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# THE ASSUMPTION OF RISK DEFENCE IN TORTS (COMMON LAW) AND EXTRA-CONTRACTUAL LIABILITY (QUÉBEC CIVIL LAW) IN CANADA

Abstract

*The paper is a comparative law study of the assumption of risk (volenti) defence in the field of torts (common law) and extra-contractual liability (civil law-Québec) in Canada. More specifically, it aims at presenting and analyzing the similarities and differences regarding the conditions of application and effects of the assumption of risk defence in the areas of negligence at common law and extra-contractual liability based on fault in Québec. The article also explains the raison d'être of the existing differences between the two volenti defences and explores whether convergence of applicable laws exists.*

Keywords

*assumption of risk – volenti – Canada – Québec – comparative study*

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# I. INTRODUCTION

Assumption of risk (*acceptation des risques* in French) is a well-known defence in the area of torts (common law) and extra-contractual liability (the Québec civil law equivalent of torts) in Canada. It originates from the Latin maxim *volenti non fit injuria* (hereinafter *volenti*), a phrase that is used in civil law and common law cases. Under Roman law, *volenti* stated a principle of estoppel *vis-à-vis* Roman citizens who consented to being sold as slaves[1]. Today, the defence has a broad field of application. It takes effect in the areas of negligence/intentional torts[2] (common law) and fault (civil law)[3] and refers to the voluntary assumption of a risk by a person who knows or should know of its presence.

*Volenti* reflects the individualism of early common law, drawing from the principle that "one is free to work out one's own destiny"[4]. It reached its peak in popularity during the industrial revolution and it favoured employers in cases involving workplace accidents: because of *volenti* employees could not recover for work injuries against their employers[5]. They were deemed to have voluntarily assumed the risks associated with

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1 *Wooldridge v. Sumner* [1962] 2 All ER 978, 990, *Smith v. Baker* [1891] A.C. 325 at 355.

2 A.M. Linden, B. Feldthusen, *Canadian Tort Law*, 9th ed., Markham: LexisNexis Canada 2011 at p. 518.

3 The province of Québec in Canada is governed by civil law in the area of extra-contractual liability as against the rest of the Canadian provinces which are governed by common law. Following civil law principles, "fault-based" liability requires a negligent or intentional conduct by the defendant. This civil law regime is comparable to the common law tort liability for negligence or intentional wrongdoing – two well distinct fields comprising their own liability defences. N. Vézina, *Part One: Preliminary Notions, Duality of Regimes, and Factual Basis of Liability*, [in:] A. Grenon, L. Bélanger-Hardy (ed.), *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada,* Toronto: Thompson Carswell 2008, p. 350.

4 Linden, Feldthusen, supra note 2, p. 518; L. Bélanger-Hardy, D. Boivin, *La responsabilité délictuelle en common law*, Cowansville: Éditions Yvon Blais Inc. 2005, p. 781. Other justifications of *volenti*: a) it contains an element of fault – if a person consents to run the risk of injury, he does not "deserve" the protection of the common law because he is co-author of the harm inflicted upon himself; or b) if someone manifests an interest in assuming the risk of an accident, a defendant who relies on it should be shielded from liability. Linden, Feldthusen, supra note 2, pp. 518-519.

5 Bélanger-Hardy, Boivin, supra note 4, p. 782. At that time, similar principles were applicable under English law regarding *volenti*: J. Murphy, Ch. Witting, *Street on Torts*, 13th ed., Oxford: Oxford University Press 2012, p. 205; F.H. Bohlen, *Voluntary Assumption of Risk*, Harvard Law Review 1906, vol. 20, no. 1, p. 14.

their work. With the adoption of legislation on liability sharing in the Canadian common law provinces at the beginning of the 20th century, the scope of *volenti* became restricted[6]. From this time onwards it is crucial to distinguish this defence from the victim's contributory negligence[7]. The latter refers to the negligence of the victim and may lead to liability sharing between the plaintiff and the defendant. The former simply asks the question whether the victim has accepted, implicitly or explicitly, the risks associated with an activity. It does not require negligent conduct on the part of the plaintiff and does not result in shared liability.

On the contrary, in civil law, the assumption of risk defence has traditionally been analysed as a form of imprudence, as a fault on the part of the victim[8]. Since the victim's fault (contributory negligence) may lead to liability sharing following civil law principles, such is possible on the basis of *volenti*. This reasoning is supported by the 1994 Québec Civil Code (QCC) Article 1477 which explicitly states that the assumption of risk by the victim may be considered imprudent. This article provides: "[t]he assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury".

It is obvious, therefore, that differences in perception exist at common law and civil law regarding *volenti*. The object of the present comparative study is to examine the conditions of the application and effects of *volenti*

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6 *Hall v. Hebert* [1993] 2 SCR 159, para 76, 78, 81; *Piercey v. General Bakeries Ltd* [1986] CarswellNfld 195, para 40. Also, see Bélanger-Hardy, Boivin, supra note 4. For a similar evolution of the defence in the United Kingdom (U.K.) see Murphy, Witting, ibidem, p. 201. Further, there are cases in Canada and the U.K. that do not regard *volenti* as a defence to the tort of negligence, but as indicating an absence of a duty of care (Canada) or denial of a fault (U.K.) on the part of the defendant. For Canada see *Atwell v. Gertridge et al.* [1958] N.S.J. no. 6, para 21 and for the U.K. see *Geary v. JC Wetherspoon plc* [2011] EWHC 1506 (QB). The latter case is also referred to by J. Goudkamp, *Tort Law Defenses,* Oxford: Hart Publishing 2013, p. 58 on this point.

7 Bélanger-Hardy, Boivin, supra note 4. See also *Rodrigue Estate v. Penner* [1970] CarswellMan 54, para 52 (hereinafter *Rodrigue*). In the present study, the terms "plaintiff" and "victim" will be used to indicate the person seeking compensation against the defendant in negligence.

8 A. Nadeau, R. Nadeau, *Traité Pratique de la Responsabilité Civile Délictuelle*, Montréal, Canada: Wilson & Lafleur Limitée 1971, p. 515. *Gaudet v. Lagacé* [1998] CanLII 12753 (QC CA) [hereinafter *Lagacé*].

in the areas of negligence (common law) and extra-contractual liability based on fault (Québec), unveiling their similarities and differences. The author will also explain the *raison d'être* of the seemingly irreconcilable differences of the two defences and determine whether convergence is possible. Although I will present different areas in which *volenti* has been considered, I do not aim to examine all the fields of application of this defence, but, rather, to use those common law and civil law cases that best illustrate its elements and aid in the comparative presentation and analysis.

