

French Civil Liability in Comparative Perspective

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Principles of Liability or a Law of Torts?

JEAN-SÉBASTIEN BORGHETTI AND SIMON WHITTAKER

English law and French law are often contrasted as regards their different approach to tort law – or should we say the law of torts? English law is famous for its discrete approach to the imposition of liability in the absence of breach of contract, as it imposes liability only on the basis of a range of distinct legal grounds ('torts'), in the absence of which liability will not be imposed. By contrast, the French law of extra-contractual liability¹ seems to love nothing better than to posit general and potentially all-encompassing principles, a distinctively French taste which is fully reflected in the *Projet de réforme*. In our view, however, a closer analysis of the *Projet de réforme* as well as of French case law reveals that the French law of liability (contractual and extra-contractual) may not be structured along legal grounds or principles that are as general as its usual presentation suggests. This concluding chapter of the book seeks to explain this view, drawing on the discussions developed in earlier chapters. How much principle really is there in the French law of civil liability?

I. A Taste for General Rules

According to article 1240 Cc (long famous as article 1382 Cc),

Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.²

¹The terminology of French civil liability remains unsettled, but for present purposes we shall refer to 'civil liability' as a broad category containing all examples of non-criminal (and non-administrative) liability (*responsabilité*), including cases of liability based on contractual non-performance and cases other than contractual non-performance: see further ch 1, ch 2 and ch 3.

²'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.'

It is not clear how the drafters of the original article 1382 of the *Code civil* (now article 1240) understood the significance of this provision. Was it intended only as an umbrella under which the various instances of fault-based liability that had been recognised over time could shelter, or was it understood as a genuinely general legal rule applicable to all the factual situations in which its conditions were satisfied? While Domat, whose work was clearly the direct inspiration of the formula used by the *Code civil*,³ may have intended it only in the first sense, the *travaux préparatoires* of the *Code civil* suggest that, at the beginning of the nineteenth century, it was understood as stating an independent rule, and not merely as a shorthand for the various discrete cases in which a person could be made liable for harm caused through his fault.⁴ In other words, article 1382 was seen as expressing a very broad legal rule: where A's fault causes harm to B, A is liable to B.

A. The Significance of *Principe*

At this point, it is probably worth clarifying what is meant by the term *principe* (principle) in this context. English lawyers tend to distinguish between principles and rules, and while there is no fixed usage here, typically there are three features of 'principles' in particular when contrasted with mere rules: first, principles are of relatively general application, not being specific to a particular set or sets of facts; secondly, often a principle is a legal proposition of some importance; and, thirdly, even where a principle is applicable (that is to say, the facts would fall within its terms), it may not actually be applied, depending on the circumstances. So, while a simple 'rule' may be expressed in a syllogistic form (if facts A, B and C exist, then legal result X follows), a principle *appeals* for its own application in the absence of some good reason why it should not apply. In the context of the law of torts, the prominent example of this can be seen in the evolution of the way in which the so-called 'neighbour principle' set out in Lord Atkin's famous speech in *Donoghue v Stevenson* has been viewed.⁵ Even at the time, this formulation was not seen as

³ Jean de Domat, *Les lois civiles dans leur ordre naturel*, 2nd edn (Paris, Auboüin, Emery and Clouzier, 1697), vol II 131 ('Toutes les pertes, & tous les dommages qui peuvent arriver par le fait de quelque personne, soit imprudence, legereté [*sic*], ignorance de ce qu'on doit sçavoir [*sic*], ou autres fautes semblables, si legeres [*sic*] qu'elles puissent être, doivent être réparées par celui [*sic*] dont l'imprudence, ou autre faute y a donné lieu'). On the interpretation of Domat's position, see the leading work by O Descamps, *Les origines de la responsabilité pour faute personnelle dans le Code civil de 1804* (Paris, LGDJ, 2005) 423–29.

⁴ See Tribun Tarrible, 'Discours, Discussion devant le Corps législatif' in PA Fenet (ed) *Recueil complet des travaux préparatoires du Code civil* (Paris, Marchand de Breuil, 1827) vol XIII, 478 at 488, who, in discussing arts 1382–1383 Cc, declared that '[c]ette disposition embrasse dans sa vaste latitude tous les genres de dommages et les assujetti à une réparation uniforme qui a pour mesure la valeur du préjudice souffert' and referring to the law in these provisions as a *principe*. On the conceptions of the Code's drafters, see Descamps (n 3) 462–68.

⁵ *Donoghue v Stevenson* [1932] AC 562, 581.

requiring later courts to impose liability by recognising a 'duty of care' in the tort of negligence where harm was reasonably foreseeable, even though one could gain this impression from the terms of the dictum, but rather as allowing or perhaps *inviting* later courts to find a duty of care and so impose liability where this is the case even where earlier authority appears to deny it. Indeed, Lord Macmillan's dictum in *Donoghue* that the 'categories of negligence are never closed'⁶ may well better reflect the decision's initial impact.⁷ Later courts seem to take a more extensive approach, with judges at least appearing to recognise that foreseeability of the claimant's harm (possibly combined with 'proximity') would prima facie lead to the recognition of a duty of care, unless there are good reasons for there not being one.⁸ This approach was later seen as potentially too expansive, and from the early 1990s the courts generally preferred to adopt the '*Caparo* test' (where foreseeability and proximity must be supplemented by asking whether it is 'fair, just and reasonable' to impose a duty of care⁹) or, even more conservatively, to adopt an 'incremental approach' and so seek analogies from the body of decided cases.¹⁰ Indeed, in *Robinson v Chief Constable of West Yorkshire Police* Lord Reed JSC recently considered that the point of the *Caparo* case was

to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.¹¹

As a result, even in the case of the tort of negligence, which is the most general and broad of the common law torts, English judges reject the idea of a principle in the sense of a genuine test for the existence of a duty of care and, therefore, of the foundation of liability. In novel cases the proper approach is seen as the drawing of analogies from decided cases, which may include weighing up the reasons for or against liability.¹² And while some English judges may feel able to identify circumstances in which 'established' or 'ordinary principles' of liability for negligence recognise the existence of a duty of care, notably, in the case of liability

⁶ *ibid* 619.

⁷ WE Peel and J Goudkamp, *Winfield and Jolowicz on Tort*, 19th edn (London, Sweet & Maxwell, 2014) [5-016].

⁸ See, in particular, *Home Office v Dorset Yacht Co Ltd* [[1970] AC 1004, 1027 (Lord Reid) and, even more famously *Anns v Merton LBC* [1978] AC 728, 751–52, where Lord Wilberforce distinguished a two-stage test in which first it was asked whether there was a sufficient relationship of proximity (when prima facie duty of care would arise) and, secondly, whether there were 'any considerations which ought to negative, or to reduce or limit' that duty.

⁹ *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617–18 (Lord Bridge of Harwich).

¹⁰ This approach was famously advocated by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43–44, but has been much approved, including by Lord Bridge in *Caparo*, [1990] 2 AC 605, 618.

¹¹ *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [21] (with whom Baroness Hale of Richmond and Lord Hodge JSC agreed).

