Brief - Individual Prejudicial Expertise and the Concept of “Steps Already Taken” under Article 158(2) C.C.P. : a Legislative Requirement in the Global and Contextual Analysis of the Managing Judge

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Abstract

Since the advent of the new Code of Civil Procedure, the refusal to participate in a joint expert opinion recorded in the first protocol of the proceeding is frequently motivated by the holding of an individual prejudicial expert opinion by one or more of the parties (art. 148, al. 2(4°) C.C.P.). Such a sequence of operations has a very real practical justification for the litigant wishing to confirm his right of action, but the question remains: how does individual prejudicial expertise fit in with the power of the courts to order that an expertise be common as a management measure, an analysis in which the “steps already taken” represent only one of the elements to be considered in a broader analysis, which must be global and contextual (art. 158(2°) C.C.P.)?

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Almost 15 years ago, the Honourable André Wery, J.S.C., in a detailed comparative analysis in favour of joint expertise, which has been elevated to the status of a rule in several jurisdictions, described with an enviable pen the question that aroused our interest in writing this text, which could not be more topical:

Finally, what will happen to the expert retained by a potential plaintiff before the institution of legal proceedings? Will an appeal have to be brought before an expert opinion is obtained? Can a defendant be forced to accept the expert retained by the plaintiff knowing that they have already made a preliminary determination on the issue raised? Will a plaintiff be required to pay half the costs of a joint expert when he has already retained another?

The debate between joint expertise and individual expertise, which is a happy mixture that calls for the combined or simultaneous application of the principles of proportionality, expedition, fairness, accessibility to justice, independence and impartiality, the right to a full and complete defence arising from the audi alteram partem rule, control of the file and adversarial debate, to name but a few, has aroused the passions of jurists, curiously enough, to such an extent that it would be surprising if the ink were to cease to flow on this subject.

The present text does not intend to settle this debate, which would deserve, as one author rightly pointed out, an entire substantive text that the format of the present article does not allow to be treated to its full value.

Rather, it is without any complex that the present proposal arises from the observation, since the advent of the new Code of Civil Procedure on January 1, 2016, of a significant number of court files whose very existence is preceded by expert opinion(s) carried out by the parties and submitted unambiguously in the Case Protocol as justifying, or even permitting, recourse to individual expertise.

Such a sequence of operations has a very real practical justification for litigants wishing to confirm their right of action, but the question remains: how does individual prejudicial expertise fit in with the power of the courts to order that an expertise be carried out jointly as a management measure, an analysis in which the “steps already taken” are only one of the elements to be considered in a broader analysis that we will describe as global and contextual?

I- ADOPTION OF THE NEW C.C.P AND THE NOTION OF “STEPS ALREADY TAKEN”

The Honourable André Wery, J.S.C., lists five criticisms of judicial expertise: it is expensive, almost always causes delays in the preparation of cases, lengthens the duration of hearings, is not very credible because it is not very objective, and requires the judge to do work for which they are not qualified.

Reflections on the role of the expert in the civil trial, here as elsewhere, are not new. In Quebec alone, over the last twenty years or so, there has been a significant number of reports and studies on this subject, produced by professional or ministerial committees, members of the Barreau, representatives of the Ministère de la Justice, committees of judges and other professional orders.

Our review of the 2011 draft legislation reveals that at that time, the notion of “steps already
“steps already taken” was absent from the bill of what has now become section 158(2°) C.C.P.10.

Indeed, it was only in the 2013 Bill that the notion of “steps already taken” made its appearance11. We were particularly interested in the comments made on the notion of “steps already taken” in the context of the adoption of the new Code of Civil Procedure12. The parliamentary journals relating to the 2013 Bill are silent as to the origin of this addition by the Quebec legislator13.

Nevertheless, one author notes the strong opposition raised during the progress of the 2011 Draft Bill with respect to common expertise, more particularly in the area of professional liability, notably because of fears concerning the possible infringement of the right to a full and complete defence, because of the fact that several currents of scientific thought may exist on a given subject, but also because of the perception of the quality of justice that litigants may have had at the time14.