In undertaking the present study, I align myself with the third category of comparative law scholars described by Pr. Mehren: those who do not reject or embrace convergence of different legal systems[9]. They believe that such convergence may or may not occur. Until or unless it takes place, however, these scholars opine that it is the responsibility of comparative law to determine to what degree and in which way the convergence exists or may be occurring, and to provide the analytical tools that enable jurists from different legal cultures to achieve a shared understanding of their respective intents, positions, or views.

This is precisely the approach the author adopts. I do not know whether convergence of Canadian common law and civil law legal principles will ever take place. I do not, however, exclude such a development in the long run. Until this occurs, I feel that it is my duty to examine different concepts in the two legal traditions in order to identify areas of possible convergence. I hope that the present study will shed some light on the rules governing the *volenti* defence. This will allow jurists from both legal systems to achieve a better understanding of the two legal traditions in Canada and better operate in a world that seeks more and more the interaction, if not the integration, of common law and civil law rules.

The following sections form the basis of my analysis: Section A focuses on the presentation of *volenti* under common law and civil law rules in Canada, and Section B analyzes the findings of the comparative presentation.

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9 For what follows in this paragraph see: A.T. von Mehren, *The Rise of Transnational Legal Practice and the Task of Comparative Law*, Tulane Law Review 2001, vol. 75, p. 1215.

# SECTION A.
## PRESENTATION OF *VOLENTI* UNDER COMMON LAW AND CIVIL LAW IN CANADA

The present section will examine Canadian cases and laws governing the assumption of risk defences at civil law and at common law in order to describe their conditions of application and effects revealing, in this way, their similarities and differences.

In both civil law and common law traditions, a defendant pleading assumption of risk by the victim must prove its presence. The conditions of *volenti* application following common law rules are: first, the risk of injury must be freely encountered by the victim; second, the victim must have knowledge of the risk and; third, he-she must assume both the physical and the legal risk involved in the activity[10]. At civil law, seemingly similar conditions govern the assumption of risk defence following case law interpreting QCC Article 1477: first, the victim must have knowledge of the risk associated with the activity; second, he-she must freely assume it[11]. As we are going to confirm, the civil law and common law *volenti* tests present important similarities, but also differences.

At common law, the first condition of application of *volenti* states that the risk of injury must be freely encountered. If the victim's consent to assume such risk is the product of fraud,

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10 *Crocker v. Sundance Northwest Resorts Ltd*. [1988] CanLII 45 (SCC), [1988] 1 S.C.R. 1186 [hereinafter *Sundance*]; *Dubé v. Labar* [1986] 1 S.C.R. 649 [hereinafter *Dubé v. Labar*]. See also Linden, Feldthusen, supra note 2, pp. 521-523; L. Bélanger-Hardy, D. Boivin, *La responsabilité délictuelle en common law*, Cowansville: Éditions Yvon Blais Inc. 2005, pp. 782-783. Similar conditions govern common law *volenti* following U.K. law. *Nettleship v. Weston* [1971] 2 QB 691 and M.A. Jones, *Clerk & Lindsell on Torts*, 20th ed., London: Sweet & Maxwell 2010, pp. 233-234.

11 *Gaudet v. Lagacé*, supra note 8 referring to doctrinal (Jean Louis Baudouin) definitions of the defence. This author also notes and case law frequently reiterates that, in the presence of *volenti*, the damage-injury should result from the ordinary risks inherent in an activity and not from abnormal, aggravated risks. J.L. Baudouin, P. Deslauriers, *La Responsabilité Civile*, 7th ed., Cowansville, Québec: Éditions Yvon Blais Inc. 2007, pp. 182-183. See also *Canuel v. Sauvageau* [1991] CanLII 3822 (QC CA) to which I will be referring later (*infra* note 24 and accompanying text) on this point. Other authors note that the presence of a risk is a condition of application of this civil law defence. C. Masse, *La responsabilité Civile*, [in:] *La Réforme du Code Civil*, vol. 2, Québec, Les Presses de l'Université de Laval 1993, no. 99, pp. 318-319.

misrepresentation, or if the victim suffers from a mental disability or lack of consciousness at the time consent is given, *volenti* may not apply. In *Halliday et al. v. Essex*[12], an intoxicated passenger rode in a car with a driver who had also been drinking. In holding that the victim could not, in the circumstances of the case, have freely agreed to assume the risk of injury, the Ontario High Court of Justice insisted on the lack of consciousness of the victim at the time consent was given[13]: "[o]n accepting the conveyance in the midnight drive the plaintiff was probably too drunk to form any valid opinion as to the state of intoxication of his driver. In that respect, he was in no position to appreciate the nature and extent of the risk and to freely release the defendant of his obligation to drive safely".

Similar principles govern Québec law. The doctrine declares that the risk incidental to an activity should be freely encountered[14]. Courts sanction this reasoning, often referring to the victim's consciousness of such risk[15]. Usually, the consciousness of the risk depends on the extent to which the victim was informed of its presence. It has, therefore, been held that participants in a rafting expedition with a limited ability to swim cannot be conscious of the serious risk of injury that part of the expedition presents, particularly in the absence of adequate information given to them by their guides[16]. In such circumstances, the risk of injury is not freely encountered.

This brings us to another condition of the application of *volenti* at civil law and at common law: the victim's knowledge of the risk incidental to an activity. The defendant has to prove that the plaintiff knew (actual knowledge) or was supposed to know (imputed knowledge) about the risk. In the absence of such knowledge, *volenti* will not apply.

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12 *Halliday et al. v. Essex* [1971] 3 O.R. 621 (Ont. H.C.J.) [hereinafter *Halliday*]. G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed., Ontario: Carswell 2010, p. 448 for a more general statement.

13 *Halliday et al. v. Essex*, supra note 12, para 13.

14 J.L. Baudouin, P. Deslauriers, supra note 11, p. 641.

15 *Thivierge v. Capitale (LA), Assurances générales* [2011] QCCS 318 (CanLII), para 23; *Létourneau v. Lefebvre* [2012] QCCS 1913 (CanLII), para 53.

16 *Centre d'expédition et de plein air laurentien v. Légaré* [1998] CanLII 13208 (QC CA).

In the common law case *Boehmer v. Heel*[17], the victim was a passenger in the defendant's car when the latter started driving at an excessive speed on an icy road. This resulted in an accident injuring the plaintiff (passenger). The court stated that *volenti* was inapplicable since "the danger [of dangerous driving] was neither obvious nor known in advance"[18]. On the contrary, the victim had reason to regard the defendant as a careful driver experienced in snowy conditions. Similarly, in the Québec court of appeal case *Allard v. Allard*[19], a passenger rode with the defendant who engaged in dangerous driving. The court reasoned that since the passenger could not have known what would happen when he decided to ride with the defendant, assumption of risk could not apply[20].