¹² *ibid* [29].

for positive action causing personal injury, others consider that even here these broad propositions are accurate only in general.¹³

By contrast, French lawyers see article 1240 Cc (and, indeed, article 1242(1) Cc) as setting out a *principe général de responsabilité* and in doing so they use the word *principe* as all but synonymous with *règle* (rule): *principe de droit* and *règle de droit* can equally consist of legal propositions which, if their conditions are satisfied, require that a certain result should follow.¹⁴ Indeed, this possible way of understanding the significance of *principe* may explain a change in the drafting of the reform of the law of contract put in place by the *Ordonnance* of 2016. In an earlier version of the proposed reform, the new introductory provisions of the *Code civil* on contract were to be prefaced by a section entitled *Principes directeurs* ('guiding principles'), these consisting of freedom of contract, the binding force of contract and good faith.¹⁵ However, the Ministry of Justice later abandoned the language of *principe* to describe these three broad propositions in the *text* of the reform itself.¹⁶ At first sight, this might have been thought surprising, given that the parliamentary legislation which empowered the government to enact the *Ordonnance*¹⁷ itself referred to these 'general principles of the law of contract', but the Ministry's report to the President of the Republic on the *Ordonnance* explained that this change sought to avoid giving courts the impression that these propositions enjoyed a higher status and therefore could be used to justify a greater judicial activism.¹⁸ For the French lawyer, the terminology of *principes* may go too far in terms of normative effect than is desirable. This may have been thought to be particularly the case of the three legal propositions in question, as freedom of contract and the binding force of contract, and, indeed some particular rules subsequently laid out

¹³ cf Lord Reed JSC's appeal to 'established principles' and 'ordinary principles' of liability in negligence in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at [26], [27], [29], [30], [42], [64] and [67] in recognising a duty of care in the police for their action causing personal injuries, and the approach of Lord Mance JSC (at [85]–[91], who emphasised (at [85]) that this 'principle [is] generally correct' but who was 'not persuaded that it is always a safe guide at the margins') and Lord Hughes JSC (at [118]–[120], who emphasised the importance of policy considerations in the context).

¹⁴ *Principe* can have distinct meanings in French law (see P Deumier, *Introduction générale au droit*, 3rd edn (Paris, LGDJ, 2015) 23–25), but it is undisputed that a *principe* can have the same normative value as a *règle*: see eg P Morvan, *Le principe en droit privé* (Paris, Editions Panthéon-Assas, 1999) 349ff.

¹⁵ *Avant-projet de réforme du droit des obligations* (document de travail) circulated by the French Ministry on 23 October 2013.

¹⁶ The substantive provisions remained as arts 1102–1104 Cc.

¹⁷ *Loi* no 2015-177 of 16 February 2015 'relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures', art 8 referring to 'les principes généraux du droit des contrats tels que la bonne foi et la liberté contractuelle'.

¹⁸ Unlike some of the European instruments, the *Ordonnance* has not opted for a preliminary chapter dedicated to "guiding principles" [*principes directeurs*] of the law of contract. Instead, a choice was made to draw inspiration from the existing first chapter of Title III of the *Code civil* entitled "Preliminary provisions" so as to indicate that, even though intended to give guiding lines [*lignes directrices*] for the law of contract, the general rules thereby set out as required by article 8 of the authorising legislation [*loi* no 2015-177, above n 17], do not in fact constitute rules of a higher level than those which follow and which the courts could use as a basis to justify an increased interventionism: they instead consist of principles intended to facilitate the interpretation of all the rules applicable to contracts, and to fill in any gaps between them': Report to the President the Republic on *Ordonnance* of 2016.

in the text itself, could be seen as countered or capable of circumvention by the principle of good faith.¹⁹

In referring to the *principes généraux* of liability for fault in article 1382 (now 1240) and of liability for the actions of things in article 1384(1) (now article 1242(1)) of the *Code civil*, French scholars do not therefore mean that these articles provide a legislative umbrella under which particular liability rules can shelter, nor that they provide a guideline on the basis of which the courts can create or discover new particular liability rules, the offspring or applications of that principle. Rather, the principles in articles 1240 or 1242(1) constitute legal rules, albeit rules with very broad areas of application. This does not mean, of course, that the courts have no role to play in putting these principles into effect in practice, but in doing so they are not seen as creating new rules. Rather, the courts' role is seen as interpreting and applying the various elements set out by these general provisions, for example, in the case of liability for fault, the notions of 'fault', 'harm' and the causal relationship between the two. In his famous introduction to the *Code civil*, Portalis explained its drafters' approach to regulation, observing famously that:

We have not thought it necessary to simplify legislation to the point of leaving citizens without rules and without a guarantee of their most important interests. We have also managed to avoid the dangerous ambition of wishing to regulate everything and foresee everything. Who would think that it is the very same people to whom a code always appears too voluminous who imperiously dare to impose on the legislator the terrible task of leaving nothing at all to the decision of the judge?²⁰

From this perspective, it might perhaps be better, therefore, not to translate the French *principe* as 'principle' in English, but instead to adopt the German expression 'general clause' (used to describe the delict provisions in §§ 823 and 826 BGB), even though to most English lawyers a 'clause' suggests a term of a contract rather than a legislative provision.²¹ Finally, we should make clear that the approach of French lawyers to the *principes* contained in articles 1240 and 1242(1) Cc can also be seen in relation to principles which are not, at least as yet, explicitly codified such as the 'principle of full reparation' (*le principe de la réparation intégrale*) of

¹⁹On the idea of the principle of good faith as a counter-principle in French contract law see S Whittaker, 'Contracts, Contract Law and Contractual Principle' in *The Code Napoléon Rewritten*, ch 3, 44–46.

²⁰'Nous n'avons ... pas cru devoir simplifier les lois au point de laisser les citoyens sans règles et sans garantie sur leurs plus grands intérêts. Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. Qui pourrait penser que ce sont ceux mêmes auxquels un code paraît toujours trop volumineux, qui osent prescrire impérieusement au législateur la terrible tâche de ne rien abandonner à la décision du juge?' J-E-M Portalis, *Discours préliminaire sur le projet de Code civil* (presented 1 pluviôse an IX = 21 January 1801) in *Discours et Rapports sur le Code civil* (Caen, Centre de philosophie politique et juridique, 1989) 6–7.

²¹See S Whittaker, 'Theory and Practice of the "General Clause" in English Law: General Norms and the Structuring of Judicial Discretion' in S Grundmann and D Mazeaud (eds), *General Clauses and Standards in European Contract Law, Comparative Law, EC Law and Contract Law Codification* (The Hague, Kluwer Law, 2006) ch 4, 60.

a claimant's harm or loss.²² As the proposed provision in the *Projet de réforme* makes clear, the purpose of reparation (whether in kind or by way of damages) is to ensure the full reparation of the claimant's loss, neither more nor less.²³ The all-encompassing nature of the principle of full reparation has led some French courts to seek ways of avoiding its consequences by fixing requirements as to the nature of the harm to be subject to reparation,²⁴ but if anything this emphasises the way in which the principle is generally viewed.

B. The Tendency to Generalise

As was explained in the Introduction to the present work,²⁵ the evolution of French liability over the last two centuries is often seen as reflecting a move towards very general bases of liability, with at least two general 'principles' (for fault and for the action of things) and with at one time a possible third general 'principle' (for the actions of others).²⁶ This tendency to generalise and to bring together different things under a single concept or idea, rather than emphasising their differences may be seen as a wider intellectual trait of French civil lawyers, who are keen to 'systematise' the raw legal materials which they find either in the codes or in the practice of the courts. Certainly, the majority of French legal scholars appear to be entirely comfortable with and, indeed, to celebrate the breadth of treatment and practical expansion of liability which has resulted from developments in the private law of liability, principally on the basis that this allows French law to vindicate the rights of 'victims', in particular of personal injuries and death.²⁷ Rather than questioning the generality of such concepts as harm or fault, legal scholars have endorsed this way of thinking wholeheartedly. This is reflected in the structure of almost all treatises, with harm and causation presented as conditions common to all regimes of liability, together with a single set of defences, in particular *force majeure* and contributory fault in the claimant (*faute de la victime*). Similarly, the 'effects of liability', ie the rules on reparation and the assessment of damages, are presented as being common to all types of liability, at least where

²² On this principle and its proposed explicit codification by the *Projet de réforme* arts 1258 and 1259, see above ch 9 and ch 10. Most French lawyers would see this as recognised by art 1231-2 Cc (former art 1149 Cc), even though this relates directly only to damages for contractual non-performance.

²³ Art 1258: 'The aim of reparation is to replace the victim as much as is possible in the situation in which he would have been if the harmful action had not taken place. It must cause him neither a loss nor an advantage'; art 1259: 'Reparation may take the form of reparation in kind or damages, these two types of measures being able to be combined so as to ensure full reparation of the loss.'