In examining the parliamentary work on the 2011 draft bill, we come to the same conclusions, while allowing ourselves to add that the notion of “steps already taken” was specifically recommended on numerous occasions during this work, which is the likely source of its integration into the final text. It should be noted that the brief presented by the Barreau du Québec on that occasion proposed that joint expertise should only be ordered at the request of a party, but that it should not be ordered at all:

[i]f a party has already retained an expert or if the parties have already agreed to an expertise process in their pre-trial protocol.15

The brief submitted by the Canadian Bar Association noted that in matters of professional liability, it is good practice for lawyers to consult an expert before instituting proceedings against a professional and that, as such, duplication of costs would result from the subsequent imposition of a joint expert opinion16.

However, it was the actors in the field of medical liability who gave the most concrete reasons for tempering the power of the managing judge to order a joint expert opinion, in particular because it is common practice in this field for a medical assessment establishing the existence of a patient's right of action to precede the actual taking over of the case by his future attorneys, since otherwise it could result in a flooding of the judicial system17. It is precisely this idea that has led us to develop the reflection that is the subject of the following section.

II– INDIVIDUAL PREJUDICIAL EXPERTISE: REAL PRACTICAL JUSTIFICATIONS

From the insurer wishing to confirm the identity of third parties whom they consider to be at fault for the purposes of their subrogatory recourse, to the owner of a residence questioning the existence of hidden defects, to the patient who is the victim of a potential medical error, as expressed by several actors in the legal community in the context of parliamentary work18, it is not inadvisable for a litigant, as a matter of prudence, to take the necessary steps to confirm the identity of potential defendants, the validity of his or her right of action19, or even to calculate more precisely his or her chances of success if he or she already knows the identity of the potential defendants to the action20.
While we agree with the position of Mr. Jean-Pierre Ménard, Ad.E., that thinking otherwise would risk flooding the judicial system\textsuperscript{21}, we would even go so far as to say that thinking otherwise could lead, in certain specific circumstances, to the preliminary dismissal of an action.

Some recent cases remind us that, in the absence of a specific and characterized fault in the statement of claim against a party, a ground that we rightly call “textual argument”, an action or forced intervention may be dismissed at the preliminary stage\textsuperscript{22}, even if the co-defendants are jointly and severally liable\textsuperscript{23}. In such a case, recourse to prejudicial expertise is of varying utility: either it may be of such a nature as to dissuade the plaintiff from instituting his action if the expert's findings are unsatisfactory, or it may conversely confirm his right of action. Obviously, when in doubt, the court should, in accordance with the age-old principle in this regard, be cautious when the outcome of the action depends on the expert opinions\textsuperscript{24}. One might even add to this argument that too much delay in withdrawing from an action that is later discovered to be without merit may constitute an abuse\textsuperscript{25}.

Variation on the same theme: while it is true that the receipt of an expert's report does not in itself constitute the starting point of the limitation period\textsuperscript{26}, the opposite is also true in certain highly technical cases\textsuperscript{27} where, without a prejudicial expert's report, the cause of action would amount for the plaintiff to mere suspicions, which are insufficient to constitute sufficient knowledge of the elements constituting the right of action necessary to conclude that the limitation period has started\textsuperscript{28}.

With these considerations in mind, let us now turn to the treatment reserved by recent case law to individual prejudicial expert assessments in application of the power to order a joint expert assessment as a management measure.

\section*{III- Practical Applications of the Notion of “Steps Already Taken” since the Coming into Force of the New C.C.P.}

The Court of Appeal, in a well-known decision which would also merit a full text\textsuperscript{29}, established that it is inaccurate in law to state that joint expertise has become the rule under the new Code of Civil Procedure\textsuperscript{30}, while specifying that the analysis that the managing judge must undertake when exercising the powers provided for in article 158(2) C.C.P. consists of “examining the source and the components of the dispute between the parties, in order to determine the extent of the evidence required to reach a solution”\textsuperscript{31}. The Court of Appeal then dissects its application of the three criteria set out in article 158(2) C.C.P. in an analysis that we would describe as global and contextual\textsuperscript{32}, in that no criterion appears to be preponderant from a theoretical point of view, the analysis being carried out on a “case-by-case” basis\textsuperscript{33}, in a qualitative rather than quantitative manner.

