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France: French Tort Law in the Light of European Harmonization

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FRENCH TORT LAW IN THE LIGHT OF EUROPEAN HARMONIZATION

Olivier Moréteau*

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This inaugural chronicle of French law will focus on tort law or civil liability, to use civilian terminology. The first section presents forthcoming legislative evolution, commenting on two draft reforms that have not been debated in the National Assembly but are receiving much doctrinal attention inside and outside the country. The second section discusses a few recent cases. Both sections place French recent developments in the light of European Harmonization, particularly the Principles of European Tort Law, published in 2005 by the European group on Tort Law,[1] of which the author is a member, and the Draft Common Frame of Reference (DCFR), compiled under the supervision of the European Commission.[2]

I. THE DRAFT REFORMS OF FRENCH TORT LAW

A. The Draft Revision of the French Civil Code Tort Provisions[3]

At the Napoleonic time, French tort law was codified in five Civil Code articles, articles 1382 to 1386 of a chapter entitled "Of Delicts and Quasi-Delicts." These articles contain general clauses that have served as the basis for the development of a formidable and abundant jurisprudence. Law teachers find in this short chapter of Book III their best examples when they want to illustrate the creativity of the courts and the interaction of law professors and judges in the creation of the law. Legislative work has been very limited in the 150 years that followed the enactment of the *Code civil des Français*. Four of the five Code articles remain totally

1. EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (2005); PRINCIPES DU DROIT EUROPÉEN DE LA RESPONSABILITÉ CIVILE, TEXTES ET COMMENTAIRES (Olivier Moréteau ed., Michel Séjean Trans., Société de législation comparée 2011).

2. DRAFT COMMON FRAME OF REFERENCE (DCFR). FULL EDITION. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW (Sellier 2009).

3. This section was first published in FESTSCHRIFT FÜR ULRICH MAGNUS 77 (Peter Mankowski & Wolfgang Wurmnest eds., Sellier 2014) under the title *The Draft Reforms of French Tort Law in the Light of European Harmonization*.

unchanged. Slight modifications were made to paragraphs 2 and following of article 1384, whilst paragraph 1, still in its vintage drafting, served as the unintended seat for the development of an overreaching doctrine of strict liability for damage caused by the act of a thing (*fait des choses*).

Few developments were made outside the Code, such as workers' compensation legislation.[4] Only in the second half of the 20th century did legislative production accelerate, yet not so much to revise or complement the time-honored Civil Code articles,[5] but to create specific regimes by special laws ancillary to the Civil Code. The most noteworthy of these is the law of July 5, 1985 aiming at the improvement of the condition of road traffic accident victims and the acceleration of the compensation process.[6] Other special laws developed insurance coverage and created compensation funds for special categories of victims. French law moved from an individualistic system where victims had to bear their own losses except where damage was caused by the fault of another (*neminem laedere*), to a system where the victim occupies a central place, with the development of strict liability and the socialization of risks. Legal doctrine shifted from fault-based to risk-based liability, and Boris Starck later developed a *théorie de la garantie*[7] whereby law and society should guarantee compensation to most if not all victims. Under the impulse of such doctrines, judges and legislators raced to the bottom, pampering French citizens and residents, and obscuring Civil Code principles whilst mitigating the escalating cost of welfare by the allocation of modest compensation. On a number of significant points, French law strayed away from mainstream European ideas.

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4. Law of 9 April 1898.

5. With the exception of arts. 1386-1 to 1386-18 implementing the European directive of 1985 on product liability.

6. Alongside with the Civil Code articles, parts of it can be read in English in Olivier Moréteau, *France* in EUROPEAN TORT LAW, BASIC TEXTS 85 (K. Oliphant and B.C. Steininger eds., de Gruyter 2011).

7. On the evolution, *see* GENEVIÈVE VINEY, INTRODUCTION À LA RESPONSABILITÉ, nos. 33 to 56 (3d ed., L.G.D.J. 2008).

Whilst French tort law developed a victim friendly attitude, much of the efforts to compensate victims were done through the development of a welfare system combining social security, compulsory insurance or compulsory insurance coverage of otherwise uninsurable risks, together with reinsurance and the development of compensation funds. Though solutions will often differ, this did not cause the traditional framework of French tort law to change: to a large extent, it remains conversant with mainstream European solutions.

In recent years, a movement took place to promote a revision of the French Civil Code regarding the law of obligations, including tort law. This coincided more or less in time with the final steps leading to the publication of major European projects such as the Draft Common Frame of Reference (hereinafter DCFR) and the Principles of European Tort Law (hereinafter PETL), the latter being available when the reform drafts came to be finalized. This paper offers a brief overview of these French reform projects, checking their impact on the architecture of the French Civil Code. It then considers to what extent they take into account recent European developments, with a special focus on their compatibility with the PETL.