In determining the knowledge of the risk, the victim's experience will be considered by both common law and civil law courts. In the civil law case *Paradis v. Québec* (*Procureur général*)[21], an experienced skier decided to ski in a challenging area in the spring and got seriously injured by a rock that was covered by snow. The court found that the skier had knowledge of the risk of injury since, based on his experience, he could have foreseen such an eventuality. The assumption of risk defence applied in this case. In the common law case *Hepworth v. Canadian Equestrian Federation*[22], the plaintiff was an experienced equestrian who was injured while participating in a horse jumping event. She had signed a waiver of liability form on the basis of which the defendants were exonerated at the trial level. The court of appeal held that the trial judge had erred in refusing to take into account the plaintiff's experience as an equestrian, including the type of risk she would have expected to assume, her knowledge and experience with the rules generally in existence, and her prior experience with waivers.

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17 [1986] B.C.J. no. 2278 (B.C.S.C.).

18 Ibidem.

19 [1980] J.Q. no. 332 (CA), para 70. I should note that similar incidents to the *Allard* case would be resolved today based on the no fault liability regime governing automobile accidents in Québec.

20 Ibidem. See also *Ste-Séraphine (Municipalité de) v. Fortier* [2005] QCCA 261 (CA).

21 [1985] J.Q. no. 647 (CS), para 99-100 a case that has been cited by subsequent trial and court of appeal cases in Québec.

22 2000 CarswellAlta 1529 (Alta C.A.), para 12.

Knowledge of the risk of injury does not suffice for the *volenti* defence to take effect following civil law and common law rules. *Volenti non fit injuria* does not equal *scienti non fit injuria*. The plaintiff must, further, assume the risk incidental to an activity. The assumption of the risk is another condition of application of *volenti*.

In the field of sports, it is often the case that a participant assumes the risk of injury following both civil law and common law rules[23]. The principle that seems to be followed under both legal traditions is that a victim is deemed to have assumed (implied consent) the risks associated with the habitual, normal practice of a sport. A Québec case has, therefore, held that when, in a friendly soccer game, a player behaves violently and injures another player, the fair play rule of the sport is not respected and there can be no assumption of risk by the victim[24]. The defendant's behaviour in this case is outside the sphere of the habitual, normal practice of the sport. On the contrary, when a soccer player accidentally falls on and injures another player, the victim will, in principle, be viewed as having assumed the risk of injury[25]. Such incidents occur in the course of the habitual, normal practice of a game. Likewise, at common law, *volenti* will apply when a golfer accidentally strikes another golfer in the eye with the golf ball[26]. This is a normal risk[27] that a player is deemed to assume. On the contrary, in *Agar v. Canning*[28] the plaintiff attempted to delay the defendant by hooking him with his stick. In so doing, he hit the defendant on the back of the neck.

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23 Common law: Linden, Feldthusen, supra note 2, p. 524; *Siddall v. Oak Bay (District)* [1980] CarswellBC 728, para 18-19. Civil law: *Gratton v. Glissoires Aquatiques Grand Splash Ltée* [1992] CarswellQue 2078, para 19 referring to A. Nadeau, R. Nadeau, *Traité Pratique de la Responsabilité Civile Délictuelle,* Montréal, Canada: Wilson & Lafleur Limitée 1971, pp. 516-517.

24 *Philibert v. Giard* [2006] CarswellQue 3615 (QC CQ), para 31, 34. See also *Canuel v. Sauvageau*, supra note 11 where the court noted that the assumption of risk defence applies with respect to the ordinary risks inherent in an activity and not to injuries resulting from abnormal risks. See also L. Perret, *Précis de responsabilité civile*, Ottawa: Éditions de l'Université d'Ottawa 1979, pp. 73-74.

25 As mentioned in: *Philibert v. Giard*, ibidem, para 31, 33.

26 *Ellison v. Rogers* [1968] 1967 CarswellOnt 213; [1968] 1 O.R. 501 (Ont. HCJ), para 36; a case that has often been cited ever since.

27 Ibidem.

28 1965 CarswellMan 59, [1965] M.J. no. 24 (Man. Q.B.) affirmed on appeal by *Agar v. Canning*, 55 W.W.R. 384, 1966 CarswellMan 11 (Man. C.A. Feb 01, 1966).

In retaliation, the defendant stopped, turned, and holding his stick with both hands, brought it down on the plaintiff's face, hitting him with the blade between the nose and right eye. In finding that the *volenti* defence did not apply in this case the court stated[29]: "Hockey necessarily involves bodily contact and blows from the puck and hockey stick (…). But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another even where there is provocation and in the heat of the game, should not fall within the scope of the implied consent".

Although this line of reasoning seems to suggest that assumption of risk is determined by similar principles at civil law and at common law, a closer look at case law underlines the presence of notable differences.

In effect, following common law rules, it is not sufficient to voluntarily participate in an activity associated with risks in order to assume them. A victim may be taking a chance of being injured by participating in an activity without, at the same time, agreeing to waive his-her right of action against the defendant[30]. In such a case, no assumption of risk exists at common law. What is required is an express (such as a written contract) or an implied (based on behavior) agreement to waive the right to sue the defendant[31].

An express waiver of the right to sue must be clearly stated and the plaintiff must be aware of and consent to it[32]. If, as was the case in *Crocker v. Sundance Northwest Resorts Ltd*[33], the plaintiff signs a waiver to sue form while visibly drunk without reading it and with no effort made on the part of the defendant to bring it to his-her attention, the *volenti* defence will not apply. An express waiver of the right to sue is not clearly agreed upon by the plaintiff. Conversely, if the plaintiff knows of the existence of the release form, and reads and signs it, understanding its content, the assumption of the legal risk will be established[34].

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29 Ibidem, para 6, 8.

30 Fridman, supra note 12, p. 454.

31 *Crocker v. Sundance Northwest Resorts Ltd*., supra note 10. Linden, Feldthusen, supra note 2, p. 522. For a similar principle applicable under U.K. law see: *Nettleship v. Weston*, supra note 10.

32 Fridman, supra note 12, pp. 450-451.

33 Supra note 10, para 34-35. Another very informative case with extensive case law references on this point is *Arndt v. The Ruskin Slo Pitch Association*, 2011 BCSC 1530 (CanLII).

34 *Loychuk v. Cougar Mountain Adventures Ltd*, 2011 BCSC 193 (CanLII).