Our discussion follows implicitly from the text of the \textit{Webasto} decision itself, in that although the Court of Appeal criticizes the trial judge for not taking into account the individual expert opinion previously obtained, it is the divergence of the schools of thought in economics and the practical consequence that the joint expert would decide the dispute in the place of the judge that seem to be the basis for the \textit{ratio decidendi}\textsuperscript{34}. Nevertheless, the courts have been able to analyze the notion of “steps already taken” on other occasions, both before and after \textit{Webasto} was decided\textsuperscript{35}. 

Any lawyer practising in the field of personal injury must be familiar with the decision in Parent v. Richer, which led, in practice, to a wave of cases governed by joint expertise in the absence of individual prejudicial expertise. In this case, the prior steps taken on the initiative of the defendants through an orthopaedic surgeon gave way to proportionality, the fate of those steps being treated as follows:

[34] The fact that the defendants have already agreed to share the costs of a defence expert opinion and to retain the services of Dr. Godin does not prevent the appointment of a joint expert. It will be up to counsel to determine among themselves whether Dr. Godin is an acceptable expert for all. If not, the situation can be remedied by considering Dr. Godin’s preliminary fees, if any, included in the legal fees, given the position initially announced by the predecessor of Mr. Jolivet.

Continuing on the subject at hand, an obiter dictum by the Honourable Clément Samson, J.S.C., suggests that the mere fact of having individual prejudicial expertise should not generate any automatic reflex on the part of the managing judge:

[30] Although this was the case in Webasto and is not the case in this case, the notion of “steps already taken” should not derail the reform of the Code, as it is anticipated that a party would simply request an expert opinion and then say that it needs to produce it in order to circumvent the debate on the single expert opinion. Even in matters of latent defects for residential buildings where the financial stakes are not always high, it is possible to design a single expert's request as soon as a formal notice is sent to the seller. A refusal by the latter could influence the decision under article 158 C.C.P. and the legal fees. One thing is certain, at the risk of repeating itself, in the present case, GCE did not request an expert opinion beforehand.

At the same time, we note the judgment in Perron v. Bélanger rendered by the Honourable Marie-Paule Gagnon, J.S.C., in which the absence of an individual prejudicial expert opinion in a case of latent defects seemed to carry some weight in the decision to order a joint expert opinion, the court noting that there was no duplication of costs as a result of the order thus rendered, the savings associated with the latter being all the more evident. It is not unreasonable to think that the outcome of this case might have been different had an individual prejudicial expert opinion been in the possession of one of the parties.

The decision in Développements Pierrefonds inc. v. Ville de Montréal, the facts of which are, however, specific and cannot be applied to a large number of situations, is another illustration of the fact that the possession of an individual prejudicial expert opinion does not generate any automatic reflex on the part of the managing judge exercising the power conferred on him by article 158(2o) C.C.P.

This civil claim for disguised expropriation against the City of Montreal was aimed, among other things, at reimbursing the value of the land acquired, as well as, separately, the value corresponding to the lost development potential. It should be kept in mind that the principal expert opinion, namely the value of the land, was not common in this case. Nevertheless, expert appraisals on matters incidental to the dispute, such as the delimitation of flood plains and the territory affected by ecological constraints, were ordered by the trial judge to be common.

The Honourable Stéphane Sansfaçon, J.C.A., confirmed the trial court's decision in that the
purpose of the joint expert reports was relatively objective and secondary to the main expert reports, which were individual. As for the notion of “steps already taken”, no demonstration had been made before the trial court to convince it that the expert reports were in fact aimed at the claim for damages: on the contrary, the highest court in the province held that the said reports had not been prepared for that purpose. Finally, we note the court’s very interesting comments on the consequences of the decision to impose joint expertise on the “steps already taken”:

[16] On the question of the work already done by the experts, there is nothing to prevent the parties from transmitting the work already done to the experts who will be appointed. The collaboration desired by the legislator in the C.C.P. does not in any way prohibit this, quite the contrary, that said, without wishing to bind in any way the independence of these experts thus designated.

[17] Moreover, the applicants will not be deprived of their right to submit in evidence the expert reports already carried out in order to claim their value as damages. Obviously, these reports will not be considered as expert reports for the purposes of the litigation.

In sum, we note from this decision that a party wishing to invoke an individual prejudicial expert report as an argument against the common expert report in the context of the analysis by the managing judge under art. 158(2) C.C.P. must at the very least establish its connection with the dispute, especially if the expert opinion deals with a subject that is incidental or secondary to its main purpose.