B. The Rationale of the Draft Projects and their Impact on the Civil Code

On September 22nd, 2005, a substantial report was submitted to the French Minister of Justice to propose a comprehensive reform of the general part of the law of obligations.[8] The project leader was the much regretted Pierre Catala, Professor Emeritus at

8. AVANT-PROJET DE RÉFORME DU DROIT DES OBLIGATIONS ET DU DROIT DE LA PRESCRIPTION (Documentation française, P. Catala ed., 2006). Available in English at http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf [hereinafter Oxford translation] and http://www.henricapitant.org/node/73 [hereinafter Capitant translation]; *See* Olivier Moréteau, *France* in EUROPEAN TORT LAW 2005 270 nos. 1-11 (H. Koziol and B.C. Steininger eds., Springer 2006), and in EUROPEAN TORT LAW 2006 196 nos. 1-8 (H. Koziol and B.C. Steininger eds., Springer 2008).

Université Panthéon Assas Paris 2. It is the work of an impressive team, including Professor Geneviève Viney (Université Panthéon Sorbonne Paris 1), a former member of the European Group on Tort Law, in charge of the provisions dealing with civil liability (*responsabilité civile*) (hereinafter the Catala draft). This is a document of 225 pages, consisting in draft Civil Code articles preceded with explanatory preambles (at the beginning of each title) and sentences (at the beginning of each chapter, section, or paragraph), including a number of substantial footnotes.

In 2008 and 2011, another academic group proposed a reform of the general part of the law of obligations. Together with a team of some twenty distinguished scholars, François Terré, also Professor Emeritus at Université Panthéon Assas Paris 2, submitted two draft proposals, one to reform the law of contract (2008, hereinafter the Terré draft on contract)[9] and the other to reform the law of tort (2011, hereinafter the Terré draft).[10] Both were prepared with the cooperation of the Ministry of Justice under the aegis of the Academy of Moral and Political Sciences, of which Professor Terré is a distinguished member. Each publication opens with the draft Civil Code articles and continues with chapters presenting the project in general and each subdivision in particular.[11]

In the meantime, a bill (*proposition de loi*) was introduced, presented by Senator Laurent Béteille, limited to the *responsabilité civile* or delictual liability.[12] The Béteille draft is based on the civil

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9. POUR UNE RÉFORME DU DROIT DES CONTRATS (F. Terré ed., Dalloz 2008).

10. POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE (F. Terré ed., Dalloz 2011); *See* Olivier Moréteau, *France* in EUROPEAN TORT LAW 2011, at 216, nos. 1-11 (K. Oliphant and B.C. Steininger eds., de Gruyter 2012), and in EUROPEAN TORT LAW 2012, at 229, nos. 1-17 (K. Oliphant and B.C. Steininger eds., de Gruyter 2013).

11. *See* Olivier Moréteau, *François Terré (ed), Pour une réforme du droit de la responsabilité civile, Collection: Thèmes & commentaires (Dalloz, 2011). xiv +224 pages*, 4 JOURNAL OF EUROPEAN TORT LAW 342 (2013) (book review).

12. Proposition de loi portant réforme de la responsabilité civile, Sénat, no. 657 (9 July 2010).

liability part of the Catala draft, drafted under the leadership of Professor Geneviève Viney. No further action was taken on this bill, and no legislative action is scheduled for the months to come regarding tort law.

1. The Catala Draft: A Revision Adulterating the Civil Code

The Catala draft is the first ambitious and comprehensive attempt to reform the French Civil Code, since the post-war project to reform the Civil Code,[13] which influenced Civil Code reform in the 1960s and 70s, though in other domains. One may also mention the French-Italian project of a Code of Obligations, published in 1927.[14] The Catala draft is not a revolution, but an attempt to clarify the law, taking into account the impressive jurisprudential work of the Court of Cassation. In that sense, it proposes a revision rather than a recodification.[15] Civil Code article numbers are used in the draft. Specific rules governing civil liability are left outside the Civil Code with the exception of product liability, maintained in the Code at articles 1386 to 1386-17 and compensation of victims of road traffic accidents, moved to articles 1385 to 1385-5.

Fundamental questions are not left aside. The Group had to decide whether liability in tort and contract had to be dealt with separately, as in the present Code, or jointly, as recommended by some scholars. The draft deals with contractual and extra-contractual liability as a single question: all rules regarding contractual and extra-contractual liability are presented in one single section entitled Civil Liability (*responsabilité civile*). Tort

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13. *Commission de réforme du Code civil*, created in 1945 by a decree of General De Gaulle: Georges Ripert, *Le bilan d'un demi-siècle de vie juridique*, D. 1950 Chron. 1.

14. *See* 8 MARIO ROTONDI, INCHIESTE DI DIRITTO COMPARATO, LE PROJET FRANCO-ITALIEN DE CODE DES OBLIGATIONS (1980); VIII TRAVAUX DE L'ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, JOURNÉES ITALIENNES DE PAVIE ET MILAN (1953).

15. For an attempt to define these terms, *see* Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1104-1112 (2009).

and contract are to sleep in the same bed, which purists may describe as adultery. However, the Group refused to abandon the time-honored *règle du non-cumul* whereby a plaintiff cannot opt for tort liability where a contractual relationship may serve as a cause of action. The justification is that in so doing, the plaintiff may by-pass a contractual clause. This may be a sound argument, yet it is very often trumped by mandatory rules preventing the exclusion or limitation of some damages, especially physical harm. The group opted for a reasonable compromise, allowing the victim of physical harm to choose the most favorable regime.[16]

2. The Terré Drafts: A Recodification Perfecting the Civil Code

Contrary to the Catala draft, dealing with contractual and extra-contractual liability as a single question,[17] both Terré drafts keep with the traditional architecture of the *Code civil* (though not using Civil Code article numbers) and leave contract liability within the law of contract: tort law aims at restoring the victim to what the situation would be without the damage (negative or reliance interest) whereas contractual damages have the additional purpose of providing an equivalent to the expected benefit (positive or expectation interest).