An implied waiver is more difficult to establish and decisions on it are not always easy to reconcile[35]. What the defendant needs to prove, in this regard, is that the plaintiff knows of the risk of injury and impliedly, by his conduct, assumes the legal risk. For example, the plaintiff who accepts a ride with the defendant driver who is intoxicated (willing passenger) may know of the risk of injury, but does not necessarily waive his-her right to sue. Although historically there have been common law cases where *volenti* has succeeded in the area of willing passengers, in recent times, this defence has been rejected in the absence of a waiver of the right to sue[36]. In the leading case *Lehnert v. Stein*[37], the plaintiff rode with the defendant knowing that the latter had been drinking. The defendant driver speeded, lost control of his car and collided with two power poles injuring the plaintiff. The court reasoned that although the plaintiff had accepted a ride with the defendant and was apprehensive that the latter would drive negligently, she had not waived her right to sue nor had she communicated this to the defendant[38]. The decision specifically stated[39]: "[o]n the facts of the case at bar the plaintiff, although apprehensive that the defendant would drive negligently and that an accident might result, decided to take a chance and go with him, that is to say, employing the phraseology of the passages just quoted, she thereby incurred the physical risk. In my opinion, there is nothing to warrant a finding that she decided to waive her right of action should she be injured or that she communicated any such decision to the defendant" (Cartwright J).

In another leading case *Car and General Insurance Corp v. Seymour*[40], the defendant driver was grossly negligent when the car went off the road injuring his passenger, a young waitress. Although the latter knew that the defendant had been drinking heavily when she rode with him and even though she suggested that the brother of the defendant drove, the court did not see in these facts an assumption of the legal risk on her part.

35 Linden, Feldthusen, supra note 2, p. 521; Fridman, supra note 12, p. 449.
36 Linden, Feldthusen, supra note 2, p. 528-533.
37 *Lehnert v. Stein*, 1962 CanLII 85 (SCC), [1963] S.C.R. 38 [hereinafter *Lehnert*].
38 Ibidem, para 44.
39 Ibidem.
40 1956 CarswellNS 31 [1956] S.C.R. 322 (SCC) [hereinafter *Seymour*].

Judge Rand noted[41]: "[i]n the light of these considerations, Maloney (the defendant) has not established his case that the passenger at any time accepted the continuing journey, or gave him any reason to infer that she did, on the terms that she released him from responsibility for care and would take the risk of any consequences resulting from the effects on him of liquor".

Even in the authority case *Dubé v. Labar*[42] where the *volenti* defence succeeded in a case where both the plaintiff and the defendant had been drinking, Justice Estey added[43]: "[t]hus *volenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part (…) common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant's negligence (…). The defence of *volenti* will, furthermore, necessarily be inapplicable in the great majority of drunken-driver-willing passenger cases. It requires an awareness of the circumstances and the consequences of action that are rarely present on the facts of such cases at the relevant time".

When the victim is a minor, the *volenti* defence may be set aside at common law[44]. A minor is a person whose contractual capacity is limited or impaired. He-she may, therefore, be found not able to waive his-her right of action against the defendant. Such a waiver may be seen as contravening public policy considerations protecting minor's interests[45].

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41 Ibidem, para 16. As we are going to see later, the victim's contributory negligence was retained in this case.

42 Supra note 10.

43 Ibidem, para 6, 7, 9.

44 Bélanger-Hardy, Boivin, supra note 4, pp. 782-783; Fridman, supra note 12, pp. 450, 451. The author states that the position of a minor is very different from that of a party who is fully capable of agreeing to run the risk. The comment on minors relates to the first condition of application of common law *volenti*: the risk must be freely encountered. See: supra notes 12-13 and accompanying text. I chose to comment on it in this part of the study in order to make clear that a minor cannot easily waive his-her legal right to sue.

45 As reported by *Wong (Litigation guardian of) v. Lok's Martial Arts Centre Inc.*, 2009 CarswellBC 2685. para 37, 39. On minors and *volenti* see also S. Shariff, *Travel and Terror: Re-Allocating, Minimizing and Managing Risks of Foreign Excursions and Out-Door Education Field Trips*, Education & Law Journal 2004, vol. 37, pp. 143-144.

Due to its strict conditions of application, it is logical to conclude that *volenti* constitutes an absolute defence at common law, totally exonerating the defendant from liability. Case law often states that *volenti* constitutes a complete bar to recovery[46]. The victim cannot bring an action against the defendant because he-she has renounced his-her right to sue and, as a result, there can be no liability sharing. The restrictive conditions of application and effect of *volenti* explain why this defence is rarely sanctioned by common law courts (except, perhaps, in cases involving sports). As was stated in the previously mentioned *Sundance* case[47]: "[s]ince the *volenti* defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the courts have tightly circumscribed its scope. It only applies in situations where the plaintiff has assumed both the physical and the legal risk involved in the activity".

To avoid the restrictive application of the assumption of risk defence, common law courts prefer to reason on the basis of the victim's contributory negligence and conclude on liability sharing between the defendant and the plaintiff (victim)[48]. Recourse to the contributory negligence defence presupposes the presence of negligence on the part of the victim. In the above-mentioned *Seymour*[49] case, the plaintiff knew that the defendant had been drinking and remained in the car even after she had suggested that the defendant's brother took the wheel. The court rejected the assumption of risk defence regarding the injuries suffered by the victim in the accident that followed. It held, however, that the plaintiff was contributorily negligent and, therefore, partially liable for her injuries since "she maintained herself in a situation fraught with too great possibility of danger" (J. Rand).

Contrary to common law cases, the QCC and provincial case law do not require a waiver of the right to sue as a condition of application of the assumption of risk defence. QCC Article 1477 explicitly states

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46 *Joe v. Paradis*, 2008 BCCA 57 (CanLII), para 16 [hereinafter *Paradis*]; *Acheson v. Dory*, 1993 CanLII 7015 (AB QB), para 38 (affirmed on appeal). See also Bélanger-Hardy, Boivin, supra note 4, p. 781; Fridman, supra note 12, p. 447.

47 Supra note 10, para 32; *Hall v. Hebert* [1993] 2 SCR 159.

48 *Hall v. Hebert*, ibidem; Fridman, supra note 12, p. 448.

49 Supra note 40 and accompanying text. See also *Galka v. Stankiewicz*, 2010 ONSC 2808 (CanLII), para 68-70; *Acheson v. Dory*, supra note 46, para 38-42.

that the latter does not entail renunciation of the victim's remedy against the person who caused the injury. Case law often cites this article confirming the victim's right to sue in the presence of *volenti*[50]. Following the comment of the minister of Justice on QCC Article 1477[51]: "[t]his article is new. It recognises a rule present in doctrine and case law following which assumption of risk does not entail renunciation of the right to sue on the part of the victim".

As a result, not only is a waiver of the right to sue not a condition of application of *volenti* in Québec, it is also prohibited following the QCC.