The Court of Appeal ruled on a similar issue a few months later in GBI Experts-conseil inc. v. Syndicat de la copropriété du 2530 Place Michel-Brault. In upholding a management decision by the Honourable Yves Poirier, J.S.C., ordering that a joint expert opinion be provided in a case involving construction defects in a condominium, the Court of Appeal, writing for the Honourable Mark Schrager, J.C.A., closed the door on the argument that a mechanical engineering firm could suffer irreparable harm by having invested large sums of money prior to the litigation of the case in order to pay for the work of its own expert. Schrager J. noted in passing that the trial decision was not unreasonable, thus precluding permission to appeal within the meaning of articles 31 and 32 C.C.P.:

[8] The prejudice, if any, is not irremediable. The joint expert reports may be favourable to the applicant. Above all, the judge saw the possibility of divergent opinions among the defendants and provided for this:

5. Considering that this common expert, when submitting his expertise, could attribute responsibilities to one or the other of the defendants;

6. The Tribunal AUTHORIZES these Defendants to submit to the Tribunal a written request for the purpose of seeking the filing of a particularized expert opinion in accordance with the discussions between counsel for the parties;

[9] Counsel for the Applicant confirms to me that this leaves open the possibility of challenging one of the expert reports in whole or in part, but she is concerned that this possibility is subject to the judge’s permission.

[10] It is far from clear that the applicant is suffering any prejudice as a result of this judgment. The mechanical expertise may be favourable, if not there is the possibility of contesting or commenting as mentioned above.
[11] As for the question of fees already spent, this is not the type of prejudice referred to in article 31 C.C.P. The expense (or prejudice) is not likely to affect the outcome of the dispute on the merits. Above all, there is nothing to prevent a priori that the expert already hired by the plaintiff be the mechanical expert appointed by the defendants. On the contrary, and in any case, nothing prevents the Applicant from sharing the work already done with a new expert and thus reducing the fees to come.

[12] In sum, I am not convinced that the judgment is unreasonable in light of the guiding principles of the procedure as provided for in article 32 C.C.P. This is a technical case involving several defendants operating in several fields. According to the conclusions of the motion to institute proceedings, there is an overlap in the alleged liability between different defendants for various defects or deficiencies. In the circumstances, it is not unreasonable for the judge to limit the number of experts involved. The rule of proportionality applies.

It is not insignificant to note that the judgment a quo attached to the order for a joint expert opinion in defence the possibility, for a party whose liability was covered by the possible report of the joint expert, of requesting authorization to produce an individual expert opinion in reply to the latter.

This decision does not, therefore, resolve the issue at hand: had it not been for the possibility of requesting authorization to produce an individual expert's report in response to the joint expert's report, would proportionality still have prevailed over the steps already taken?

More fundamentally, in this case, it is not impossible to think that if the joint expert were different from the expert hired by the mechanical engineering firm before the file was brought into court and if the latter's liability were affected by this joint expert opinion, the firm could, with permission, produce the individual expert opinion that it had had prepared before the case was brought into court, and the related fees would then be fully useful.

It should be remembered from the foregoing that the court may always allow a party, while ordering the joint nature of an expert opinion, to produce an individual expert opinion a posteriori, whether or not it is prejudicial, in the event that the party's liability is covered by the joint expert report.

The case of B. Frégeau et Fils inc. v. Ville de Saint-Jean-sur-Richelieu also recalls the global and contextual analysis to which we referred earlier. In this case, the action was based on the defendant city's obligation of good faith in the context of a call for tenders, with the plaintiff contractor alleging that the nature of the soils and the site conditions were different from what was contractually planned. A counterclaim was filed by the city for new plans and specifications and for the execution of the work provided for in the contract. A warranty claim was also filed against engineering firms.

