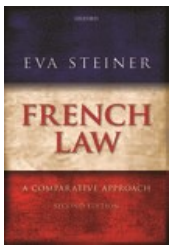

French Law: A Comparative Approach (2nd edn)

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CHAPTER

14 The Law of Tort

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Abstract

This chapter examines the French law of tort. Although French law takes a broad approach to civil liability, when looking more closely at the way in which French judges have dealt with claims in tort, it becomes apparent that the need to avoid extending the scope of civil liability to an unlimited extent has also been present in French law. Indeed, in order to achieve desirable results, French judges have on many occasions used their discretion to interpret restrictively the elastic concepts of fault, damage, and causation. Hence, they end up dismissing claims which, for policy reasons, would have created unjust results or would have opened the gates to a flood of new claims. Thus, even though French judges do not admit to it openly in their judgments, they are influenced as regards the matter of deciding the limits of liability by general policy considerations, especially the 'floodgates arguments' which their English counterparts also readily understand.

Keywords: tort, law of tort, civil liability, recoverable loss, vicarious liability, causation

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> *Il faut rougir de faire une faute et non de la réparer.*
>
> Jean-Jacques Rousseau, *Emile.*

Introduction

As for the law governing contract, the bicentenary of the French Civil Code in 2004 was an opportunity to raise the alarm about the state of extra-contractual liability in France. Since the enactment of the Civil Code in 1804, the legislative framework relating to tortious liability had only been detailed in five provisions of the Code, arts 1382 to 1386 (numbered today arts 1240–1244), thus leaving to the courts the task of developing—often randomly—the law in this area. It is therefore not surprising to find to this day a developed and complex body of case law governing civil liability in France. As part of the reform process to rewrite the law of obligations triggered by the 2005 Catala proposals (see previous chapter), and following a public consultation undertaken between April and July 2016, the French Government eventually published in March 2017 the long-awaited draft parliamentary bill for the Reform of the Law of Civil Liability (referred to as the '2017 Bill' or 'the Bill' in the following developments), largely based as in contract on the Catala project.

At the time of writing this chapter, it was still unclear when the 2017 Bill would become binding law. What follows examines the law as it stands at the time of the Bill.

The French Broad Approach to Tort Liability

Although for purposes of convenience this chapter is entitled 'The Law of Tort', a more appropriate title would be either 'The Law of Civil Liability' (*responsabilité civile*) or, more precisely, 'The Law of Delictual Liability' (*responsabilité délictuelle*), which are the technical expressions under which the law in this area is usually known in France. The 2017 Bill rather refers to 'extra-contractual' liability, thereby promoting an approach based on the 'field' covered by the new provisions rather than on the intrinsic nature of civil liability. Such a description is open to criticism considering that the borders between contract and tort have never been strictly delineated in French Law, as is the case in the Bill itself. As an illustration, the new proposed art. 1233-1 states that 'any compensation of physical injury even arising from contract is made using the rules provided in tort law'.

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Although the word 'tort' is used in everyday French language to describe a wrong, there is no concept as such in French civil law. The idea that tort liability should arise from an exhaustive list of specific acts which can be regarded as 'torts' is alien to French law which, instead, has opted for a more generalised approach to civil liability based on the notion of 'fault'. Historically, French law departed from the Roman law of delicts, modelled on criminal law, which offered, as in today's English law, a list of nominate wrongs as possible causes of action.

The French concept of '*faute*', taken from the Latin word *culpa*, is deeply rooted in natural law and religious doctrine, both of which provided the basic material on which French jurists relied in order to fashion the law in this area. The complementary general clauses of arts 1240 and 1241 of the Civil Code are striking illustrations of the universality, both in terms and in spirit, which to the present day characterises the French concept of civil liability:

> Article 1240
>
> Any act whatever of man, which causes damage to another, obliges the one through whose fault it occurred, to compensate it.
>
> Article 1241
>
> Everyone is liable for the damage he/she causes not only by his/her [intentional] act, but also by his/her negligent conduct or by his/her imprudence.

Amongst the principal civil law systems, this level of generality apparent within the French Civil Code is uncommon. Even § 823(1) of the German Civil Code (BGB), the German provision equivalent to art. 1240, contains some degree of generality and yet still provides a list of protected interests and rights whose infringement may give rise to a claim in compensation.

The categorisation approach to tort law, prevalent in legal systems such as that in England, presents the advantage of reducing judicial discretion as well as highlighting the distinctive aspects of each type of wrong by treating them separately. However, the main drawback to having a finite list of nominate torts is the existence of gaps within the law that this engenders, with the adverse and unjust consequence that potential claimants may be denied any legal remedies when their case and circumstances do not fit within the existing legal classification.

However, the distinction between the common law 'tort' model and the conceptual model of civil law systems such as in France, although true, has been somehow exaggerated. In fact, separate from the general principle based on fault found in art. 1240, since its enactment the Civil Code has also provided for specific regimes which are generally of strict liability where fault does not need to be proved. These are liability for damages caused by things (art. 1242 *alin é a* 1), by the actions of persons other than the defendant (art. 1242 *alin é as* 1, 4 and 5), by animals (art. 1243), and by defective buildings (art. 1244). Today, the law relating to civil wrongs is even more fragmented with a multiplication of special causes of action in a variety of areas such as, e.g., road traffic accidents (Law of 5 July 1985) and defective products (arts 1245 et seq. of the Civil Code, implementing the European Directive of 25 July 1985). The 2017 Bill further strengthens the dualism
p. 252 between generality and particularism in the law of civil ↳ liability. Indeed, the Bill provides a new general definition of fault side by side with the special regimes of strict liability described above which, for that purpose, have been broken down into separate headings, including two innovations: the consolidation of the judicial doctrine of *troubles anormaux de voisinage* (new proposed art. 1244) and the codification of the basic provisions of Law of 5 July 1985 on road traffic accidents (new proposed arts 1285–1288).

Conversely, in common law systems such as England, it has been felt necessary to move away from the strict nominate tort approach and to formulate the rules governing civil liability more broadly, especially in the context of actionable negligence and the duty of care. In *Donoghue v Stevenson* [1932] AC 562, Lord Atkin's famous formulation of what is commonly known as the 'neighbour principle' illustrates well that need for generalisation:

> In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.

However, in delivering his 'neighbour principle', Lord Atkin was aware of the danger of stating propositions of law in wider terms than is necessary and was very careful not to provide an all-embracing cause of action similar to those found today in arts 1240 and 1241 of the French Civil Code.

He added:

> But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour?, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then,

> in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.

What may account for the more restrictive model of civil liability adopted by English lawyers is the fact that tort law in England grew up out of the difficulty to accommodate a number of new situations arising within the framework of existing contractual duties (Markesinis 1977: 88–9). As a consequence, tort law helped fill the gaps left by contractual causes of action, developing as such in a piecemeal fashion as circumstances arose. In contrast, in French law, contractual and extra-contractual liability developed in such a way that contractual claims were governed by a set of special rules set against the general tort liability clause of the then art. 1382 (now 1240). In this respect, the rule of *non-cumul*, in preventing plaintiffs from the possibility
p. 253 of bringing their case concurrently in tort and contract when their claim fell under the ambit of contract ↳ law, demonstrates further the specificity of French contract law against the generality of tort-based liability. These remarks must be further considered in the general background of a law largely shaped in France by doctrinal writing around ideas based on individual responsibility and standards expected for citizen behaviour, where any evidence of 'proximity' or 'special relationship' between the parties, such as those required by common law judges, were not seen as essential.

However, when looking more closely at the way in which French judges have dealt with claims in tort, it will be apparent that the need to avoid extending the scope of civil liability to an unlimited extent has also been present in French law. Indeed, in order to achieve desirable results, French judges have on many occasions used their discretion to interpret restrictively the elastic concepts of fault, damage, and causation, thereby dismissing claims which, for policy reasons, would have created unjust results or would have opened the gates to a flood of new claims. Thus, even though French judges do not admit to it openly in their judgments, they are also influenced as regards the matter of deciding the limits of liability by general policy considerations, especially the 'floodgates arguments' which their English counterparts will also readily understand.

How the Law of Tort Developed in France

Since the end of the 19th century, the French law of tort has seen a continuous development in response to a number of deep and widely felt changes in social and economic conditions.

First, the industrialisation of society which had taken place by the end of the 19th century had the effect of shaking to its foundations the fault-based civil liability system of the original Civil Code of 1804. In 1897, prominent authors such as Saleilles and Josserand both proposed in their respective works a risk-based approach to civil liability (the party who carries out an activity must underwrite the financial risks generated by such an activity), which eventually led the legislature and the judiciary in its turn to introduce to the law regimes of strict liability, notably in the context of industrial accidents and damage caused by things held in a person's care. At the same time, statutory developments in the fields of insurance and social security had the effect of spreading the cost of compensation for personal injury caused by individual negligence, thus extending in part to the community at large the distribution of risk previously reserved to individual responsibility.

Secondly, in the course of the 20th century, doctrines based on the idea of social solidarity transformed legal attitudes to the way in which compensation should be paid to those suffering the consequences of wrongful acts. Following this, since the 1950s, there has been an increase in France in so-called 'guaranty funds', a system of compensation which has the purpose of awarding damages to the victims of personal injury where the party responsible for the injurious act has remained unknown, or is fully or partially insolvent. One of the oldest of these funds is *Fonds de Garantie Automobile* (FGA), a fund financed partly by

p. 254 insurance companies and partly by motorists, which ↳ since 1951 has allowed victims of road traffic accidents or their dependants to recover damages for personal injury. Similar guaranty funds have been established more recently in the context of victims of criminal offences, terrorism, and illnesses from HIV-contaminated blood transfusions and asbestos.

Thirdly, the increase in large-scale catastrophes has affected the way French jurists approach civil liability. Tragedies such as the 1978 Amoco Cadiz tanker oil spill on the Brittany coast which polluted 360 km of shoreline, the 1992 deadly collapse of a temporary stand in the Furiani Stadium that killed and injured many supporters, the 1999 blaze in the Mont Blanc tunnel where many motorists perished, or the sinking of the tanker *Erika* (also in 1999), resulting in about 30,000 gallons of heavy fuel oil spilling into the sea, are all catastrophic events that have little in common, both in magnitude and with regard to the amount of damages awarded, with the type of actions commonly heard by courts two centuries ago when the Civil Code was enacted.

