



Volume 76 | Number 4

*Liber Amicorum: Alain A. Levasseur*

*A Louisiana Law Review Symposium of the Civil Law*

Summer 2016

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## Repository Citation

Jean-Louis Baudouin, *Abuse of Right in Quebec: Some 40 Years Later*, 76 La. L. Rev. (2016)

Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol76/iss4/14>

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# Abuse of Right in Quebec: Some 40 Years Later

Jean-Louis Baudouin\*

## INTRODUCTION

Professor Alain Levasseur has taught and written extensively in the area of the civil law of obligations. The framework and general principles of both Louisiana and Quebec civil law are drawn from the same Latino-Germanic tradition and heritage. Yet their evolution in many areas has been different due to distinctive cultural and social characteristics.

American common law jurisdictions have clearly influenced Louisiana private law. The situation in Quebec, however, has been slightly different. Due to the persistence of the use of the French language, the doctrinal and jurisprudential impact of continental law—particularly that of France—has always played an important role. Yet Louisiana, due to the existence of a civil code and a well-implanted Roman tradition, remains with Quebec and Haiti as one of the only continental-related jurisdictions in North America.<sup>1</sup>

In Quebec, the law of contract has seen a remarkable evolution since the adoption of the new Quebec Civil Code in 1994. Large discretionary power to control contractual relationships was given to the courts, and most of the new rules were specifically designed to increase and promote equity, fair dealing, consumer protection, and good faith in contractual matters.<sup>2</sup> The doctrine of abuse of right also underwent profound and significant changes.

Abuse of right generally covers three different situations. The first is the area of contracts. In that respect, in 1994, the Quebec legislature codified a number of protective measures that had already been, in certain circumstances, previously only initiated by the courts.<sup>3</sup> The second is that of property rights. By contrast, the evolution in that case has clearly been the task of the courts based on the specific adoption by the Civil Code of

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1. Continental-related jurisdictions are jurisdictions that draw their civil law from the Romanist continental tradition.

2. For an overview, see Jean-Louis Baudouin, *Justice et équilibre: la nouvelle moralité contractuelle du droit civil québécois*, in *LE CONTRAT AU DÉBUT DU XXIE SIÈCLE: ÉTUDES OFFERTES À JACQUES GHESTIN* 29–44 (L.G.D.J. ed., 2001).

3. JEAN-LOUIS BAUDOIN, PIERRE-GABRIEL JOBIN & NATHALIE VÉZINA, *LES OBLIGATIONS* no. 156, at 255 (7th ed. 2013).

1994 of the theory of abuse of right in two distinct articles.<sup>4</sup> Finally, the third general area relates to judicial matters in general—cases where the system of justice is used to seek revenge, to intimidate litigants, or, in other words, situations where the civil or criminal justice systems are misused.<sup>5</sup> In this particular case, however, the evolution is mostly due to legislative intervention.<sup>6</sup>

In 1974, Judge Albert Mayrand of the Quebec Court of Appeal participated in a conference at the Louisiana Institute of Civil Law Studies at the Paul M. Hebert Law Center at Louisiana State University. The *Louisiana Law Review* later published the Article that Judge Mayrand submitted for this conference.<sup>7</sup> In that Article, he drew a portrait of the existing French and Quebec law on abuse of right.<sup>8</sup>

The purpose of this short Essay in honor of Professor Alain Levasseur is to show how not only the law but also the very concept of abuse of right in property and judicial areas have drastically changed over the years.

#### I. ABUSE OF RIGHT AND OWNERSHIP LAW

Abuse of right in the exercise of the right of ownership as a tool to control good faith and equity in personal relationships originated in France.<sup>9</sup> By the end of the nineteenth century and the beginning of the twentieth century, the notion of abuse of right was well known in Quebec.<sup>10</sup> Yet until recently, doubt subsisted as to the very foundation of abuse of right.<sup>11</sup>

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4. Civil Code of Québec, S.Q. 1991, c. 64, art. 7 (Can.) (“No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.”); *id.* at art. 976 (“Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe to each other, according to the nature or location of their land or local custom.”).

5. 1 JEAN-LOUIS BAUDOIN, PATRICE DESLAURIERS & BENOÎT MOORE, *LA RESPONSABILITÉ CIVILE* no. 1-236, at 223 (8th ed. 2014).

6. J.L. BAUDOIN, *L’abus du droit d’ester en justice au Québec: valse d’hésitation entre le législateur et les juges*, in LIBER AMICORUM, MÉLANGES EN L’HONNEUR DE CAMILLE JAFFRET-SPINOSI 53 (2013).