Following the publication of a new call for tenders to complete the project in dispute, the plaintiff applied to the court to have a joint expert report on the difference between the new call for tenders and the initial call for tenders. Applying the Webasto decision, the Honourable François P. Duprat, J.S.C., came to the following conclusion:

[26] The request suggests that a single expert would limit the debate and, in application of the principle of proportionality, would avoid the multiplication of expert opinions on this aspect of the dispute. The
defendants in warranty argue that the dispute over the cost of completing the work actually concerns the City's counterclaim against Frégeau and not the professionals on the site. For them, these are facts subsequent to the facts in dispute. Furthermore, the City points out that experts have already been retained on both sides and that some of these expert reports deal with previous and subsequent calls for tenders. It was also pointed out that a report listing the differences between the two calls for tenders without providing an opinion on the work would not serve to resolve the dispute between the City and Frégeau, namely the damages related to the resumption of the work provided for in the new call for tenders. In this case, the Tribunal can only note from the counterclaim, which will probably be amended, that this aspect of the damages is very important.

[27] In view of the foregoing and in light of the management powers under article 158 C.C.P. as well as the reasons given for the request for a joint expert opinion, the Tribunal cannot conclude that a single expert opinion would be likely to resolve the dispute, especially in a context where the parties have already retained experts and the issue of a new call for tenders is particularly relevant to the counterclaim. The request will therefore not be granted.

Here again, the steps already taken were not sufficient, in themselves, to justify refusing to use the joint expert: Justice Duprat’s ratio decidendi was based in part on the prior retention of experts, but also on the fact that the joint expert report envisaged affected in part the city's only counterclaim, which was unrelated to the professionals on whom the report was being imposed.

Finally, in Canadian Plastics inc. v. Novo Électronique inc., this could in principle have been the first case dealing with an expert report prepared specifically for the purposes of the litigation and dealing directly with it, where the debate could have centred on the notion of “steps already taken”, because unlike in Webasto, the parties did not seem to be raising the highly technical nature of the subject matter under consideration or conflicting schools of scientific thought.

Although the joint expert opinion was ordered, the Honourable Alain Bolduc, J.S.C. used a procedural reason to reject the argument based on the expert opinion already carried out by one party in the course of the proceedings, in response to the opposing party's oral defence:

[22] While it is true that Canadian Plastics incurred costs in the preparation of its expert opinion, this has no bearing. Since the second protocol of the proceeding, like the first, does not provide for the filing of expert reports, it was required to obtain leave of the court under article 232, par. 1 C.C.P., in order to file an expert opinion.

CONCLUSION

In short, the simple fact of having individual prejudicial expertise is one factor among many to be weighed in accordance with a global and contextual approach to the three criteria of article 158 (2°) C.C.P., so much so that it would be inaccurate to think that managing judges will develop an automatic reflex leading them invariably to individual expertise in such a case.

Nevertheless, we note from the case law illustrations cited above that no decision has yet ruled on the question of whether the mere holding of an individual prejudicial expert opinion dealing directly with the heart of the dispute and leading to a global resolution of the dispute, for example...
the cause of a fire, water damage, latent defects or a medical error, is sufficient to convince the managing judge not to exercise the power conferred on him or her by article 158(2) C.C.P, even though, for the purposes of the discussion, it should be a relatively technical area where there are no conflicting schools of thought, which are factors likely to favour common expertise.

This practical example is coupled with an avenue for reflection: as we have seen, several authors have denounced the fact that imposing joint expertise in such circumstances would generate a duplication of costs for the party succumbing to such a decision, not to mention the proliferation of recourse to shadow experts or “experts fantômes”. On the specific question of duplication of costs, one author has suggested, in a position in favour of joint expertise, a comparative economic analysis of the two models, the conclusion of which was self-evident: the system of joint expertise is less costly than that of individual expertise. Nevertheless, if the variable of individual prejudicial expertise is present in the equation, this conclusion must be questioned in our humble opinion.

Could the “steps already taken” in the overall contextual analysis tip the balance in the specific circumstances of the practical example under consideration? With respect to the contrary opinion, we are of the opinion that the answer must be affirmative insofar as, beyond the argument of duplication of costs, as we have expressed it, the carrying out of an individual prejudicial expertise has, in many cases, a very real practical justification, without which many actions could be brought lightly, even before determining whether a cause of action exists against the defendants concerned, which, we can well imagine, is certainly not the aim of the legislator.

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2. For an in-depth analysis on the interaction of these principles in the debate opposing common expertise to individual expertise, see among others Emmanuel PRÉVILLE-RATELLE, under the direction of Jean-Louis BAUDOIN, Le paradoxe de l’expertise partisane (The Paradox of Partisan Expertise), Collection Minerve, Montreal, Éditions Yvon Blais, 2015, p. 79-89, EYB2015MIN6.