General Conditions for Civil Liability

Generally, before a plaintiff can recover damages in French law, he must show that he has suffered damage and that damage was caused (*lien de causalité*) by an act or omission for which the defendant was liable (*faute* or *fait générateur*). This part of the chapter will examine the general conditions of what is known as liability for *fait personnel*, i.e. where a person may be held liable as a result of a personal fault (Civil Code, arts 1240 and 1241).

However, and this will be considered later in this chapter, a person can also be sued in tort as a consequence of damage caused by a thing in his/her care (*responsabilité du fait des choses que l'on a sous sa garde*—Civil Code, art. 1242 *alin é a* 1), or because that person is answerable in law for another's action (*responsabilité du fait d'autrui*—Civil Code art. 1242 *alin é as* 4 and 5).

The Concept of Fault

A lack of definition in the 1804 Civil Code

As already stated, the traditional basis of tort liability in French law is fault on the part of a defendant. As a consequence of fault not having been defined in the Civil Code, authors and judges have commonly relied on the definition given by the 17th-century French jurist Domat, who is reputed to have inspired the principled approach to civil liability in the then arts 1382 and 1383 of the Civil Code. In his seminal work, dated 1689, *les Loix Civiles dans leur Ordre Naturel* (Book 2, Title 8, Section 4, paragraph 1), Domat gives the following definition of *faute*:

> Any loss and damage whatsoever arising through the act of a person, whether being an act of negligence, of recklessness [*légèreté*], an absence of knowledge of what ought to be known, or any similar fault, whatever their importance, must give rise to compensation. For this constitutes a tort [*c'est un tort qu'il a fait*] even though there was no intention to harm.

p. 255 Thus, following Domat, fault should be generally understood today to include any kind of deliberate act (Civil Code, art. 1240) or any reckless or negligent conduct (Civil Code, art. 1241).

Fault and duty of care

At first, the notion of fault in arts 1240 and 1241 might appear to be too vague to a lawyer trained in a common law jurisdiction. And it is true that, as a consequence of this broadly defined character of fault, French judges have felt free to hold the existence of a wrong in a number of situations, even in the absence of any statutory basis, or any line of precedents, or a relationship between the parties involved.

In attempting to systematise the case law related to fault, it would appear that a person at fault in French law is in fact someone who has breached a kind of 'general duty of good conduct', whether this conduct was dictated by legal norms or by social standards. The Catala working group on the reform of the law of obligations in 2005 picked up this approach by proposing a definition of 'fault' similar to the one finally adopted by the 2017 Bill in new art. 1242: 'A violation of a legislative requirement or a failure in the general duty of care and diligence constitutes a fault' (translated into English by Whittaker, S. under the auspices of the French Ministry of Justice).

It could be argued that, *prima facie*, this approach does not greatly differ in its essence from the common law notion of duty of care as defined in *Donoghue* in so far as in both cases there seems to be an underlying moral obligation not to harm your neighbour. In fact, the difference with French law is in degree, rather than in nature, and lies in the fact that the French duty encompasses many more situations and bears less restriction in its ambit than its common law counterpart. Thus, in theory, in French law, subject to legal or judicial recognition, a person may be held liable when causing any damage to someone else's property; when inflicting harm or injury, either deliberately or negligently, to another whoever this other is; or when hurting the feelings or causing emotional suffering to others whatever the circumstances. Moreover, following well-established case law, misconduct of the kind described above can be the result of either (i) a 'positive act', such as the knocking over of a pedestrian by a motorist, or the act of offending somebody, or (ii) an omission, such as any wrongful failure to do something or to act in a certain way. In respect of omissions, French courts have decided that, in certain circumstances, there is a specific obligation to act, making breach of this obligation actionable. For example, there is in French law a general obligation placed on individuals to rescue others who are in danger or, in a more restricted context, a duty imposed on an employer to ensure safety in the workplace. Whereas there has been no difficulty in imposing such a duty to act where there is a relevant statute or a contract, it has been more problematic in circumstances where no juridical source for such an obligation could be found. However, here again, lack of legal basis has not prevented judges from extending the notion of wrongful abstention to non-statute-based areas such as professional practice as can be illustrated by the famous case of *Branly* (Cass. 1, 27 February 1951, D. 1951, 329), where an historian writing on the history of wireless telegraphy (TSF) omitted to mention the name of Edouard Branly, one of the inventors of this means of communication. However, it was later decided by the
p. 256 courts that a ↳ mere abstention, in the absence of any recognised duty to act, whether prescribed by statute, contract, or—as in *Branly*—by professional standards, cannot be construed as a wrong, unless such an abstention is proved to be malicious. For instance, in the case of a newspaper, *La Haute Marne Libérée*, a lawyer claimed damages after his name was not mentioned in a case report (Civ. 2, 17 July 1953, D. 1954, 533). The Court of Cassation, dismissing the appeal, ruled that 'an omission, where there is no intention to cause harm, cannot constitute a fault unless there was at least a professional obligation to include the fact omitted'. In this case, the lawyer's name not being essential to the reporting of the case, no duty of care could be held against the newspaper in the absence of any malicious intent. However, in converse to the ruling in *La Haute Marne Libérée*, an intentional or malicious abstention will always give rise to a wrong. This is supported by well-established case law. Classical illustrations of malicious abstention include the refusal by a husband of Jewish faith to grant his ex-spouse a bill of divorce or 'get', thus making a religious marriage to another man by his ex-wife impossible (e.g. Cass. Civ. 2, 5 June 1985. JCP 1987, II, 20728; Cass Civ. 2, 15 June 1988, JCP 1989, II, 21223; Cass Civ. 2, 12 December 1994, JCP 1995, IV, 416).

Determination of fault

The determination of fault raises two separate questions:

(i) *What is the standard of care to be expected from the person at fault?* The answer to this question is that fault is externally determined by consideration of the nature of the act itself (*in abstracto*), independently from the defendant's particular circumstances such as his/her age, intelligence, and emotional state and feelings. In order to determine the standard of care required of a defendant, his/her conduct is compared with the way a reasonable person would have acted in the given circumstances. The reasonable man of the Civil Code was known until 2014 as the *bonus pater familias*, 'the good family father', an outmoded notion rooted in Roman law. From now on, the Civil Code uses instead the adverb *raisonnablement* (reasonably) (e.g. in art. 1880), a notion more familiar to common lawyers, to describe the degree of care expected from a defendant.

(ii) *What is the degree of fault required to incur liability*? Generally, any kind of fault, however serious, may incur liability in tort. However, a closer look at case law shows that repetitive misconduct will more likely be held to amount to a fault rather than behaviour which may be considered as being 'proportionate', in the context of the particular circumstances of the case. In Cass. civ. 2, 2 April 1997, D. 1997, 411, *SA Automobiles Citroën v SA Canal Plus*, the Court of Cassation quashed a judgment given by the Court of Appeal of Paris which had decided that one of the sketches of a TV satirical series, featuring a rubber puppet representing the managing director of the car company Peugeot/Citroen in a crude and unflattering manner, did not cause him or the company harm, since the show, in the Court of Appeal's view, was not malicious but rather pure entertainment. The Court of Appeal had concluded that the depiction of the plaintiff, being merely a parody of the reality, was not therefore considered likely to cause disrepute to the plaintiff or to the trade brand he represented.
p. 257 However, the Court of Cassation ↳ held that the broadcasters of the series did indeed incur liability, even in the absence of any malicious intent, in view of the 'outrageous, provocative and repetitive' character of the comments made against the plaintiff during the programme.

In contrast with the *SA Automobiles Citroën* case, in the later 2006 decision *Comité National contre les Maladies Respiratoires et la Tuberculose (CNMTR) v Société JT International GmbH et autre,* the Court of Cassation again quashed a Paris Court of Appeal decision which had, on this occasion, found the defendant liable. In this case, the defendant, the National Committee for protection against respiratory illnesses, had published, in the course of its public campaign against smoking, posters and stamps featuring the image of a camel smoking a cigarette, surrounded by a cloud of smoke in which could be seen a human skull. The company marketing the Camel brand of cigarettes sued the Committee, claiming that these facts amounted not only to an abuse of freedom of expression but also constituted a 'fault' under the then art. 1382 of the Civil Code. Whilst the Court of Appeal, on the one hand, agreed with the plaintiff in so far as the defendant's acts were of a nature such as to bring discredit to Camel, the Court of Cassation, on the other hand, considered that the image giving rise to the litigation was essentially humorous and was above all proportionate to the legitimate aim pursued by the defendant, i.e. the protection of young people against the potential health hazard arising out of the smoking habit.

A more recent decision illustrates further the more cautious approach to fault adopted by the highest court in the *Camel* case. In Cass. Com. 1 March 2017 (the *Meccano* case), the Court of Cassation quashed the judgment of the Court of Appeal of Paris in a case where the defendant, a well-known weekly magazine-format newspaper, had used in various articles the word *Meccano* (from the registered brand of construction toys) to describe complex scientific, political and intellectual constructs, without mentioning the origin of the term *Meccano* itself. The Court of Appeal's view was that the defendant had been at fault in not specifying that *Meccano* was a protected brand, thus implying that it has become a generic term or word of the language, contributing in the long run to a process in which the trademark would lose its distinctive

character. According to the Court of Cassation, such a justification by the appeal judges was not sufficient to establish a fault on the part of the defendant. Indeed, for the Court of Cassation, there was nothing in the circumstances of the case to suggest that the use of a trademark in a metaphorical way ran the risk of degenerating it into a word of common language.

Fault: a concept in decline?

As already noted, the risk theory introduced at the end of the 19th century weakened the fault-based system of the Civil Code. As a consequence, emphasis in tort law shifted from the defendant's conduct to the plaintiff's claim, making compensation the principal concern and issue in a tort action. French judges have been driven by an 'ideology of compensation' which has given rise to a new interpretation of the key elements of civil liability, in particular in the concept of fault itself.

