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Simultaneous Methods**

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# Double Reasoning in the Codified Mixed Systems – Code and Case Law as Simultaneous Methods

Vernon Valentine Palmer\*

*Mastering the lawless science of our law,  
That codeless myriad of precedent,  
That wilderness of single instances,  
Thro' which a few by wit or fortune led,  
May beat a pathway out to wealth and fame.<sup>1</sup>*

## INTRODUCTION

The methodology of the judge in the mixed jurisdictions was not heralded at first as a distinctive characteristic or a significant subject. The writers who spearheaded the study of the mixed systems, such as F. P. Walton, R. W. Lee and T. B. Smith, did not focus upon methodology. They emphasized the mixed pedigree of the substantive law, and not least they highlighted the process of common law infiltration. But they did not suggest that judicial method was something itself mixed and hybrid. Perhaps judicial method did not stand out in relief when one placed the methods of Scottish and English judges side by side, or compared the methods of South African judges with Scottish judges. All three countries had *uncodified* systems and adhered to the same form of judgment. All three relied heavily upon strong systems of precedents and, indeed, recognized judicial decisions as a source of law.<sup>2</sup> That any distinctive method existed in the uncodified systems that needed to be preserved against English encroachment was apparently never a serious question.

This picture, however, was almost totally the reverse in the *codified* mixed systems. There judicial methodology was caught between the ideology brought with the codes and the institutions which the common law sovereign implanted for their implementation. These European-style codes were from the beginning cast into an alien institutional and procedural

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<sup>1</sup>Lord Alfred Tennyson, *Aylmer's Field*, lines 437-442.

<sup>2</sup> See Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, 44-53 (2001) (2<sup>nd</sup> ed, 2012).

framework. The codes presupposed a modest role for the judge, a stricter separation of powers restraining his power, and they declared legislation the exclusive or near-exclusive source of law.<sup>3</sup> The Anglo-American institutions surrounding the codes, however, presupposed powerful, centralized courts in the common law model, possessing inherent powers and staffed by judges who perceived themselves as law creators and policy makers. Such courts might attribute any precedential value or make any use they desired of their own cases, whatever the codes might declare about the true sources of "law". In my view this mixed marriage of codes and courts, whatever its merits or outcomes (it has been praised in some quarters as the "best of both worlds")<sup>4</sup> created an inescapable and long-term tension between the codes and the cases. That tension is still the source of controversies today, including the tired perennial debates over the binding force of past decisions.<sup>5</sup> It may be recalled that the mere allegation by an academic lawyer in the 1930s that Louisiana judges had adopted *stare decisis* ignited a far-reaching polemic over whether Louisiana should be called a common law state.<sup>6</sup> It appears that from the

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<sup>3</sup> Historically the tension in the relationship is captured in Edward Livingston's plan to deny the Louisiana judges the power to create precedents when the code was silent, and in requiring them to make an annual "circumstantial account" of their decisions to the general assembly. For details concerning the plan and its rejection, see Vernon Valentine Palmer, "The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana," in A. M. Rabello, *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997), pp. 402-406.

<sup>4</sup> Albert Tate, "The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience," 20 Loy. L. Rev. 231 (1974) ("...[T]he judge of a mixed jurisdiction such as Louisiana has the best of both worlds available to him for the performance of his judicial function. He may take advantage of the techniques and perspectives of both legal systems." Ibid., p. 231.

<sup>5</sup> The traditional battle lines regarding the jurisprudence in the codified mixed jurisdictions have raised questions such as: Is the jurisprudence a *de jure* source of law? Is *stare decisis* recognized? Or is *jurisprudence constante* or *doctrina legal* recognized? Are cases easily overturned and overruled? Are lower courts bound to follow upper court decisions? Have cases become more important than the Civil Code itself? Are common law ideas seeping into the system through the cases and supplanting the Civil Code? See Palmer, *Mixed Jurisdictions Worldwide*, above at pp. 44-53

<sup>6</sup> The issue continued to reverberate into the 1970s and seems still unsettled. See Gordon Ireland, "Louisiana's Legal System Reappraised," 11 Tul. L. Rev. 585 (1937); Daggett *et al.*, "A Reappraisal Reappraised: A Brief for the Civil Law of Louisiana," 12 Tul. L. Rev. 12 (1937); John H. Tucker, "The Code and the Common Law in Louisiana," 29 Tul. L. Rev. 739 (1955); Mack Barham, "Methodology of the Civil Law in Louisiana," 50 Tul. L. Rev. 474 (1976); Albert Tate, "The Law-Making Function of the Judge," 28 La. L. Rev. 211 (1968); Albert Tate, "Civilian Methodology in Louisiana," 44 Tul. L. Rev. 673 (1970); Albert Tate, "Code Custom of the Courts: Louisiana Theory of Precedent," 48 Tul. L. Rev. 1 (1973). For the Quebec literature, see P. B. Mignault, "The Authority of Decided Cases," *Can. Bar Rev.* 1 (1925); W. Friedmann, "Stare Decisis at Common Law and under the Civil Code of Quebec," *Can. Bar Rev.* 723 (1953); Bernier, "L'autorité du precedent judiciaire à la Cour d'Appel du Québec," 6 R/J.T. 535 (1971); Brierley and Macdonald, *Quebec Civil Law*, Sec 100. On Puerto Rico's situation, see Manuel Rodriguez Ramos, "Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico," 23 Tul. L. Rev. 1, 345 (Parts 1 & 2) (1948-1949); José Trías Monge, *El Choque de dos culturas*; David Rivé Ribera, "La doctrina de stare decisis y el derecho civil en Puerto Rico," 63 *Re. Jur. UPR* 131 (1994); Liana Fiol Matta, "Civil Law and Common Law in the Legal Method of Puerto Rico," 40 *Am. J. Comp. L.* 783 (1992).

very beginning legal method mattered a great deal in these codified systems. Indeed the whole subject became a defining issue, a litmus test of purity, self-identity and cultural allegiance.<sup>7</sup>

Today, however, it is time to step back from the usual framework of discussion and to look beyond the stereotypes about common law and civil law methodology. Many (including the present writer) have been distracted too long by the theoretical, ideological and even polemical nature of ancient disputes. Meantime there has been little direct study of the process of interaction between codes and cases. There has been no examination of whether and to what extent the code texts actually permit a deductive, syllogistic method to operate, and to what extent they may require a second inductive method to take over the resolution of actual cases. Put another way, we have not studied whether a kind of double reasoning process (deductive *plus* inductive) takes place in a large number of instances.<sup>8</sup>

The reason we have not delved into this subject is not difficult to perceive. It has much to do with the stereotyped image of the "deductive" code and the "inductive" common law, a subject to be discussed below. We have to some extent subscribed to the myth that the codes are "rulebooks" in which all but a few questions can be resolved rather easily by precise rules and syllogistic reasoning. According to the myth, there is little need for inductive reasoning from past cases for "the code has done it all", and the cases mainly embody the code. This is contrary to all experience of the civilian judge. The civilian judge has need to use supplementary inductive, case-based logic in scores of circumstances, and in this endeavor his or her use of cases does not materially differ from the techniques of a common law judge. The overlap in approach turns out to be functionally related to the requirements of the task. The reach of the technique into many civilian systems suggests it is not the product of an acquired cultural habit, and does not emanate from common law influence, however understandable that perception may be in a mixed jurisdiction. To discuss this subject objectively, it is imperative to keep separate the perennial, and often justified, mixed jurisdiction concern that common law cases may be used as the source of induction and may therefore introduce an unnecessary infiltration of common law ideas. That concern is a separate question of "purity" that need not necessarily arise and depends upon the prophylactic tradition of the judges.

It is believed that the phenomenon of double reasoning occurs in all civilian systems, even though their jurists may not be aware of the fact. If this process is universal, however, the reader may wonder why the title to this article seems limited to the experience of codified *mixed* legal systems like Louisiana, Quebec and Puerto Rico. The reason is purely practical. It is far

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<sup>7</sup> A distinguished English visitor to Louisiana in the 1950s noted "...[I]t is the doctrine of stare decisis which arouses the greatest antagonism among adherents of the civilian system." H. F. Jolowicz, "The Civil Law in Louisiana," 29 Tul. L. Rev. 491 (1955).

<sup>8</sup> Traditional common law technique (case-based reasoning by example and analogy) is treated here as a type of inductive logic because that is its tendency and direction, though Aristotle thought that reasoning by example was somewhat different than induction ("Clearly then to argue by example is neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term and one of them is known. It differs from induction, because induction starting from all the particular cases proves ... that the major term belongs to the middle and does not apply the syllogistic conclusion to the minor term, whereas argument by example does make this application and does not draw its proof from all the particular cases"). *Analytica Priora* 69a (McKeon ed. 1941).

easier to document and demonstrate the phenomenon of double reasoning in the codified *mixed* systems than in so-called *pure* civilian systems such as France and Italy. The mixed systems adhere to the Anglo-American form of judgment. The facts and reasoning of the cases are fully exposed, argumentation and citations are unchecked by the formal constraints and conventions on the Continent, and the case reports are full and transparent documents which afford an opportunity for close study. It is obviously more difficult to follow the actual reasoning of continental judges, much less develop a taxonomy of their jurisprudence, when the form of the judgment itself bans the citation of cases or when the published case "report" is merely an abstract *massima* devoid of facts.<sup>9</sup> The hybrid nature of the mixed systems, therefore, allows us to overcome these limitations and offers the most favorable terrain for understanding the relationship between the codes, the judges and the jurisprudence.<sup>10</sup>

This study attempts to ascertain what kinds of texts and what kinds of problems give rise to what kinds of jurisprudence. No theoretical model or taxonomy of texts and/or cases has been found which would enlighten us as to the function of the precedents. Past debates about *stare decisis* and *jurisprudence constante* were usually abstract discussions that glided over the direct analysis of cases. As a result, these debates conveyed the erroneous impression that the jurisprudence is a monolith – that *all* cases decided by courts constitute "the jurisprudence" and that every case is of equal significance to the theoretical question. This may lead to overzealous counting and erroneous evaluation.

Only by examining the fact situations in relation to the type of texts concerned (the context) can we begin to see the function of the precedents. By understanding this relationship we may evaluate more clearly the relative importance or irrelevance of certain kinds of cases. A different but important claim follows from this: the function of the jurisprudence is not the result of the theory of precedent any judge or academic lawyer may happen to subscribe to, nor does it necessarily correspond to the general teachings of one tradition or another about the source value of precedent. To the contrary, the function is largely controlled by the nature of the texts which have been supplied, and whether those texts present a narrow rule, a wide principle, a general standard, or something else in-between.