This prohibition of a waiver of the right to sue is compatible with and supported by QCC Article 1474. The latter explicitly states that exclusion or liability limitation clauses are prohibited in Québec in the case of bodily or moral injury[52]. This provision is intended to protect the victim and is *d'ordre public*[53], therefore, of strict compliance. Provincial case law is replete with examples of contractual exclusion or limitation clauses that are deemed null and void based on QCC Article 1474 in the presence of bodily or moral injury suffered by the victim. For example, it has been held that the presence of a contractual waiver of liability signed by the victim prior to a horse-back riding excursion is null and void based on QCC Article 1474 with respect to the injuries suffered by the victim during the excursion[54]. Since civil law cases may view an express

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50 See the above-mentioned case *Philibert v. Giard*, supra note 24, para 19, 2735-3861; *Québec inc. (Centre de ski Mont-Rigaud) v. Wood*, 2008 QCCA 723, para 11-12; *Gaudet v. Lagacé*, supra note 8; *Jeanson v. Waterloo*, 2009 QCCQ 6058, para 14.
As early as 1952, the Supreme Court of Canada decided that in willing passenger cases the right to sue cannot be denied in Québec in the presence of *volenti*: *Parent v. Lapointe* [1952] 1 R.C.S. 376, para 383.

51 As reported by *Lagacé*, ibidem at note 7. The translation of the statement from French to English was made by the author and reflects its substance.

52 It specifically provides: "1474. A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.
He may not in any way exclude or limit his liability for bodily or moral injury caused to another".
Note that in the case of material injury, exclusion or liability limitation clauses are only prohibited in the presence of intentional fault and gross negligence.

53 See, e.g. *Carpentier v. Nautilus Plus inc.*, 2008 QCCQ 8859 (CanLII), para 13.

54 *Sugrue v. Keller*, 2010 QCCS 6204 (CanLII), para 129. For a similar clause regarding a snow-mobile accident see: *Gaudreault v. Club des Neiges Lystania* [2000] AZ-50078158 (CS).

or an implied waiver of a legal action as an attempt to exclude the defendant's liability[55], such waivers are probably null and void based on QCC Article 1474 in the presence of bodily or moral injury of the victim. Thus, the civil law stance allowing the right to sue in the presence of *volenti* is quite burdensome on the defendant and incompatible with the common law reasoning due to the prescriptions of the QCC Articles 1477 and 1474.

If a waiver of the right to sue is not a condition of application of *volenti* in Québec, how does one assume the risk incidental to an activity? It suffices that the plaintiff has knowledge of the risk, that he-she voluntarily and freely participates in the activity comprising inherent risks and that the risk materializes[56]. In this way, when a soccer player accidently gets injured by another player during a friendly soccer game, he-she may be deemed, in Québec, to have accepted the risk of injury since he-she has voluntarily participated in the game in full knowledge of the associated risks[57]. This leads to the defendant's total or partial exoneration since, as we are going to see, *volenti* may lead to liability sharing in Québec. In an analogous scenario, a common law judge will further reason on the assumption (express or implied) of the legal risk and, in its presence, exonerate the defendant. In the civil law willing passenger case, *Boyd v. Québec*[58], the passenger knew that the defendant was drunk and incapable of driving when he decided to ride with him. The court of appeal affirmed the trial judge's decision in concluding that the willing passenger accepted the risk of injury in driving with the defendant[59]. It did not require a waiver of the right to sue in order to give effect to *volenti*. This contrasts with the common law decisions examined earlier (*Lehnert, Seymour*) that insist on the assumption

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55 On this point see: *Investissements René St-Pierre inc. v. Zurich compagnie d'assurances*, 2007 QCCA 1269 (CanLII), para 40.

56 P. Deslauriers, *Part Two: Injury, Causation, and Means of Exoneration*, [in:] A. Grenon, L. Bélanger-Hardy (ed.), *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada*, Toronto: Thompson Carswell 2008, p. 428.

57 As mentioned in: *Philibert v. Giard*, supra note 24.

58 *Boyd v. Québec (Procureur général)*, QL [1985] J.Q. no. 746 (C.A.). Similar incidents today would be resolved based on the no fault liability regime governing automobile accidents in Québec.

59 Ibidem, para 88.

of the legal risk by the willing passenger and, in its absence, disallow the defence.

The above-mentioned *Lagacé*[60] case, further confirms this line of reasoning. Here, three young children (11, 12, and 13 years old respectively) played with gas and fire resulting in an explosion which injured one of them. The appeal court of Québec stated that the children knew of the risk of harm associated with the activity and accepted it when they started their game. In other words, they had accepted the risk of injury by voluntarily participating in an activity which they knew to be dangerous. In concluding on the presence of *volenti*, the court did not require proof of a waiver of the right to sue on the part of the plaintiffs.

The *Lagacé* holding also demonstrates that minority and assumption of risk are compatible in Québec. If the minor voluntarily participates in an activity in full knowledge of the risk involved – a proof that is not always easy to make[61] – assumption of risk may take effect. As I have stated, this is not always the case at common law where minority and *volenti* may be harder to reconcile with regard to an implied or an express waiver of the right of action consented to by the minor[62].

QCC Article 1477 not only states that *volenti* does not entail renunciation of the right to sue on the part of the victim; it also declares that an assumption of risk "may be considered imprudent". This expression has been interpreted by majority case law in Québec[63] to allow the treatment of *volenti* as a fault paving, in this way, the road towards liability sharing between the plaintiff and the defendant. Following the comment of the minister of Justice on Article 1477[64]: "(…) assumption of risk may, in certain circumstances, constitute a negligence or an imprudence of the victim and allow liability sharing".

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60 Supra note 8.

61 Baudouin, Deslauriers, supra note 11, p. 691.

62 Supra notes 44, 45 and accompanying text.

63 *Lagacé*, supra note 8 refers to the majority case law view regarding the relation of *volenti* to the concept of fault. *Allard v. Allard* (supra note 19, paras 60-61) and *Boyd v. Québec* (supra note 58, para 81) explicitly state that *volenti* may constitute a fault on the part of the victim.

64 As reported by *Lagacé*, supra note 8, note 7. The translation of the statement from French to English was made by the author and reflects its substance.

Case law examples on *volenti* and liability sharing abound in Québec. In the well-known *Capers Stanford v. Mont Tremblant Lodge Inc* [hereinafter *Capers*][65] the claimant was taking ski classes at Mont Tremblant when the instructor invited the group to ski in another, more advanced area. In so doing, he failed to inform the group of a hidden obstacle present. Conscious, however, of the hesitations of the claimant to ski in the proposed area, the instructor suggested not joining the group, a suggestion that she refused. The court found that the instructor was at fault in failing to inform the skier of the hidden obstacle. It further observed that the skier accepted the risk of injury since she distanced herself from the other students and ventured in the unknown instead of slowing down or not skiing in the proposed area. This resulted in a shared liability between the plaintiff and the defendant.

Such case law does not imply that *volenti* cannot totally exonerate the defendant following civil law principles. It can lead to his-her total or his-her partial exoneration[66]. In the former case, the common law and civil law defences approximate to one another: there is no liability sharing and the victim's claim is rejected. Most frequently, however, civil law courts either reject the assumption of risk defence and hold the defendant liable, or sanction it and conclude on shared liability[67]. As a result, *volenti* is often used by Québec courts and often leads to shared liability.