Formerly, before a person could be held liable under French law—apart from committing a wrongful act—that person would have to be able to understand the consequences of his or her own actions (*discernement*). Thus, on the basis of this definition and requirement, very young children and mentally handicapped adults
p. 258 were traditionally exempt from liability. However, in 1984, the Court of Cassation decided in ↳ a series of five judgments that very young children, although lacking the power of discernment, make their parents liable to answer for their wrongful acts (Ass. Plén., D. 1984, 525). Following the 1984 rulings, not only can young children be held liable for damage caused to others, despite them being unable to understand the consequences of their actions, but also a claim on their behalf can be reduced on the basis of the child's contributory negligence where such circumstances apply. Thus, in *Derguini*, one of the five 1984 judgments, contributory negligence was held against a girl of five who was fatally injured when running into the road without looking, and, in *Lemaire*, another of the 1984 rulings, the same applied in the case of a boy electrocuted while attempting to change a bulb without first switching off the electricity (however, case law may change under new proposed art. 1255 of the 2017 Bill, which states that 'unless it bears the characteristics of *force majeure*, the act of a victim lacking discernment has no exonerating effect'.)

Prior to this case law on children, in 1968, Parliament introduced art. 489–2 in the Civil Code (later to become art. 414-3) whereby mentally ill people can be held liable for their own acts. This followed the landmark case of *Trichard* (Cass. Civ. 2, 18 December 1964, D. 1965, 191) where a person caused an accident during the course of an epileptic fit and it was held that persons committing a tort whilst in a state of unconsciousness were nevertheless still liable for the damage they caused.

These developments in France may be set as 'a striking counter-example' (Von Bar 1998: 90) to other European laws of *delict* which are, by and large, more protective than in France, particularly in the case of young children. As an illustration, art. 2046 of the Italian Civil Code lays down that any person who does not have the capacity *d'intendere o di volere* is exempt from liability. The Swiss Code of Obligations offers a halfway solution between full liability and total exemption in that if in principle persons lacking discernment cannot be held liable, they can nevertheless be asked to compensate the loss suffered when 'equity requires it' (Code of Obligations, art. 54§1).

Despite the apparent decline in the notion of fault in French civil law, conservative scholars such as Mazeaud (1985) prefer to speak of a transformation of the concept of fault into a *faute objective*, rather than admitting that the principle of fault itself has been abandoned.

In addition to these considerations applying to the concept of fault, there are a number of situations where it is not necessary for the plaintiff to prove fault and/or where the absence of fault cannot of itself provide a defence:

(i) where the damage has been caused by things which are in the defendant's care (art. 1242 *alinéa* 1);

(ii) where the defendant is liable for the acts of another, e.g. parents for their children, employers for their employees (art. 1242 *alinéas* 4 and 5);

(iii) where the defendant has the use, management, and control of an animal (art. 1243);

(iv) where the defendant is the owner of a building which has caused damage on account of any structural defect or lack of maintenance (art. 1244).

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Recoverable Loss in French Law

As a preliminary comment, it is important to note that the basic rule in French law for recovery of damages is that plaintiffs may sue for the entire loss suffered so that they are returned to the position that they were in prior to the act causing injury. This rule is better known as the principle of *réparation intégrale du préjudice* (or full compensation principle) which is now expressly referred to in new proposed arts 1258–1259 of the 2017 Bill. This is a pervasive principle which not only accounts for the general tendency of the French courts to expand the number of heads of losses that can be brought in tort claims, but also has all sorts of other ramifications in a variety of specific circumstances. Thus, e.g., the principle that compensation is due for 'all the damaging consequences of one's actions' underlies the refusal so far by the Court of Cassation to recognise, by reference to former art. 1382 of the Civil Code, a plaintiff's duty to mitigate his/her losses (see two leading judgments in Cass. Civ. 2, 19 June 2003, JCP 2003, II, 10170; case law confirmed in Cass. Civ. 2, 22 January 2009, D. 2009, 1114). It should be noted that the current view of the Court of Cassation on the injured party's duty to mitigate his/her loss is at odds with a number of other European legal jurisdictions, including England and Germany, and also runs counter to various European and international texts which have indeed recognised such a duty (see e.g. the UNIDROIT Principles of International Commercial Contracts 2016, art. 7.4.8 (1) and (2), the Principles of European Contract Law 2002, art. 9.505 (1) and (2), and the UN Convention on Contracts for the International Sale of Goods 1980, art. 77). However, things will slightly change in the future in France since the 2017 Bill provides (in what would become new art. 1263 of the Civil Code) for the possibility that a court may reduce the claimant compensation package where he/she has allowed his/her situation to worsen and has not acted in mitigation of the loss. However, under the Bill, mitigation is still not permitted with regard to the victim's physical injuries.

Réparation intégrale is further adduced to explain the feature of compensation that the poor condition of the thing damaged (e.g. an old car) will not be taken into account to reduce the figure when calculating the quantum of damages. Equally, a court cannot reduce the victim's compensation for personal injury due to a pre-existing condition or pathological predisposition which may have contributed to the occurrence of the injury (Cass. Civ. 2, 19 May 2016; solution consolidated in the 2017 Bill, art. 1268). Finally, for the Court of Cassation, full compensation for loss incurred also means that a plaintiff suffering from an irreversible and unconscious condition in consequence of a road traffic accident can nevertheless recover for pain and suffering and loss of amenities, even though, in such circumstances, the plaintiff cannot feel anything and is not aware, as in the case at hand, of her state (see Cass. Civ. 2, 22 February 1995, JCP 1995, I, 3853, Mlle X ... v Société Transport Agglomé*ration Elbeuvienne*).

As regards the general categorisation of damages applied in French Law, legal scholars and judges usually distinguish between (a) damage to property which results in an economic loss known as *préjudice matériel*; (b) emotional harm giving rise to *préjudice moral*, and (c) physical injury which engenders *préjudice corporel*. Yet, this traditional tripartite classification has never been expressed in the Civil Code.

p. 260 However, based on the fact that ↳ each *préjudice* has a pecuniary as well as a non-pecuniary element, the drafters of the 2017 Bill have opted instead for a classification based on patrimonial (referring to a person's wealth or estate) v extra-patrimonial losses (art. 1235). When comparing the two, the tripartite

classification rests on the nature of the injury suffered and as such presents the advantage of recognising physical injury as a category distinct from the two other ones mentioned above. Indeed, not only do several rules apply differently to physical harm but, also, unlike the other two, damages for bodily injury are awarded following a complex detailed nomenclature (see below). It is interesting to note that Quebec, France's sister civil law system, moved from a bipartite to a tripartite division in its new 1994 Civil Code (art. 1457). Thus, according to art. 1457:

> Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause any injury [*préjudice,* in the French version of the article] to another.
>
> Where he is endowed with reason and fails in this duty, he is liable for any injury [*préjudice*] he causes to another by such fault and is bound to make reparation for the injury [*préjudice*], whether it be *bodily*, *moral* or *material* in nature [emphasis added].

For the sake of consistency and clarity, the traditional doctrinal and jurisprudential tripartite classification used in France will be adopted (using French terminology) in the following brief examination of categories of recoverable loss in France. Each category has further subdivisions which are also considered in turn below.

Prejudice matériel

Under *préjudice matériel* a person can not only recover the actual money value of losses sustained (*damnum emergens*) for (a) damage to property as well as (b) expenses incurred as a consequence of personal injury, but also the loss of earnings and loss of profits (*lucrum cessans*) consequent upon the act of the defendant, such as, e.g., a loss of commercial opportunity.

Unlike some common law jurisdictions, pure economic loss, defined as a pecuniary loss which is not consequent upon physical harm or property damage, is not treated as a separate category of loss in France. There is no legal objection in French law against the recovery of such loss, so long as a causal link can be established between the defendant's wrongful conduct and the plaintiff's loss. When reviewing the case law in this area, it would appear that French judges have often taken the view that when the damage claimed was 'uncertain' due to lack of causation, then the loss could not be recovered—in this respect acting not that much differently from an English judge using the test of remoteness of damage. In practice, uncertainty of damage is likely to arise in French law where economic loss might have been due to other factors, thus making this damage unforeseeable to the defendant. Thus, claims for loss of profit allegedly caused by the death of key employees against a defendant involved in their death have been rejected by French courts in view of the fact that various circumstances other than the defendant's act and involvement in their demise might have been at the root of such a financial loss. A similar approach was taken when a talented opera
p. 261 singer was injured ↳ and unable to perform any longer at the plaintiff's opera house, allegedly causing a drop in the number of tickets sold. Here again the Court of Cassation decided that the drop could have been caused by a multitude of other circumstances which were not necessarily related to the defendant's act.

Préjudice moral

There was a time when it was debatable in French law whether non-pecuniary loss known as *dommage/préjudice moral* should be recoverable at all. Three arguments were put forward against recovery for losses of this kind:

(i) it is morally wrong for those suffering to claim money for the pain and suffering they experience following the death or total incapacity of their loved ones;

(ii) in any event, recovery of damages for loss suffered will not assuage the true loss suffered;

(iii) *préjudice moral* is difficult to assess in monetary terms.

However, despite these objections, the Court of Cassation has allowed plaintiffs to recover for their pain and suffering since its landmark decision of 25 June 1833 (S. 1833, I, 458). Under French law it is even possible to claim for the pain and suffering caused by the death of an animal, following the landmark case of the racehorse *Lunus*, Cass. Civ. 1, 16 January 1962, D. 1962, 199).