²⁴ Ch 9 above pp 185–189.

²⁵ Above, pp 3–5.

²⁶ See ch 8 above pp 152–153.

²⁷ See esp G Viney 'Pour ou contre un "principe general" de responsabilité civile pour faute?' in *Etudes offertes à P Catala* (Paris, Litec, 2001) 555, 557 who observes that almost no one in France challenges the existence of the general principle of liability for fault, the exception being P Remy, 'Critique du système français de responsabilité civile' (1996) *Droit et Cultures* 31.

this is extra-contractual.²⁸ According to this now standard presentation, the only differences between the 'main' liability regimes, ie those based on the historical provisions in the *Code civil*, consist in their *faits générateurs*, that is, the actions (or perhaps events) which may give rise to liability. A striking exception to this approach is found in Remy's work. He remarked on French law's characteristic 'constantly to reduce the casuistry of the *faits générateurs* of delictual liability to an abstract principle (fault or risk)' and he saw this as problematic as it explained why strict liability is seen as based on a 'principle' competing with the principle of liability for fault, whereas it should be seen only as an exception.²⁹ In his view, the 'excessive generality' of the French law of delict has led to too broad an imposition of strict liability, which in its turn has led to occasional attempts to return liability to fault by circuitous and hidden routes.³⁰

As has been seen in earlier chapters, the two principles of French civil liability law advocated by scholars and recognised by the courts are indeed of an extraordinary breadth. So, liability for fault does not formally distinguish between different types of fault (intentional, grossly negligent (*faute lourde*) or merely negligent);³¹ it does not distinguish between different types of harm (*dommage*), allowing personal injury (*dommage corporel*, which also includes death), damage to physical property, 'moral' harm of different types (*dommage moral*) and economic loss.³² While the original context of 'liability for the action of things' was accidents at work and then road accidents, this strict liability has never been restricted to these contexts, nor even to the recovery by claimants of compensation for personal injuries or death.³³

To an extent, the *Projet de réforme* can be seen as the apotheosis of this generalising tendency of French liability law. It brings together *la responsabilité délictuelle* (now firmly renamed *la responsabilité extracontractuelle*) and *la responsabilité contractuelle* (a category which, as has earlier been seen, was itself controversial) together under a single legislative category of *la responsabilité civile* or civil liability.³⁴ Moreover, most of the rules on liability in the *Projet de réforme* are presented as being common to both these branches of liability: this applies to the rules governing harm/loss and causation, the effects of liability and the grounds of exoneration.³⁵ The analytical starting-point is clearly intended to be general

²⁸In the contractual context, there have always been the special rules as to foreseen and foreseeable damages etc in arts 1150–1151 Cc (now arts 1231-3–1231-4 Cc).

²⁹Rémy (n 27) 32–33.

³⁰*ibid* 37 (such as the requirement that the 'thing' played an 'active role' in the creation of the claimant's harm and the definition of the 'keeping' (*la garde*) of the thing as a power of its 'use, control and direction').

³¹See ch 5 esp at p 80.

³²See ch 9, p 181.

³³See above, p 4.

³⁴See above ch 2 and ch 3, pp 39–47.

³⁵This is particularly clear from the proposed Sub-Title II, Ch II ('Conditions of Liability'), which sets out 'common provisions' for both contractual and extra-contractual liability for 'reparable loss' and 'causal relationship', Ch III ('Grounds of Exoneration or of Exclusion of Liability') and Ch IV ('The Effects of Liability').

for these fundamental elements and for the most important consequences of contractual and extra-contractual liability.

II. Diversity Beneath the Generality

However, in our view, such a picture of the French law of liability is fundamentally misleading. The patterns of liability are much more complicated and diverse than this ‘classical’ and, to an extent, reductionist picture allows. This may be seen in two main ways. First, there is a considerable diversity of treatment beneath the generality of the classic principles of liability themselves – as is, in some respects and to an extent, reflected in the *Projet de réforme* itself. Secondly, the French legislature has enacted a series of what have become known as ‘special regimes of liability’, with particular rules adapted for their contexts and with varying relationships with the ‘general law’ arising under the classic principles.

A. The Nuanced Bases of Liability

First, in the case of liability for fault under article 1240 of the *Code civil* which is seen as providing the fundamental starting-point for liability (*le droit commun de la responsabilité*) liability is not as general in its application as at first appears, quite apart from the specific legislative regimes which explicitly exclude its application (such as the *loi Badinter* on motor-vehicle accidents³⁶).

As regards the categories of people who can be liable (so-called restrictions *rationae personae*), while in principle all persons (apart from public bodies³⁷) are covered, the courts have held that article 1240 does not apply to company directors (*dirigeants sociaux*)³⁸ nor to employees (*préposés*) acting within the scope of their mission both of whom enjoy a certain immunity from liability.³⁹ As regards the subject-matter of a claim (so-called restrictions *rationae materiae*), article 1240 does not apply to cases of abuse of freedom of expression against persons;⁴⁰ it does not apply in cases of the infringement of a person’s privacy,⁴¹ nor does it apply in

³⁶ *Loi* 85-677 of 5 July 1985 (*loi Badinter*).

³⁷ Public bodies (including the State and local authorities) are often subject to the special rules set out by administrative law, on which see ch 20 above.

³⁸ Cass com 20 May 2003 no 99-17092, Bull civ IV no 84, D 2003, 2623 note B Dondero.

³⁹ In the case of employees (*préposés*), this was recognised first by Ass plén 25 February 2000 no 97-17378 (*affaire Costedoat*) D 2000, 673 note P Brun and see P Malaurie, L Aynès and P Stoffel-Munck, *Droit des obligations*, 10th edn (Paris, LDGJ, 2018) 96–97 noting that later case law has restricted the scope of the immunity in particular by excluding cases in which the employee intentionally commits a criminal offence (Ass plén 14 December 2001 no 00-82066 (*affaire Cousin*) D 2002, 1230 note J Julien) and has held that it does not extend to the employee’s own liability insurer: Cass civ (1) 12 July 2007, Bull civ I no 270, D 2007, 2908 note S Porchy-Simon. See further ch 8 above pp 154–155.

⁴⁰ Ass plén 12 July 2000 no 98-11155, D 2000, 463 obs P Jourdain.

⁴¹ Cass civ (1) 5 November 1996 no 94-14798, JCP 1997, II, 22805 note J Ravanas.

the very particular case of ‘faults’ committed on a sports ground which have an effect on bets which were placed on the outcome of the game.⁴² Interestingly, the *Projet de réforme* does not say anything about these judicial restrictions on the application of liability for fault. Despite this silence, these exceptions are likely to survive the enactment of the *Projet de réforme*.

Moreover, even where the courts have recognised that, in principle, article 1240 *does* apply, they have then treated the conditions of liability specially, notably by requiring a particular type of fault in order for liability to be imposed. This was recognised by Starck, who identified a broad distinction between claims for personal injuries and damage to property, where the slightest fault is enough, and claims for economic and ‘moral’ harm, where the courts require particular types of harm (*des fautes suffisamment caractérisées*).⁴³ For example, in claims based on the abuse of rights, in some types of case an intention to harm is required, whereas in other types of case the court considers whether the defendant’s exercise of their right is ‘excessive’;⁴⁴ in claims in respect of the breaking-off of pre-contractual negotiations by a party, the courts impose liability only in special circumstances, as ‘fault consists generally in a sudden volte-face putting an end to long negotiations which were capable of giving an impression that the contract would be concluded’;⁴⁵ in claims against third parties to a contract as ‘accessory to a contracting party’s non-performance’, their liability arises only if they *knew* of the party’s contractual obligation in question;⁴⁶ and in claims against competitors their behaviour must have been unfair (*la concurrence déloyale*).⁴⁷ This final example is particularly illuminating. In the nineteenth century, the courts created the possibility of liability for ‘unfair competition’, so as to balance the otherwise very general principle of freedom of commerce and industry and, therefore, of competition recognised by the revolutionary *Décret d’Allarde* of 1791.⁴⁸ They did so on the basis of the general ground of liability for fault in (then) article 1382 Cc, the courts assessing whether the unfairness or fairness of competition in terms of the presence or absence of ‘fault’.⁴⁹ More recently, however, the legislature has supplemented this case law under the general law by imposing liability in particular circumstances and subject to particular conditions in the Code de commerce.