When discussing and differentiating the nature of these texts, heavy reliance will be placed herein on a basic and widely-recognized distinction between *rules* and *principles*.<sup>11</sup> It will

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<sup>9</sup> Regarding the lack of transparency in French and Italian case reports and judgments, see Raimon Siltala, *A Theory of Precedent* (2000). Despite the obstacles, it is not possible to hide entirely the double-reasoning process actually taking place behind these screens.

<sup>10</sup> Ironically, their unique advantage has gone unrecognized. These systems are nowhere to be found in recent comprehensive studies of precedent. Raimo Siltala, *A Theory of Precedent* 129 (2000); Neil MacCormick and Robert Summers, *Interpreting Precedents* 532 (1997).

<sup>11</sup> On this distinction see P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law*, 88-95 (1996); Richard Posner, *Law and Legal Theory in the UK and USA*, 13-19 (1996); Ronald Dworkin, *Taking Rights Seriously*, 371 (1977). For Dworkin, a rule can be defined as an absolute norm that is "applicable in an all-or-nothing fashion", although within a restricted context. A rule sets forth the specific set of preconditions for its application and the consequences that follow. The code provisions governing the rescission of contracts by persons under eighteen years would exemplify a narrow rule. Another example might be the "mailbox" rule found in the provisions on offer and acceptance of contracts. In contrast a "principle" for Dworkin is an overarching standard which is connected to the basic

be stressed that the number of principles, standards, or general rules found in these codes is quite inconsistent with the popular image that the codes are "rulebooks". Flexible principles and supple rules are hallmarks of the civil codes in the French tradition. General provisions confer upon judges unfettered discretion to reach a multiplicity of defensible, but potentially inconsistent, outcomes in given cases.<sup>12</sup>

Principles as indeterminate as good faith, prudent administrator, *culpa, causa*, good morals, best interest of the child, undue influence, unjust enrichment,<sup>13</sup> public policy and public interest, and equity cannot be applied deductively. They must be transformed and broken down into narrower propositions if that discretion is to be contained and become consistent and uniform. Richard Posner correctly stresses the hierarchical relationship between principles and rules: "Rules mediate between principles and action. They translate principles into directive for action. They are subtended by principles."<sup>14</sup>

It will be shown below that the jurisprudence accomplishes this task of translation through "double reasoning" ranged into functionally distinct types of jurisprudence. It is interesting to observe that the broad wording of the codes would seem to authorize, *ex ante*, more judicial activism and judicial creativity than does much Anglo-American legislation with its traditional emphasis on curbing judicial discretion.<sup>15</sup> This difference in delegated authority,

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tenets of morality. An example may be the codal command that contracts must be performed in good faith. See Maud Piers, "Good Faith in English Law—Could a Rule Become a Principle?", 26 Tul. Euro. & Civ. L. Forum 123 (2011). Another way of describing this distinction may be the difference between "complete" and "incomplete" law. See K. Pistor and C. Xu, "Le défi de la loi incomplète et la façon dont différents systèmes juridiques le relève," in *Le Bijuridisme: Une Approche Economique* (2007), pp. 70-108. John Lovett has singled out a number of standards found in the Louisiana Civil Code, such as in the child custody provisions (the best interests of the child) and the laws of testatorship (the undue influence standard). He notes that the distinction between rules and standards is not binary or rigid but consists of a spectrum with in-between normative structures. Code standards are often flanked or supported by some tight-fitting rules, and the resulting ensemble confers "hybrid discretion" in the judge. John Lovett, "Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction" (forthcoming in *Loyola Law Review* 2012). For application of this distinction to the UCC and Federal Rules of Evidence, see Mark D. Rosen, "What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development," 1994 Wisc. L. Rev. 1119, 1161-1167, and authorities within.

<sup>12</sup>See Vernon Valentine Palmer, "The Many Guises of Equity in a Mixed Jurisdiction," 67 Tul. L. Rev. 7 (1994); Roberto MacLean, "Judicial Discretion in the Civil Law," 43 La. L. Rev. 45, 50-56 (1982). Under the Louisiana Civil Code (1870), good faith appeared in no less than eighteen code provisions within the fields of marriage, property law, contracts and prescription. Bad faith was the standard in nine articles. Palmer, "The Many Guises of Equity". For a full inventory of the code provisions, ranging from extremely precise rules to general principles, see Clarence J. Morrow, *L'influence du code civil au point de vue de la technique juridique* (1954), further discussed *infra*, note 32.

<sup>13</sup> The principles of unjust enrichment are explicitly stated in both the Quebec Civil Code (Q.C.C. art. 1493) and the revised Louisiana Civil Code (La. C.C. art. 2298). The French Civil Code has no text stating the principle, though the jurisprudence worked out a general theory from specific texts.

<sup>14</sup> Richard Posner, *Law and Legal Theory in the UK and USA* 16 (1996).

<sup>15</sup> It has been observed that: "...when an English statute emerges from the Parliamentary draftsman it is often couched in language so detailed, specific, complex and elaborate that its aim seems to curb the

however, may not ultimately produce great disparities in their discretion. The civilian's judge's discretion will be eventually curbed *ex post* – not by the code, but ironically by the constraining tendencies of the jurisprudence itself.

At its core, methodological choices basically respond to textual challenges. Factors other than the nature of the text obviously do play a role, but in my view they play a supporting role. History, professional training, entrenched legal habits, law reporting practices, the presence or absence of juries, differences in legal culture and many other similar "backdrop" factors will affect the style as well as the quantity and quality of the jurisprudence.<sup>16</sup> Yet we also know they can very well disguise rather than illuminate what is truly occurring, and in the final analysis they afford no basis upon which to discuss the function or the basis for a classification of the jurisprudence.

In my view the judge does not completely control his choice of method nor is it necessarily a simple matter for him or her to change it. It is important to recognize that mixed jurisdiction judges cannot change their methodology at once to suit their cultural aspirations or to answer the call for civilian renaissance; nor is it necessarily good method to measure the success or failure of their method by counting cases and citations indiscriminately.<sup>17</sup>

In this article a small case study has been used to provide data, concepts and illustrations. The data set comprises about thirty decisions in the field of medical liability from reported cases in the codified systems of Quebec, Puerto Rico, and Louisiana.<sup>18</sup> We begin by explaining the

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power of judges rather than to provide them with a framework for an intelligent and reasoned exercise of that power". Hein Kötz, "Towards a European Civil Code: The Duty of Good Faith," in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming*, p. 249.

<sup>16</sup> Basil Markesinis has called attention to the need to read foreign cases in the context of their wider legal background. See, "Reading Through a Foreign Judgment," in Cane and Stapleton (eds) *supra*, pp. 268-270.

<sup>17</sup> It is being cautiously suggested that crude citation counts, a preoccupation in the mixed jurisdictions, do not seem to be a reliable or even an objective way of gauging methodological trends. Indeed that way of looking at the question is basically ideological and not an objective framework of analysis. It tends to view case cites as a manifestation of common law method or influence, even those of local origin that do not embody common law content.

<sup>18</sup> **The following cases are within the Study:**

*Quebec*

St-Jean c. Mercier [2002] 1 RCS 491, 2002 CSC 15.

Arnt v. Smith, [1997] 2 SCR 539

Lawson v. Laferrière, [1991] 1 SCR 541, 78 DLR (4<sup>th</sup>) 609

Dr Houde c. Lucien Coté, [1987] JE 87, 1987 RJQ 723 (CA)

Lapointe c Hôpital le Gardeur 25 Septembre 1989, [www.jugements.qc.ca/php/decision.php](http://www.jugements.qc.ca/php/decision.php)

P.L. c. Benchetrit, 24 août 2010, [www.jugements.qc.ca/php](http://www.jugements.qc.ca/php)

Laferrière c Lawson, [1989] RJQ 27, 20 QAC 52

Dr Kulczycky c. Rafferty, 19 juillet 1994 (CA),

Bernier c. Dr Décarie, 26 juin 2001, (CA)

Kobe ter Neuzen v. Dr Korn, 127 DLR (4<sup>th</sup>) 577 (SC 1995)

Hôpital de L'Enfant-Jésus, 2 avril 2001, (CA) [www.jugements.qc.ca/php](http://www.jugements.qc.ca/php)

Dr Therrien c. Dr Launay et Boulianne, 4 mars 2005 (Cour supérieure) [www.jugements.qc.ca/php](http://www.jugements.qc.ca/php)

Baum v. Mohr, April 18, 2008, (CA) 2008 QCCA 718

concept of double reasoning and what kinds of codal provisions give rise to the phenomenon. Using Louisiana decisions first for illustrative purposes, it isolates four functions of the jurisprudence and presents a preliminary taxonomy of the “case types”. Thereafter it briefly examines medical jurisprudence in Quebec and Puerto Rico, noting that whereas the judicial styles may differ, the same case types exist and play a similar role.

## DOUBLE REASONING

The thesis is that the mixed jurisdiction judges use the code and the case law in various combinations to produce a system of double reasoning. In select areas of the code where the texts contain *principles* (rather than *rules*) and hence are particularly wide, the judges of the codified systems are prone to use two methods at once. The field of tort law, presided over by the tort General Clause, serves as one area *par excellence* to observe this phenomenon, but in my view dual reasoning will be used and needed in all branches of law and in all legal systems where the texts or terminology are of similar breadth.<sup>19</sup> As previously mentioned, the mere use of inductive reasoning does not equate with common law infiltration, no more than the use of deductive logic by an English judge would signal a civil law importation.

Let me describe this process further. When deciding cases under general code texts our judges begin analysis with the relevant and initially controlling code provision and then appear to

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Municipalité de Saint-Hilarion c. Quebec Inc, 10 decembre 2009, [www.jugements.qc.ca/php](http://www.jugements.qc.ca/php)

### *Puerto Rico*

Ramos Orengo v. Gov't of the Capital 88 PRR 306 (1963)  
Vera Morales v. Dr. Bravo, 161 DPR 308 (S.C. 2004)  
Lopez Delgado v. Dr. Canizares, 153 DPR 119 (S.C. 2004)  
Santiago Otero v. Dr. Mendez 135 DPR 540 (S.C. 1994)  
Rios Ruiz v. Dr. Mark, 110 DPR 846 ( S.C. 1987)  
Riley v. Dr Rodriguez de Pacheco, 119 DPR 762 (S.C. 1987)  
Rodriguez Crespo v. Dr Hernandez, 121 DPR 639 (S.C. 1988).