Préjudice corporel

In France, compensation for physical damage claims is determined with the aid of tables established by the courts themselves in collaboration with medical experts. Damages are categorised following either a traditional listing, or a more recent listing known as the 'Dintilhac nomenclature', named after the Court of Cassation judge who presided over the commission that submitted a report to the Minister of Justice in October 2005. The aim of the Dintilhac nomenclature is to harmonise the system of compensation of personal injury in order to promote better equality of treatment between victims. Although it has not been formally adopted by Parliament, the courts have often referred to it and applied its definitions. It should be noted that lower courts play an essential part in the assessment of the quantum of damages awarded for each item of bodily injury claims in liability cases. On this matter, the 2017 Bill (art. 1271) provides for the establishment of a national database that will bring together the final decisions given by the courts of appeal across the country on quantum of damages awarded for the compensation of personal injury suffered by victims of road traffic accidents.

Préjudice corporel may take a variety of forms: physical pain (formerly called *pretium doloris*), nervous breakdown, distress experienced following physical disablement and loss of amenities of life. One important detail in respect of the French system of assessment of damages is that each of these sub-categories of *préjudice corporel* constitutes an individually separate and distinct head of damages—assessment of which is independent of each other—which means that, in practice, a plaintiff can recover a sum of money for each
p. 262 of them. Since the 1990s, there has been a tendency on the part ↳ of the courts to extend the list of heads of damages for pain and suffering linked to physical injury. Thus, in addition to standard bodily injury claims, plaintiffs have been able to recover over the years damages for personal distress consequential to AIDS-related illnesses following infection with HIV (*préjudice de contamination*); for asbestos-related anxiety (*préjudice d'anxiété*); for the loss of sexual potency (*préjudice sexuel*); and, more recently, for the impaired ability to establish a family (*préjudice d'établissement*).

Special categories of loss

Loss of chance

Loss of chance, or *perte d'une chance*, can be generally defined as a loss of opportunity of a desired outcome. As a sort of 'virtual' damage, loss of chance has the particular feature that, to be recoverable, it does not necessarily need to have occurred prior to the claim. However, according to new art. 1238 (2017 Bill), a loss of a chance is recoverable only where it is the present and certain disappearance of a favourable eventuality.

The doctrine of loss of chance is recognised in both civil and common law systems and has been applied in a variety of contexts. Some classic illustrations of claims for loss of chance drawn from case law now follow:

(a) The loss of a chance of competing in a beauty contest owing to the defendant's act.

(b) The loss of a chance, for the owner of a horse, to win a race when, owing to a driver's negligence, the

horse is injured and can no longer run in the race.

(c) The loss of a chance, for a litigant, to win a case owing to his lawyer's negligence in lodging a claim or lodging an appeal on time.

(d) The loss of opportunity, for a student, to take an examination owing to a bodily injury caused by the defendant.

(e) The loss of a commercial opportunity owing to a defendant's negligence.

In French law, before someone suffering a lost chance can recover damages, he must show that the alleged 'lost chance' is 'real and serious' and not hypothetical, i.e. there is a real likelihood that, but for the event causing loss, the future gain or benefit would have been realised. Thus, it was decided in *Erhard v Bennoun* (Cass. Civ. 2, 12 May 1966, D. 1967, 3) that the loss claimed by a 19-year-old victim of an accident, no longer able to embark on a career as a pharmacist, was purely conjectural at the time of the accident, since the claimant had just failed the first part of her baccalaureate and, therefore, it was held that her prospects of becoming a pharmacist were too uncertain and remote.

Over the years, cases involving loss of a chance have consistently been subject to controversy, both in civil and in common law systems, especially in matters concerned with medical negligence. The question raised by loss of chance in medical liability cases is the following: is it possible for an action in tort to succeed when a doctor negligently fails to inform a patient of a medical condition, thus depriving the patient of a chance or an opportunity of obtaining proper treatment?

This question is particularly problematic because, unlike classic loss of chance cases where future actual damage has not yet occurred and remains contingent (i.e. winning or losing a beauty contest, passing or failing an exam, winning or losing a case, etc.), in the medical context the event for which loss is claimed is
p. 263 most likely ↳ to have actually occurred and the chance for positive remedial action has already been lost. Indeed, when patients or their dependants are seeking damages for having lost the chance for a cure or improvement in their condition and, in extreme cases, for their survival, it has been suggested that what they are effectively claiming for is compensation for illness, injury, or death. Therefore, the damage caused is the actual illness, injury, or death which has occurred and not the 'loss of a chance' claimed for a better life or for life itself. Despite this, French courts have widely recognised the loss of chance in this field by referring to the notion of 'loss of chance of recovery' (*perte d'une chance de guérison*) or, in the case of death, 'loss of chance of survival' (*perte d'une chance de survie*). In fact, as many French authors have argued (see, e.g., Viney and Jourdain 2006: 229), what French courts are trying to do in applying the doctrine of loss of chance in such cases is to make the proof of causation easier for the victims of a medical negligence by shifting what is to be proved in their favour. Thus, the plaintiff does not have to prove the causal link between the doctor's negligence and the actual death or injury, but rather between the doctor's negligence and the easier-to-prove, fuzzier notions of loss of chance of recovery or loss of chance of survival. By shifting the issue of proof of causation from the actual damage to the loss of a chance, French judges, unlike their common law counterparts, avoid getting involved with the factual and statistical considerations as to whether, but for the defendant's negligence, the claimant would have been in the same situation anyway. The House of Lords case of *Gregg v Scott* [2005] UKHL 2 is a good illustration of how English judges have been much more cautious than their French counterparts in dealing with loss of chance claims in medical negligence cases. Thus, in a typical case of a patient whose condition was not correctly diagnosed, which resulted in a delay in his treatment and, possibly, reduced his chances of being cured, the House of Lords held that he had not established that, on the balance of probabilities, the defendant's negligence had had an effect on the outcome of the disease because it was held more probable than not that the patient would have been in the same position, even if his treatment had not been delayed by the defendant's negligence.

A similar approach was taken more than a decade earlier by the Canadian Supreme Court in the seminal case of *Lawson v Laferrière* [1991] 1 SCR 541. Here, a doctor failed to inform a patient that she had cancer before it was too late and had become terminal. The claimant was awarded damages only for the psychological distress of not being informed earlier and for the better quality of life she would have been likely to enjoy if she had been informed promptly. However, the claim for loss of chance to benefit from proper medical care was dismissed after a lengthy judgment which still provides the best summary in the English language of French doctrinal writings on the issue of loss of chance in the context of medical negligence.

Wrongful life and wrongful birth claims

Can the birth of a child be considered as a recoverable loss? This question has been debated in a number of legal jurisdictions including the United States (*Procanik v Cillo* 97 NJ 339 (1984)), England (*McKay v Essex Area Health Authority* [1982] 1 QB 1166), and France (*Perruche*, Cass. Ass. Plén., 17 November 2000, D. 2001, 332). It raises a variety of legal and ethical issues for which space is not available here to consider fully. ↳ However, within this rubric, French courts have had to consider three principal types of claims:

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1. Action brought by parents claiming for the birth of a healthy child following a failed abortion.
2. Action brought by parents of a child born disabled, claiming that but for the negligence of the medical practitioner or hospital they would not have to support a child born with a disability (wrongful birth claim).
3. Claim brought on behalf of a child born disabled that he would have been better off if he had never been born (wrongful life claim).

Claim 1 is not recoverable under French law since the birth of a child is not considered in itself as a source of damage (*Mlle P. v Picard*, Cass. Civ. 1, 25 June 1991, D. 1991, 466).

Under claim 2, parents can usually recover for emotional harm and medical expenses incurred. However, since the Law of 4 March 2002 on the rights of the patient and the quality of the health care system, parents can no longer claim for the extra costs of bringing up a disabled child (art. L114-5 *in fine* of the Family and Social Action Code).

It is claim 3 which has given rise to most controversy since, it has been argued, what is being claimed is that the child's life is 'a wrong'. In the 2000 case of *Perruche*, a child was born severely disabled as a result of German measles having been contracted by his mother during pregnancy. The Court of Cassation, sitting on this occasion in full formal assembly, held that the child had the right to claim damages from the blood-test laboratory and from the doctor who both failed to give the correct information to the mother in respect of her blood tests, which would have detected her condition and alerted her to the fact that she had German measles.

Perruche was subsequently taken up and followed (in Cass. Ass. Plén., 13 July 2001, D. 2001, 2325), but provoked such an uproar amongst academics, politicians, organisations for the rights of the disabled, and the medical profession that it was finally overruled by the Law of 4 March 2002 which stated in its art. 1 the principle that 'no one can seek damages for the sole fact of being born' (principle to be found today in art. L114-5 of the Family and Social Action Code). However, the European Court of Human Rights struck a blow to this new legislation by subsequently ruling *in Maurice v France* and *Draon v France* (2005) that the Law of 4 March 2002, by applying immediately to pending cases, had the effect of retrospectively depriving parents of children born disabled of the possibility of claiming compensation for 'special burdens' arising from their child's disability and, by so doing, had therefore interfered with the exercise of the pre-existing rights to compensation which could have been exercised under the domestic law applicable until that date. As a result of the Strasbourg jurisprudence, it is assumed today that whereas the 2002 'anti-*Perruche*' legislation

applies to children born after the entry into force of the 2002 law, i.e., as of 7 March 2002, the *Perruche* jurisprudence prevails for all claims filed before 7 March 2002. However, prior to 2011, there was still uncertainty as to the case of children born before 7 March 2002 for which legal action was introduced after 7
p. 265 March 2002. This was resolved in Cass. ↳ Civ. 1 15 December 2011, where the Court of Cassation upheld the Court of Appeal decision to apply the *Perruche* jurisprudence to all children born before 7 March 2002, regardless of the date by which the claims were filed. However, this solution adopted by the Court in 2011 was fiercely criticised for considerably reducing the ambit of the 2002 legislation. In parallel with these developments, a Law of 11 February 2005 on equal opportunities for the disabled introduced new provisions with a view to increasing benefits in the case of children born with a disability. In addition, laws enacted in 2015 and 2016 in the area of healthcare introduced programmes of prevention and awareness for the disabled, together with compensation schemes based on the principle of social solidarity.