Contributory negligence, liability sharing and *volenti* are, therefore, compatible concepts following civil law reasoning. This contrasts common law case law mentioned earlier (*Sundance, Paradis*)[68] that regards *volenti* as an absolute defence, prohibiting any liability split between the plaintiff and the defendant.

Based on the above-mentioned analysis, important similarities are identified between the common law and civil law *volenti* defences. Both

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65 1979 CarswellQue 644, (1979) CS 953 (AZIMUT). For a similar holding see also *Jeanson v. Waterloo (Ville de)*, 2009 QCCQ 6058 (CanLII).

66 Baudouin, Deslauriers, supra note 11, p. 641.

67 M. Tancelin, D. Gardner, *Jurisprudence Commentée sur les Obligations*, 10th ed., Montréal: Wilson & Lafleur 2010, pp. 708-709 a remark made based on case law ten years after the entry into force of the QCC.

68 Supra notes 46, 47 and accompanying text.

require that the victim has knowledge of the risks involved in an activity. In both cases the experience of the victim plays a role in determining such knowledge. Following the civil law and the common law traditions the risk incidental to an activity should be freely encountered. Lack of consciousness of the victim at the time consent is given or other element vitiating his-her consent renders this defence inapplicable. Finally, common law and civil law *volenti* imply that the victim participates in the activity associated with risks.

At the same time, notable differences can be observed between the two defences. At common law, a waiver of a right to sue is a condition of the application of *volenti* contrary to the QCC Article 1477 (and Article 1474) that has rejected this approach. Further, the common law defence is an absolute one prohibiting liability sharing between the plaintiff and the defendant contrary to the QCC Article 1477 and Québec case law which explicitly sanction liability sharing based on *volenti*.

## SECTION B.
## ANALYSIS OF FINDINGS

The said conceptual similarities of the common law and the civil law *volenti* (knowledge of a risk, risk freely assumed by the victim) are easy to establish and to justify. It is logical that a defence which is based, from its origins to the present day, on a person's consent presupposes that he-she has knowledge of the risk and that he-she freely agrees to incur it. In this part of the study, the differences of the common law and the civil law defences, their *raison d'être,* and the possibility of their convergence will mostly retain our attention.

As stated, there are two important differences underlying the common law and the civil law assumption of risk defences: a) the absence of a renunciation of the right to sue as a condition of application of *volenti* at civil law (QCC Article 1477) contrary to common law; and b) the fact that *volenti* constitutes a complete defence at common law contrary to civil law principles that allow liability sharing in its presence (QCC Article 1477).

Looking at the history of the Québec and the common law *volenti* defences, one may understand why we encounter, in Canada, two different views of what appears to be a simple and straightforward legal concept.

In effect, during the negotiations of the 1991 QCC, Article 1477 was introduced with the intent to put an end to the controversy then prevailing[69]. At that time, there were cases and doctrine that were viewing the Québec assumption of risk defence as a form of contributory negligence on the part of the victim[70]. For example, in *Lamothe v. Plassé*[71], a willing passenger case, the plaintiff and the defendant were both drinking before they decided to take to the road. The defendant was driving at a dangerous speed, ridiculing the plaintiff's (passenger) frequent requests to slow down. Due to his imprudent driving, an accident occurred leading to the amputation of the right hand of the plaintiff. In the trial that followed, the defendant pleaded the assumption of risk defence in order to be absolved from liability. The court held that the plaintiff was at fault in accepting a ride with a drunken driver and concluded on a split of liability between the parties[72]: *"(…) la Cour est convaincue que le demandeur a commis une faute en acceptant d'être conduit en automobile par un chauffeur en état d'ébriété ou dont les facultés avaient été amoindries par l'alcool et que le demandeur à cause de ce fait doit supporter doit supporter les conséquences de sa faute dans une proportion de 50%"*.

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69 Masse, supra note 11, pp. 318-319; M. Tancelin, D. Gardner, *Jurisprudence Commentée sur les Obligations*, 6th ed., Montréal: Wilson & Lafleur Ltée 1996, p. 532. We remind the reader that the negotiations of the QCC started in 1955. This code is the product of decades of negotiations: S. Normand, *An Introduction to Québec Civil Law*, [in:] A. Grenon, L. Bélanger-Hardy (ed.), *Éléments de Common Law Canadienne: Comparaison avec le Droit Civil Québécois*, Toronto: Thompson Carswell 2008, p. 42.

70 Masse, supra note 11.

71 (1953) RJ 341 (CS Que). The case refers to doctrine sharing the same view. It has been cited by subsequent cases such as: *Lariviere v. Lagueux,* 1977 CarswellQue 595, [1977] 2 A.C.W.S. 109 (Qué CA), para 15 and *Boyd c Cartier*, 1981 CarswellQue 1038 (CSQ). See also: *Delisle v. Kessler*, 1986 CarswellQue 1340 (CSQ), para 12 on this position and M. Awada, *Lamothe v. Plassé*, McGill Law Journal 1955-1956, vol. 2, no. 1, pp. 64-65 adopting this view.

72 Ibidem, pp. 346-347.

This conclusion conforms to the traditional civil law stance according to which *volenti* constitutes a form of imprudence on the part of the victim[73].

Another view, however, regarded *volenti* as a renunciation of the right to sue the defendant[74]. The latter position approximated to the common law defence. Québec doctrine and case law sharing this view often cited common law cases – for exemple, *Dubé v. Labar*[75] – when commenting on the civil law assumption of risk[76].

The drafters of the code rejected the view approximating the civil law defence to its common law counterpart[77]. QCC Article 1477 explicitly states that *volenti* does not entail renunciation of the victim's remedy against the defendant. It also provides that assumption of risk may constitute a fault on the part of the victim leading, therefore, to liability sharing. As mentioned earlier, today, the majority case law in Québec allows *volenti* to be treated as a fault on the part of the victim[78]. The new provision and its judicial application follow the traditional civil law approach analyzing *volenti* as a form of imprudence and allowing for liability sharing between the plaintiff and the defendant. As a result, defendants frequently invoke *volenti* as a defence in this province and courts often have recourse to shared liability between the parties following its principles.

The Québec stance contrasts the evolution of the defence in the Canadian common law provinces. Even though, historically, a distinction between *volenti* and contributory negligence was unnecessary at common law[79], this has changed with the introduction of apportionment legislation in the 20th century. From that time onwards it is essential

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73 Masse, supra note 11, pp. 318-319. On the traditional view of *volenti* under civil law see supra note 8 and accompanying text.