⁴² Cass civ (2) 14 June 2018 no 17-20046, D 2018, 1784 note JS Borghetti.

⁴³ B Starck, H Roland and L Boyer, *Obligations, 1. Responsabilité délictuelle*, 5th edn (Paris, Litec, 1996) 149–50.

⁴⁴ Malaurie, Aynès and Stoffel-Munck (n 39) 70.

⁴⁵ *ibid* 268 noting that this liability is normally delictual and referring to Cass com 26 November 2003 no 00-10243 and no 00-10949, D 2004, 869 note AS Dupré-Dallemagne.

⁴⁶ Such a person is termed a *tiers complice à l’inexécution d’une obligation contractuelle*. The condition of knowledge is clear from Ass plén 9 May 2008, Bull civ Ass plén no 3, RTD civ 2008, 485 note P Jourdain.

⁴⁷ Cf the position of employees acting in the course of their employment whose liability can arise only where they deliberately committed a criminal offence: see above, p 462.

⁴⁸ *Loi* of 2 and 17 March 1791.

⁴⁹ Louis Vogel, *Traité de droit commercial Georges Ripert/René Roublot*, 18th edn (Paris, LDGJ, 2001), vol 1 590–91 and 601ff.

For example, since 2008 the Code de commerce has provided that various types of commercial person are ‘liable’ for ‘subjecting or attempting to subject’ their commercial partner to ‘obligations creating a significant imbalance in the rights and obligations of the parties’.⁵⁰

Secondly, in the case of liability for the actions of things under article 1242(1) (former article 1384(1) Cc), the formal position has become ever more general since the two particular examples of ‘liability for things’ in the Code (liability for animals and for ruinous buildings) have been interpreted so as to lose their distinctiveness⁵¹ to the extent that they are not specifically regulated by the *Projet de réforme*. However, underneath the generality of the principle of this strict liability for the action of things, the courts have accepted a number of rather strange distinctions in deciding whether there can be said to be an ‘action of the thing’ (*le fait de la chose*), distinguishing between moving things in contact with the claimant or their property, non-moving things, and things which suffer from defects or ‘abnormality’.⁵² This complex case law may be open to criticism, but its content was nevertheless included explicitly in summary form in article 1243 of the *Projet de réforme*.⁵³ More generally, as Knetsch observes, ‘it is not by chance that presumptions of causation find their preferred area of application in the field of strict liability’.⁵⁴ Moreover, while liability for the actions of things under article 1242(1) Cc (formerly article 1384(1) Cc) is typically presented as very general, its practical scope of application has become increasingly restricted, and its applications in the modern case law are surprisingly few and far between. In particular, it does not apply to motor-vehicle accidents which fall within the scope of the special rules provided by the *loi Badinter* of 1985,⁵⁵ nor to claims falling within the special rules governing product liability where the particular claim against a producer is necessarily based on the lack of safety of a product.⁵⁶ To the extent to which the *Projet de réforme* would apply the special regime governing motor-vehicle

⁵⁰ This provision was enacted as art 442-6-I.2° Ccom, but was amended and renumbered by Ordonnance 2019-359 of 24 April 2019, art 2 as art L 442-1-I Ccom.

⁵¹ Malaurie, Aynès and Stoffel-Munck (n 39) 107. See art 1385 Cc (now art 1243 Cc); art 1386 Cc (now art 1244 Cc) (ruinous buildings).

⁵² For a summary in English see S Whittaker ‘The Law of Obligations’ in J Bell, S Boyron and S Whittaker (eds), *Principles of French Law*, 2nd edn (Oxford, Oxford University Press, 2008) ch 10, 386–88.

⁵³ Art 1243(2)–(3): ‘(2) An action of a thing is presumed wherever, while moving, it comes into contact with the person or property which is harmed. (3) In other cases, it is for the victim to prove the action of the thing by establishing either its defect or the abnormality of its position, its state or its behaviour.’ For an overview of the case law see F Terré, P Simler, Y Lequette and F Chénéde, *Droit civil, Les obligations*, 12th edn (Paris, Dalloz, 2018) 1057ff.

⁵⁴ See ch 7 above p 140.

⁵⁵ The regime of liability under the *loi Badinter* is termed ‘autonomous’ meaning that no victim of an accident can rely on the general law of liability (whether for fault or, more importantly, for the actions of things): Cass civ (2) 4 May 1987, Bull civ II no 87.

⁵⁶ Com civ (1) 11 July 2018 no 17-20154 thereby interpreting strictly art 1386-18 (now 1245-17) Cc which allows a person falling within the product liability regime to claim on the basis of the law of contractual or extra-contractual liabilities or special liability regimes.

accidents, it would restrict further the practical application of the 'general law' of liability for the actions of things.⁵⁷

Thirdly, in the case of liability for the actions of other people, it is often said that in its famous decision in *Blieck* in 1991 the Cour de cassation recognised a new general principle of liability for another's action based on article 1242(1) (formerly article 1384(1)) of the *Code civil* mirroring the principle of liability for the action of things.⁵⁸ However, this is not in fact the case – indeed, it would be difficult to see how a rule could work if it stated simply that 'one is liable for the action of other persons'. Certainly, if one looks at the case law after *Blieck*, it is clear that article 1242(1) has instead been treated as providing an umbrella under which two distinct and well-defined situations of liability for another's action can shelter: liability of persons in charge of organising and controlling the 'lifestyle' (*le mode de vie*) of other persons for harm caused by those persons; and, secondly, liability of sports associations for harm caused by their members in the practice of the sport.⁵⁹ Beyond these two recognised categories of liability for the actions of others, the *Code civil* itself still sets out a series of particular examples: liability of employers (*commettants*) for their employees (*préposés*), liability of parents for their minor children, and liability of teachers or artisans for their pupils or apprentices.⁶⁰ As Häcker has explained, the *Projet de réforme* implicitly rejects the idea that liability for the action of others is based on a 'general principle' as article 1245(1) of the *Projet* providing that '[a] person is liable for harm caused by another person in the cases and subject to the conditions laid down by articles 1246 to 1249' and the latter provisions then set out a series of particular situations drawn from the existing law in which such a liability is recognised.⁶¹ Of these situations, three are stated to be strict liability (the liability of parents and others for minor children, the liability of a person charged with the care of an adult, and the liability of employers for their employees', whereas one rests on a rebuttable presumption of fault ('other persons who take on by contract, and by way of their business or profession, a task of supervision of another person or the organisation and control of the activity of another person').⁶²

⁵⁷ Arts 1285–1288 of the *Projet de réforme*.

⁵⁸ See eg M Fabre-Magnan, *Droit des obligations, 2 – Responsabilité civile et quasi-contrats*, 4th edn (Paris, PUF, 2018) 458–62 who considers that the principle has remained marginal compared to the particular examples in the Code but that the scope and regime governing the new 'general principle' of liability for the actions of others have been made clearer, although uncertainties remain.

⁵⁹ See ch 8 above pp 152–153.

⁶⁰ Art 1243(3)–(8) Cc (formerly art 1384(4)–(8) Cc).

⁶¹ Ch 8 above, pp 155–156 where it is also explained that, unlike the existing law, the *Projet de réforme* does not treat these cases as examples of 'actions which give rise to liability' (*faits générateurs de responsabilité*) but rather as cases in which there is 'proof of an action of a nature to engage liability in the direct author of the harm': art 1245(1) of the *Projet de réforme*. In this way, as the title of the relevant section states, liability arises as a result of the 'imputation of harm caused by another person'.