7. Albert Mayrand, *Abuse of Rights in France and Quebec*, 34 *LA. L. REV.* 993 (1974).

8. *See id.*

9. PHILIPPE LE TOURNEAU ET AL., *DROIT DE LA RESPONSABILITÉ ET DES CONTRATS - RÉGIMES D’INDEMNISATION* no. 6863, at 1706 (10th ed. 2014).

10. *See* BAUDOIN, *supra* note 6, no. 1-246, at 236.

11. *See id.*

During that time, a vast majority of cases repeatedly held that abuse of right in ownership disputes was merely a specific illustration of the general rule of civil liability based on fault.<sup>12</sup> In other words, the plaintiff had to prove to the satisfaction of the court that the defendant had been negligent. This was an easy burden to discharge when the damage had been intentional or caused by the effect of an obvious act of negligence showing wanton disregard for the rights of others.<sup>13</sup> A few cases at the turn of the nineteenth century, however, had ruled that the liability involved in abuse of right cases was actually strict liability, and this liability existed when the right of ownership was used in an “antisocial way.”<sup>14</sup> The simple existence of damage that the exercise of the right of ownership caused was enough to create liability. By and large, however, courts did not follow these authorities.

*Katz v. Reitz*, one of the seminal judgments of Judge Mayrand’s career, adopted the latter view.<sup>15</sup> In *Katz*, Judge Mayrand came to the conclusion that the liability for the abusive use of one’s right of ownership was strict liability—meaning that the plaintiff did not need to prove fault, but rather simply prove that the exercise of the right had caused damages beyond a neighbor’s normal limit of tolerance.<sup>16</sup> This decision, however, was not consistently followed.

The situation changed dramatically in 2008 with the Supreme Court of Canada case *Ciment du St-Laurent v. Barrette*.<sup>17</sup> In that case, Ciment du St-Laurent—a cement company—had been operating a plant over a long period of time, and it held all the necessary licenses, permits, and administrative authorizations required to operate the plant.<sup>18</sup> The company’s operations, however, caused repeated and significant damage to neighbors, including pollution, dust, odors, noise, and unwanted debris.<sup>19</sup> Between 1991 and 1995, the company had spent approximately \$8 million to improve the dust collector machines, which served as proof

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12. *See id.*

13. One example would be the case of the man who erected long poles to prevent the use of his neighbor’s airstrip. *Air-Rimouski Ltée v. Gagnon Ltée*, [1952] C.S. 149 (Can. Que.). Another example is the man who constructed a hideous fence to deprive his neighbor of sunshine. *Brodeur v. Choinière*, [1945] C.S. 334 (Can. Que.).

14. *See* *Can. Paper Co. v. Brown*, [1922] S.C.R. 243 (Can.); *Dugas v. Drysdale*, [1897] S.C.R. 20 (Can.).

15. *Katz v. Reitz* [1973] C.A. 230 (Can. Que.).

16. *Id.* at 237.

17. *Barrette v. Ciment du St-Laurent Inc.*, [2008] S.C.R. 392 (Can.).

18. *Id.* para. 4.

19. *Id.* paras. 5–6.

that the company had done everything it could to reduce the damage caused by its operations.<sup>20</sup>

In response to the ongoing nuisance caused by the company's operations, a group of citizens brought a class action seeking compensation.<sup>21</sup> The Superior Court<sup>22</sup> held the defendant company liable, finding that although the company had done everything that it could to minimize the inconvenience caused by its operations, the evidence clearly showed that the prejudice the plaintiffs suffered largely exceeded the standard of an acceptable tolerance.<sup>23</sup> The court also held that, because the right at issue was personal, the company's liability extended to everyone who suffered damages and was not limited to owners of adjoining lands.<sup>24</sup> Lessees, for example, also held the right to be compensated.<sup>25</sup> Finally, the court confirmed the existing jurisprudence to the effect that all administrative authorizations and operation permits did not confer legal immunity.<sup>26</sup>

The Court of Appeal<sup>27</sup> rejected the strict liability theory and held that Ciment du St-Laurent was at fault and that its liability was to be assessed on that basis.<sup>28</sup> As far as the nature of abuse of right is concerned, the appellate court found that the obligation was not a personal right but a right *in rem*.<sup>29</sup> In other words, the neighborhood created a real obligation of each property to the others, essentially a sort of servitude. An important consequence was that any recourse by persons other than those holding a right of ownership was therefore excluded.<sup>30</sup>

The Supreme Court of Canada overturned the Court of Appeal and reinstated the findings of the Superior Court.<sup>31</sup> In a lengthy and elaborate unanimous judgment, the Supreme Court held that Article 976 of the Civil Code of Quebec created strict liability in this circumstance, irrespective of any fault or negligence.<sup>32</sup> The defendant company was liable on the sole basis that the levels of inconvenience and disturbance that it caused exceeded those that would be generally acceptable under the

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20. *Id.* para. 7.