Ecological damage

Contemporary evolution of the law of civil liability has seen the emergence of new heads of damages such as environmental or ecological damage. Law 2016-1087 of 8 August 2016 introduced in the French Civil Code (arts 1246 et seq.) a fourth category of damage, i.e. ecological damage (*préjudice écologique*). These new provisions deal with civil liability cases of water pollution, land contamination and damage to biodiversity by individuals or corporations. Prior to 2016, French courts were faced with a lack of a clear statutory basis for suing the perpetrators of such damage to the environment. They relied therefore essentially on the general Civil Code provisions on the law of civil liability. However, the sinking and massive oil spill from the tanker *Erika* off the coast of Brittany in 1999 raised the question of compensation for ecological harm and the setting of broader rules on environmental liability. In its 2012 final judgment on this case, the Criminal Chamber of the Court of Cassation, whilst recognising for the first time the principle of environmental liability, also highlighted the need to introduce such a principle in the statute book. This evolution as regards environmental liability will be fully completed once the 2017 Bill is implemented (new arts 1279-1 et seq.).

What is the effect of death on a cause of action?

In the field of tort, French law also recognises the distinction common in many jurisdictions between (i) transmission to the heirs of causes of action on the death of a victim, and (ii) death as a cause of independent action on the part of the dependants.

Under (i), since the landmark judgments in *Ch. Mixte*, 30 April 1976, D. 1977, 185, an estate can claim in respect of any losses sustained by the deceased before his death, even though no action was commenced by the deceased himself before the event. As far as (ii) is concerned, such an action raises in French law the possibility of a claim for *préjudice par ricochet*, i.e. losses suffered by dependants of victims of fatal accidents. Under this heading, dependants have a cause of action against a defendant to whom a claim in damages can be made for bereavement, loss of dependency (*perte de subsides*), and funeral expenses.

The question of who may be considered to be within the class of dependants has caused some difficulties on account of the absence in French law of any special text providing a list of persons entitled to recover damages as dependants of the deceased. It has been left once again to the judiciary to develop legal devices
p. 266 aimed at limiting liability in this context. Faced with the danger of a multiplicity of claimants, the Court of ↳ Cassation introduced in 1937 the requirement of *intérêt légitime juridiquement protégé*, which, in practical terms, meant that only those able to show a specific blood or legal relationship between themselves and the deceased could possibly succeed in their claim (Civ., 27 July 1937, *Métenier v Epoux Luce*, D.P. 1938, 1.5). Notably, the 1937 ruling had the effect of excluding, from the circle of dependants, unmarried partners, known as *concubins*. However, a divergence of views soon arose on this issue between the criminal and the

civil divisions of the Court of Cassation. The *Veuve Gaudras v Dangereux* landmark judgment, given in *Chambre Mixte* in 1970, eventually settled this controversy by agreeing to award damages to the long-term unmarried partner of the victim of a road traffic accident, stating that under the broad principle of the then art. 1382 of the Civil Code there was no specific requirement for a pre-existing legal relationship between the deceased partner and the plaintiff for the latter to recover damages for losses suffered following death (*Ch. Mixte*, 27 February 1970, D. 1970, 201).

Today, French courts have inclined to an even more open-handed approach with respect to dependants by awarding damages to anyone who can establish a loss of dependency and/or a *préjudice d'affection* (emotional loss), thereby implying a certain degree of 'proximity' with the deceased prior to his death. This development has, as a consequence, effectively widened the concept of dependency, leading on occasion to embarrassing social situations. Thus, it is not uncommon nowadays to find both the deceased's spouse and mistress claiming side by side in court for economic and emotional loss following the death of their spouse or partner (for an early illustration, see Court of Appeal of Riom, 9 November 1978, JCP 1979, II, 19107).

Causation

The third condition, under arts 1240 and 1241 of the Civil Code, for which a defendant may be held liable for a plaintiff's loss is that the plaintiff must prove that the defendant's act has *caused* the damage.

Generally, causation problems arise if, when looking at the damage, it would appear that this was actually caused by a number of different factors or events. How to determine, in such a case, which, if any, of these events was relevant, is a question which must be addressed, so as to be able to hold liable the person responsible for the damage. This issue has vexed jurists in many parts of the world for years. The problem stems from the fact that obtaining strict proof of causation is almost impossible, and thus it will always present inherent practical difficulties. This partly explains why judges' views on causation are very often muddled or inconsistent since, when faced with the difficulty of proving causation, courts would rather focus on the need to produce a just result to the parties involved than display a coherent logical approach. In England, this concern for justice is clearly seen in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. In this case a group of employees had been exposed to inhalation of asbestos during different periods of employment and while working for different employers and, following claims for asbestos-related illnesses, it became difficult to attribute liability to one or the other wrongful exposure. However, the then
p. 267 House of Lords held that claimants could recover damages where they had been working for more than one
↳ employer and there was no means of discovering which exposure had caused them to become ill.

In addressing the issue of causation in cases where there was more than one cause of the damage, French courts have vacillated between two main tests of causation. The first one, often referred to as the '*sine qua non test*', is inspired by theory of equivalence expressed by the 19th-century German criminalist Von Buri. According to Von Buri's analysis, every concurrent event contributing to the damaging result is a 'cause', with the proviso that the damaging result is not cancelled out once any or each of these events is removed. In an attempt to limit the wide scope of the equivalence theory, the German philosopher Von Kries proposed another test based on the theory of adequacy. Under this test, a cause will only be considered relevant if not improbable. Unlike the former, this test presupposes an element of prioritising between events which may have concurred to produce a damaging result. The judge hearing the case will have to choose which is the event most likely to have produced the damage in the circumstances (the *cause adéquate*).

In considering the case law generated by the French courts on the issue of causation, it is hard to reconcile the various solutions given in a variety of contexts. However, looking more closely, in an attempt to categorise court solutions, two types of situations can be distinguished:

(i) When several persons have caused the damage by one unlawful act committed in common, each will

be held responsible for the whole of the damage, though amongst themselves they could sue one another for different contributions (and unless they can show that they could not have caused the damage). This solution based on the theory of equivalence has been applied in French law to a number of circumstances such as hunting accidents or accidents caused by a group of children. The underlying rationale seems to be that the risk undertaken by the group through its negligent conduct gives rise to liability on the part of each member of that group (Civ., 5 June 1957, D. 1957, 493, about a group of huntsmen). Here, French law appears to take its cue again from a German source. Indeed, the BGB, § 830 (1) provides that where several persons have caused damage by a wrongful act committed in common each is responsible for the damage. The 2017 Bill consolidates this approach in its new proposed art. 1240 of the Civil Code, extending it further to joint tortfeasors 'exercising a similar activity' (such as successive employers).

(ii) When one event has generated a plurality of damaging results (*dommages en cascade*). The famous 18th-century French jurist Pothier gave the following well-known example to illustrate this situation: a livestock dealer sells an infected cow to a farmer; the cow dies after having contaminated the whole herd; the farmer goes bankrupt; he then commits suicide. In similar circumstances French courts will opt for the theory of adequacy by looking for the event which was the determining factor in producing the ultimate wrongful result. Therefore, in Pothier's example, the dealer avoids liability if it would be decided that the most likely cause for the farmer having committed suicide was his
p. 268 bankruptcy and not the defective sale of the contaminated cow. In modern times, a similar ↳ analysis has been applied to AIDS patients who have died following a chain of circumstances as follows: a road traffic accident which necessitated a blood transfusion; the blood supplied to the hospital was contaminated; the patient was contaminated with HIV following blood transfusion; the patient died from an AIDS-related disease. Here, the negligence on the part of the organisation supplying the blood would be held to be the most likely cause of death. By contrast, when applying the theory of equivalence, the negligent driver who originally caused the accident would be held equally liable for the cause of death.

In conclusion, it should be noted that, in recent years, the Court of Cassation has had to deal with issues of causation in the context of industrial accidents. In *Assemblée Plénière*, 24 June 2005, Bull. 7, G, an employee of N, was electrocuted and left incapacitated whilst trying to move scaffolding with a colleague which then hit an electrical pylon. In the lower courts, G's claim was rejected on the grounds that, despite the employer's wrongful omission to take all the measures necessary to avoid such an accident, such an omission was not the determining cause of the accident, which was in fact due to G's lack of care in moving the scaffolding. The Court of Cassation did not concur with this view, based on 'adequacy of cause'. Applying instead the equivalence test, the court ruled that, although the employer's negligence was not in this case a determinant *cause*, it was nevertheless a 'necessary condition' for the damage to have taken place, thus making the employer liable for the employee's injury. This example shows, once again, how causation has been in France, as elsewhere, a fluctuating legal notion, greatly dependent on factual circumstances and policy considerations.

Special Regimes of Liability

Liability For Things in One's Keeping

Liability for things in one's keeping (*fait des choses*) is governed by art. 1242 *alinéa* 1 of the Civil Code which states:

> One is liable not only for damages caused by one's own act, but also for that which is caused by the acts of persons for whom one is answerable, or by *things which are in one's keeping* [emphasis added].

The last part of art. 1242 *alin é a* 1 has certainly been, in the history of judicial statutory interpretation, one of the most debated texts of the French Civil Code. Whereas today it is no longer at issue that art. 1242 is indeed an instance of strict liability, this interpretation is the result of incremental developments which have taken place between the end of the 19th century and the first decades of the 20th century. However, the fact that most of the controversy on the nature of the regime of liability provided for by the then art. 1384 was settled by the mid-1940s does not mean necessarily that this text is no longer the subject of legal debate in court and in doctrinal writings. On looking closely at various law reports it becomes apparent that French litigants are still keen to argue on the definition of what may be considered as a *chose* and as a *gardien* in art.
p. 269 1242, which ↳ accounts for the huge body of case law existing in this area. Even if French rules of statutory construction are rather flexible as compared to other jurisdictions (see in Chapter 3, Statutory Interpretation), it is questionable as to what degree the wording of art. 1242 can be stretched to meet new circumstances without betraying the intention of the framers of the Civil Code who lived within the confines of a more limited agrarian society. On account of this, art. 1242 cannot be read and understood today without looking at the fast-evolving case law relating to this text. In an attempt to restore the upset balance between codification and judicial creativity on this topic, the authors of the 2005 Catala reform proposals had rewritten this part of the Civil Code by consolidating in part the existing case law on the subject (arts 1354 et seq. of the proposals). Similarly, the 2017 Bill also introduces a new art. 1243 which incorporates in the Civil Code the main rules established by the courts in respect of the connected notions of *chose* and *garde*.