⁶² Arts 1246–1249 Cc.

Overall, therefore, we can see that there is a complexity and a diversity of treatment in the established law beneath the generality of the ‘principles’ of liability for fault, for the action of things and for the actions of other people.

B. A Unified Regime for ‘Civil Liability’?

Many general works on the law of obligations set out the law in a way which treats the rules governing liability to a common framework, apart from the various sources of the liability, its *faits générateurs*. This can be seen in the treatment of causation, harm or loss (where a principle of ‘full reparation’ applies), and defences (such as the victim’s contributory fault and *force majeure*). This approach is reflected in the *Projet de réforme* as it would create a common *framework* of treatment of ‘civil liability’ so as to include both contractual and extra-contractual liability.⁶³ However, on closer examination a number of rules which are presented as applying to all types of liability are in fact specific either to extra-contractual liability or to contractual liability – or even to the ‘special regimes of liability’ which the *Projet* includes within its scope.

In some cases, the distinct treatment of the rules governing contractual and extra-contractual liability is explicit in the text of the provisions themselves, as in the case of the definitions of *force majeure*,⁶⁴ the rules governing the effect of exclusion clauses⁶⁵ and possibly also penalty clauses,⁶⁶ and the restriction of actions for cessation of unlawful behaviour and civil penalties to extra-contractual liability.⁶⁷ There are, however, a number of rules which appear to apply equally to contractual and to extra-contractual liability, but in fact are likely to apply in practice only to extra-contractual liability. This stems from the new and radical treatment of liability for personal injury (*dommage corporel*) found in article 1233-1(1) of the *Projet*, which provides that:

Losses resulting from personal injury are subject to reparation on the basis of the rules of extra-contractual liability, even if they are caused in the course of performance of a contract.

Although article 1233-1(2) recognises an exception to this rule for the case where an express contractual stipulation is more favourable to the claimant than the

⁶³ Above, ch 1.

⁶⁴ Art 1253 of the *Projet de réforme* sets out the definition of *force majeure* for extra-contractual liability and cross-refers to art 1218 Cc (in force) for the definition of *force majeure* for contractual liability.

⁶⁵ Arts 1282 and 1283, providing exceptions to the general recognition of the validity of contract terms both for contractual and extra-contractual matters of ‘contract terms whose object or effect is to exclude or to limit liability’.

⁶⁶ Although art 1284’s rules on *clauses pénales* reflect established law (art 1231-5 Cc) and are generally seen as concerning penalties imposed for contractual non-performance, Z Jacquemin (ch 15 above p 326) raises the question whether art 1284 could equally apply to penalties agreed to govern extra-contractual liability.

⁶⁷ Art 1266 (actions for cessation on which see ch 18 above); art 1266-1 (civil penalties on which see ch 16 above).

application of the rules of extra-contractual liability, this is unlikely to be significant in practice. If this provision were enacted, the vast majority of claims for damages for personal injuries would necessarily be on the basis of extra-contractual liability.⁶⁸ This means that where the *Projet* sets out rules governing personal injury which *apparently* apply both to contractual and to extra-contractual liability, in practice they will apply almost exclusively to extra-contractual liability. This is true of the special rule of causation governing personal injury caused ‘by an undetermined person among two or more identified persons acting in concert or exercising a similar activity’,⁶⁹ the special rules governing the assessment of reparation for personal injuries,⁷⁰ and the exclusion of liability for personal injury.⁷¹ This proposed treatment is particularly interesting for our present concern. For while it is the case that the extraordinary developments in the French law of civil liability, both extra-contractual (liability for the action of things) and contractual (liability arising from non-performance of ‘safety obligations’), were inspired by a concern to ensure compensation for victims of personal injuries, the liabilities themselves are not so restricted.⁷² The *Projet de réforme* would give formal recognition both to the importance and to the distinctiveness of this type of harm in contrast to the classically undifferentiated approach earlier described. As will be explained, this reflects a more general shift in approach towards the recognition of distinctions in the law of liability according to the nature of the harm suffered by the claimant.

We can see a similar contrast between initial appearance and reality in the *Projet de réforme*’s treatment of defences. For while Chapter III of the *Projet de réforme* presents the ‘grounds of exoneration or of exclusion of liability’ in a way which looks as though it applies to liability in general, this presentation is misleading.⁷³ A first and obvious point which we have already noted is that the *Projet* explicitly accepts that the definition of *force majeure* should differ as between contractual and extra-contractual liability,⁷⁴ but we should add that in practice in the context

⁶⁸ One of the apparent consequences of this approach is the intended abandonment of the complex case law which has recognised for more than a century that contracts may contain (contractual) obligations as to the safety of the other party or their property (*obligations de sécurité*). These obligations may either require proof of negligence (in the case of *obligations de moyens*) or they may instead impose strict liability with a defence of *force majeure* (in the case of *obligations de résultat*). On this existing law see Malaurie, Aynès and Stoffel-Munck (n 39) 542–44.

⁶⁹ Art 1240 of the *Projet de réforme*, on which see ch 12 above pp 251–252, and ch 13, pp 277–280.

⁷⁰ Arts 1267–1277 of the *Projet de réforme*.

⁷¹ Art 1281(2) of the *Projet de réforme*.

⁷² Thus, both these grounds of liability may apply to recover for damage to property (*dommage matériel*), such as in a motor-accident before the *loi Badinter*. See eg Cass civ (2), 26 September 2002, no 00-18627, Bull civ II no 198, JCP G 2003, I, 154, no 34, obs G Viney, ruling that the owner of a restaurant which had to be closed due to the risk that rocks would fall from a nearby cliff could claim damages for pure economic loss against the owner of that cliff on the basis of art 1384(1); Cass civ (1), 9 July 2015, no 14-13423, ruling that the company in charge of carrying passengers with their luggage has an obligation (*obligation de sécurité*) to ensure that the luggage does not get damaged in the course of travel.

⁷³ For further analysis of the *Projet de réforme*’s treatment of *causes d’exonération* see ch 14 above.

⁷⁴ Art 1253 of the *Projet de réforme* and art 1218 Cc.

of extra-contractual liability this defence applies only to liability for the action of things.⁷⁵

Secondly, article 1257 of the *Projet de réforme* provides for 'grounds of exclusion' of civil liability applicable generally, stating that:

An action causing harm does not give rise to liability where its author finds himself in one of the situations foreseen by articles 122-4 to 122-77 of the Criminal Code.

As Steel has explained, these *faits justificatifs* are largely drawn from the provisions of the Criminal Code governing, for example, self-defence or necessity.⁷⁶ It is also clear that the way in which these exclusions of liability take effect is that their existence is incompatible with fault in the 'author', that is the person who acts and whose liability is in issue.⁷⁷ This has a direct implication for the practical ambit of these 'grounds of exclusion' as they will be significant predominantly where liability is itself sought on the basis of the author's 'fault'.

Thirdly, the victim's contributory fault is not applied uniformly across the whole of the law of civil liability, in particular being subject to a series of special rules in the law governing road accident and product liability.⁷⁸

Finally, the existing law governing a victim's 'acceptance of risks' apparently differs according to the nature of the harm, a broad distinction being drawn between interferences with property and privacy and related rights on the one hand and most cases of personal injury on the other.⁷⁹ In this respect, article 1257-1 of the *Projet de réforme* appears to concern only the first category of case, leaving the second unregulated.⁸⁰

C. Distinctions According to the Type of Interest of the Claimant

One of the axioms of the French law of civil liability is that it does not distinguish according to the nature of the claimant's harm or, to put it another way, according to the nature of the interest of the claimant which has been prejudiced

⁷⁵ See J-S Borghetti, 'L'avant-projet de réforme de la responsabilité civile. Commentaire des principales dispositions' D 2016, 142, [34]. *Force majeure* cannot coexist with a fault on the part of the defendant, which means that, if fault has been established by the claimant, the defence of *force majeure* cannot be raised. Moreover, *force majeure* is not accepted as a defence in most special regimes of liability, including those covered by the *Projet*, ie liability for the action of motor-vehicles and liability for defective products. Finally, the case law is not clear as to whether *force majeure* can apply in cases of abnormal nuisance between neighbours.