### *Louisiana*

Smith v. State Dept. of Health and Hospitals, 676 So2d 543 (La 1996)  
Ardoin v. Hartford Accident and Indemnity Co, 360 So2d 1331 (La 1978)  
Pffnner v. Correa, 643 So2d 1228 (La 1994)  
Martin v. East Jefferson Gen. Hospital, 582 So2d 1272 (La 1991)  
Hastings v. Baton Rouge Gen. Hospital, 498 So2d 713 (La 1987)  
Smith v. State Dept of Health and Human Resources Admin., 523 So2d 815 (La 1988)  
Turner v. Dr. Massiah, 641 So2d 610 (5<sup>th</sup> cir. 1994)  
Hernandez v. Chalmette Medical Center, 869 So2d 141 (4<sup>th</sup> cir. 2004)

<sup>19</sup> The point is too basic to be restricted to European-style "codes" or "civil law" countries or indeed to the mixed jurisdictions. It may extend to any system, codified or uncoded, religious or secular. Given the exponential growth of statutory material in this "Age of Statutes", the common-law judges also are undoubtedly experiencing greater opportunity and need for double reasoning. This may be confirmed, for instance, by reviewing cases arising under the Uniform Commercial Code and the "common-law codes" of the Code States. See below notes 71 ff and accompanying text.



be *deducing* their way toward a conclusion based upon that codal premise. However, they cannot finalize a syllogism (or rather the *series* of syllogisms involved) from the text *tout court*.<sup>20</sup> The text offers no more than undefined words like "fault" or "causation" in articulating its principle, and it may even be considered a standard too nebulous to be called a principle. As Lee would put it, the mind then seeks "a middle term" because, between the broad morality of the tort provision (*neminem laedere*) and the particularity of the facts, no middle term (no intermediate rule) is supplied.<sup>21</sup> The judges may need an additional rule *ab extra* to serve as a subordinate premise to fill the inter-space in the logic. There are, I believe, at least three distinguishable types of jurisprudence that fill this inter-space. The first is what is popularly called the *Seminal* or *Leading* case, the second may be described as the *Concretizing* case,<sup>22</sup> and the third may be called the *Lacuna-Filling* case. The study of these three types will indicate that the mixed jurisdiction judge pays such close attention to the "facts" and "rules" generated by such cases that it is sometimes difficult to distinguish the reasoning pattern from that of a common law jurist operating without a Civil Code.

## 1. Seminal Cases

Even within the narrow field of medical liability, there is no difficulty identifying seminal cases. A lengthy list of cases have established the "loss of a chance of survival" doctrine, the rule of *res ipsa loquitur*, the "discovery rule" which governs the starting point in prescription questions, the "emergency" exception to the requirement of informed consent, the presumption of adequate medical treatment, and so forth.<sup>23</sup> Canadian readers may recognize the so-called "modified objective" test of causation laid down in the leading case *Reibl v. Hughes*;<sup>24</sup> Louisiana readers may recognize the rule of solidary liability for consecutive acts of medical negligence announced in the leading case of *Weber v. Charity Hospital of Louisiana*.<sup>25</sup> These judicially-devised rules

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<sup>20</sup> It is said that Beccaria, expanding upon Montesquieu, was the first to compare a legal judgment to a syllogism. Michel Troper, "What is Interpretation of the Law for the French Judge?" in Y. Morigiwa, M. Stolleis, J-L Halperin (eds), *Interpretation of Law in the Age of Enlightenment* (2011), p. 140. J.-L. Bergel points out that the solution of the simplest tort case rests upon a series of four or five syllogisms (polysyllogisms). *Méthodologie Juridique* 146-147 (2001). The final decisive syllogism under French C.C. Art. 1382 or La. C.C. Art 2315 merely encapsulates the previous syllogisms in the series.

<sup>21</sup> R.W. Lee saw this as a structural weakness in the delictual General Clause: "The transition from the rule of morality to the particular legal situation is too abrupt. The mind seeks a middle term in a rule of law. But it is the peculiar weakness of this branch of law that the middle terms are rather conspicuously wanting." "Torts and Delicts," 27 Yale L. J. 721 (1918).

<sup>22</sup> In making these distinctions and in the taxonomy presented later, the excellent study by Mark Rosen helped clarify a number of issues. It has not been necessary to adopt his entire classification scheme and his terminology has been modified, but there has been great benefit from his discussion of the different functional roles played by the cases. See Rosen, *supra* note 11.

<sup>23</sup> For Puerto Rican examples, see below notes 66-69 and accompanying text.

<sup>24</sup> [1980] 2 SCR 880. See the related test of "rational subjectivity." *Pelletier c. Roberge*, [1991] R.R.A 726. The French expression "arrêt de principe" is in effect a synonym for leading case. See the description of *Housen c. Nicholaisen* [2002] 2 R.C.S. 235 in the opinion of the court in *P.L. c. Benchetrit*, 2010 QCCA 1505, at para 23.

<sup>25</sup> 475 So2d 1047 (La 1985).

have been indispensable in forging the desired syllogism from the Code and of requiring future judges to do the same. They are invariably deployed in the specific contextual situations they control; the seminal case often appears at the head of a string of cited cases. The trailing cases are not seminal themselves; they are but subsequent applications of such a decision.

A seminal case operates as a source of double reasoning in the field of medical liability. In the case of *Hernandez v. Chalmette Medical Center*<sup>26</sup> the court had to determine whether two doctors, who negligently misread a patient's x-rays, would be liable for that patient's later injury during an operation in which they did not participate. Initially the two doctors negligently failed to recognize from the x-rays that a child was suffering from an abnormal condition in his hip. They released the child from the hospital and sent him home. As a result of delay and lack of prompt treatment, his condition worsened and there was further damage to the hip. To correct this condition, the child later underwent a "hip reduction" operation performed by a different doctor. The operation was unsuccessful, however, because the attending nurse negligently failed to administer sufficient medication. This raised the following question: are the two doctors responsible for not only injuries caused by their negligent diagnosis, but for the subsequent injuries caused by the nurse and her employer, the hospital, during the subsequent operation? This is a complex question about causation and solidary liability. The court in *Hernandez* invoked and followed the seminal *Weber* case.

*Weber* involved a tortfeasor whose negligent driving caused injury to his passenger and required hospitalization. During her hospitalization, she received a transfusion of contaminated blood from which she contracted hepatitis and therefore further injury. The *Weber* court ruled that the risk of such further injury at the hospital was included in the duty of care the negligent driver owed his passenger, and so the defendant was held solidarily liable for the entire damage. It will be noted that the rule in *Weber* functions as a substitute for the Code's broad provisions on "causation" (duty/risk) and "solidary liability". This rule permits the court to deduce the answer from the case better than from the code's general clause, because the case stands for a situational rule, not an abstract proposition. Returning to the problem in the *Hernandez* case, one may see what use the Court made of *Weber*. In the quoted passage below, note that the Civil Code is not discussed or even cited by the court. The Code is preempted by the role of the seminal case.<sup>27</sup>

With solidary obligations, it is the co-extensiveness of the obligations for the "same" debt that determines the solidarity of the obligation. *Weber v. Charity Hospital of Louisiana*, 475 So.2d 1047, 1051 (La.1985) (citing *Narcise v. Illinois Central Gulf Railroad*, 427 So.2d 1192 (La.1983)). Therefore, in the instant case, we must determine first, whether [the hospital] CMC was at fault, and second, whether any damages

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<sup>26</sup> 869 So2d 141 (4<sup>th</sup> Cir 2004)

<sup>27</sup> The Louisiana Civil Code has a number of provisions on solidary liability and there are certain rules on indivisible obligations which function as solidary liability rules. (See Arts 1786 ff, esp Art 1799 and 1818). However, none of these provisions are directly cited or analyzed. The *Weber* & *Narcisse* cases seem to "stand in" or substitute for code principles themselves.

suffered by plaintiffs are attributable to the fault of *both* CMC and Drs. Redmann and Lavis, which would make these parties solidarily liable.

In the instant case, the issue is whether the duty to provide proper medical care, which was breached by Drs. Redmann and Lavis, encompassed the risk that the patient, upon returning to the hospital to receive the previously neglected care, would again be subject to an act of malpractice or breach of care that would further worsen his condition. *According to the reasoning of Weber, the risk of suffering malpractice while undergoing a normal hospital procedure or operation is included in the risk borne by the tortfeasor whose fault sent the victim to the hospital.*(emphasis added). In the instant case, the mistakes of Drs. Redmann and Lavis necessitated Chris Hernandez's return to the hospital and included the risk that he would be further injured by his treatment there. We also find that there is an ease of association between the injury (the development of necrosis) and the rule of law which gave rise to the duty (the obligation of doctors and nurses to provide appropriate care). *If, as in Weber, malpractice is considered part of the risk of being treated in a hospital, then a physician's malpractice that necessitates a patient having to return to that same hospital for further treatment must include the risk that further malpractice will occur that will exacerbate the patient's condition.* (emphasis added). We therefore find the instant case to be indistinguishable from *Weber*.

Having explained *Weber's* applicability to the facts, the Court distinguished the case at hand from two other cases (*Younger* and *Littleton*), very much as any common law court would reason.

We do, however, distinguish this case from *Younger*, in which the Supreme Court found that the collapse of the shower chair was unrelated to treatment of the original injury; in the case of Chris Hernandez, the negligent treatment of the dislocated hip on Chris' Hernandez's second visit to the hospital was clearly related to the prior negligent treatment of the same injury that caused him to return. We also distinguish the instant case from *Littleton*, in which we found that a breach of care by one nursing home that caused an injury did not encompass the risk of the patient being reinjured by a second nursing home in which she had placed herself; in the instant case, unlike in *Littleton*, all of Chris' Hernandez's subsequent problems occurred during the course of treating the misdiagnosed dislocated hip and repairing the damage from the defendants' failure to timely diagnose it.

Accordingly, we find no error in the trial court's denial of defendants' exception of prescription. Because Drs. Redmann, and Lavis and CMC are solidary obligors, the timely filed complaint against CMC interrupted prescription as to the two physicians.

