sa place véritable comme fondement de cette responsabilité légale.»

Thus he considers that it is not necessary for the defendant to prove the direct cause and true nature of the accident, but enough to show positively a complete absence of fault on his part (p. 441). *Sed quaere:* see the next footnote.

[45] Cf. Taschereau, J., in *Cloaks Ltd.* v. *Cooperberg and Davis* [1959], S.C.R. 785, at 788: [le gardien juridique] «peut s'exonérer en démontrant l'intervention d'une force majeure, d'un cas fortuit, de l'acte d'un tiers, ou qu'il n'a pu par des moyens raisonnables empêcher le fait qui a causé le dommage. *Cette responsabilité existe même en l'absence de faute* attribuable au gardien de la chose». (Italics added). Taschereau, J., dissented in the result, but his statement of principle was expressly endorsed by Abbott and Judson, JJ., at p. 791.

[46] But see Nadeau, *supra*, fn. 44. It is submitted that this goes too far.

the exoneration permitted by art. 1054, para. 6, as understood by the Privy Council, depends upon exculpation in the prescribed way. In short, Art 1054, para. 1, read together with para. 6, establishes a kind of rebuttable presumption of fault. It amounts to treating all instances of damage caused by things in defendant's care as raising against the defendant a *prima facie* case, which he may answer in any way which shows that he could not by reasonable means prevent the damage. This surely does relatively small violence to the fault principle so cherished in Quebec. Indeed it differs very little from other legal presumptions of fault in which the judiciary acquieces without misgiving.[47] Perhaps, after all, it was not really necessary to insist so rigorously on the doctrine of the autonomous act of things; a less destructive interpretation of art. 1054, para. 1, was possible without total surrender to the risk principle.

"Garde de Structure" and "garde de comportement"

It is curious that the devotion of the courts to the fault doctrine in Quebec, which has given rise to the restrictive interpretation of art. 1054, para. 1, has not deterred the courts from flirting with the risk principle in regard to the meaning of *"garde"* in the very same paragraph. In this area, the courts have borrowed from France a theory of the division of *garde* which, in France itself, is still highly controversial. This theory maintains that *garde* can be divisible, one person having the *garde* of the *structure* of the thing whilst, concurrently, another person has the garde of it's *comportement*, or behaviour.[48] The result is to make it possible for an injured person to sue either the original owner or manufacturer of the thing, or the person in whose *garde* it was at the time of the accident, according to whether the accident is attributable, causally speaking, to a structural defect in the thing, or to it's *comportement.*

This theory clearly leans towards the risk principle in fixing the owner or manufacturer with a continuing responsibility for damage caused by structural defects, even although he no longer retains control of the thing in question. His responsibility here turns, not upon *garde* of the thing (except in an extended sense), but rather upon his ownership, present or past. This is a movement towards "products liability", similar in function, though different

[47] And compare the reversal of the onus where there is a presumption of fact — *Côté* v. *Duchesne* [1963] B.R. 748.

[48] See Mazeaud et Tunc, *La Responsabilité Civile* (5th ed.), vol. II, no. 1160-3.

in character and legal analysis, from the developments in this field which have taken place in the common law in the United States.[49]

This notion of divisible *garde* has been severely attacked as being inconsistent with the text of the Civil Code, in conflict with the principle of fault which animates the jurisprudence of Quebec, and as adding nothing to the scope of the remedies which the injured party enjoys without benefit of any such theory.[50] One may, however, take leave to question the last mentioned criticism, since it is impossible to doubt that the transfer of the onus to the defendant, in the sense of requiring him to exculpate himself in the terms of art. 1054, para. 6., is a great and often decisive advantage to the plaintiff.

However, without pursuing this particular controversy, it is appropriate to note here the apparent lack of a coherent theory which has resulted in a timid flight from the risk principle in dealing with Art. 1054, para. 1, where it refers to "things", whilst embracing the risk principle by adopting this radical interpretation of the word *"garde"* in the very same paragraph. It might be that, at any rate in the field of physical injuries to the person, contemporary social attitudes are better served by the latter approach than by the former, and in so far as the provisions of art. 1054 of the Civil Code are capable of yielding a meaning which will afford greater protection to the injured party, a departure from the dogma of fault liability would be no bad thing. It is indeed true that, to some extent, the safeguarding of the interest of persons suffering physical injuries is independently catered for by separate statutes, such as those which obtain in the field of industrial injuries and highway accidents. But there would seem to be no good reason why the Civil Code, without offending accepted canons of construction, should not come to the aid of special laws affecting particular fields of personal injury, so as to provide a *jus in subsidio* which would generally broaden and strengthen the remedial position of the injured party.

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[49] See the American Restatement of Torts (2nd ed.) § 402 A, Kessler, "Products Liability" (1967), 76 Yale L.J. 887.

[50] See Kamil Antaki — «Garde de structure et garde de comportement», (1966), 12 McGill L.J., 41.