The 2011 draft is limited to the law of civil delicts, abandoning the traditional distinction of delicts (intentional torts) and quasi-delicts (non-intentional torts), recently described as inaccurate.[18] The draft is phrased in general provisions and avoids definitions, to keep the Code flexible, as originally intended. In the overall presentation of the *responsabilité civile* project, Philippe Remy and

16. Art. 1341(2) Catala Draft.
17. A position reflected in the Béteille draft (*supra* note 12), at arts. 1386-24.
18. E. DESCHEEMAEKER, THE DIVISION OF WRONGS, A HISTORICAL COMPARATIVE STUDY 121-38 (Oxford Univ. Press 2009).

Jean-Sébastien Borghetti[19] explain why the Terré Group prefers the recodification option to a simple revision. The draft aims at reconciling the apparently irreconcilable: rebuilding a consistent, comprehensive code system, and making it compatible with leading European options, illustrating how French law had strayed away from both. Like in the Catala draft, general clauses are maintained, despite the development of specific regimes. There is no attempt to rewrite article 1382 (contrary to the Catala draft), and yet a significant addition is made, indicating that the damage must be "illicitly caused," which is a major breakthrough. The draft article 1 makes it clear that victims must bear their own losses and may only recover where the damage is caused in an illicit manner, which may cause Boris Starck to turn in his grave.[20]

C. A Quick Glance at the Drafts and their Compatibility with the PETL

1. Time Factors

Members of the Terré Group took into account both the PETL[21] and the DCFR. In a series of preliminary reflections written before the group started working and published along with the draft, Philippe Remy offers a critical appraisal of current French law,[22] opening various options such as consolidation (proposed in the Catala draft) or recodification, the latter being the option favored by the Group. Of the proposed choice between general clauses *à la Française*, a common law style catalogue of

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19. Philippe Remy & Jean-Sébastien Borghetti, *Présentation du projet de réforme de la responsabilité délictuelle*, in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 61 (F. Terré ed., Dalloz 2011).

20. The draft was described as a "bomb in the landscape of personal injury law" by victims' rights militants: Claudine Bernfeld, *Rapport Terré, Feu la réparation intégrale*, JCP 2012, no. 30.

21. Not fully available in French at the time of publication. *See* PRINCIPES DU DROIT EUROPÉEN DE LA RESPONSABILITÉ CIVILE, TEXTES ET COMMENTAIRES, *supra* note 1.

22. Philippe Remy, *Réflexions préliminaires sur le chapitre* Des délits, in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 61 (F. Terré ed., Dalloz 2011).

specific torts or to German like selective and hierarchized protected interests, the Group preferred the French option. In the preliminary chapter, Philippe Remy reviews the DCFR and the PETL like visiting a store or a catalogue, shopping for items that may serve the improvement of the French system and leaving aside those already abandoned by French jurisprudence, as being old-fashioned.[23] The draft, overall, aims at favoring European options whenever compatible with French views. It comes as no surprise that it is more European friendly than the Catala draft. Geneviève Viney, in charge of the civil liability part of the Catala draft, had left the European Group on Tort Law, and the author of the present article, who joined the Group in 2002, was not a member of the Catala taskforce nor of the Terré Group and had limited contacts with members of both groups during the period of conception and production. The PETL and DCFR were still in the making when the Catala Group was working and published its report.

2. Scope of Civil Liability

As mentioned already, the Terré draft is closer to mainstream European solutions than the Catala draft. The fact that it keeps the traditional distinction between tort and contract liability, in line with the DCFR,[24] rather than merging provisions on tort and contract damages as proposed by the Catala Group, provides a significant example. Except where otherwise provided, the compensation of physical and psychological harm (*atteintes à l'intégrité physique et psychique de la personne*) is to be exclusively regulated by the law of delicts, though occasioned in the context of contract performance (article 3). This is a useful clarification, the compensation of such losses having nothing to do

23. *Id*. at 43-59.
24. Art. 6:101(1) and 3:702 DCFR. *See* Remy & Borghetti, *supra* note 19, at 63 n.9.

with contractual damages[25] that aim at satisfying by equivalent the positive or expectation interest of the victim of non-performance. Failure to perform contractual obligations is indeed governed by the law of contract (article 4). The Terré Group insists on clear boundaries between contractual and delictual liability, and the unwritten *principe du non-cumul* remains a French signature.

Whether provisions on damages are gathered in one Code chapter (articles 1340-1386 Catala draft) or kept separate (Terré drafts) is not much of an issue, as long as distinct provisions exist for the compensation of purely contractual losses (expectation interest). The Catala draft, however, whilst making special provisions for contract damages, may be blamed for not making clear provisions directing to the award of expectation damages in case of non-performance of contract (*lucrum cessans*), a drawback if we compare with the clear wording of article 1149 of the French Civil Code and article 118 of the Terré draft on contract.