21. *Id.* para. 8.

22. *Barrette v. Ciment du St-Laurent Inc.*, [2003] R.J.Q. 1883 (Can. Que.).

23. *Id.* at paras. 305–15.

24. *Id.* at paras. 344–49.

25. *Id.* at paras. 350–57.

26. *Id.* at paras. 382–90.

27. *Barrette v. Ciment du St-Laurent Inc.*, [2006] R.J.Q. 2633 (Can. Que. C.A.).

28. *Id.* at paras. 214–22.

29. *Id.* at paras. 177–84.

30. *Id.*

31. *Barrette v. Ciment du St-Laurent Inc.*, [2008] S.C.R. 392, para. 3 (Can.).

32. *Id.* paras. 37–96.

circumstances.<sup>33</sup> The degree of tolerance due by neighbors therefore remained a question of fact to be assessed by courts in each specific circumstance.<sup>34</sup>

The essence of the Supreme Court reasoning can be found in the following passage:

Even though it appears to be absolute, the right of ownership has limits. Article 976 *C.C.Q.* establishes one such limit in prohibiting owners of land from forcing their neighbours to suffer abnormal or excessive annoyances. This limit relates to the *result* of the owner's act rather than to the owner's *conduct*. It can therefore be said that in Quebec civil law, there is, in respect of neighbourhood disturbances, a no-fault liability regime based on art. 976 *C.C.Q.* which does not require recourse to the concept of abuse of rights or to the general rules of civil liability. With this form of liability, a fair balance is struck between the rights of owners or occupants of neighbouring lands.<sup>35</sup>

A number of collateral issues have not yet been resolved by the Quebec case law. An important one is whether the plaintiff must prove that the events leading to the alleged abuse are not merely isolated but have a certain degree of recurrence. Recently, the Court of Appeal held that the recurrence of the act, although not a determining condition to liability, was nevertheless an important element that ought to be taken with consideration by courts together with the objective character of its seriousness.<sup>36</sup> As well, a number of cases have now allowed parties that are not the owners of adjoining lands—such as lessees, persons who have worked on the premises, etc.—to benefit from the action for abuse of right.<sup>37</sup> The finding of the Canadian Supreme Court will certainly have a direct and profound impact on environmental protection as courts have witnessed a dramatic increase of demands for compensation in recent years.<sup>38</sup>

## II. ABUSE OF RIGHT AND JUDICIAL PROCEEDINGS

Courts in Quebec have always sanctioned clearly abusive use of judicial proceedings motivated by vengeance or clear disregard for the

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33. *Id.* paras. 87–96.

34. *See id.*

35. *Id.* para. 86.

36. *Plantons A et P Inc. v. Delage*, [2015] QCCA 7 (Can. Que. C.A.).

37. *See, e.g., Larue v. TVA Prods. Inc.*, [2011] QCCS 5493 (Can. Que.).

38. BAUDOUIN, *supra* note 6, no. 1-259, at 251.

system of justice.<sup>39</sup> Overall, however, they have always been very shy to find liability and have not been very creative in that respect. For a long period of time, judicial intervention was indeed limited to two specific instances. The first instance concerned a plaintiff who had used the judicial system with clear intent to cause damage to the other party; in other words, a vexatious or frivolous state of mind was present.<sup>40</sup> The second instance, which was much more limited, occurred when the plaintiff had no sustainable right in law, even if there was no real intent to cause prejudice.<sup>41</sup> As one can well imagine, getting relief in this particular situation was much more problematic, and the burden of proof was not easy to discharge. Courts were thus generally reluctant to impose sanctions for the misuse of the judicial system in the absence of clear and convincing evidence of clearly futile or vexatious behavior, and the standard of fault the courts required was very high.<sup>42</sup>

In recent years, however, a new form of abusive conduct—best known as SLAPP<sup>43</sup>—became an increasing concern. SLAPP was designed to restrain or totally prevent the right of free speech by using defamation or injunctive remedies against people who did not have the emotional or financial support to meet the challenge.<sup>44</sup>

One should also note that courts were reluctant, when abusive behavior was found, to order the losing party to pay the other party's attorney's fees and additional litigation costs not directly covered by law as court costs. In a controversial decision, for example, the Court of Appeal held that there was no causal connection between the abusive conduct and the reimbursement of attorney's fees, and that the courts could only consider the fees as a direct damage in exceptional circumstances.<sup>45</sup> The legal community criticized this judgment on the grounds that the distinction between abuse of right related to the legal question raised and abuse of right related to the very use of the judicial system was artificial, and that the appellate court's decision

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39. *See id.* no. 236, at 223.