When considering today the situations in which art. 1242 applies, three questions need to be addressed:

(i) What is the meaning of *chose* in article 1242?

(ii) What does *garde* mean?

(iii) What defences are available to the defendant or *gardien* when sued for liability?

The meaning of *chose*

Chose—a developing concept

Originally, when the Civil Code was enacted and during the most part of the 19th century, it was held that the term *chose* used in former art. 1384 *alinéa* 1 was only intended to cover the specific code provisions which followed art. 1384, namely art. 1385 on liability for damage caused by animals and art. 1386 on liability for damage caused by the collapse of buildings in a ruinous state, thereby restricting the ambit of art. 1384 to those things only. However, as France industrialised, with the concomitant rise of industrial accidents at the end of the 19th century, and in order to facilitate compensation for the victims of such accidents without the burden of proving the fault of the employer, it became necessary to widen the scope of art. 1384, so as to include machinery.

A first step in this respect was taken in *Veuve Teffaine* (Civ., 16 June 1896, D.P. 1897, I, 433) where a ship's engineer was fatally injured by the explosion of the pipe of a boiler attached to a tugboat. The Court of Cassation ruled that, under art. 1384 *alin é a* 1, the owners of the tugboat (also employers, in this case) were liable without the possibility for them as a defence to use their absence of fault, or the fact that the accident was due to an inherent defect in the thing, this being unknown to them (the welding of the tube was defective).

With the *Jand'heur* case, a new and decisive turn took place in the development of art. 1384, when, at the turn of the 20th century, new problems arose with the arrival of the first motor vehicle accidents. In *Jand'heur v Les Galeries Belfortaises* (*Ch. Réunies*, 13 February 1930, D. 1930, 1, 57), a young girl was run over by a lorry belonging to the defendant, *Galeries Belfortaises*. A series of five decisions were made in this case in which the notion of '*chose*' in art. 1384 was fiercely debated. This issue of deciding whether or not the
p. 270 defendant's lorry was a '*chose*' under the terms of art. 1384 was ↳ crucial since, if this was not held to be the case, the plaintiff (here, the girl's mother) would have had to prove the fault of the driver in order to be awarded damages. In the Courts of Appeal of Besançon (29 December 1925) and, later, Lyon (7 July 1927), the plaintiff's claim failed on both occasions on the grounds that the lorry being, at the time of the accident, a thing under human agency, art. 1382 was the only relevant text to be applied and, in consequence, the fault of the driver needed to be proved in order for the plaintiff to be awarded damages. In a closely argued judgment, the Court of Appeal of Lyon further held that only damage resulting from an inherent defect of the object could give rise to an application of art. 1384. The Court of Cassation, in its 1930 final decision in this case, quashing the Lyon Court of Appeal judgment, held in *Chambres Réunies* (today *Assemblée Plénière*):

> For the purpose of applying the presumption of liability laid down in article 1384, the law does not distinguish between things causing damage when handled by man or causing damage by themselves; nor is it necessary that the damage resulted from an inherent defect in the object.

The *Jand'heur* decision was groundbreaking. Not only did it establish, under art. 1384, a presumption of liability against any keeper of a thing which could only be rebutted by proving circumstances amounting to a case of *force majeure* (on this notion, see 'Defences' below) or any other circumstances not attributable to the keeper (e.g. the act of a third party), but, also, since *Jand'heur*, the term *chose*, as used in former art. 1384 and current art. 1242, has acquired an all-inclusive definition. Nowadays, art. 1242 applies to all *choses*, whether defective or not, whether moving or inert, whether or not of a dangerous nature, whether liquid, gaseous, or in solid form, and whether movable or immovable. However, it must be pointed out that there are notable exclusions from the general regime of art. 1242 *alinéa* 1. These are, *inter alia*, motor vehicles which are governed by the Law of 5 July 1985 (considered below), as well as nuclear energy and cable cars, which are both governed by special statutes.

It may be further noted that the Belgian courts took a different approach to dealing with the concept of chose under art. 1384 of the Belgian Civil Code which was modelled on the French provision. Indeed, in contrast with French law, since a landmark decision of the Belgian Court of Cassation, dated 26 May 1904, only damage caused by a defective object has given rise to liability under art. 1384.

Chose must have played an 'active role'

It is not enough to prove the existence of a *chose*; the *chose* must have been the cause of the damage or, to use an expression commonly found in decisions, must have played an 'active role' or be 'the instrument of damage caused'. In other words, there must be a causal connection between the object itself and the damage caused. In assessing this further requirement, French judges examine whether or not the object was in the wrong place (*position anormale*), even though it was defect-free. For example, it was decided that a folding chair lying on the terrace of a café in the evening played an 'active role' in the occurrence of damage as being in the wrong place at the wrong time (*Pialet*, Cass. Civ., 24 February 1941, D.A. 1941, 129). On the other
p. 271 hand, where a customer in ↳ the defendant's bathhouse fainted and burnt herself on a heating pipe when she fell, the defendant avoided liability for the accident as it was held that the pipe was in no way 'acting or involved abnormally' (*Cadé*, Cass. Civ., 19 February 1941, D.A. 1941, 211).

In respect of involvement of the object, French courts make certain distinctions, which can be summarised as follows:

(i) Where damage involves a *chose* in movement which has made direct physical contact with the property damaged or the person injured, e.g. a bicycle hitting a pedestrian, then 'active role' is presumed. The onus is then for the defendant to show that the *chose* was acting normally or played a 'passive role' when damage took place.

(ii) Where damage involves (a) a *chose* which is inert, or where (b) there was no direct physical contact between the *chose* in contention and the person or thing damaged, e.g. the wheel of a car which dislodges a stone or a nail which then breaks a window or hurts a passerby, then in both cases the onus is for the plaintiff to prove 'active role'.

In practice, it is difficult to distinguish between what is inert and what is moving. For example, it was decided that a trampoline in use was to be considered as inert, the onus therefore being on the plaintiff to prove 'active role'. In contrast, in a judgment given the same day, the Court of Cassation held that an automatically opening garage door was held to be a moving object where a child was hurt when the door opened, transferring to the defendant the burden of proof that the object did not play an 'active role' in the damage caused (both judgments in Cass. Civ. 2, 8 June 1994, Bull. civ. II, no. 151 and 152).

What does *garde* mean?

The case of Franck

The *Franck* case gave the Court of Cassation the opportunity to define the second condition of liability for damage caused by things in former art. 1384 *alinéa* 1: the notion of *garde*. In *Franck* (Ch. Réun., 2 December 1941, DC 1942, 25) a car belonging to Franck was entrusted to his son. It was stolen on Christmas Eve 1929. In the course of that evening, the thief, who was driving the car and was never found, ran over and fatally injured Connot, a postman. In a first judgment in this case (Civ., 3 March 1936) the Court of Cassation took the view that the *garde* of the car still belonged to its owner, Franck, despite the fact that it was in the charge of his son from whose hands the car was stolen. In so doing, the Court of Cassation was applying the doctrine of *garde juridique* according to which the thing's owner remained as the *gardien*, whatever the circumstances, and was thus liable for the damage caused by the thing. The rationale underlying this decision was an application of the principle of risk in respect of which an owner who takes the benefit of a thing—here a car—must be responsible for any damage arising out of its use. However, following the case being sent back by the Civil Division of the Court of Cassation to the Court of Appeal of Besançon, the latter declared, contrary to the highest court, that at the time of the accident the *gardien* was actually the thief,
p. 272 since he had the ↳ physical possession of the car at the material time of the accident. On second appeal the case was referred back to the *Chambres Réunies* of the Court of Cassation. In a landmark decision given in 1941, the *Chambres Réunies*, reversing the prior 1936 Civil Division ruling and agreeing with the Court of Appeal, held that the definition of the *gardien* of a thing is not necessarily related to the legal status of the keeper, but rather to the 'use, direction and control' of this thing at the time of the accident.

The scope of the *Franck* ruling

Under *Franck*, liability for damages caused by things is primarily related to its physical keeping at the time of the accident (*garde matérielle*).

However, physical keeping is not sufficient. The French terms '*direction*' and '*contr ô le*', used by the *Chambres Réunies*, suggest a further power to supervise the thing. For example, an employee who has the use of a thing does not necessarily become its *gardien* if he is acting under the supervision of the employer. Only if he is using the thing contrary to the instructions of his employer, and thus holds control over it, does he become its *gardien*. In a more recent illustration, a woman was held liable for the injury caused to a friend

whom she had asked to hang her curtains on the grounds that she remained the *gardien* of the stool on which the friend had been standing when he fell, as he was all along operating on her instructions (Civ. 2, 7 May 2002, D. 2003, somm. 463).

Further, under the *Franck* ruling, even a temporary use of a thing can transform a user into a *gardien*. Thus, it was decided that a person opening a door or a child kicking a bottle both became *gardiens* when injury was caused. However, things which are ownerless and belong to nobody (*res nullius*) cannot bestow the status of *garde*: e.g. the owner of a block of flats could not be held liable when a shower of snow fell from a roof and hurt someone (Civ. 2, 9 April 1973, Bull. Civ. II, 142.); nor can alpinists be held *gardiens* of stones falling beneath them and causing injury as they make their way in the mountains (Civ. 2, 24 April 2003, D. 2003, IR 1340).