This was double reasoning because the result was initially and partly deduced from the code requirement on causation, but at the same time the court actually substituted the *Weber*

"consecutive negligence" rule and made that the major premise of its syllogism on the causation question. The *Weber* rule obscures the Code (which in fact was not mentioned). Indeed the existence of the *Weber* rule seems to preclude fresh or different analysis on this question. Furthermore, as seen in the passage above, the court had a choice of major premises and chose to follow *Weber* after distinguishing away two other precedents that would have led to different outcomes. This act of distinguishing was done on the basis of finding significant differences between the facts of those cases and the facts at hand. This close attention to the facts, the *ratio decidendi*, and the distinguishing features seems very close to the reasoning of a common law judge, though that in no way affects its functional legitimacy.<sup>28</sup>

## 2. Concretizing Cases

We turn to a class of cases that exemplify double reasoning of a second kind. The role of a *concretizing* case is not to supply a subordinate rule in substitution of the code, as we have just seen in the seminal cases. Rather it is to offer a previous ruling whose facts are relevant to the case at hand and may even match them. To help "concretize" the application of an abstract codal command, the previous ruling offers a small contextual template which may be an approximate factual match.<sup>29</sup> Recourse to jurisprudence of this kind is primarily for the purpose of ensuring consistency and uniformity of outcome. Even though a range of answers are defensible and not logically excluded by the code provision in question, there is a low tolerance for single decisions standing alone. There is instead the demi-urge to regard a previous case as creating a "subrule" and now to subsume (hence juridify) the facts at hand within that subrule.<sup>30</sup> The judges and pleaders in this situation here too display the same casuistic skills as the common lawyers. They will compare, distinguish, analogize, follow or decide not to follow these subrulings. Here the jurisprudence is a mechanism to control the discretion delegated by wide texts and ensure that outcomes are relatively consistent.

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<sup>28</sup> Basil Markesinis indicates some differences in the way that German and English judges make use of prior cases of tortious liability: "...[T]hrough careful reading of the [German] judgments, one realises that the earlier case law is either quoted as a mere illustration of a particular view or as an example of an established practice. Rarely, if ever, is this case law *scrutinised* in the way an English court would consider and redefine earlier decisional law. There is thus little or no evidence of the previous cases having been used as building blocks for the new decision. The reason for this different treatment is, of course, to be found on the combined impact that the three factors – history, legal education and codal background — have had on the nature of German judicial work". Basil Markesinis, "Judicial Style and Judicial Reasoning in England and Germany," [2000] *Camb. L. J.* 294, 297.

<sup>29</sup> The search for such matches requires inductive sifting through the cases. The template may be located by a bottom-up search for similar fact patterns, without the use of code provisions, or it may be found by a top-down search which begins with the relevant code article(s) and then locates near matches among the applications.

<sup>30</sup> The process resembles the common law method described by Karl Llewellyn: "*The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes. Our legal theory does not admit of single decisions standing on their own. If judges are free, are indeed forced, to decide new cases for which there is no rule, they must at least make a new rule as they decide*". K. Llewellyn, *The Bramble Bush* 42-43 (1960) (first published 1930).

The case of *Mitchell v. Roy*,<sup>31</sup> which has no claim to fame or importance other than to highlight this methodological approach, shows how this "concretizing jurisprudence" works in practice. Although not a medical case, it is a particularly instructive example.

The case involved an accident between a car and a small boy riding a bicycle. The child was seriously injured in the accident. The driver was speeding through a neighborhood where a number of children were playing. Darion, a 10 year-old on a bicycle, darted out into the street from the side, was upended and thrown onto the car's hood, and struck his head against the windshield. Darion was not wearing a protective helmet, as state law required. His mother knew he was riding without a helmet because she was aware he had outgrown the helmet she had bought for him.

The case was tried by a single judge, sitting without a jury. The problem was to allocate, if need be, the fault between the driver, the 10 year-old, and his mother under the Civil Code's comparative fault provision, art 2323(A) which reads:

"[I]n any action for damages where a person suffers injury death or loss, the degree of fault of all persons causing or contributing to the injury, death or loss shall be determined.

The trial judge ruled that the driver should be held completely at fault because the evidence showed he was going too fast, failed to take into account the presence of children, and ignored a friend's warning. Accordingly, he assigned no portion of the fault to the child or his mother. The driver appealed this ruling.

On appeal the defendant driver pointed to a series of "darting out" cases where circuit courts had held that a driver faced with "the sudden act of a child that created an emergency and rendered it impossible for him to prevent the accident" should not be assessed with *any* fault, much less with all of it. The plaintiff's brief, in contrast, cited no cases in favor of the allocation made by the judge, which the Court saw as a serious deficiency: "The plaintiff offers no jurisprudential support for her contention that the trial court correctly held that Darion was not guilty of any fault under the facts of this case". In other words, defendant's position had support in cases, whereas plaintiff's did not.

As may be seen from the excerpt quoted below, the court then set forth four factually-similar "darting out" cases involving children 9 years, 6 years, 9 years, and 10 years old. The Court closely compared the allocations of fault made by prior courts in each variant situation.

"In **Keel v. Thompson**, 392 So.2d 713 (La.App. 3 Cir.1980), the parents of a *nine-year-old boy* who was struck by a vehicle after he failed to stop at a stop sign before entering the street brought suit against the driver and her insurer. Where the evidence established that the driver "was proceeding at a safe speed, considerably below the speed limit," "there was nothing to indicate that children were playing or riding bicycles in that area," and the driver's view was blocked by a large bush, the appellate court affirmed the trial court's finding that the driver was free from any negligence. *Id.* at 716.

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<sup>31</sup> 51 So3d 153 (3<sup>rd</sup> Cir 2010).

In **Johnson v. Safeway Insurance Co.**, 96–910 (La.App. 3 Cir. 2/19/97), 694 So.2d 411, writ denied, 97–1750 (La.10/17/97), 701 So.2d 1330, the trial court dismissed a suit brought by the mother of a *six-year-old* child who was struck by a car as he darted across a street, noting that the driver's line of vision was blocked by hedges and that the driver had done his best to avoid the accident. On appeal, fault was assessed at *fifty percent each* to the driver and the child. The appellate court based its fault assessment on its finding that the driver owed a high degree of care because of the presence of children in the area and its reversal of the trial court's factual finding that the driver's view was totally obscured, along with its determination that “a six year old boy understands he should not cross a street without first looking for oncoming traffic.” Id. at 414.

In **Bogan**, 703 So.2d 1382, suit was filed on behalf of a *nine-year-old* who was injured when he was struck by a vehicle after darting into the street from between two parked cars. Following a jury trial, the driver was found free from negligence in causing the accident. The fourth circuit affirmed, noting that there was no evidence that the driver could have or should have seen the child any sooner than he did because of parked cars and large trees on the side of the roadway, the driver was aware of the presence of children in the area and was paying close attention to his surroundings, and he was not speeding.<sup>1</sup>

In **Rideau**, 970 So.2d 564, a *ten-year-old girl* was killed when a truck hit her as she tried to cross the road. After a jury trial, the truck driver was found *sixty percent at fault* and the child and her mother were each found to be twenty percent at fault. On appeal, the first circuit found error in the trial court's failure to grant the plaintiffs' request for a judgment notwithstanding the verdict to strike either the twenty percent fault of the child or her mother and to proportionally re-allocate fault to the other. In doing so, the appellate court reasoned that because the evidence showed that the ten year old was a mature and intelligent child who had been instructed on how to safely cross the street on her own and had done so many times in the past, she had the “duty and responsibility to take the necessary steps to ensure her own safety when crossing the road.” Id. at 574. That being the case, her mother “had no duty to supervise her every time she needed to cross the road” and thus “could not be at fault for failing to help [her] cross the road on this occasion.” Id. at 574–75. As a result, the court reversed the jury's imposition of fault on the mother and re-assigned it to her daughter after determining that, although the driver and the child “were almost equally at fault in causing [the] accident,” the driver should bear the higher percentage of fault because “[t]he risk created by his inattention or inadvertence was great, and he was in a superior position to avoid the accident.” Id. at 579. "

The court compared the concrete allocations of fault in those four cases with the facts at hand and reached the following conclusion:

"After reviewing the jurisprudence and the particular facts of the case now before us, we are convinced that the trial court committed manifest error in failing to assign any fault to Darion. Delisa testified that her son had been instructed on how to safely cross the street and he had been allowed to ride his bicycle, alone to his friends' houses in the neighborhood for three or four years before this accident occurred. *Like the child in Rideau*, Darion had the "duty and responsibility to take the necessary steps to ensure [his] own safety when crossing the road," and he must bear some fault in causing the accident. Rideau, 970 So.2d at 574."

The Court of Appeal therefore allocated 60% fault to the driver (exactly as in *Rideau* above), 25% to the child, and 15% to his mother for their respective fault.

Methodologically, it may be asked, what has the court really done? Clearly it cited and quoted the comparative fault article, but that text only affords a modicum of deductive reasoning, and only to the extent of requiring apportionment rather than denying plaintiff any recovery under the old "all or nothing" rule of contributory negligence. Beyond furnishing a beginning point, the article does not supply a major premise capable of producing fault allocations for particular fact situations. It is, after all, a standard rather than a rule.<sup>32</sup> The jurisprudence, however, can furnish concrete information about apportionments made in analogous situations, and the court said it was manifest error not to follow that jurisprudence. In principle the analogous situations could not create the missing major premise (the missing rule), but they may allow the court to act consistently in like situations, which is an important component of equal justice and the rule of law.<sup>33</sup> This why the Court was tempted to cite and discuss four of its own third circuit cases, all of which were vehicular accidents with young children darting out or crossing roads or riding bicycles. From these four choices the Court selected the closest factual match (apparently the *Rideau* case where the child was also 10 years old) and adopted the allocation of driver fault found in that case (60%). The Court used case-based, example-driven reasoning to apply a general principle which lacked a defined major premise. Or put another way, what the court has done is to "concretize" the abstract command of apportionment but without committing itself to any major premise. This function represents one of the principal uses of the jurisprudence.

It may useful to imagine how the same problem would be resolved without a civil code. Assume that Louisiana was a common law state with a comparative fault statute but no civil code. The same result in *Mitchell v. Roy* could be independently reached by a common law judge, lawyer or student searching through the cases for the closest analogy. The reasoning technique would be, to all exterior appearances, essentially the same. If this is correct, the basically inductive "case by case" approach (historically the technique of the common law) has a

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<sup>32</sup> See authorities in note 11 and accompanying text.