The Terré draft makes room for prevention, article 2 enabling the judge to order reasonable measures to prevent or stop the illicit act that the claimant is facing. Though not expressly articulated in the PETL, prevention is a purpose underlying art 2:104 PETL. Compensation of preventive expenses is also to be found in article 1344 Catala draft and article 51 Terré draft. In her *exposé des motifs* to the civil liability part of the Catala draft however, Geneviève Viney insists that prevention is not a specific function of tort law, although she refers to article 1369-1 Catala draft dealing with reparation in kind, which allows the judge to order the cessation of the illicit act.[26]

Section I of the Terré draft (*Du délit civil en général*) offers general provisions that apply not only to cases governed by the

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25. Hence a recent shift from contract to tort liability in cases of medical malpractice: Cass. Civ. 1, 3 June 2010, Bull. I no. 128; Olivier Moréteau, *France* in EUROPEAN TORT LAW 2010, at 175, nos. 4-10 (H. Koziol and B.C. Steininger eds., de Gruyter 2011).

26. Catala Draft, *supra* note 8. *See also* VINEY, *supra* note 7, at 155-58, no. 66-3.

general clause, but also in cases governed by the special regimes, forming a *droit commun* in the French sense. It first deals with fault (articles 5 to 7), offering a classical definition introducing the concept of illicit act in the French Code, where it is so far only implied (article 5), as opposed to article 1352 Catala draft, which makes no reference to the illicit character of the act.[27] Damage must be certain and is defined in a general clause as any harm to "an interest recognized and protected by the law,"[28] without any attempt to list such protected interests, although they are featured as separate heads of damage in Section IV of the draft dealing with compensation. One notes the recognition of collective interest such as in case of damage to the environment, whenever provided by the law (article 8 paragraph 2). Loss of a chance, though unnamed in article 9, is identified as a separate head of damage, like in article 1346 Catala draft, confirming a well-established jurisprudence and encompassing recent developments, here at variance from mainstream European solutions.

3. Causation

Causation is dealt with in different ways in both projects. The Catala draft deals with it in two short articles, with no attempt to define causation or give guidance, but simply insisting that a causal link must be proved (article 1347). The Terré draft defines causation (article 10), describing the cause of damage as any fact susceptible of producing it "according to the ordinary course of things and without which it would not have occurred." Article 10 also limits liability to immediate and direct consequences of the author's act. Causation may be established by all means, which must be understood as including presumptions.

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27. Though saying that the violation of a law or a regulation would be a delict: art. 1352 para. 2 Catala draft.

28. Art. 8, para. 1 Terré draft; *see also* art. 1343 Catala draft; art. 2:101 PETL.

Article 11 and 12 Terré draft deal with complex issues, proposing rules that are more detailed than the DCFR, yet without the fine-tuning of the PETL. The idea is to keep the system flexible, while providing the courts with guidelines. Article 11 makes room for solidary liability in case of multiple tortfeasors, with a solution similar to article 1348 Catala draft:

> [E]xcept as otherwise provided, those who caused the same damage are each answerable for the whole. If they all committed a fault, they contribute among themselves in proportion to the gravity of their respective fault. If none of them committed a fault, they contribute in equal shares. If only some of them committed a fault, they alone bear the final onus of the damage.

Article 12 provides: "[W]hen damage is caused by an undetermined member of a group of persons acting together, each one is answerable for the whole, except where proving that he could not have caused it."

4. Liability for Others

Liability for others is dealt with in article 13 Terré draft, providing an interesting structural change that was also discussed by the European Group on Tort Law, though not implemented in the PETL. Liability for others is not dealt with as a head of liability like fault or liability for the fact of things (*fait générateur*); it deals with imputation of compensation, shifting the onus to others. Article 13 locks liability for others to cases provided for by the law and to cases where there is a delict. This is a big change regarding liability of parents for the acts of their children, which had been stretched in scope beyond situations where a child was the author of a delict, with infants made liable for "objective fault" etc. One wonders whether the draft does not go too far when limiting the liability of parents for "the act of the minor," which seems to exclude liability for the act of things, animals, or buildings, which may be too restrictive (article 14), a restriction not to be found in

article 1356 of the Catala draft which otherwise makes similar provisions. Like the PETL, the Catala draft treats liability for others like a separate head of liability (act of a third party, articles 1355-1360).

The Terré draft also rearranges the development of a general doctrine of liability for others developed by the courts on the basis of the present article 1384 paragraph 1, into more suitable sub-categories: it adds to the strict liability of parents and tutors the strict liability of legal or natural persons entrusted by judicial or administrative decision or by contract with the task of organizing or monitoring the life of a minor (article 14), making a similar provision in the case of a major under protection (article 15). Other persons professionally in charge of monitoring another person's life are also answerable, though under a simple presumption of negligence (article 16). Similar provisions are to be found in articles 1355 to 1358 Catala draft.