Subsequent developments

Although French courts have over the years adhered to the *Franck* decision when deciding who may be considered as *gardien*, subsequent developments to this case need to be considered when refining the definition of *garde*:

> *From garde matérielle to garde intellectuelle*: over time, *garde* has become a very abstract concept in the sense that the power of supervision can be determined even in the absence of any effective physical control over a thing. Thus, it has been held that a lack of discernment and a state of unconsciousness does not necessarily exclude the possibility of *garde* being applied: a young child (*infans*) can be held to be a *gardien* despite not being able to understand the consequences of his or her acts (*Gabillet*, 9 May 1984, Bull. civ. Ass. Plén, 1); similarly, in *Trichard* (cited above) the defendant was held to be the *gardien* despite him suffering from an epileptic fit at the material time
> p. 273 of the accident. Furthermore, in a case where the driver of a car entrusted the driving ↳ wheel of her car to her passenger friend, so as to have a rest, following which an accident occurred, it was decided that the driver, despite having fallen asleep and no longer being at the wheel of the car, had nevertheless retained the *garde* of the vehicle at the time of the crash (*FGA v Rebeuh*, Civ. 2, 8 November 1989, RTDC 1990, 92).

Garde de la structure, garde du comportement: in the field of product liability French courts have further distinguished between *gardien de la structure* (the producer/ manufacturer/owner) and *gardien du comportement* (the user of the product), as a way in which to reintroduce a specific regime of liability for defective products or products which, by their nature, are intrinsically dangerous. Thus, the owner/manufacturer of oxygen bottles was held liable when one of the bottles exploded while being transported (Civ. 2, 5 January 1956, D. 1957, 261). This distinction has been further applied to cases involving the explosion of highly pressurised glass bottles, such as fizzy drinks, or the implosion of a television set, for which in both cases the distributor/manufacturer was held liable. But, in contrast, judges have refused to extend liability to the manufacturer of cigarettes in a case where a smoker died from his heavy smoking habits. It was held, in such circumstances, that the smoker's conduct was to blame and that a pack of cigarettes, unlike bottles of oxygen or over-pressurised glass bottles, did not have within itself a 'dynamism of its own' capable of creating injury without firstly having to be used (*SEITA v Consorts X*, Cass. Civ. 2, 20 November 2003, Bull. II, 355).

Defences

Force majeure

The *gardien* or keeper of a thing which has caused damage will be able to avoid liability if it can be shown that at the relevant time there were some external circumstances that the keeper could not have avoided or have reasonably foreseen (combined conditions of unforeseeablity and unavoidability). These circumstances are known in French law as *cas fortuit* or *force majeure*. The concept of *force majeure* was originally taken from the law of contract (Civil Code, former art. 1148; since 2016, art. 1218) and was extended to the law of tort to be used as a defence for damage caused by things (but this defence could also be used by a defendant sued under former art. 1382 in the context of fault-based liability). For clarity purposes, the 2017 Bill introduces a specific definition of force majeure for extra-contractual liability taking into account recent trends observed in case law (see below).

Because the circumstances of *force majeure* are external to the keeper of a thing, it cannot be raised as a defence to show that there was a defect in the thing or that, at the material time, the keeper's actions were beyond his/her own control by reason of any 'internal' physical circumstances such as, e.g., a heart attack or an epileptic fit. Over time, in weighing up the other circumstances allegedly amounting to *force majeure*, French judges put more emphasis on whether or not the event could have been avoided, in spite of the fact that it could have been foreseen. So, e.g., in the case of a storm, gales, or black ice, circumstances which most of the time can be foreseen, but not necessarily prevented, judges would determine the issue by
p. 274 looking closely at whether ↳ the defendant in these particular circumstances was in a position to have prevented the damage. If all reasonable, necessary steps had been taken to avoid the damage, then this would usually have been sufficient for the defendant to argue *force majeure* and escape liability. However, in 2006, the Full Assembly of the Court of Cassation cast a doubt upon these developments by switching back to the combined requirement of unforeseeability and unavoidability in the assessment of the events amounting to *force majeure* (Ass. Plén. 14 April 2006, two decisions, one in tort, *Brugiroux*, the other in contract, *Mittenaere*). Such a rigorous approach was criticised by a majority of scholars. Indeed, they argued that in requiring in all cases—in contract as well as in tort—a combination of these characteristics, the highest court was unrealistic, for there are predictable events which may constitute *force majeure* when it is not possible to prevent them, or even avoid their harmful effects, regardless of the precautions taken by the defendant. The 2017 Bill seems to go back to a more sensible and practical viewpoint by laying down in its proposed art. 1253 that, in tort, *force majeure* is 'an event whose occurrence and consequences could not have been *avoided* [emphasis added] by taking appropriate measures', not mentioning the requirement of predictability.

Today, once *force majeure* is found, this will generally free the defendant entirely from liability. In the past, the effect of a finding of *force majeure* was merely to reduce the amount of damages awarded, to the extent that the *chose* in former art. 1384, or the defendant's own negligence under former art. 1382, contributed to the accident or the damage (*Lamorici è re*, Cass. com., 19 June 1951, D. 1951, 717; *Houillères du Nord,* Cass. Civ., 13 March 1957, JCP 1957, II, 10084).

Act of a third party (*fait d'un tiers*)

Two situations need to be distinguished:

(i) Where the act of a third party meets the characteristics of an event of *force majeure* as outlined above, then the defendant will not be held liable for the damage at all (solution consolidated in new proposed art. 1253 of the 2017 Bill).

(ii) Where two or more persons (including the defendant) contributed to the damage, then, under the

principle of *obligation in solidum*, they will all be held responsible to pay for the damage in its entirety. In practice, this means that the party who was sued (the *solvens*) will have to pay the damage in full but will then have recourse against one or more of the other parties for their part in the damage (*action récursoire*) (see further new proposed art. 1265 of the 2017 Bill).

Contributory negligence (*fait de la victime*)

Prior to 1982, in circumstances where a defendant could neither have foreseen nor have avoided the act of a plaintiff or of a victim of an accident, then liability was avoided in full. However, if it could have been shown that the accident or damage was due in part to the defendant's act and in part to the plaintiff's or victim's own contributory negligence, the damages awarded to the plaintiff would have been reduced. However, in
p. 275 the 1982 *Desmares* decision, where two elderly pedestrians were knocked over by ↳ the defendant's car when attempting to cross a busy road not at a pedestrian crossing, the Court of Cassation excluded the possibility of the damages awarded to the injured couple being reduced for their contributory negligence (Cass. Civ. 2, 21 July 1982). *Desmares* proved to be a very controversial decision in so far as drivers were put under a great deal of pressure in circumstances when accidents were caused in part by the gross negligence of the victim. Indeed, in such cases, as contributory negligence was no longer a defence, the only recourse left was to establish that the act of the injured party amounted to an event of *force majeure.* The rigid approach taken in *Desmares* nevertheless had the effect that the lower courts ignored the Court of Cassation ruling and so continued to apply the traditional rules of contributory negligence in respect of personal injuries sustained in road traffic accidents. This unsustainable state of affairs pushed the legislature to intervene in 1985 so as to clarify the system of compensation for victims of road traffic accidents (Law of 5 July 1985 on road traffic accidents; see below). In 1987, *Desmares* was also overturned by *Mettettal* (Civ. 2, 6 April 1987, D. 1988, 32), which marked a return to the traditional approach to contributory negligence, but only in cases other than accidents caused by road motor vehicles since the latter were governed by the 1985 Law, which remains in force.

Defences under the Law of 5 July 1985 on road traffic accidents

The law passed by the French Parliament on 5 July 1985 (known as *Loi Badinter*) was designed to improve the position of the victims of road traffic accidents and to speed up compensation procedures. However, concern for a rational legislative scheme in this area was not new. Already, in 1964, a Commission had been set up to look at the issues raised by traffic accident compensation and examine proposals made in this respect by Professor Tunc (Tunc 1983) who had written extensively on this matter and had been crusading for years for reform to take place. However, until 1985, all attempts to reform the law failed on account of the hostility of the legal profession who feared that cases in this area would no longer be litigated in the courts if a new system of automatic compensation for victims of road traffic accidents was introduced.

Surprisingly, in contrast to what had been expected, the 1985 Law has generated far more litigation than originally anticipated. This has been mainly due to the open-textured nature of its principal provisions—arts 1 to 6 (these articles of the 1985 Law are codified in the 2017 Bill as new proposed arts 1285–1288 of the Civil Code). According to its art. 1, the 1985 Law is concerned with the victims of road traffic accidents in which a motor vehicle is 'involved' or, in French, *impliqué*. The definition of what is a motor vehicle is quite wide and includes such vehicles as cars, lorries, coaches, buses, motorbikes (but not bicycles), and also tractors or road sweepers. However, trains and trams running on their own tracks are expressly excluded by art. 1. *Impliqué* is a term which has given rise to much discussion in court. According to the latest case law, a vehicle is *impliqué* in the accident when it has the effect of disrupting the traffic, even though it may have been stationary at the time of the accident and even though there was no physical contact between it and the victim. Since the Law only deals with 'road traffic accidents', accidents occurring on fair grounds, although
p. 276 possibly involving ↳ motor vehicles, do not fall within its scope. Yet, it has been held that accidents taking

place on private roads, ski slopes, farmlands, or race circuits are to be considered as 'road traffic accidents' and therefore are included within the provisions of the 1985 Law.

As far as defences under the 1985 Law are concerned, art. 2 provides that *force majeure* and acts of a third party no longer constitute a valid defence against injured parties who are victims of road traffic accidents—this provision includes injured drivers. Furthermore, according to art. 3, in respect of pedestrian or vehicle passenger victims, contributory negligence on their part is not a defence for the perpetrator of the injury and they are all entitled to full compensation for personal injury irrespective of any fault they may have committed, unless it can be proved that their fault was the sole cause of the accident and that it can further be classified as 'inexcusable'. *Faute inexcusable* is a concept borrowed from labour law which has been defined as being 'deliberate and of exceptional seriousness, exposing the person at fault to a danger that he or she should have been aware of '(*Ouradi v Gabet*, Cass. Civ. 2, 20 July 1987, Bull. Civ. II, 160). However, the Court of Cassation interprets *faute inexcusable* in a very narrow way. Foolish behaviour on the part of the plaintiff victim will not suffice as evidence constituting such a degree of fault. Thus, it has been held that the act of an intoxicated victim who crosses the highway and stands on it for a while, at a place where there was no light and when it was raining, is not to be considered as 'inexcusable' (Ass. Plén., 10 November 1995, D. 1996, 633). The same solution applies to failure by an injured passenger to wear a seat belt (Civ. 2, 20 March 1996, Bull. Civ. II, 68, 43.). Victims less than 16 or more than 70 years old and those who have been held permanently disabled or incapacitated to at least 80 per cent are entitled to full damages in all circumstances, notwithstanding their *faute inexcusable*, except if they deliberately incurred the harm suffered such as, e.g., in the case of an attempted suicide. It should be noted that art. 3 provisions which have just been outlined above do not apply to injured drivers who, under art. 4, can be held as being contributorily negligent. As far as damage to property is concerned, under art. 5 of the Law, contributory negligence can be held against all victims of road traffic accidents, whether drivers or pedestrians, the effect of which is to reduce or exonerate from damages the party held liable.