<sup>33</sup> "A necessary condition for a legal system to be considered as operating under a rule of law is a high degree of consistency between similar fact situations and similar judicial outcomes". Jonathan Kastellac, "The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees", 7 J. Empirical Legal Studies 202 (2010)

certain utility in dealing with codified texts of indeterminate resolution. The technique is in fact put to use by civilian and mixed-jurisdiction judges.<sup>34</sup>

### 3. Lacuna-Filling Cases

This is a less numerous but important part of the jurisprudence. In theory such cases arise only when the code is silent and the judge must devise a rule to cover the case in accordance with reason and equity. Functionally, the *lacuna-filling* case is distinguishable from seminal cases and concretizing cases, for whereas the last rework and narrow a wide text, the former rests upon no text at all. In consequence, it does not involve double reasoning in aid of the completion of wide texts, but offers a means of correcting unintended gaps in the code's coverage. Theoretically, this type of case can play little role in a study of jurisprudence arising under a seamless General Clause, since such provisions are in their nature gapless.<sup>35</sup>

#### TOWARD A PRELIMINARY TAXONOMY

We have seen that *seminal* cases and *concretizing* cases provide two essential means of reformulating and applying the wide codal texts. It must be asked: what occurs when the civil code already provides narrow, fact-sorting rules which permit deductive outcomes? Does this produce jurisprudence of a different kind and is it worthy of consideration? For example, suppose the code provides a closely governing rule (perhaps it states the age of contractual capacity is 18 or that a particular prescriptive period is 10 years). Now suppose the cases uniformly repeat what the code already says. Surely the contribution of the judge and the value of the case is minimal. Assuming no ambiguity nor any gap in such a rule, the code alone is sufficient authority for these outcomes.<sup>36</sup> The jurisprudence embodies the code and adds little or

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<sup>34</sup>Recently John Barker expressed surprise that an inductive approach to research is in fact occurring in civil law countries: "In civil law jurisdictions that reject *stare decisis*, cases constitute only persuasive authority. But ... many lawyers in civil law jurisdictions do word searches on fact patterns to find the Civil Code articles and legislation etc., that have been applied to those facts by other judges. In the past there was a presupposition that only lawyers in common law jurisdictions would search using words representing fact patterns". John Barker, "Research Myths About Common Law and Civil Law Jurisdictions" <http://solutions.wolterskluwer.com/blog/2010/10/research-myths-about-common-law-civil-law> My own view is that this "bottom up" approach to research is not necessarily a recent phenomenon made possible by advanced search engines (which to be sure have enhanced capabilities), but has been occurring in the civil law from the beginning of law reporting.

<sup>35</sup> A great French jurist, commenting on the General Clause of the Code Napoleon, said that it "...could not be more general. It has the knack of being everywhere at once which, to our somewhat prejudiced eyes, passes for excellence". Jean Carbonnier, *Le silence et la gloire*, 1951 D. Chron. 119, 122 (English translation by Bernard Rudden, "Torticles," 6/7 Tul. Civ. & Euro. L. Forum 105, 107 (1991-92)).

<sup>36</sup> As examples, see *Deville v. Federal Savings Bank of Evangeline Parish*, 635 So2d 195 (La. 1994) and *Florida v. Stokes*, 944 So 2d 598 (1<sup>st</sup> Cir 2006), which basically repeat codal statements on the contractual incapacity of minors (C.C. arts. 1918, 1923) and easily apply them to the fact situations at hand by a series of short deductive steps. Obviously not all the rules are so simple as this example. No doubt it is a matter of degree and there will be a gray area between window dressing and decisions requiring more judicial interpretation, due to the spectrum which lies between principles and rules. See above, note 12.



no value. This may therefore be regarded as a distinguishable fourth variety of jurisprudence which I believe is largely "window dressing". In a codified system it is almost unnecessary to treat it as jurisprudence. A glance at the case reports shows it nevertheless exists and in fact leads a luxurious existence. Reporters such as West Publishing apparently grant it equal dignity.<sup>37</sup> Plainly there is no occasion for double reasoning of the kind described earlier. Yet the mixed jurisdiction judges, whether from habit or for extra emphasis, often simultaneously refer to both the narrow code rule and the cases decided under it. This reflexive and redundant act has been found to be a prominent feature in cases interpreting the Uniform Commercial Code. According to Mark Rosen, this "belt and suspenders" approach has been used in about one-fifth of all the issues in his study. Even if a judge merely paraphrases the code rule rather than quoting or citing it directly, a later pleader or lower court judge may think it seems important enough to justify further citation. One danger, particularly in a common law culture, is that subsequent judges may look exclusively to the decision embodying the code rule and not look any longer at the Civil Code directly. That appears to be one of the ways that basic mistakes creep into the system. Such mistakes are increasingly possible because modern research techniques of today make possible fact-based (bottom up) searches of the jurisprudence, as well as the traditional code based (top down) searches. Unless recognized as a redundancy, this prolific jurisprudence is apt to mislead those who make crude quantitative surveys of the citation practices and who automatically associate the citing of cases with common law method and infiltration. The practice is not really a sign of common law technique (i.e. case-based reasoning). Yet it is given this meaning in the literature.

With the foregoing in mind, and as a first step toward understanding the medical liability cases to follow, a tentative preliminary taxonomy of the jurisprudence in a codified mixed system would look as follows:

### 1. "Window-dressing" citations

- Here the Code has a closely governing rule, and the court may easily deduce the solution from the code. It will cite (without further discussion) cases previously decided under the rule, but as window dressing. The cases simply embody the code rule. They therefore do not displace the central authority of the code.
- *This is not double-reasoning.* But "bottom-up" researchers, using word search techniques, may find their way back to the code this way.
- *Seemle:* Window-dressing cites are never considered "leading" or "seminal" or "lacuna-filling" cases. They are undeservedly numerous, however, and can cause misleading and inflated results in crude quantitative citation studies.

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<sup>37</sup> In Louisiana the judges have the authority to screen opinions for non-publication, but the criteria are loose and permissive and do not systematically block publication of "window dressing" cases. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.1.

See V. V. Palmer and Harry Borowski, "Louisiana", Chapter 4, §III, in Vernon Valentine Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2<sup>nd</sup> ed. 2012).

- Mark Rosen calls this the “belt and suspenders” approach. In his sample it accounted for about one-fifth of the overall number of issues resolved under the UCC.<sup>38</sup>
  - Examples of such rules: the age of contractual capacity is eighteen. Servitudes are extinguished by non-use of ten years. The causes for revocation of a donation are the following: ... The repairs for which the lessee is responsible are as follows: ... and so forth.<sup>39</sup>
- 2. “Concretizing” citations**
- This refers to the use of analogous prior cases to make an abstract provision concrete. “Concretizing” resembles common law inductive reasoning.
  - Concretizing cases often entail exposition of prior fact patterns and necessitate the use of the techniques of distinguishing, following, or not following prior cases.
  - The purpose behind the matching of fact patterns is to achieve consistent outcomes, equal treatment of similarly situated parties, rule of law considerations and an internal check on judicial discretion.
  - Rosen's study shows this is the foremost object of using case law. Over forty percent of the UCC issues were resolved using this technique.<sup>40</sup>
- 3. “Seminal” or “Leading Case” citations**
- The cited case functions as *a substitute* for the code itself,<sup>41</sup> whose provisions may altogether drop from view.
  - Such cases are often deemed “leading” or “seminal” cases. Since these cases are almost entirely the creative work product of the judges, they resemble at a formal level (but not in content) the leading cases found in the common law.
  - May be problematic because the case may transform the code.

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<sup>38</sup> Rosen, supra note 11, pp. 1147-1148.

<sup>39</sup> C.J. Morrow demonstrated (*L'Influence du code civil au point de vue de la technique juridique: Louisiane* (1954)) that the Civil Code of Louisiana (1870) displayed the most precise rules in those areas where it made *quantitative determinations* (such as the age of majority or the periods of prescription), or *enumerated different types and species* (such as the types of repairs allotted to the lessee, or the specific causes for the revocation of a donation), or *imposed special formalities* (such as for testaments and authentic acts), or *established the way to calculate the length of a term*. He contrasted these “rigid” rules with the very supple (*très souple*) rules where the judge was given a full power of appreciation, such as his discretion to allow the debtor an additional delay when a resolatory action is brought for nonperformance of a contract. In turn, he differentiated these flexible rules from the many indeterminate “standards” dispersed through the code, such as the delictal general clause, the multiple allusions to good faith and the classic standard *le bon père de la famille* which appears in so many guises in the provisions. Clearly Morrow was tracing a continuum or spectrum leading from rules to standards. His analysis would hold true generally of the other civil codes in the French tradition.

<sup>40</sup> Rosen, supra note 12, pp. 1151-1152.

<sup>41</sup> Rosen refers to this category of case as a “Substitution” for the code's own provisions. *Ibid.*, p 1157.

- These leading decisions are usually placed at the head of a string of cites, The trailing citations are not leading cases, but simply cases that have reaffirmed or reapplied the rule embodied in the leading case. The technique of string cites has a boilerplate quality intended to show the rule is hardened and established.

#### 4. “Lacuna-Filling” citations

- The unforeseen or unprovided-for case. Since this type of decision is nearly entirely the creative work of the court, it too is apt to be considered a leading case, though obviously not one that substitutes for a code provision. The lacunae may be considered either to be "true gaps" or "gaps of justice" which fairness may prompt the judge to fill.<sup>42</sup> Unforeseen cases are usually considered fairly rare and gaps should be filled under a special Directory Provision regulating the judge's discretion. In practice it is a more untrammelled, noiseless process and may comprise a substantial number of cases, particularly if one fails to distinguish gap-filling from filling the hermeneutical space inherent in the code's principles and standards. Then gap-filling may easily overlap the “concretizing” jurisprudence.

### A MODEST CASE STUDY: MEDICAL LIABILITY CASES FROM QUEBEC, PUERTO RICO AND LOUISIANA

This subject-matter has been chosen for cross-comparative and illustrative purposes because medical malpractice liability is a fact-intensive and evolving area of the law. It is regulated in these three jurisdictions under nearly identical General Clauses. If the hypothesis about a correlation between abstract code standards and double reasoning were accurate, this field should contain a rich deposit of double reasoning. Although the scope of the research is modest, it is a convincing demonstration of similarly structured reasoning and a similarly functioning jurisprudence, though manifesting interesting stylistic differences. Ten malpractice cases were examined from each jurisdiction, about 30 cases in all. These were typically long opinions of 20-25 pages (the longest was 87 pages).<sup>43</sup> Each case contains multiple issues. Space constraints allow one or two illustrations to be presented, but the general characterizations are based on an analysis of all cases in the study. The introduction above addressed examples from Louisiana, so here only examples from Quebec and Puerto Rico will be discussed.

#### 1. Quebec

The medical liability cases arising under the Quebec Civil Code reveal a judiciary tightly focused upon the significance of its prior cases. This is not to suggest that the doctrine is neglected.

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<sup>42</sup> On the different kinds of gaps, see C. W. Canaris, "De la manière de constater et de combler les lacunes de la loi en droit Allemand", in Perelman, *Le problème des lacunes en droit*, (1968), pp. 169-179; Vernon Valentine Palmer, "The Many Guises of Equity in a Mixed Jurisdiction", 67 *Tul. L. Rev.* 7 (1994).