Article 17 defines the scope of the employer's liability for the fact of the employee using modern language (unlike in article 1359 Catala draft, the antiquated *commettant* and *préposé* are replaced by *employeur* and *salarié*), yet with a dualistic approach, depending upon whether or not employer and employee are bound by a contract of employment. Where a contract exists, the employer is liable except when proving an abuse of function (*abus de function*) on the part of the employee, namely when acting without authorization for a purpose unconnected with the employment (article 17). Under the same article, the employee is liable for the consequences of his intentional fault, which does not mean that the employer will always be exonerated in such a case. Article 17 paragraph 3 Terré draft and article 1359.1 Catala draft exclude the liability of the employee acting within the limits of his employment when having committed no intentional fault. The Catala draft adds an exception for cases where the victim cannot recover from the employer or from insurance. This latter point is left open in article 6:102 PETL.

In the absence of a contract of employment, the liability of the employer is based on a simple presumption of negligence, the employee being liable for his own fault (article 18 Terré draft).

Article 1360 Catala draft makes special provision allowing victims to sue entities regulating or organizing the activity of independent workers, or entities controlling the activity of others, such as franchisors or parent companies.

5. Specific Regimes

Section II of the Terré draft deals with the main special delicts (*Des principaux délits spéciaux*), making clear that fault liability may be invoked in every circumstance (article 19 paragraph 1). However, a victim may not ride on several special regimes (article 19 paragraph 2). The general provision on liability for the act of things is maintained, though with a major qualification: it is limited to physical and psychological harm, which is a substantial reduction of the scope of the *Jand'heur* jurisprudence (article 20). Additional detail restates well established jurisprudence: the custodian is defined as the one having the use and the control of the thing (article 1354-2 Catala draft has it in one word only: *la maîtrise de la chose*), with a presumption that the owner has custody; as to the fact of the thing, it may lie either in its defects, in its abnormal position, its state, or its behavior. There is no reference to the dangerousness of the thing, which keeps well alive the French idiosyncrasy of strict liability for damages caused by any sort of things, though with a limited scope if we compare it to existing law and the Catala draft (article 1354 to 1354-4). No change is to be noted regarding the fact of animals (article 21) and buildings (article 22), the draft keeping the wording of article 1385 and 1386. Though the latter has been swallowed by article 1384 in recent jurisprudence,[29] it would regain its lost autonomy for the

29. Cass. Civ. 2, 22 October 2009, Bull II no. 255; Olivier Moréteau, *France* in EUROPEAN TORT LAW 2009, at 198, nos. 48-53 (H. Koziol and B.C. Steininger eds., de Gruyter 2010).

compensation of damage to property if excluded from the scope of liability for the fact of things.

A new special regime appears under the name of classified facilities, a substitute to liability for abnormally dangerous things to be found at article 1362 Catala draft, which echoes article 5:101 PETL. Article 23 reads:

> [E]xcept as otherwise provided, the operator of a facility classified in accordance with the Environment Code is answerable by operation of law for physical or psychological harm to persons or damage to property caused by its operation, when it is precisely the occurrence of the risk that justified classification that caused the damage.

Classification serves a preventive purpose. Liability is strict and exoneration causes are limited to the inexcusable fault of the victim or the intentional fact of a third party where such facts can be characterized as force majeure, which fits the scenario of an act of terrorism.

Another addition is codification of the doctrine of *trouble du voisinage*, the French version of nuisance, thus far a purely jurisprudential construct. Article 24 Terré draft does not differ much from what is proposed in article 1361 Catala draft, also setting normal inconvenience as the standard. Likewise, liability for damages caused by motor vehicles is added to the Civil Code (articles 25 to 28), yet with a few changes. Product liability (articles 29 to 42 Terré draft; articles 1386 to 1386-17 Catala draft) is of course based on the 1985 EU directive, with a few cosmetic changes. Section II ends with article 43 on medical malpractice. It makes health providers liable for damage caused by their fault, regardless of the existence of a contract. Non-fault liability may only prosper in those cases provided for in the Public Health Code.

6. Exclusion and Exoneration

The Terré draft addresses exclusion and exoneration, clearly distinguishing two concepts that are easily confused. Some defences aim at excluding liability altogether when, due to certain circumstances, there is no delictual conduct (article 45). Others exonerate totally or partially the author of a delict when some outside circumstances interfere with causation (articles 46 and 47). The Catala draft does not confuse the two, dealing with exoneration in articles 1349 to 1351-1, and justification or exclusion (though none of these words is used) in article 1352. The European Group on Tort Law preferred the use of the common law word "defences," using it as a generic title in the PETL (Title IV. Defences).[30]

a. Exclusion

On all accounts, both Catala and Terré drafts do not aim at changing the law but bringing useful clarification, whilst completing the *Code civil* with solutions that have been developed by the courts.

Exclusion is dealt with in article 1352 Catala draft, stating that there is no fault in situations provided for by articles 122-4 to 122-7 of the Penal Code. The Terré Group preferred to list these justifications in article 45: "as provided for by the Penal Code, no liability stems from the damaging act, if it was prescribed by legislative or regulatory provisions, imposed by a legitimate authority, or ordered by the necessity of self-defence or of safeguarding a higher interest."