Vicarious Liability

Preliminary comments

Vicarious liability, which is examined here, is not the only instance existing in the French civil law of 'liability for the act of another' (*fait d'autrui*). Under new art. 1242 *alinéa 4* of the Civil Code, parents are also liable for the acts of their children. Parents' liability has over time become a case of strict liability, especially since the landmark judgments given by the Court of Cassation in *Bertrand* (Cass. Civ. 2, 19 February 1997, D. 1997, 265) and in *Levert* (Cass. Civ. 2, 10 May 2001, D. 2001, 2854). Today, there is little margin for manoeuvre for parents to avoid liability for the acts of their children, even when the child is not held to be at fault or was not under their supervision at the time of the damage. According to the Court of Cassation, 'only
p. 277 *force majeure* and the ↳ contributory negligence of the injured party can free a father and mother from liability for damage caused by children less than 18 years of age who are still living with them'. However, the 2017 Bill, apart from removing the former requirement of 'cohabitation' between parents and child, provides for specific situations where parents can no longer be held liable, i.e. (i) when the child is under the care of a guardian or (ii) when a person has been entrusted by judicial or administrative decision with organising the child's life on a permanent basis (new proposed art. 1246). More generally, since the landmark case of *Association des centres éducatifs du Limousin v Blieck* (Ass. Plén., 29 March 1991, D. 1991, 324), there is now in French law, under art. 1242 of the Civil Code, a general principle of liability for acts carried out by persons who are in the care of institutions or organisations where patients or residents are supervised on a long-term basis and in a structured environment. The *Blieck* principle has been applied to mental institutions, sport associations, and homeless communal shelters. The 2017 Bill proposes to introduce the *Blieck* principle into the Civil Code, in a new art. 1247.

Turning now to the specific question of vicarious liability, the liability of employers will be addressed below in terms of matters regarding definition, judicial interpretation, and the scope of the liability.

Defining employers' liability

In French law, employers or masters (known in French civil law as *maîtres* or *commettants*) are vicariously liable for their employees or servants (*domestiques* or *préposés*) when they have committed a tort '*dans les fonctions auxquelles ils les ont employés*' (Civil Code, new art. 1242 *alinéa* 5). The search for a satisfactory test to be applied when deciding whether or not an employee is acting '*dans les fonctions …*' has generated as much debate in France as in the common law jurisdictions when trying to define the English phrase, 'in the course of employment'. In both jurisdictions, judges have had to face linguistic difficulties in that expressions such as 'course of employment', in English, and '*dans les fonctions*', in French, do not necessarily display their legal content purely by virtue of their semantic meaning. Thus, in both jurisdictions, it has not always been easy to decide with certainty whether or not an employee was indeed acting in the course of employment. For example, should an employer be held vicariously liable in situations where an employee carried out a criminal act whilst at work, or where an employee, despite having been warned against doing something, nevertheless went ahead and did it?

In considering the content of the terms of art. 1242 *alinéa* 5, French courts have used a case-by-case approach, not so dissimilar from their common law counterparts, examining in detail factual circumstances and, when necessary, distinguishing between cases, with a view to applying the most suitable criterion of liability. In so doing, French judges have attempted to provide, under the guise of logical analysis, a just and practical remedy for those suffering as a consequence of wrongs perpetrated by employees. Here again, the 'risk doctrine' advocated by Saleilles and Josserand has over time legitimated the idea that employers, who introduce a risk in carrying out an enterprise, incur liability if loss is caused in the course of that enterprise.
p. 278 Importantly, it ↳ was generally thought that employers, being the stronger parties in the employment relationship, were the ones who, through liability insurance, could provide the most effective means of redress. Deterrence of future harm was a further major consideration underlying the way French courts dealt with vicarious liability. Because employers were under a duty to provide a safe environment in the workplace, they have been considered to be the most able to enforce regulations and ensure efficient supervision at work. Holding employers vicariously liable for the wrongs of their employees was thought to encourage employers to take such steps as necessary to reduce the risk of future harm.

Judicial interpretation relating to employers' liability

Before 1960, the second civil division of the Court of Cassation took a restrictive view on the connection to be established between the wrongful act of employees and their employment. Indeed, for that division, there had to be a strong causal connection between the employees' duties and the act causing damage (Civ. 2, 1 July 1954, D. 1954, 628). So, where an employee was acting without permission and for a purpose unrelated to his employment, such a causal link was missing and the employer was free from liability. Under this test of causation, it was relatively easy for an employer to avoid liability for the tortious act of an employee by showing that the act had no relation to the tasks assigned to the employee who was furthermore acting without permission. However, before 1960 and in contrast to the civil division, the criminal division of the Court of Cassation, when dealing with vicarious liability in cases where the employee had been charged with a criminal offence carried out whilst at work, took a much wider interpretation of the phrase '*dans les fonctions*'. Under the criminal division test, employers were held vicariously liable where the criminal offence was only made possible on account of facilities enjoyed by the employee by reason of his employment. In practical terms this meant that, where the criminal act was carried out in the workplace and during hours of employment, this was sufficient to make a case for tortious liability against the employer (see, e.g., Crim. 5 November 1953, D. 1953, 698, where a cinema owner was held vicariously liable for the act of one of his employees who, while showing a woman the way to the lavatory, raped and killed her).

From 1960 to 1988, in a series of five decisions given in full assembly, the Court of Cassation struggled to resolve the divergence of view existing between the criminal and the civil divisions of the Court as outlined above. The judgment in *Société d'assurances La Cité v Héro*, Ass. Plén. 19 May 1988, D. 1988, 513 eventually settled the controversy. Here, an insurance broker employed by the insurance company *La Cité* was charged with embezzling sums taken from insurance policies sold door to door. *Héro* was a borderline case in the sense that, although this insurance broker was acting in part without authority and for his own purposes, he was still collecting and registering policies for the benefit of the insurance company for which he was working. In other words, he was not acting completely outside the scope of his functions but rather beyond this scope, what is known in French as *abus de fonctions*. Consequently, the test laid down by the court in
p. 279 *Héro* was that an employer *was not* to be held vicariously liable where the ↳ employee was acting (i) completely outside the scope of his employment, (ii) without authorisation, and (iii) for personal purposes (now codified in the 2017 Bill in new proposed art. 1249 *alinéa* 3). In a subsequent case it was held that a combination of these three necessary conditions had not been met where a bank employee was held guilty of misappropriation of funds and, in consequence, the bank was held liable for this act (Civ. 2, 8 June 1995, Bull. civ. II, 53).

The same outcome was applied where an employee stole goods entrusted to him by his employer during working hours and in the workplace (Crim., 16 February 1999, JCP 2000, I, 199, 11). In both the bank case and the stolen goods case, although the employees were acting without permission and for personal purposes, their wrongful acts were not carried out completely 'outside the scope of their actual employment' and, therefore, one of the three conditions in *Héro* was missing, thus ascribing liability to the employer.

The scope of employers' liability

As for *fait des choses*, art. 1242 *alinéa* 5 is also an instance of strict liability. Once it can been shown that the employee has acted within the course of his employment as defined earlier, employers cannot avoid liability unless proof can be given that the employee's act amounted to circumstances of *force majeure.* Arguing the absence of any negligence on their part or on the fact that they were not on the premises when the wrongful act of their employee was carried out is not a defence.

One way employers would be able to avoid liability is to show an absence of an employment relationship (*lien de subordination*) between them and their alleged employees. However, French courts have restrictively interpreted attempts by employers to avoid liability in this respect. For example, the absence of any formal contract of employment will not suffice as a defence. Thus, it was decided—in a case where A, a helper, had hit customers when hired on an informal basis for the summer vacation by B, a restaurant owner—that the employer/employee relationship as per the then art. 1384 *alin é a* 5 did not need to have formal expression for *lien de subordination* to exist; nor did it need to have been based on a long-term arrangement or indeed was there any need for a salary to have been paid. All that was required for the employer to be held liable was the power on his part 'to give orders or directives' (*Bettembourg*, Crim., 14 June 1990, D. 1990, IR, 208. See also the 2017 Bill which adopts this definition in art. 1249 *alinéa* 1). This 'power of order and directive' has been further extended to independent contractors or to professionals who, despite their independent status, are nevertheless assimilated within the term 'employees' where they have placed themselves, even temporarily, under the authority of the defendant employer.

Finally, in consequence of the *Costedoat* case (Ass. Plén., 25 February 2000, JCP 2000, II, 10295), once the employer has been found vicariously liable, only he, and not his employee, can be required to pay damages in compensation, even though the employee was found to be negligent. Prior to *Costedoat*, there was the possibility given to the injured party to seek damages from either the employer or the employee who then
p. 280 had recourse against each other. Generally, it was the ↳ employer who was pursued for money, vicarious liability being then a way to guarantee payment against the limited means of an employee. However, it was formerly still possible to sue the employee where recourse to the employer was not possible for whatever reason. Since *Costedoat*, the nature of employer liability has moved towards a regime of individual liability, employers now being liable for themselves only and not as guarantors for the vicarious acts of their employees. In spite of this, recourse by the employer against the employee for his negligent act still lies in contract law, within the contract of employment, and in criminal law, when the employee's wrongful act also constitutes a criminal offence.

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