⁷⁶ Ch 14 above pp 294–297.

⁷⁷ *ibid* p 295.

⁷⁸ *ibid* pp 301–303.

⁷⁹ *ibid* p 304 and ch 15 above, pp 318–319.

⁸⁰ Ch 14 above, p 303.

by the defendant's action or omission.⁸¹ But is this position reflected in the *Projet de réforme*? While the 'principles' of liability for fault and for the action of things in articles 1241 to 1243 of the *Projet* make no distinctions of this sort, on looking more closely, there appear to be a number of ways in which the type of harm can indeed have an impact on whether liability will be imposed.

First, as has earlier been noted, if implemented, the *Projet de réforme* would generally bar the application of contractual liability in cases of personal injury, and the effect of this would be to apply specific rules governing this type of harm, which are broadly intended to be more favourable to claimants. This would mark a radical change from existing law.

Secondly, this time reflecting existing law, both the 'principal special regimes of liability' included in the *Projet* (and therefore to be included in the *Code civil*) do in fact distinguish according to the nature of the claimant's harm. So while the *ground* of liability for the 'driver or keeper' of a vehicle for road accidents does not distinguish according to the victim's harm, the treatment of the victim's fault does indeed do so, it having no effect where the victim has suffered personal injury (with a series of exceptions and special rules), whereas it may limit or exclude liability where the victim has suffered physical damage to property.⁸² And while the special legislative regime governing harm caused by defective products in the *Projet de réforme* applies without qualification where the victim has suffered personal injury, it applies only to certain cases of damage to property, namely where the damage is other than to the defective product itself, causes a loss above an amount set by decree (currently 500 euros) and 'the property is of a type normally intended for private use or consumption and was used by the victim mainly for his own private use or consumption'.⁸³

Thirdly, the particular situations which were earlier outlined where liability for fault under article 1240 Cc (and apparently equally under articles 1241 and 1242 of the *Projet de réforme*) is excluded by reason of the subject-matter of the claim, typically involving claims for financial or purely 'moral' harm.⁸⁴

Finally, and much more generally, even as regards the application of liability for fault, in reading the case law one is left with the impression that the courts, especially the Cour de cassation, are much more willing to accept findings of 'fault' by the lower courts, the *juges du fond*, where the claimant has suffered a serious harm.⁸⁵ And very broadly, while 'virtual fault' (*la faute virtuelle*, where fault is

⁸¹ This is often contrasted with the approach of German law, whose § 823(1) BGB lists the interests of a person to be protected.

⁸² Arts 1287 and 1288 of the *Projet de réforme* reflecting *loi* no 85-677 of 5 July 1985, arts 2-5.

⁸³ Art 1290 of the *Projet de réforme*. The first two restrictions reflect the current position in the *Code civil* (art 1245-1 Cc), but the restriction as to the character of the property damaged is not contained in the *Code civil* except for the purposes of the validity of exclusion clauses: art 1245-14 Cc. This restriction is, however, contained in art 9 of the Product Liability Directive 1985 which these special liability provisions seek to implement.

⁸⁴ Above, pp 462-463.

⁸⁵ *cf* Starck, Roland and Boyer (n 43) 149-50. A good example is Cass civ (2) 18 May 2000 no 98-12802, Bull civ II no 85; in this case, where a person fell while climbing a rock, bringing together in

really fictitious) has been recognised in cases of death or personal injury, in claims for purely financial losses a claimant may often find establishing fault in the defendant much more difficult. Indeed, at times it could be thought that the general law of civil liability operates under a points system under which each element of liability (*fait générateur*, causation, harm) is worth a certain number of points and claimants win where they gain a certain total number of points. Let us say, for example, that liability is established as soon as the claimant scores a total of 10 points. If the defendant was at fault but was only slightly careless, his fault will count as two points; whereas, if he was guilty of gross negligence or even of an intentional fault, this *fait générateur* will be worth three or four points, or maybe even five points. Likewise, if the causal connection between the *fait générateur* and the harm was very close and obvious, it will be ‘worth’ more points than if it was more remote and/or uncertain. As for harm, it will ‘weigh’ a number of points proportional to its nature and its intensity: serious personal injury may be worth six, seven or eight points, whereas loss of expected profits or harm to reputation will only be worth, say, one or two points. This means that if a claimant can establish that he suffered serious personal injury (eight points), it will be enough for him to establish a very small fault on the defendant’s part (one or two points), or even a ‘virtual fault’, and a more tenuous causal link (one point) to get compensated. However, if the harm he suffered is not so serious (say four points), the court will be more demanding as regards the reality and seriousness of fault and causation.

Of course, this ‘points system’ is only a metaphor, and we are by no means suggesting that French courts explicitly follow this sort of reasoning when dealing with liability cases. However, the study of the French case law suggests that serious harm or gross fault do attract liability more readily than minor harm or slight negligence – even though, in theory, neither the seriousness of fault nor the nature or intensity of harm should have an influence on the existence of liability. As Carbonnier expressed it so vividly:

Fault is no more the sum of physical, psychological and social elements than life is the sum of oxygen, hydrogen, carbon etc. There must be something more: a spontaneous and intuitive judgment by the court ... Nowhere more than in relation to fault do the judges proceed by way of a judgment based on fairness [*équité*], condemning or pardoning in the name of society ... The Cour de cassation’s assessment is a global one, acting as a court of *review of excesses of fairness*. Rather than ensuring that the law [*la loi*] is respected, its role here appears to be to prevent (in the interest, most often, why shouldn’t one say it? Of insurance companies and parties with deep pockets) an over-charitable fairness, which would let the evaluation of needs and resources come before the morality of the case.⁸⁶

his fall the climber behind him, the Cour de cassation ruled that the defendant was liable under article 1382 Cc, given that ‘to bring about another climber’s fall constitutes a fault’ (‘le fait de provoquer la chute d’un autre grimpeur constitue une faute’).

⁸⁶ J Carbonnier, *Droit civil*, vol II, *Les biens, Les obligations* (Paris, PUF, 2004) 2306 (emphasis added).

Ironically, therefore, the very generality of approach of the law and of the concepts of which the law is constructed allows French courts to proceed in a distinctly casuistic, not to say, policy-driven way.

III. The Increased Importance of the 'Special Regimes' of Liability and Compensation

The heartland of the French law of civil liability is typically seen in the classic law of liability for fault, for the action of things and the action of others and these bodies of law often remain the focus of discussions of the law of *responsabilité délictuelle* or *responsabilité civile* in the treatises on the law of obligations. However, it is widely realised that this body of law has been much supplemented and at times excluded by special regimes of liability or of compensation. These special legislative regimes of liability have been created for a number of reasons and in a number of particular circumstances, but many have been concerned to take further the primary concern of French lawyers of making easier the recovery of damages for accidental personal injury and death.

The seeds of these important developments can be seen early in the case of accidents at work. Towards the end of the nineteenth century some French lawyers became sympathetic to the difficulty which workers injured at work encountered in establishing the fault of their employers. Various suggestions were put forward, including treating the employer's liability as based on a contractual obligation as to their employees' safety and, even more famously, holding the employer as 'keeper' of the thing (typically machinery) which caused the employee's injury.⁸⁷ While both these suggestions flourished in the sense that the idea of 'contractual obligations of safety' and liability for the action of things became settled features of the law, in the specific case of accidents at work in 1898 the legislature intervened and imposed liability on employers to provide fixed rates or tariffs of compensation to their workers for death or personal injuries without proof of fault.⁸⁸ Where an employee had such a claim, neither the employer's fault nor the employee's fault would have any effect on the amount of employee's compensation except where the fault was 'inexcusable'.⁸⁹ However, where the employee had such a claim, he could not rely on any other legal grounds of claiming in respect of the accident.⁹⁰ In this way, compensation for accidents at work is often seen as having 'escaped' the law

⁸⁷ On the idea of using contract as a means of imposing strict liability, see ch 2 above p 16. On the use of 'liability for the actions of things' see Cass civ 16 June 1896 (*arrêt Teffaine*) S 1897, 1, 17 note P Esmein and ch 7 above p 129.