Safeguard of a higher interest is taken care of in article 122-7 of the Penal Code, excluding liability when the defendant faces actual or imminent danger to herself, a stranger, or property, and accomplishes an act necessary to safeguard such person or

30. The French translation of Title IV (*Les causes limitatives et exonératoires de responsabilité*) reflects and amplifies the conceptual confusion in that part of the PETL.

property, except where the act is disproportionate. The Terré draft adds a qualification in the final part of article 45: if the higher interest to be safeguarded is not the victim's interest, the victim may claim "equitable" compensation. This may apply whenever it is necessary to damage third-party property in order to assist a person in a situation of imminent danger, such as breaking into a room to rescue a suffocating child. The drafters seem anxious to avoid a possible interplay with the law of unjustified enrichment,[31] though one may find it more equitable to allow the third party to be compensated by the safeguarded party on a *de in rem verso* basis rather than by the Good Samaritan on the basis of the final provision of article 45. The PETL are conducive of such a solution, excluding liability in case of necessity (article 7:101(1)(b)), the commentary explaining that restitution claims remain open in such a case.[32] However, the wording of article 45 leaves room for a claim against the enriched rather than against the Good Samaritan.

Last, but not least, *volenti non fit injuria* is reflected in the second paragraph of article 45, excluding compensation to the victim who consented to the damage, except in those cases where the law does not allow the victim to renounce the protection of the infringed interest, which echoes article 7:101(1) PETL. Likewise, The Catala draft excludes compensation where the victim sought the harm voluntarily (article 1350).

b. Exoneration

Exoneration is dealt with in articles 1349 to 1351-1 Catala draft and articles 46 and 47 Terré draft. All articles address cases where outside circumstances tamper with causation. Both drafts agree on

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31. Clothilde Grare-Didier, *Des causes d'exclusion ou d'exonération de la responsabilité* in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 185, 187 (F. Terré ed., Dalloz 2011). However, in the absence of a Civil Code article, *enrichissement sans cause* does not obey to stringent requirements, French jurisprudence making reference to equity: 2 MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, RESPONSABILITÉ CIVILE ET QUASI CONTRATS 447 et seq. (2d ed., PUF 2010).

32. Art. 7:101 PETL cmt. 13.

a generic use of *force majeure* that includes the act of a stranger or the act of the victim and is distinguished from a fortuitous event (*cas fortuit*), meant to be a sub-category (article 1349 Catala draft; article 46 Terré draft). When they can be characterized as force majeure, such acts exonerate the defendant, which reflects current court practice, which is not fully in line with article 7:102 PETL.[33] The drafts differ on the definition of force majeure.

According to article 1349 paragraph 3 Catala draft, "Force majeure is an unavoidable event that the actor could not foresee or whose effects one could not avoid through appropriate measures."[34] In this definition, unforeseeability and irresistibility are not cumulative conditions. Unforeseeability does not appear in the Terré definition. Article 46 defines force majeure as an event which, by itself or by its consequences, cannot be resisted through appropriate measures. This definition is at variance with that used in the context of contractual obligations, which does not generate problems given the clear separation of tort and contract liability in the Terré draft.[35]

Partial exoneration may only exist in case of fault of the victim, when it does not have the characteristics of force majeure (article 1351 Catala draft; article 47 Terré draft), which does not change the law and reflects article 8:101 PETL. However, the Catala draft requires the victim's fault to be serious (*faute grave*) for partial exoneration, when suffering physical harm. This solution is meant to be protective of victims of physical injury but it may add useless complexity. Both drafts exclude partial exoneration when the victim is deprived of judgment, meaning that minors must receive

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33. Art 7:102 PETL provides for full or partial exoneration and applies to strict liability only.

34. Capitant translation, *supra* note 8.

35. Irresistibility is the sole factor insisted on these days in tort cases: *See* GENEVIÈVE VINEY & PATRICE JOURDAIN, LES CONDITIONS DE LA RESPONSABILITÉ no. 396 (3rd ed., L.G.D.J. 2006). The Terré Group rightly keeps a requirement of reasonable foreseeability when force majeure is used in contractual obligations (art. 100 Terré draft on contract).

full compensation even when acting negligently.[36] This latter solution must be approved; it would have the effect of overruling a much criticized jurisprudence.[37]

7. Contract Clauses

Both drafts deal with contract clauses limiting or excluding liability, with a scope limited to tort liability in the case of the Terré draft. Liability for physical harm (to which the Terré draft adds psychological harm) may not be excluded or limited by a contract clause (article 1382-1 Catala draft; article 48 Terré draft). Liability for fault cannot be limited or excluded by a contract clause (article 1382-4 Catala draft; article 48 Terré draft). Unless otherwise provided, under article 48 Terré draft, no-fault liability may be limited or excluded by contract, but such limitation or exclusion has no effect regarding physical and psychological harm, in full accordance with the principle that "Life, bodily or mental integrity . . . enjoy the most extensive protection" (article 2:102(2) PETL).[38]

8. Compensation

The French Civil Code makes no provision regarding compensation. Rules have been developed by doctrine and jurisprudence, often adapting Civil Code provisions applicable to contract damages (articles 1146 to 1155).[39] This is therefore an important area where the Code needs to be completed. Both drafts

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36. Art. 1351-1 Catala draft; art. 47 Terré draft.

37. Cass. Plen. 9 May 1984, JCP 1984, II, 20255 (note N. Dejean de la Bâtie, 20256, note P. Jourdain), D. 1984 Jurisp. 525 (note F. Chabas). *See* Laurence Francoz-Terminal et al., *Children as Victims under French Law*, in CHILDREN IN TORT LAW, PART II: CHILDREN AS VICTIMS 89, 97, no. 27 (M. Martín-Casals ed., Springer 2007).