<sup>43</sup> The number of cases was actually larger because it was necessary to read “behind” the internal citations to understand how the reference was being used.

Indeed, the contrary. Doctrine is referred to much more often in than other mixed jurisdictions, but that is a subject to be considered on another occasion.

The Quebec judges are not content merely to cite the names of past decisions. They typically set forth the facts and reasoning of cases under consideration and discuss these elements thoroughly. This is especially evident when they are engaged in the process of stating which decisions they follow and which they do not follow. In the course of these discussions the courts use all the casuistical arts known to common law judges, including the techniques of "distinguishing" prior cases on their facts, differentiating *obiter* remarks from the holding, and treating certain cases as "leading cases" that contain controlling rules.<sup>44</sup> As noted long ago but confirmed here, the Quebec judges share with the common lawyers a tendency to juridify fact situations into legal rules.<sup>45</sup>

Two cases serve as illustrations of these tendencies. The first is *Lawson v. Laferrière*,<sup>46</sup> a significant appeal from Quebec decided by the Supreme Court of Canada. The Supreme Court's decision reversed the Court of Appeal and rejected that court's adoption of the French theory of "loss of a chance," which is an alternative means of measuring a patient's damages in a medical malpractice case. This case is considered a leading case in the field.

Two matters about the Court must be emphasized. First, the Supreme Court of Canada attempts to transform itself into a civilian court for purposes of a Quebec appeal. By convention, it assigns all the Quebec members of the Court to such cases. In the panel of seven which decided the case at hand, three Justices (including the C.J.) were trained civilians and former Quebec judges. A Quebec member of the Court (Justice Gonthier) authored the opinion and deployed the cases. Although the court's composition is "mixed," Justice Gonthier's reasoning in the case is not untypical of the Quebec judiciary. The second matter concerns the interesting tableau of authorities that the Supreme Court places at the beginning of its judgments, a practice that the Quebec Court of Appeal is known to sometimes follow.<sup>47</sup> The structure of this tableau, in which each case is graded on a scale ranging from *Followed* or *Not Followed*, on down to *Considered* or merely *Referred To*, is quite indicative, at least to an outsider.<sup>48</sup> It lends

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<sup>44</sup> For example a leading decision may be introduced in these terms: "The starting point for this question *must* be *Reibl v. Hughes* ... *Reibel v. Hughes* is a very significant and leading authority". *Arnt v. Smith* [1997] 1 SCR 539 (emphasis in original). As there pointed out, *Reibl* contains the so-called "modified objective test for causation" which is specially crafted for solving informed-consent causation issues.

<sup>45</sup> Louis Baudouin, *Les Aspects Généraux Du Droit Privé Dans La Province du Québec* (Paris 1967) ("La raison de cette attitude semble tenir à cette idée que le fait en question ayant été l'objet d'un jugement a pris dès lors aux yeux du juge, sa véritable et seule valeur, celle d'une règle de droit celle d'un principe.") *Ibid* p. 68.

<sup>46</sup> [1991] 1 S.C.R. 541.

<sup>47</sup> Such a tableau is found in the Court of Appeal judgment in *Laferrière*, 20 Q.A.C. 52, [1989] R.J.27, [1989] R.R.A. 4.

<sup>48</sup>

#### Tableau of Authorities

*Beaupré c. Joly*, [1971] C.S. 199 — *considered*

*Brabander c. Goulet*, [1981] C.A. 36 — *considered*

support to the assessment of nearly sixty years ago, that in terms of total practical effect the Quebec doctrine and practice of precedent is "remarkably close to that of the Common Law".<sup>49</sup> This also confirms Jean-Louis Baudouin's carefully phrased observation that the jurisprudence has become a "primordial" source of law.<sup>50</sup> The tableau grants a birds-eye view of the Supreme Court's regard for its own precedents and the precedents of the Quebec courts.<sup>51</sup>

The facts of *Laferrière* were as follows. Mrs. Dupuis discovered a lump in her breast in 1971 and had a biopsy taken. Her doctor never informed her of the test results, which showed she had cancer. The result was a four year interval in which she received no treatment. Not until 1975 did she learn of her cancer, but by then it had metastasized and she died in 1978.

The trial judge found the doctor clearly at fault for failing to inform her of the test result, but held that this failure had no causal relation to her death. She had no probability of surviving even if she had been informed and had started treatments four years earlier. Her chance of survival was apparently well below fifty percent. The Court of Appeal reversed this judgment, awarding \$50,000 as the value of the chance she lost to survive or improve her condition.

On appeal to the Supreme Court, Justice Gonthier, writing for the majority, reversed the judgment, stating "I do not feel that the theory of loss of chance, at least as it is understood in

<i>Dodds c. Schierz</i> , [1988] 40 C.C.L.T. 167, —	<i>considered</i>
<i>Gburek c. Cohen</i> , [1988] R.J.Q. 2424 (C.A.) —	<i>referred to</i>
<i>Grenier c. Gervais</i> , [1950] B.R. 60 —	<i>considered</i>
<i>Hoston c. East Berkshire H.A.A.</i> , [1987] A.C. 750 —	<i>referred to</i>
<i>J.E. Construction Inc. c. G.M. du Canada</i> —	<i>considered</i>
<i>Lachambre c. Perreault</i> , [1990] R.R.A. 397 (C.A.) —	<b><i>followed</i></b>
<i>Lacourcière c. Leplante</i> , [1976] C.A. 433 —	<i>considered</i>
<i>Lapointe c. Hôpital Le Gardeur</i> , 2 C.C.L.T. (2d) 97, —	<i>considered</i>
<i>Laurentide Motels Ltd v. Beauport</i> , [1989] 1 R.C.S. 705, —	<i>considered</i>
<i>Luk c. Mihaly</i> , [1989] R.R.A. 737 (C.S.) —	<b><i>not followed</i></b>
<i>Morin c. Blais</i> , [1977] 1 R.C.S. 570, 10 N.R. 489 —	<b><i>followed</i></b>
<i>Shawinigan Engineering Co. c. Naud</i> , [1929] R.C.S. 341 —	<i>referred to</i>
<i>Snell c. Farrell</i> , [1990] 2 R.C.S. 311,	— <i>followed</i>
<i>Sol-Air B.G. Inc. c. Marsh &amp; McLennan</i> , [1988] R.R.A. 206 —	<i>considered</i>
<i>Tardif c. Laverrière</i> (10 novembre 1976), n[o] 6210 (C.S.) —	<i>considered</i>
<i>Wilson c. Rowswell</i> , [1970] R.C.S. 865, 11 D.L.R. (3d) 737 —	<i>referred to</i>

[emphasis

supplied]

<sup>49</sup> "Stare Decisis at Common Law and Under the Civil Code of Quebec", (1953) 31 Can. Bar Rev. 723, 746.

<sup>50</sup> "C'est un truism de constater que la jurisprudence, en pratique, est devenue, et nous employons ce terme avec circonspection, une source 'primordiale' de droit." Jean-Louis Baudouin, "*Quo Vadis?*", 46 C. de D. 613, 622.

<sup>51</sup> Anglin C. J. declared in 1932 that *stare decisis* applied to all courts in Canada. "Nor will it do to say that, although *stare decisis* may be a good enough doctrine for the rest of Canada, it forms no part of Quebec jurisprudence and it, therefore, should not be applied in this court to cases from that province. ... The doctrine of *stare decisis* must equally apply in the determination of any case which comes before this Court, whatever may be the province of its origin". *Daoust, Lalonde and Cie, Ltée. v. Ferland*, [1932] S.C.R. 342.

France and Belgium, should be introduced into the civil law of Quebec in matters of medical responsibility”.

This decision is seminal because, in rejecting an alternative version of causation, it establishes a decisive interpretation of the requirements of causation. It holds that proof of causation must be based on "the balance of probabilities". The decision rejects compensating the loss of any chance with little or no probability of realization.

The case is an excellent example of double reasoning. First, Justice Gonthier reviewed malpractice cases involving lawyers, notaries and insurance brokers quite closely, inductively searching for instances in which loss of a chance theory had been used in those types of cases. He found no sign that it had been. Coming to the medical context, he examined three cases in particular to see whether any Quebec court had accepted or applied the loss of a chance theory. He found the *Tardif* case was ambiguous on the subject, though he recognized the ruling came close to qualifying as a precedent in favor of the French theory.<sup>52</sup> The *Zuk* case, which actually employed loss of chance reasoning consistent with the French theory, was deemed to be an aberration and therefore not followed.<sup>53</sup> The *Lachambre* case, however, which required proof on a balance of probabilities and did not use the French theory, was deemed “typical” of the cases in the Quebec courts. *Lachambre's* approach accordingly was followed.<sup>54</sup> Here in brief we see how the court navigated its search through the prior cases, very much in the traditional Anglo-American manner.

A second example is from the Court of Appeal. This time the Court used the jurisprudence to concretize the meaning of a broad standard. In the case of *Côté v. Dr. Houde*.<sup>55</sup> plaintiff was a carpenter, who suffered permanent paralysis as a result of an anesthesiologist's mistake while he was undergoing surgery. The evidence at trial showed plaintiff would be confined to a wheelchair for the rest of his life and that he had a life expectancy of 12.2 years. Based on actuarial calculations, the trial judge set his damages at \$345,594. Shortly thereafter and while the case was on appeal, plaintiff died. The appellants then sought permission to present his death as a new fact and to have the damages recalculated in light of it.

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<sup>52</sup> The care with which the court delved into the ambiguities of the *Tardif* holding is indicative of the weight attached to the rationales of decided cases, even the rationale of the trial court's judgment. The Court explained its doubt in these terms:

"We are not given enough information to know whether the [trial] judge recognized the chance itself and compensated according to its probability or whether he recognized a small lost benefit and deemed it probable. Both solutions could have produced a similar result. The trial judge plainly refused to recognize the potential benefits, or the lost chance, of the operation, though clearly such benefits were possible. *If he had done so, this case would be a strong precedent in favour of the use of loss of chance in medical cases along the French model.* In fact, the trial judge viewed this damage as too "aléatoire" ("uncertain") which suggests that he was not tempted to use that model" (my emphasis).

<sup>53</sup> "The *Zuk* case was decided in the midst of the recent debate over whether the French version of loss of chance has been accepted in Quebec. It may have been decided on the assumption that the debate had been resolved in favour of the French approach".

<sup>54</sup> "It seems to me that the approach used in *Lachambre* is typical of Quebec courts ... By focusing on the outcome of the chance, the courts in Quebec ensure that the causal link between the fault and the actual situation now experienced by the plaintiff is established at least on the balance of probabilities".