40. *See, e.g.,* St-Amour v. Peterson, [1998] R.R.A. 103 (Can. Que.); Moiescu v. Garmaise, [1993] R.R.A. 587 (Can. Que.).

41. Victor Parent Inc. v. Cie Found. du Can., [1996] R.R.A. 738 (Can. Que.).

42. BAUDOIN, *supra* note 6, no. 1-235, at 222.

43. A SLAPP lawsuit is “[a] strategic lawsuit against public participation – that is, a suit brought by a developer, corporate executive, or elected official to stifle those who protest against some type of high-dollar initiative or who take an adverse position on a public-interest issue (often involving the environment).” BLACK’S LAW DICTIONARY 1514 (9th ed. 2009).

44. Savoie v Thériault- Martel, [2015] QCCA 591 (Can. Que. C.A.).

45. Entreprises Immobilières du Terroir Ltée v. Viel, [2002] R.J.Q. 1262 (Can. Que. C.A.).

seriously decreased the opportunity to sanction a large number of abusive conducts.<sup>46</sup>

The conservative approach of the jurisprudence is probably one of the main reasons why the legislature intervened. In 2009, the legislature enacted a series of rules in the Code of Civil Procedure that considerably increased the power of courts and extended the remedies available against abusive proceedings.<sup>47</sup>

According to Article 51 of the Code of Civil Procedure, courts at any time, either on demand or on their own initiative, can declare any proceeding or judicial demand abusive in whole or in part.<sup>48</sup> Importantly, the notion of abuse is defined in a very broad way and includes proceedings that are unfounded, frivolous, intended to delay the judicial process, vexatious, or quarrelsome.<sup>49</sup> These amendments are also designed to protect against SLAPP procedures restricting the right of free speech in matters of general social interest. After hearing the parties on a motion to declare the procedure abusive, the court can take any one or more of the following five actions: (1) impose conditions to the continuance of further proceedings; (2) require specific undertakings from the parties for the orderly conduct of the procedure; (3) stay the proceeding in whole or in part; (4) recommend special management of the case; or (5) order the abusive party to pay to the other a provision for costs.<sup>50</sup>

Additionally, the court can also order compensation of the aggrieved party, which can include legal costs, general damages, lawyer's professional fees, expert disbursements, and punitive damages.<sup>51</sup> In a recent case that the Quebec Court of Appeal confirmed, a judge held the owner of a senior residence who had brought a SLAPP action in defamation against the daughter of a resident to pay a penalty of \$200,000.<sup>52</sup> Since the amendments to the Code of Civil Procedure, courts have been very proactive, and the number of reported cases is staggering, as courts now feel more comfortable with a legislative framework supporting their intervention.<sup>53</sup>

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46. BAUDOUIN, *supra* note 6, no. 1-348, at 389.

47. Code of Civil Procedure, R.S.Q. 2009, c. C-25, arts. 54.1 to 54.6 (Can.). As of 2016, these articles are now designated as article 51 *et seq.* of the new Code of Civil Procedure.

48. *Id.* art. 54.1.

49. *Id.*

50. *Id.* art. 54.3.

51. *See id.* art. 54.4.

52. Savoie v. Thériault-Martel, [2015] QCCA 591 (Can. Que. C.A.).

53. *See* Raphaël Lescop, *Revue analytique de la jurisprudence portant sur les articles 54.1 à 54.6 du Code de procédure civile: du 4 juin 2009 au 4 juin 2012*,



## CONCLUSION

If one compares the law today to the state of the law at the time Judge Mayrand wrote his Article, one can only come to the conclusion that in the last 41 years, the development of the abuse of right theory in Quebec, by both the legislature and the courts, has been simply spectacular. In all both instances of property matters and judicial proceedings, however, this evolution is clearly indicative of a general trend in Quebec to introduce a higher level of equity, good faith, and social justice in human relationships.