⁸⁸ *Loi* of 9 April 1898 'sur les responsabilités des accidents dont les ouvriers sont victimes dans leur travail', art 1.

⁸⁹ *ibid* art 20.

⁹⁰ *ibid* art 2(1).

of civil liability (almost) altogether.⁹¹ Moreover, of the ‘classic triple requirement’ of harm, fault and a causal link between them, this regime waives the *requirement* of fault; it substitutes for the normal rule of causation a requirement of a ‘causal link, even if rather stretched’ between the employee’s work and the harm;⁹² and it disappplies the general principle of ‘full reparation’ in favour of a scale of fixed sums according to the seriousness of the effects of the accident, providing a system of compensation which is said to be *forfaitaire*. None of this law governing compensation for accidents at work is contained in the *Code civil* as it is seen as belonging instead to the law of social security and therefore appropriate for the *Code de sécurité sociale*. More recently, other special regimes of compensation (*régimes d’indemnisation*) as opposed to regimes of liability (*régimes de responsabilité*) have been created, notably, for the cases of compensation of victims of crime⁹³ and of victims of contamination by blood products.⁹⁴

Secondly, as recognised by the *Projet de réforme*, there are two ‘principal’ special regimes of liability: liability for road accidents and liability for defective products.⁹⁵ The first was born out of a series of decisions of the Cour de cassation in relation to the application of liability for the actions of things in article 1384(1) Cc (now article 1242(1) Cc)⁹⁶ and was put into effect in 1985 by special legislation outside the *Code civil*.⁹⁷ As earlier noted, where this special regime applies, the victim of a road accident cannot rely on the general law.⁹⁸ The origins of the product liability regime are rather different, being international rather than particular to France. In 1985 the EEC enacted a directive requiring Member States to recognise a regime of liability on ‘producers’ where a defect of safety in their product caused harm (personal injuries or ‘consumer property’).⁹⁹ The implementation of this directive in France proved particularly difficult, in part owing to the (correct) sense that the European regime would be *less* protective of the victims of products than existing French approaches under the general law, and in part owing to the political and legal fall-out of the ‘affair of contaminated blood’.¹⁰⁰ Eventually, it was

⁹¹ Malaurie, Aynès and Stoffel-Munck (n 39) 26. The relevant legislative scheme is now contained in art L 411-1 ff *Code de sécurité sociale*.

⁹² Terré, Simler and Lequette (n 53) 1222.

⁹³ This compensation is provided by the *Fonds d’indemnisation des victimes des actes de terrorisme et d’autres infractions* as provided for by arts 706-3–706-15 *Code de procédure pénale*.

⁹⁴ Arts L 3122-1–3122-6 *Code de la santé publique*.

⁹⁵ There are other special regimes of liability, for example, as regards nuclear accidents: see art L 597-1ff *Code de l’environnement*.

⁹⁶ Notably, the *arrêt Desmares* Cass civ (2) 21 July 1982, D 1982, 449 concl Charbonnier, note Larroumet.

⁹⁷ *Loi 85-677* of 5 July 1985, *loi Badinter*.

⁹⁸ Above, p 464.

⁹⁹ Council Directive 1985/374/EEC of 25 July 1985 concerning liability for defective products, art 9. The directive was preceded by a European Convention on products liability in regard to personal injury and death of 27 January 1977, European Treaty Series No 91 which was signed by only four states, Austria, Belgium, France and Luxembourg.

¹⁰⁰ On this see (in English) S Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (Oxford, Oxford University Press, 2005) 450–61.

implemented by legislation inserted (controversially) into the *Code civil*.¹⁰¹ Where the special product liability regime applies, in principle the victim of a product can claim only on the basis of a 'ground of liability' other than a defect of safety.¹⁰² In the case of both liability for road accidents and liability for defective products, the bases of liability and the defences available differ significantly from the approach under the general laws, whether for fault or for the action of things.

The *Projet de réforme* follows the common academic approach by presenting liability for 'the action of motor-vehicles' (ie for traffic accidents) and liability for defective products as 'special liability regimes' after the main body of the law of civil liability in Chapter VI, even though the *Projet* recognises that the structure of these regimes is similar to the other liability regimes, and is therefore based on the triple requirement of '*fait générateur-causation-harm*'¹⁰³ and although the practical relevance of these regimes is much greater than that of liability for the action of things or liability for 'abnormal nuisance between neighbours', both of which are included simply and prominently as *faits générateurs* of liability in Section 2 of Chapter II. Apart from the power of established practice, the reason why liability for traffic accidents and liability for defective products remain regulated separately probably lies in the fact that these regimes stand apart not only by reason of their *faits générateurs*, but also by reason of their grounds of exoneration and of the way in which they differentiate various kinds of harm – and the product liability regime also has specific prescription and limitation periods.¹⁰⁴ However, these types of differences are not as unusual as the *Projet de réforme's* drafters seem to believe and in particular the grounds of exoneration mentioned in Chapter III of the *Projet de réforme* are not in fact common to all types of liability.

Finally, beyond these two principal special regimes of liability, the *Projet de réforme* includes some particular treatments of liability, but excludes others.

The *Projet* includes a new provision on 'abnormal nuisance between neighbours' which has no equivalent in the existing *Code civil*, though it clearly seeks to give legislative recognition to a long-established body of case law.¹⁰⁵ In doing so, it treats 'abnormal nuisance' as a distinct *fait générateur de responsabilité*.

Secondly, in 2016 new provisions were inserted into the *Code civil* immediately after the rules governing product liability which concern 'reparation of environmental loss'.¹⁰⁶ While at very first glance one could imagine that these provisions impose a special liability in respect of environmental loss, in fact

¹⁰¹ Art 1386-1–1386-18 (now 1245-1 – 1245-17) Cc (first inserted in 1998).

¹⁰² Above, p 464, n 56.

¹⁰³ In the case of motor-vehicle accidents this had, indeed, been disputed on the basis that the motor-vehicle merely had to be 'involved' or 'implicated' (*impliqué*) in the accident which led to the claimant's harm: *loi* no 85-677 art 1 and see Terré, Simler and Lequette (n 53) 1249–51.

¹⁰⁴ See art 1298 of the *Projet de réforme* reflecting art 1386-6 Cc (special grounds of exoneration); art 1290 of the *Projet de réforme* reflecting art 1386-2 Cc (special treatment of harm); arts 1299-1 and 1299-2 of the *Projet de réforme* reflecting arts 1386-16 and 1386-17 Cc (special prescription and delay periods).

¹⁰⁵ See ch 11 above.

¹⁰⁶ Arts 1246–1252 Cc referring to '*un préjudice écologique*'.

they do not; rather, they regulate the nature of reparation for environmental loss where liability is established, that is, on independent grounds.¹⁰⁷ This character of these new rules is reflected properly in their position in the *Projet de réforme* as they appear there in a sub-section of the new Section 2 of Chapter IV entitled 'Special rules governing the reparation of losses resulting from certain types of harm'; here 'environmental harm'.

On the other hand, there is no mention in the *Projet de réforme* of the special rules governing medical liability. Until 2002 the liability in private law¹⁰⁸ of hospitals, clinics and doctors was based on non-performance of a contractual 'safety obligation' which was at first seen as requiring proof of lack of care (*obligation de moyens*),¹⁰⁹ later though the courts recognised that liability could sometimes be based on a stricter contractual obligation, notably in the case of hospital-acquired infection.¹¹⁰ However, in 2002 legislation was enacted which provides that, whether working in the public or private sector, medical professionals and 'any establishment, service or bodies in which individual acts of prevention, diagnosis or care take place are liable for the harmful consequences of acts of prevention, diagnosis or care only in the case of fault'.¹¹¹ The legislation recognises two exceptions to this position: cases involving the application of the special product liability provisions and cases involving hospital-acquired infection in the absence of *cause étrangère*, that is, *force majeure*.¹¹² Despite its practical significance, this law is not contained in the *Code civil* nor even referenced in the *Projet de réforme*.