74 Masse, supra note 11, pp. 318-319.

75 Supra notes 10 and 42.

76 M. Tancelin, *Jurisprudence sur les Obligations*, Montréal: Wilson Lafleur Ltée 1988, supra note 2, p. 527 citing *Dubé v. Labar* while stating that the use of this defence should be exceptional. See also *Gervais v. Canadian Arena Co.,* (1936) 74 S.C. 389 (C.S.Que) referring to Canadian common law, and English and American case law in giving effect to the *volenti* defence.

77 Masse, supra note 11, pp. 318-319.

78 Supra note 63 and accompanying text.

79 *Dubé v. Labar*, supra note 42, para 12.

to distinguish between the two defences[80]. Common law *volenti* implies a renunciation of the right to sue on the part of the victim. The assumption of legal risk is a strict condition of application and a hard proof to establish. Further, the assumption of risk constitutes a complete defence contrary to contributory negligence. It is obvious, therefore, that although *volenti* constitutes a defence to fault-negligence following civil law and common law principles respectively, its constitutive elements have evolved in different directions under the two Canadian legal traditions.

Civil law and common law perspectives regarding *volenti* reflect the very foundations of the two legal systems they represent which are, themselves, based on diametrically opposing views. The absence of a renunciation of the right to sue, the possibility of liability sharing in the presence of *volenti* (QCC Article 1477), as well as the limitation of the freedom of contracting in the presence of bodily and moral injury (QCC Article 1474) are protectionist civil code provisions favouring the victim. The civilian codified protection of the victim emphasizes the paternalism of the civil law[81]. It abides, in this way, by Jean-Jacques Rousseau's theory that the state – as reflected in the laws – is the source of all rights under the social contract and the pursuit of collective ends[82]. Following Rousseau, the law should pursue the collective well-being and should not be hampered by individual quests. Individual freedoms – such as the freedom of contracting – should be restricted in order to serve the common interest[83]. In so doing, civil law contrasts the liberty and individualism of common law[84]. In effect, following

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80 Supra notes 6, 7 and accompanying text.

81 Ibidem. A.G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought*, [in:] C. Varga (ed.), *Comparative Legal Cultures*, New York: New York University Press 1992, pp. 89, 90 on the philosophy of the civil law. The author notes that this does not necessarily mean that civil law decries paternalism, but that it carries a strong element of paternalism.

82 On Jean-Jacques Rousseau see: Y. Guchet, *La Pensée politique*, Paris: Armand Colin 1991, pp. 74-80.

83 Ibidem. In our case, the common interest would be that of victims of activities associated with risks, who may have signed a waiver of legal actions in order to participate in them.

84 Chloros, supra note 81, pp. 86, 89, 90. As William Blackstone noted: "Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights (…)"; W. Blackstone, *Commentaries on the Laws of England*, vol. 1, Oxford:

common law reasoning, a person must bear the consequences of his-her own acts. If a waiver of legal action is what he-she has agreed upon in engaging in an activity associated with risk, his-her engagement should be honoured. The philosophy of the common law stresses the right of the individual to dispose of himself-herself and of his-her property to the exclusion of any other interest[85]. The scale of values this legal system tries to express is emancipation rather than control, responsibility rather than paternalism[86]. It is normal, therefore, that Canadian common law does not seek to limit the victim's freedom of contracting with respect to the assumption of risk defence. The statement of William L. Prosser applies, in this regard, to *volenti* following Canadian common law[87]: "[i]t is a fundamental principle of the common law that *volenti non fit injuria* – to one who is willing, no wrong is done. The attitude of the courts has not, in general, been one of paternalism. Where no public interest is contravened, they have left the individual to work out his own destiny, and are not concerned with protecting him from his own folly in permitting others to do him harm".

This line of reasoning is hard to reconcile with the paternalistic QCC Articles 1477 and 1474 protecting the victim in case of injury.

Despite the different evolution of the two defences, some common ground in their application may be identified. Given the fact that common law courts prefer to have recourse to the contributory negligence defence instead of *volenti* – bypassing, in this way, the strict conditions

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Clarendon Press 1765, facsimile version: Legal Classics Library 1983, pp. 134-136, available online: http://web2.uvcs.uvic.ca/courses/lawdemo/DOCS/BLACKSTN/B134_136.HTM. On this quotation and the individualism of the common law see also D.R. Pound, *Proceedings in Commemoration of the Address*, (1964) 35 F.R.D. 241 (WL).

85 Chloros, supra note 81, p. 86.

86 Ibidem, p. 87. Even the strongest critics of the common law will recognise that individualism and liberty are two of the most characteristic aspects of this system. However, it has been argued that judicial paternalism at common law may override consent based defences such as *volenti* regarding specific product liability cases. J. Mohrbutter, *Harrington v. Dow Corning Corp. and Social Utility: Unfit for Their Purpose Within Product Liability Negligence Law*, Saskatchewan Law Review 2012, vol. 75, pp. 303-304. On a description of the two legal systems see also F.A. Hayek, *The Constitution of Liberty*, Chicago: the University of Chicago Press 1960, pp. 54-57.

87 W.L. Prosser (ed.), W.P. Keeton (ed.), D.B. Dobbs (ed.), R.E. Keeton (ed.), D.G. Owen (ed.), *Prosser and Keeton on the Law of Torts*, 5th ed., St. Paul, Minn.: West Pub. Co. 1984, p. 112.

of application and effects of the latter – similar cases may be decided similarly following common law and civil law rules. In effect, while the Québec courts may conclude on liability sharing in the presence of *volenti*, common law courts may, in similar circumstances, do the same by resorting to the contributory negligence defence rather than that of assumption of risk. For example, in the above-mentioned civil law case *Capers*[88], the court concluded on liability sharing in the presence of *volenti* regarding a ski accident attributed to the fault of the plaintiff and the defendant. In the common law case *Turanec v. Ross*[89], the plaintiff and the defendant collided while skiing due to their failure to keep a lookout for one another. The court rejected *volenti* but resorted to liability sharing between the parties at dispute owing to their respective negligence.

This leads to the conclusion that, from a practical point of view, liability sharing may be applied by both civil law and common law courts in the presence of similar fact patterns, either by resorting to the assumption of risk defence (in Québec) or to the contributory negligence defence (in common law provinces). Since both legal systems may reach the same conclusion one way or another, it may be argued that no further comment is necessary on the difference in approach adopted by common law and civil law courts regarding *volenti*. In other words, if the end result is more or less the same, the path followed towards this end does not really matter.

Conceptually, however, the difference in approach regarding *volenti* and liability sharing in the two legal systems is troubling and deserves further commentary.

Assumption of risk at common law does not ask the question of whether the plaintiff commits a wrongful act or is at fault, but, instead, involves a person who merely accepts, implicitly or explicitly, the risks associated with an activity. As a result, one may assume the risks inherent in an activity without being negligent. If the victim is negligent, common law courts will not reason on the basis of *volenti* but, rather, on contributory negligence. Clarity in the applicable rule of law supports the distinction between the two defences.