5. In the eyes of the prosecutors using this statement.

6. Art. 148, para. 2(4e) C.P.C.

7. The comprehensive and contextual approach is referred to as such in reference to a framework of analysis already used in many fields, including administrative and labour law (Canada (Minister of Citizenship
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9. For a review of texts to be consulted in this regard, see in particular: Daniel JUTRAS, “L'expert et la justice civile” (The Expert and Civil Justice), in Pierre NOREAU, Emmanuelle BERNHEIM, Maya CACHECHO, Catherine PICHÉ, Jean-François ROBERGE and Catherine ROSSI (eds.), 22 chantiers sur l'accès au droit et à la justice (22 Projects on Access to the Law and to Justice), Montréal, Éditions Yvon Blais, 2020, p. 148-149.


14. G. ROUSSEAU, supra, note 4, p. 68.

15. Barreau du Québec, Brief of the Barreau du Québec on the draft bill instituting the new Code of Civil Procedure, presented to the Commission des institutions de l'Assemblée nationale du Québec on December 19, 2011, p. 27.

16. Canadian Bar Association, Brief on the Draft Bill Instituting the New Code of Civil Procedure, presented to the Commission des institutions de l'Assemblée nationale du Québec, December 16, 2011, p. 22. We will return to this point in the conclusion of this text.


18. See previous section.

19. As Professor Jutras acknowledges: "In many cases, parties bring in experts (to assess the viability of their claim or theory of the case, for example) long before the judge is able to narrow the debate, sometimes even before the claim is brought to trial." See D. JUTRAS, supra, note 9, p. 153. See to the same effect the comments of the Honourable Geneviève Cotnam, J.C.A., then lawyer: "It is common for parties to retain the services of an expert even before the case becomes contentious. The expertise is not necessarily..."
prepared with the objective of being filed with the court, but may be prepared to verify certain facts, to provide evidence or to evaluate the chances of success of a possible appeal.” See Geneviève COTNAM, “L’expertise commune : un changement culturel” ("Common Expertise): A Cultural Change") in Geneviève COTNAM and Isabelle HUDON (eds.), L'expertise (Expertise), Montreal, LexisNexis, 2016, p. 67, n 2-108.

20. As the Court of Appeal recently reminded us, you don't sue someone in order to find out if they have caused you
harm, as a lawsuit is not a fishing expedition: *Lacour v. Construction D.M. Turcotte TRO inc.*, 2019 QCCA 1023, EYB 2019-312527, par. 45.


23. *Ville de Blainville v. Grands travaux Soter inc*, 2019 QCCS 2675, EYB 2019-313532 (Application for permission to appeal dismissed by LK Industries inc. v. Vitrerie JL inc, 2019 QCCA 1612, EYB 2019-317330.) It should be noted, however, that this decision fails to distinguish between the trend in the case law that, in the presence of joint and several liability, proof of the necessity criterion is not required in order to allow the forced intervention of a joint and several debtor, as permitted by article 1529 C.c.Q.: *Girard v. Girard*, 2007 QCCA 473, E EYB 2007-117435, par. Serres Floraphus inc. v. Norséco inc, 2008 QCCS 1455, EYB 2008-132323, par. 38 et seq.; *Association pour la défense des droits des défunt et des familles du Cimetière Notre-Dame-des-Neiges v. Fabrique de la paroisse Notre-Dame de Montréal*, 2008 QCCS 5697., EYB 2008-154350, par. 25 ; *Mainville v. Laval (City of)*, 2006 QCCS 883, EYB 2006-101527, par. 31-40 ; *Factory Mutual Insurance Company v. Gérin-Lajoie*, J.E. 2006-2093, REJB 2006-79922, par. 32-33 (S.C.) (Request for permission to appeal dismissed (C.A., 2003-12-04) 500-09-013965-033); Vincent KARIM, *Les obligations (The Obligations)*, vol. 2, 5th ed., Montreal, Wilson & Lafleur, 2020, p. 283-284, par. 746. We note, however, from the judgment dismissing the motion for permission to appeal dismissed by *LK Industries inc. v. Vitrerie JL inc*, 2019 QCCA 1612, EYB 2019-317330. It should be noted, however, that this decision fails to distinguish between the trend in the case law that, in the presence of joint and several liability, proof of the necessity criterion is not required in order to allow the forced intervention of a joint and several debtor, as permitted by article 1529 C.c.Q.: *Girard v. Girard*, 2007 QCCA 473, E EYB 2007-117435, par. Serres Floraphus inc. v. Norséco inc, 2008 QCCS 1455, EYB 2008-132323, par. 38 et seq.; *Association pour la défense des droits des défunt et des familles du Cimetière Notre-Dame-des-Neiges v. Fabrique de la paroisse Notre-Dame de Montréal*, 2008 QCCS 5697., EYB 2008-154350, par. 25 ; *Mainville v. Laval (City of)*, 2006 QCCS 883, EYB 2006-101527, par. 31-40 ; *Factory Mutual Insurance Company v. Gérin-Lajoie*, J.E. 2006-2093, REJB 2006-79922, par. 32-33 (S.C.) (Request for permission to appeal dismissed (C.A., 2003-12-04) 500-09-013965-033); Vincent KARIM, *Les obligations (The Obligations)*, vol. 2, 5th ed., Montreal, Wilson & Lafleur, 2020, p. 283-284, par. 746. We note, however, from the judgment dismissing the motion for permission to appeal dismissed this decision that the lack of treatment of article 1529 C.c.Q. in the first instance was not sufficient to conclude that there was contradictory case law on the subject, although it is difficult to deny that there is an apparent contradiction between the decision rendered and the existing case law on the subject.