38. Christophe Quézel-Ambrunaz, *La responsabilité civile et les droits du Titre I du Livre I du Code civil, À la découverte d'une hiérarchisation des intérêts protégés*, RTDCiv 2012, 251.

39. GENEVIÈVE VINEY & PATRICE JOURDAIN, LES EFFETS DE LA RESPONSABILITÉ no. 56 (2d ed., L.G.D.J. 2001).

often make similar provisions, though the perspective may be different at times, due to differences in scope: over-inclusive view of civil liability in the Catala draft, encompassing contractual and extra-contractual obligations compared to the exclusive, tort-only approach of the Terré draft. Yet, as to what pertains to extra-contractual liability, both aim at compensating damage unjustly caused, thereby promoting prevention and cessation of illicit disorder. This paragraph will focus on some novelties or specificities of French law.

a. The Principle of Full Compensation

Full compensation of damage remains a cardinal principle, subject to exceptions that will be discussed below. The chief idea is to restore the victim to the position she would have been in if the wrong had not been committed (article 1370 Catala draft; article 49 Terré draft; compare with article 10:101 PETL and article 6:101(1) DCFR). According to article 1368 Catala draft and article 50 Terré draft, the judge has complete discretion when it comes to choosing between compensation by equivalent (damages) and restoration in kind. On this point, both drafts reflect the French tradition and do not follow the PETL.[40]

Both drafts (articles 1379-5 to 1379-8 Catala draft; articles 61 and 62 Terré draft) make sure that the victim receives full compensation, no more and no less, which is a key element in orchestrating subrogatory action by third-party payers such as welfare, social security, or insurance, in cases where the victim received full or partial payments from such third-party payers. All this is to be based on the interplay of Civil Code and special legislation.

b. Restoration in Kind

Restoration in kind must aim at suppressing, reducing, or compensating the damage (article 1369 Catala draft; article 51

40. Arts. 10:101 and 10:104 PETL favor damages over restoration in kind.

Terré draft). According to article 51 Terré draft, it may be supplemented with an allocation of damages, but may not interfere with the defendant's fundamental rights or impose an excessive burden, which echoes article 10:104 PETL. Article 1369-1 Catala draft and article 51 paragraph 2 Terré draft allow for self-help, provided that it is judicially authorized. The defendant may offer restoration in kind when damages are claimed (article 51 paragraph 3 Terré draft), which invites the judge to adopt the less costly option.

c. Assessment and Itemization of Damages

Both drafts invite the court to assess damages on the day of the judgment, taking into account the foreseeable evolution of the damage (article 1372 Catala draft; article 52 paragraph 1 Terré draft), in accordance with current jurisprudence. Additional compensation may be reclaimed when the damage happens to increase after judgment (article 1375 Catala draft; article 52 paragraph 1 Terré draft).

Article 1374 Catala draft and article 52 paragraph 2 Terré draft force the judge to detail the heads of damage. This breaks with the long-term Court of Cassation practice of accepting compensation by way of a lump sum, on the pretense that assessment of damage is a question of fact not to be reviewed by the highest court.[41] This does not mean that all lower courts refrain from giving detailed judgment: many decisions itemize heads of damage and assign reasons. However, for the sake of good justice and in furtherance of the principle of exact compensation, it is reasonable to request itemization in all cases. As a rule, itemization of damages does not restrict the victim's right to use the moneys freely, with private discretion, though the court may impose a particular appropriation in exceptional cases (article 1377 Catala draft; article 55 Terré draft).

41. VINEY & JOURDAIN, *supra* note 39, at no. 62.

d. Punitive Damages or Disgorgement of Illicit Profit

Article 1371 Catala draft makes provision for punitive damages: where an obviously intentional fault becomes a source of profit (*faute lucrative*), punitive damages may be awarded, in addition to compensatory damages. The amount of punitive damages must be clearly distinguished from compensatory damages and part of them may be made payable to the Public Treasury. Punitive damages may not be the object of insurance. Naming this additional award "punitive damages" may be a misnomer. It seems the purpose of the rule is not so much to punish the tortfeasor but disgorging illicit profit, with a reasonable allocation to the Public Treasury, to prevent or limit an unjustified enrichment of the victim.

The Terré draft has a similar provision, though more carefully drafted, since article 54 does not use the punitive damages terminology. Article 54 allows the disgorgement of illicit profits as a substitute to purely compensatory damages, provided there has been intentional fault aimed towards illicit gains (*faute lucrative*).[42] Under this rule, any amount exceeding pure compensation cannot be covered by liability insurance. The Terré Group carefully drafted article 54 so that it would be strictly restitution-based, thereby avoiding any confusion with punitive damages, which never was and should not be an option in French tort law. This is a much-needed provision, preferable to its Catala counterpart.

e. Mitigation of Damage

Both drafts plan to introduce a duty to mitigate damage into French law. Article 1373 Catala draft provides that "[w]hen the victim by sure, reasonable, and proportionate means might have reduced the extent or the aggravation of the injury suffered, his failure to do so will result in a reduction of his award, unless the