IV. Concluding Observations

Overall, therefore, the generality and sheer breadth of treatment of the grounds of liability and also of their accompanying regime of rules in existing French law is not merely reflected, it is magnified in the new provisions proposed by the *Projet de réforme*. However, it soon becomes clear that this first impression of generality must be qualified in a number of ways, both in the case of existing law as developed by the courts on the basis of the classic provisions in the *Code civil* and as supplemented by 'special' legislation, and in the case of the *Projet de réforme* itself.

¹⁰⁷ This is clear from the terms of art 1246 Cc, which states that 'Any person liable for ecological loss [*un préjudice écologique*] is bound to make reparation for it'; art 1247 Cc adds that 'Ecological loss is subject to reparation subject to the conditions in the present Title, where it consists of a non-negligible injury to the elements or functions of ecosystems or to the collective advantages derived by man from the environment'.

¹⁰⁸ Different rules applied to the liability of public hospitals in the administrative courts, though in 1992 the Conseil d'Etat changed the general basis of liability from *faute lourde* (gross fault) to *faute simple* (ordinary fault): CE 10 April 1992, JCP 1992, II, 79027 note Moreau, Leb 1992 171, concl Legal.

¹⁰⁹ This was first accepted by the Cour de cassation in Cass civ 20 May 1936, DP 1936, I, 88 rapp Josserand, concl Matter.

¹¹⁰ Cass civ (1) 29 June 1999, rapp Sargos, JCP 1999, II, 10138.

¹¹¹ Art L 1142-1-1(1) *Code de la santé publique*.

¹¹² Art L 1142-1-1(2) *Code de la santé publique*.

What we find in practice is a law teeming with distinctions: as to the subject-matter of the claim, as to the formal legal ground of the claim (contract or non-contract, fault, the ‘action of things,’ product liability etc), as to the context in which it arises, and as to the kind of harm for which the claimant seeks compensation. Some of these distinctions are crisp and depend on quite finely drawn legal categories (for example, the separate treatment of injuries in road accidents, injuries by defective products and injuries in the course of medical treatment); but many of these distinctions are much more fluid, notably where they are drawn by the courts in the course of their application of the ‘chameleon concept’ of extra-contractual fault.¹¹³

The title of this chapter poses a question about the French law of civil liability, asking whether it consists of ‘principles of liability’ or a ‘law of torts’. Of course, a first response to this question could challenge its terms of reference by pointing out the inappropriateness of seeking to apply a way of thinking (‘a law of torts’) taken from the common law to the very different materials of French civil law. However, we can, we think, rescue our title’s legitimacy if we explain that the key feature of the common law of torts is that it consists of a series of particular liabilities, each with their own concepts, context and history and that we are therefore asking if any of this finds echoes in the French law. The existence of the ‘law of torts’ in English law does not deny the possibility that these ‘nominate torts’ are related (as, for example, liability in private nuisance and liability in the rule in *Rylands v Fletcher*), nor that they can overlap in particular circumstances. Nor does it deny the possibility of their sharing common concepts or being based on an overall theoretical position, for example, that they are all based on infringement of a claimant’s rights.¹¹⁴ However, what it reflects is the importance of a series of distinctions, in particular, according to the nature of the claimant’s interest (or right) which has been infringed, according to the nature of the defendant’s conduct and according to the practical context more generally. It also reflects an assumption that *outside* the scope of each of the particular torts (and also breach of contract or breach of trust), the law does *not* impose liability: each tort constitutes an island of liability set in a sea of freedom from liability.¹¹⁵

¹¹³ B Starck, ‘Des contrats conclus en violation des droits contractuels d’autrui’ JCP 1954, I, 1180 [38] referring to fault as a ‘veritable legal chameleon, changing according to its context’.

¹¹⁴ See, notably, R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007). See also T Weir, *Tort Law* (Oxford, Oxford University Press, 2002) 12, arguing that, whatever the tort, there are three ‘focal points’: what the tortfeasor did, what the claimant suffered in consequence, and how the suffering resulted from the conduct.

¹¹⁵ *cf* Whittaker (n 52) 365. We avoid referring to a ‘sea of immunity’ as ‘[an] “immunity” is generally understood to be an exemption based on a defendant’s status from a liability imposed by the law on others, as in the case of sovereign immunity’: *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 per Lord Toulson JSC. This approach was adopted by the Supreme Court in *Robinson v Chief Constable of West Yorkshire Police* n 11, [2018] UKSC 4 at [55] (Lord Reed JSC) and [99] (Lord Hughes JSC) who identified the question there as being whether the police owed a duty of care in the tort of negligence (the threshold condition for liability) in the circumstances rather than whether the police enjoyed an immunity from liability in those circumstances.

At one level, this must also be true of French law: if none of the broad classic grounds of liability in the *Code civil*, nor any of the particular ‘special’ grounds of liability beyond the Code apply on the facts, then the defendant should not be held liable. However, this way of thinking is not, in our view, recognisably French, and for two main reasons. First, the point of the general principle of liability for fault in article 1240 Cc (formerly article 1382 Cc) is exactly that *all* ‘victims’ of *any harm* in *all situations* are covered by its protection, leaving to the application of the *conditions* of liability which that provision poses (‘fault’ ‘causing’ ‘harm’) to determine whether a particular defendant is liable to a particular claimant. There are, therefore, no situations in which a defendant is in principle free from liability (and even more free from *responsabilité*), even though there may be situations in which a defendant *is not liable*.¹¹⁶ Secondly, an assumption that the law allows gaps in the law of liability ignores the centrality of ‘victims’ of death and personal injuries in the thinking and in the development of the French law of civil liability and the general commitment of French lawyers to finding any and every way to ensure that these victims are properly compensated.¹¹⁷ This explains what to a foreign lawyer can look like the distortions of the notion of delictual fault (especially ‘virtual fault’) and the extraordinarily inventive approach to interpretation of the *Code civil* required for the invention of liability for the actions of things. As a result, the idea of areas of freedom from liability (where a person *cannot in law be liable*) would be seen as incompatible with the ‘principles of liability’ which are set out in the Code and also with the social and legal policy of well over a century.

In our view, there is, therefore, a commitment by French lawyers both to the idea that their law of extra-contractual liability takes as its starting-point a series of ‘general principles’ of liability and also to a social policy of ensuring compensation for the victims of personal injuries. Indeed, it would not be going too far to say that it is a point of faith among many French legal scholars to uphold the existence of ‘principles of liability’ rather than a law of individual civil wrongs (torts or delicts) with intervening gaps. As we have observed, this does not mean that the treatment of cases by French scholars or courts is undifferentiated. Quite the reverse. Both legislation and even more case law contain a myriad of distinctions, some underneath the generality of the ‘principles’ of liability themselves and some by reason of the particular legislative treatments of the various ‘special regimes of liability’. But these are islands of particular treatment set in a sea of liability.

¹¹⁶ The defendant may not be liable broadly in two situations. First, where one of the legal conditions of liability are not satisfied (such as an absence of fault for the purposes of liability under art 1240 Cc) and, secondly, where exceptionally a defendant is immune from liability in the sense that, although the conditions of that defendant’s liability are actually met, a special immunity rule protects the defendant. In French law, such an immunity normally exists where the claimant can turn to another defendant for compensation: see O Deshayes (ed), *Les immunités de responsabilité civile* (Paris, PUF, 2009).

¹¹⁷ J-S Borghetti, ‘The Culture of Tort Law in France’ (2012) 3 JETL 158, 173.