26. On this subject, see the case law review by the Honourable Donald Bisson, J.S.C., in *Ville de Mont-Saint-Hilaire v. Constructions Prélon inc.*, 2017 QCCS 89, EYB 2017-275009, par. 27 et seq. See also: *Lacour v. Construction D.M. Turcotte TRO inc.*, supra, note 20, par. 48 et seq.


par. 499, p. 362, which points out that this leading case is criticized, and case law cited therein.

31. Ibid.


33. Ibid, par. 15.
34. Ibid, par. 28-36.

35. Note that the decision in Univesta Assurances et services financiers inc. v. Fiducie familiale Simon Bélanger, 2018 QCCS 2389, EYB 2018-295025, par. 35, will not be dealt with in this text, given the very specific facts underlying it.


37. We note, however, that the possibility of a divergence between the various schools of thought, particularly in basic and applied research, has not yet been tested by the courts, this decision having been rendered before Webasto v. Transport TFI 6, supra, note 29. See G. COTNAM, supra, note 19, n° 2-88, p. 67: “This will also be the case when several schools of thought clash on a given subject, for example in medical liability, where several therapeutic approaches may be considered in the face of the same clinical picture.”

38. We note from the decision that only an appointment had been scheduled and that a formal report did not seem to be prepared: see par. 25.


41. 2020 QCCA 428, EYB 2020-349794.

42. Ibid, par. 12.


44. 2020 QCCA 934, EYB 2020-356140.

45. For more context, see the practice note reproduced as a reported decision: Syndicat de la copropriété du 2530 Place Michel-Brault v. 9222-6810 Québec inc. (Développement MAP), 2020 QCCS 2780, EYB 2020-361885.

46. 2020 QCCS 3862, EYB 2020-366653.

47. Without specifying, however, that a proper report had been written.

48. 2021 QCCS 402, EYB 2021-374518 (time for appeal not expired at time of writing).

49. In contrast to Développements Pierrefonds, supra, note 41.

50. Canadian Plastics Inc. supra, note 46, par. 24.

51. See to this effect: G. COTNAM, supra, note 19, n° 2-109 to 2-111, at pp. 70-71, where it is stated that in the case analysed here, presented from the perspective of an insurer’s investigation following a loss, the subsequent joint expert report is not a source of economy.


53. See D. JUTRAS, supra, note 9, p. 160; E. PREVILLE-RATELLE, supra note 2, p 92-93.

54. See G. COTNAM, supra, note 19, no 2-114, p. 71; Robert-Jean CHÉNIER, "Un regard critique sur la preuve


56. E. PRÉVILLE-RATELLE, *supra*, note 2, pp. 92-93; see also *Développements Pierrefonds inc. v. Ville de Montréal*, supra, note 41, par. 13 *in fine*.


58. See section II of this text.