<sup>55</sup> 1987 RJQ 723.

The traditional rule in Quebec (and Canada and England generally) is that damages are assessed “once and for all time” at the trial. An appellate court usually has no power, or only an exceptional power, to reopen the record and permit proof of posterior events that would alter that assessment in a given case. Since 1965, however, an amendment of the Quebec Code of Civil Procedure permitted such new evidence to be admitted on an exceptional basis — “if the ends of justice require it”.<sup>56</sup> The Canadian Supreme Court had long held, but rarely used, this discretionary power. The question was: should an exception be recognized under the facts at hand for the unexpected and immediate death of the plaintiff?

There were three written opinions in the *Côté* case. The most complete and searching of these was the opinion by Judge Chouinard. Clearly, Judge Chouinard attempts to “concretize” the fluid standard “if justice requires”, using the prior decisions as comparative data points to give substance to the standard. He moved inductively through a range of analogous situations involving supervening events where courts had either admitted or refused to admit evidence of their occurrence. The review encompassed perhaps a dozen cases altogether. It naturally included the Court of Appeal's own jurisprudence, both before and after the Code of Procedure was amended in 1965, but he also considered with no apparent misgivings some Canadian and English cases.<sup>57</sup> He began with a pre-1965 case in which the Quebec Court of Appeal refused to accept proof of the death of a man whose damages were based upon a presumed life expectancy of 39 years. Accordingly, no reduction in the assessed damages was allowed.<sup>58</sup> He came next to a post-1965 case<sup>59</sup> in which the Court of Appeal allowed in subsequent proof showing the sexual potency of a man whom the trial court had determined was impotent. The new proof showed he had become the father of a child and was living in a marriage-like situation with a female companion. His damages were reduced by \$12,000. The common law authorities included a Saskatchewan case where evidence of a widow’s remarriage was allowed, thus reducing her award.<sup>60</sup> There was a closely analogous English case in which plaintiff had died before appeal and his death was admitted into evidence,<sup>61</sup> and another English case in which the health of an injured person changed dramatically before appeal. The court admitted the real and substantially higher costs of his future medical care.<sup>62</sup>

The Court of Appeal concluded that the damages of the deceased Lucien Côté should be reduced to \$207, 601. The question in the case was essentially: “Does death deserve to be called an exceptional post-trial event?” The answer of the court seemed to be that if sexual potency,

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<sup>56</sup> The discretion to grant an exception had been possessed by the Canadian Supreme Court and the English courts for many years. The 1965 amendment to the Quebec Code of Civil Procedure (art. 523) merely gave to the Court of Appeal the same authority those courts already enjoyed.

<sup>57</sup> The court saw no anomaly in drawing upon common law cases: “Il n'existe pas d'objection à citer devant nos tribunaux les décisions de droit commun qui traitent de cas similaires au nôtre”.

<sup>58</sup> *Kingsway Transport Ltd c. Lapointe*, [1954] B.R. 116.

<sup>59</sup> *Procureur Général du Québec c. Dugal*, (1979) C.S. 617.

<sup>60</sup> *Maitland c. Drozda*, (1983) 3 W.W.R. 193.

<sup>61</sup> *McCann v. Shepard*, [1973] 2 AER 981.

<sup>62</sup> *Mulholland v. Mitchell* [1971] AC 666, (1971). The words of Lord Wilberforce in the *Mulholland* case were quoted with persuasive effect: “Courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice.” 1 All ER at 313.

remarriage, and change of health were adjudged to be exceptional enough, then death should also qualify.

The role of the jurisprudence in Quebec is no doubt as "primordial" as Judge Baudouin suggested, but there is an interesting formalism in the Quebec judgments which seems *stylistically* at war with that conclusion. Often at the beginning of an opinion, but sometimes in other places, the reader finds a short *arrêt* has been inserted into the judgment that looks tantalizingly like the classic *arrêts* of the Cour de Cassation. It is a single sentence divided by *Attendu que, Vu, Dire et Déclarer*, and so forth, and it too is devoid of cases or authorities. This historical vestige, it seems, is simply folded into the long, discursive, personalized common law-style judgment characteristic of the Quebec judge.<sup>63</sup> Its existence seems to attract no notice or

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<sup>63</sup> See for example the following *arrêt* inserted into the report of *Coté v. Dr. Houde*:

**La Cour, statuant sur la requête** de l'Hôtel-Dieu de Québec en date du 28 avril 1987 et intitulée "Requête en explication et en correction du jugement";

**Vu** l'arrêt de la Cour déposé le 27 février 1987;

**Attendu que** la requérante et l'intimé ont, depuis, payé à dame Monique Gosselin-Côté chacun 50 % de la condamnation en capital, intérêts, indemnité additionnelle et dépens, sous réserve expresse de leurs droits respectifs (pièce R-1);

**Attendu que** les conclusions de la présente requête sont ainsi libellées:

**Dire et déclarer** que malgré les sommes que l'Hôtel-Dieu de Québec a dû contribuer dans la satisfaction du jugement rendu en cette cause, le défendeur Jacques Houde doit assumer seul toutes les conséquences pécuniaires dudit jugement;

Subsidiairement, pour le cas où la première conclusion ci-dessus ne serait pas retenue:

**Dire et déclarer** que la requérante Hôtel-Dieu de Québec doit être tenue responsable dans la satisfaction du jugement jusqu'à concurrence de 20 % seulement, le co-défendeur Jacques Houde devant assumer 80 % du montant de la condamnation;

Subsidiairement, pour le cas où cette Honorable Cour devrait conclure que l'Hôtel-Dieu de Québec doit assumer un pourcentage quelconque dans le montant de la condamnation;

**Dire et déclarer** que l'Hôtel-Dieu de Québec doit contribuer pour sa part au montant des intérêts légaux seulement et exclure de toute participation à la satisfaction du jugement une contribution quelconque dans l'indemnité additionnelle accordée par cette Honorable Cour à la partie demanderesse;

**Attendu qu'au** soutien de ses prétentions la requérante invoque les dispositions des articles 469, 520 et 523 C.P.;

**Attendu que** l'arrêt ci-dessus mentionné n'est pas entaché d'erreur d'écriture et de quelque autre erreur matérielle;

**Vu** les conclusions déposées par les parties en appel tant dans les inscriptions en appel que dans les mémoires;

**Attendu qu'il** ne s'agit pas d'un cas où la Cour par inadvertance omet de prononcer sur une partie de la demande;

**Attendu que** les allégations de la requête ne montrent pas qu'il s'agit d'un cas qui tombe dans le champ d'application de l'article 523 C.P.;

**Attendu que** la requérante n'a pas établi que la Cour, dessaisie du pourvoi, serait justifiée de se saisir à nouveau de l'affaire aux fins de prononcer sur les nouvelles conclusions de la requérante reproduites ci-dessus;

Pour ces motifs:

**Rejette** la requête avec dépens.



comment in Quebec. Here, hidden in plain view, is a still visible symbol of the inner tension within the codified mixed systems.

## 2. Puerto Rico

In reading the recent Puerto Rican cases, from the 1980s on, one gains the impression that the judgments are considerably less discursive than in Louisiana and Quebec, even less discursive, probably, than they once were in Puerto Rico itself several decades ago. The judiciary still cites a large number of cases, indeed strings of cites. There is conspicuously little exposition of their facts and reasoning, little elaborated use of analogy from example to example. Thus the "concretizing" role of the jurisprudence is less evident. This does not mean the process itself is not occurring, but only that it is less apparent on the face of the written opinions. The decisions of a few decades ago displayed an open style which allowed us to see the concretizing function of the cases. The case of *Ramos Orengo v. Government of the Capital of P.R.*,<sup>64</sup> is an example from an era in which the court explicitly revisited and reconciled the facts of its prior holdings with those presently before it.

In *Ramos Orengo* the trial court found that the public hospital was liable when the nurse failed to prevent a patient, who had a sudden epileptic seizure, from falling from his stretcher to the floor and injuring himself. The trial judge based liability upon three holdings of the Supreme Court involving somewhat analogous facts. However, after a detailed review of these cases the Supreme Court would conclude that those cases were entirely distinguishable and that the ruling below was in error. It is the open style of this factual review (rather than the holding itself that the accident was unforeseeable and not due to negligence) which is of methodological interest here:

"The facts in the case under consideration are entirely different from those which we considered in the cases which we have just analyzed. Neither the specific acts which caused the injuries in *Carrasquillo* [burns to a new born baby caused by hot water bags placed in the baby's cradle], nor the knowledge of the patient's mental condition ... in *Roses* [hospital patient with known psychosis and suicidal tendencies escaped from her room, climbed to terrace, jumped to ground and died], nor the very special conditions which existed in *Hernández* [three year old with meningitis hung herself by string of her gown in climbing down from her cradle] are present in the instant case. On the contrary...when appellee arrived at the outpatient clinic he was quiet...suddenly and unexpectedly he turned over and fell from the stretcher. At no time was appellee left alone on the stretcher; on the contrary, he fell from it while he was being attended".

As mentioned, no similar examples in the post-1980 jurisprudence were found.

There has been, on the other hand, no diminution in the role of seminal and leading cases. The Puerto Rican judge refers to them usually in a string of cites, placing the earliest case at the head of the list. For example, the 1973 case of *Oliveros v. Abréu*, after a complete survey of Puerto Rican and American cases, replaced the out-dated locality rule and stated the modern standard of physician liability in Puerto Rico.<sup>65</sup> Cases of this kind stand for specific propositions

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<sup>64</sup> 88 P.R.R. 306 (1963)

<sup>65</sup> 101 D.P.R. 209 (1973).

not stated explicitly in the Code, but which have been effectively inserted there by judicial interpretation. Some other propositions of similar importance are the discovery rule on the running of prescription,<sup>66</sup> the rule withholding liability for honest errors of judgment or diagnosis by doctors,<sup>67</sup> the presumption that adequate treatment was administered to the patient,<sup>68</sup> the rule of *res ipsa loquitur*, and so forth. These propositions are sometimes stated in staccato fashion as if they were code provisions, their provenance indicated by bare citations without factual details, quoted excerpts, or reasoning taken from the original case. One gains the impression these propositions have become a form of boilerplate in the opinions.<sup>69</sup>

## MYTHS, LEGENDS, AND CLOSING THOUGHTS

We face many myths and legends in comparative law. The methodological differences between Common Law and Civil Law, for instance, are constantly described in outworn, misleading generalizations.<sup>70</sup> The codes are caricatured as complete and gapless rulebooks in which all but a few questions can be solved through a process of deductive reasoning.<sup>71</sup> Of course, everyone should know codes are not gapless, not complete, and certainly not "rulebooks". They embody not only a fair number of precise rules, but a host of broad principles, undefined words and nebulous standards which cannot qualify as rules and cannot be applied by any simple deductive process. The texture of these provisions accounts for the scale and scope of the praetorian edifice constructed on top of them, a superstructure of varying height and strength depending directly on the nature and condition of the underlying text.<sup>72</sup>

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<sup>66</sup> See *Colon Prieto v. Geigel*, 115 D.P.R. 232, 246-247 (1984).