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88 Ibidem.

89 1980 CanLII 574 (BC SC).

Prominent civil law doctrine also favours a distinction between assumption of risk and plaintiff's fault and criticizes majority case law that treats them alike[90]. One of the arguments advanced in this regard is that when a person assumes the risk of injury, he-she may do so in the absence of any fault on his-her part[91]. Another argument in the same direction is that *volenti* relates to the accountability (*imputabilité*) of the risk and not to the victim's fault (contributory negligence)[92]. These doctrinal views are not shared by majority case law which treats the two defences alike.

It is, therefore, not clear how the assumption of risk and the contributory negligence defences differ in practice in Québec, since QCC Article 1477 explicitly states that assumption of risk may be imprudent and majority case law seconds this view. Further, both *volenti* and contributory negligence may lead to liability sharing. Following the opinion of some authors, the judicial stance that consists in treating the assumption of risk and contributory negligence defences alike in Québec, renders the maxim *volenti non fit injuria* useless[93].

This observation carries considerable weight for several reasons: first, if *volenti* is useless in Québec due to its confusion with contributory negligence, it can be compared to its common law counterpart which is not often invoked by defendants before the courts. In effect, one can argue that the two defences are in decline in both legal systems in Canada: the civil law *volenti* due to its confusion with contributory negligence that renders it useless in practice, and the common law defence due to the heavy burden of proof it entails. For different reasons, therefore, *volenti* may be of little practical use to defendants in both legal systems when dissociated from the contributory negligence defence. Second,

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90 L. Giroux, *Acceptation des Risques*, Le Cahiers de Droit 1967-1968, pp. 68, 69. See also the commentary of M. Tancelin, *Des Obligations en Droit Mixte du Québec*, 7th ed., Montréal, Québec: Wilson & Lafleur Ltée 2009, pp. 579-581.

91 As reported by Baudouin, Deslauriers, supra note 11, p. 643 commenting on the conflicting arguments.

92 Giroux, supra note 90, pp. 68, 69.

93 Tancelin, Gardner, supra note 67, p. 708. As the authors have stated in a previous edition of their work, QCC article 1477 "confirms the disappearance of this defence". M. Tancelin, D. Gardner, *Jurisprudence Commentée sur les Obligations*, 6th ed., Montréal: Wilson & Lafleur Ltée 1996, p. 532.

the confusion of the contributory negligence and *volenti* in Québec contrasts common law decisions which clearly distinguish between the two defences and leads to lack of clarity regarding their respective roles.

One cannot but wonder: could civil law and common law reconsider their respective positions on *volenti* regarding the renunciation of the right to sue – or, rather, its absence in Québec – and the dissociation of *volenti* from contributory negligence – or, rather, their approximation in Québec – in an attempt to reconcile traditionally opposing views?

With respect to the renunciation of the right to sue, we deem a reconciliation of the civil law and common law positions highly unlikely. The absence of a waiver of the right to sue is explicitly prescribed by QCC Article 1477. This provision clearly states that the assumption of risk defence does not entail a renunciation of the victim's remedy against the person who caused the injury. As above-mentioned, the drafters of the QCC sought to differentiate Québec civil law from common law in allowing the victim to seek a remedy in the presence of *volenti*. Considering the explicit legal requirement and the negotiating history of QCC Article 1477, it is highly improbable that a waiver of the right to sue would be viewed as a condition of application of civil law *volenti*. On the contrary, the victim's right to sue remains a focal point in differentiating the civil law and common law defences in Canada. Likewise, the waiver of the right to a legal action as a condition of application of *volenti* is a strict judicial requirement at common law. It has survived the test of time and Canadian common law cases do not deviate from it.

A similar argument can be made with regards to the relation of *volenti* and contributory negligence at civil law and at common law in Canada. The dissociation of *volenti* from the victim's contributory negligence at common law is deeply rooted in the history of these defences and Canadian common law cases insist on preserving it. *Volenti* cannot, therefore, lead to liability sharing contrary to contributory negligence. On the contrary, majority case law in Québec confuses the two defences and allows liability sharing based on the prescriptions of QCC Article 1477. Despite the seemingly polarised views, however, a window of opportunity may be present allowing for an approximation of the common law

and the civil law stances on this point provided that there is a change of judicial stance in Québec.

In effect, the dissociation of the two defences would be possible in this province if majority case law interpreted strictly the provision that an assumption of risk "may be considered imprudent" (Article 1477). In such a case, *volenti* would not, in principle, be treated on the same basis as contributory negligence and would not lead to liability sharing but, rather, to the total exoneration of the defendant or to the rejection of the defence. The victim would not renounce his right to sue the defendant in the presence of *volenti*. However, obtaining a remedy against the defendant would be quite exceptional under this hypothesis since the victim's fault would not, in principle, be confused with the assumption of risk[94]. Contributory negligence and the resulting liability sharing between the plaintiff and the defendant would apply in the presence of the victim's fault, quite apart from *volenti*. Such a change of judicial stance in Québec would approximate *volenti* under civil law and common law in Canada because it would distinguish the defences of assumption of risk and contributory negligence as common law currently does. It also would not require a redrafting of QCC Article 1477, but merely a different judicial interpretation of the article. Instead of majority case law supporting the view that assumption of risk "may be considered imprudent" – the judicial stance prevailing today on the basis of the wording of QCC Article 1477 – majority case law would interpret this provision strictly, dissociating, in principle, the concepts of *volenti* from the victim's contributory negligence.

In practice, however, such a change of judicial position is unlikely to occur in Québec in the near future since there is no sign of reconsideration of the majority case law view treating the two defences alike. Furthermore, there seems to be no intent in Québec or in the common law provinces to reconcile the rules governing civil law and common law *volenti*. Considering the elements and evolution of the two defences

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94 The proposed distinction between the two defences would probably be supported by some Québec authors who state that *volenti* should apply only in exceptional circumstances; Tancelin, Gardner, supra note 67, p. 708.

it is hard to envision, therefore, their approximation under the current state of law.

## II. Conclusion

As demonstrated by the present study, important similarities, but also notable differences underline *volenti* in the area of torts (common law) and extra-contractual liability (Québec). In both legal systems *volenti* requires knowledge of the risks inherent in an activity and their assumption by the victim. However, common law specifically refers to the assumption of the legal risk contrary to civil law. Further, common law *volenti* constitutes an absolute defence excluding any possibility of liability sharing between the plaintiff and the defendant whereas civil code Article 1477 allows it. These differences are hard to reconcile. They are solidly rooted in the history of the two defences and the foundations of the civil law and the common law systems as herein explained.