<sup>67</sup> *Rodríguez Crespo v. Hernández*, 121 D.P.R. 639 (1988).

<sup>68</sup> *Sáez v. Municipality*, 84 P.R.R. 615 (1962).

<sup>69</sup> For examples of this boilerplate, see *Ramos Orengo v. Government of the Capital*, 88 P.R.R. 306 (1963); *Rodríguez Crespo v. Hernández*, 121 D.P.R. 639 (1988); *Riley v. Dr. Rodríguez de Pacheco*, 119 D.P.R. 762 (1987).

<sup>70</sup> See Lord Macmillan's lecture "Two Ways of Thinking", in *Law and Other Things* (1937), pp. 76-85.

<sup>71</sup> One widely-read book seems to state in all apparent seriousness: "He [the civil law judge] is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic". J. H. Merryman, *The Civil Law Tradition* 37-39 (1969).

<sup>72</sup> An aerial view of the jurisprudence is impossible. Figuratively speaking, we may imagine how it might look. The tallest and strongest judicial structures would be built upon the most fluid and flexible code foundations. For example, the French Civil Code roundly declares in principle, "Chacun a droit au respect de sa vie privée," and "La loi assure la primauté de la personne." Here the Cour de Cassation has found it necessary to construct *arrêts de principe* (which are assimilated here to the category of seminal cases). These are the decisions that reshaped and translated these broad commands into narrower propositions about personality rights. On the other hand, an aerial view will not show any tall buildings erected on rigid and precise rules. Article 1593 of the French Civil Code declares: "The expenses of acts occasioned by or accessory to the sale are at the charge of the buyer". Unsurprisingly, there is little jurisprudence here, and what few cases we find create no skyline and have no originality. The bulk of the jurisprudence, which fits somewhere between these two extremes, would appear as a series of moderate and substantial

This view no doubt runs contrary to the stereotypes we have of the "deductive" codes and the bureaucratic judges. It recognizes that the *oeuvre* of the civilian judge is an enormous intellectual contribution to the completion of the codes, entailing creative opportunities and responsibilities that probably equal if not exceed those presented to the judges of the common law.

The folklore of the "deductive" codes dies hard and not without reason. It survives because we were meant to be deceived. Some systems deliberately discouraged a case law and, intentionally or not, concealed the actual workings of the judicial process at the highest levels.<sup>73</sup> The veil can be lifted, but to do so we must find and read the court's internal documents. Only then do we discover how closely the *juge rapporteur* and the *avocat-général* follow and analyze the past jurisprudence and the degree to which they consider alternative arguments, policy questions, and then fashion discretionary rulings.<sup>74</sup> After a panoramic survey of precedent, Neil MacCormick and Robert Summers concluded that "The normativity of precedent has evolved as a matter of judicial practice and marks the emergence of a new type of accepted legal authority in civil law countries, beyond constitution, code, statute and administrative regulation or decree, and even beyond hierarchical reversibility. Precedent is now everywhere cited and accepted — even called for — in legal argumentation as essential to making a legally satisfactory case".<sup>75</sup> The authors continue: "In all countries save France (at the Cour de Cassation level) this is further mirrored in the citation by courts of precedents in their judicial opinions. Precedents so cited at least have force or provide further support, even for judicial decisions rather closely governed by general code or particular statute".<sup>76</sup>

The legends and myths surrounding the "inductive" common law, however, are no less daunting and difficult to overcome. The common law was, in its prime, a legal system predominantly created by judges. They reasoned by example and analogy from one established precedent to a new set of facts. Edward Levi showed us this process in his brilliant account of a famous series of tort cases in the 19<sup>th</sup> century.<sup>77</sup> It is a process, he said, in which the rules change as the rules are applied. He called it a "moving classification system" which takes in stride new situations and changing wants.<sup>78</sup> But the common law method Levi described is surely the

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structures, uneven in height, quality and strength, resting upon supple code provisions of medium generality.

<sup>73</sup> Consider the implications in a (otherwise shocking) statement of a French judge: "[We] do not write our judgments for the parties, their legal advisors or, still less for the general public. We write them for ourselves." Quoted in Jan M. Smits, "The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries," in Mark Von Hoeke (ed), *Epistemology and Methodology of Comparative Law* (2002).

<sup>74</sup> Mitchell Lasser, "Judicial (Self-)Portraits: Judicial Discourse in the French Legal System", 104 Yale L. J. 1325 (1995); Olivier Moréteau, "The Future of Civil Codes in France and Louisiana", 2 J. Civ. L. Studies 39 (2009), <http://ssrn.com/abstract=1547321>. Siltala claims that both the French and Italian systems may be styled as deductive, legalistic and magisterial, but the obstacles to a coherent case law are greater in Italy where only the *massima* (a short statement of a rule or principle without a factual frame) of a ruling is openly published. Raimo Siltala, *A Theory of Precedent* 129 (2000).

<sup>75</sup> Neil MacCormick and Robert Summers, *Interpreting Precedents* 532 (1997).

<sup>76</sup> *Ibid.* at 533.

<sup>77</sup> *An Introduction to Legal Reasoning* 1 (Chicago 1951).

<sup>78</sup> *Ibid.* 3.

common law method of *la belle époque*. We live now in what has been called "The Age of Statutes," an era in which "... we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law".<sup>79</sup> Statutes and regulations form the basis of a vast bureaucratic, administrative and regulatory machine.<sup>80</sup> Even with respect to private law it is an age of codifications like the UCC and the common-law codes in "Code States".<sup>81</sup> The deposit of written and enacted law in Britain, America or Canada easily rivals that of the civil law, and in consequence the use of deductive reasoning in common-law countries cannot be regarded any longer as exceptional or rare. It too has become the norm. Richard Posner claims that most legal questions in America are resolved syllogistically, with a legal rule as the major premise. Is marriage to one's sister valid, he asks? Is it illegal to drive 60 mph in a 40 mph zone? While these are indeed easy questions, they are in the majority, even if not taught in elite law schools. "These and many other legal questions are answered deductively by the application of clear and uncontested rules to facts determined or conceded".<sup>82</sup>

The inductive case-based method by which the common law grew has not been discarded or forgotten. Whenever there are no more rules, when the law is vague and indeterminate, or wherever the law takes the form of a wide principle or loose standard, the common law comes back to the fact-based, case-by-case analogical reasoning described by Edward Levi. However, the civil law does the same. The famous general clauses of the BGB, such as §242 on good faith, have produced a prodigious amount of case law that defies classification as deductive outcomes of the code.<sup>83</sup>

Reverting to the thesis advanced above: in the more difficult cases, which not only comprise cases of first impression but all cases of Indeterminate Resolution, the codified mixed jurisdictions do engage in case-based analogical reasoning. This was identified above as the operative role of the concretizing cases. Courts turn to such cases in search of analogies and data points (whether describing them as precedents or not, whether acknowledging them as 'sources' or not) in order to reach a legally satisfactory decision consistent and uniform with the past. The

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<sup>79</sup> Guido Calabresi, *A Common Law for the Age of Statutes* 1 (1982).

<sup>80</sup> Mary Ann Glendon, "The Sources of Law in a Changing Legal Order," 17 *Creighton L. Rev.* 663, 666-670 (1984).

<sup>81</sup> For analysis of the methodological differences entailed by common law codification, see Izhak Englard, "Li v. Yellow Cab Co — A Belated and Inglorious Centennial of the California Civil Code," 65 *Cal. L. Rev.* 4 (1977).

<sup>82</sup> *The Problems of Jurisprudence* 42-43 (1990). See also Kenneth Vandavelde, *Thinking Like a Lawyer: An Introduction to Legal Reasoning* 67 (1996), asserting that the use of syllogisms is the "dominant style" of legal reasoning at common law.

<sup>83</sup> See Basil Markesinis, "Reading Through a Foreign Judgment", in Peter Cane and Jane Stapleton, *Essays in the Law of Obligations: Essays in Celebration of John Fleming* (1998), pp. 261, 271-274, although the author cautions that some of these cases are not really inductive either but simply derive from the court's feeling of fairness. On the precedential value of these decisions in Germany, see Reinhard Zimmermann and Nils Jansen, "Quieta Movere: Interpretative Change in a Codified System," in Cane and Stapleton, *Essays*, pp 298-299 ("Every student of German private law is made aware, again and again, of the importance of leading cases decided by the highest courts. *Herrenreiter*, *Schwimmerschalter*, *Jungbullen*, or *Glugreise* have become household names with which German lawyers have to be familiar").

circle of situations involved here (a large number, it is believed) are situations by hypothesis in which there is a need and true vocation for double reasoning. By observing the patterns in three codified systems in the same area of indeterminate resolution — medical liability — the functional use of seminal and concretizing cases under a civil code has been demonstrated. The inductive function is believed to be independent of the theory of precedent and theory of sources applied in the jurisdiction. As a matter of observation, it becomes a matter of indifference what precedential weight such cases bear. That question is seldom posed, for they are not found useful because of a formal constraint, but because of the information they contain. Whether a seminal case is called a source or not is also a matter of indifference. It is more important to know that is functionally ordained to become the major premise of a syllogism determining the outcome of important issues.

It has been suggested that double reasoning is used to a greater or lesser extent by all systems, including France, Italy and Germany. If that thesis is correct, then surely it cannot be dismissed out of hand in mixed systems on purist suspicion that one part of it (case-based reasoning) seems similar to the basic method of the common law. The reach of the technique into many systems suggests it is not the product of an acquired cultural habit, and does not emanate from common law influence, however understandable that perception may be in a mixed jurisdiction. In my view it is especially important to keep separate the perennial, and often justified, mixed jurisdiction concern that common law cases may be used as the source of induction and may therefore introduce an unnecessary infiltration of common law ideas. That concern, however, is a separate question of “purity” that need not necessarily arise and depends upon the prophylactic tradition of the judges. It is a question which has always been handled far more carefully in Quebec, where the waters of the two streams have been kept separate, as opposed to Louisiana, where they often mingle.