42. *See* Rodolphe Mésa, *Précisions sur la notion de faute lucrative et son régime*, JCP 2012, no. 625.

nature of the measures would be such as to violate his physical integrity."[43] Given the scope of the draft, this is meant to apply to liability in tort and in contract. Article 53 of the Terré draft introduces a similar duty though limited to tort law,[44] also saying it does not apply to cases of physical and psychological harm. In other cases, the judge may reduce the amount of damages awarded to the victim for failure to take safe and reasonable steps to mitigate the loss. Unlike the PECL,[45] the PETL make no provision to this effect. This would be a significant change in French tort law, though recent jurisprudence leans in this direction:[46] acceptable in the context of contracts, mitigation of damage is more controversial in tort law, but reflects the standard of conduct as articulated in article 4:102 PETL.

f. Physical Harm

Articles 1379 to 1379-3 Catala draft and articles 56 to 64 Terré draft deal with the compensation of physical and psychological harm, bringing much desirable clarification and certainty to the matter. These rules will not be discussed in much detail. There was considerable discussion on the subject at the time of the adoption of the special law on road traffic accidents (1985) and the matter received particular attention with a report by Professor Lambert-Faivre (2003) and the so-called *nomenclature Dintilhac* (2005), triggering subsequent legislative action in 2006 and 2010.[47] Reference must be made to tables or schedules adopted by way of regulation, in an itemized manner (article 1379-1 Catala draft;

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43. Capitant translation, *supra* note 8.

44. A comparable duty appears in art. 121 Terré draft on contract, which connects to the duty of good faith.

45. Art. 9:505 PECL.

46. Cass. Civ. 2, 24 November 2011, JCP 2012, no. 170 (note V. Rebeyrol); RTDCiv 2012, 324 (obs. P. Jourdain): this confusing case seems to limit the duty to damage to property, and to the prevention of additional damage that has not been caused yet, rather than mitigation of existing damage. *Id.* at 326.

47. For details, *see* Pauline Remy-Corlay, *De la réparation*, in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 191, 203 et seq. (F. Terré ed., Dalloz 2011).

articles 56 and 57 Terré draft). The victim's pre-existing condition is only to be taken into account to the extent that its adverse consequences began manifesting themselves at the time the victim was harmed (article 1379-2 Catala draft; article 57 Terré draft), which reflects current jurisprudence.[48] Article 1379 Catala draft and article 59 Terré draft define the scope of compensation, including actual and future expenses, lost income and loss of profits. Compensation of future losses can take the form of indexed periodic payments, which can later be changed into capital (article 1379-3 Catala draft; article 60 Terré draft).

g. Indirect Victims

Both drafts (article 1379 Catala draft; article 63 and 64 Terré draft) deal with the compensation of indirect victims (*victimes par ricochet*), who appear to benefit from much larger compensation awards compared to what they get in other jurisdictions.[49] The victim's dependents can be compensated for the loss of support. The Terré draft specifically refers to the spouse, parents, children, and special others living with the victim where the Catala draft refers to them under the generic name of *victimes par ricochet*. The Terré draft makes them eligible for compensation of moral damage, and may cumulate such compensation with rights they receive from the victim as successors in case of death (article 63). Compensation of their indirect damage (*dommage réfléchi*) is subjected to exoneration causes affecting the direct victim's claim. Indirect damage may not be compensated outside the scope of article 63, except in exceptional cases and for very specific reasons (article 64). These rules come close to articles 10:202(2), 10:301(1), and 8:101(2) PETL.

h. Damage to Property

Both drafts adopt classical solutions regarding compensation of damage to property. When a corporeal thing is damaged, the victim

48. *Id*. at 204.
49. *Id*. at 218.

is entitled to the cost of repair or the cost of a replacement, whichever of the two is lower (article 65 Terré draft), or the cost of replacement if repair is costing more (article 1380 Catala draft). When none of these solutions is possible, compensation must reflect the value of the thing at the time of the judgment, taking into account its condition just before the damage occurred (article 1380-1 Catala draft; article 65 Terré draft). This looks slightly less generous than article 10:203(1) PETL which allows compensation to the extent of the upper bracket if the victim chooses the more expensive option, "if it is reasonable to do so." All related economic losses must be compensated (article 1380-2 Catala draft; article 66 Terré draft). In case of intentional harm causing serious non-pecuniary loss, the latter may be compensated (article 67 Terré draft). Article 1380-2 Catala draft is broad enough to support not only compensation of such a loss but also of any damage caused by loss of enjoyment.

i. Non-Pecuniary Damage

Pure non-pecuniary damage (*dommage moral*) is taken care of in the last two articles of the Terré draft (articles 68 and 69). The Catala draft mentions "non-economic and personal harm" at article 1379, listing psychological harm, pain and suffering, disfigurement, deprivation of pleasure (*préjudice d'agrément*), and sexual impairment.

Article 68 Terré draft opens a right to compensation for any form of harm to "moral integrity, particularly dignity, honour, reputation, or private life." This echoes article 10:301(1) PETL. Such a right is recognized not only to natural persons, but also to juridical persons in case of serious fault. This latter provision may seem rather odd, but finds some support in recent cases decided by the Court of Cassation[50] and by the European Court of Human

50. Cass. Com., 15 May 2012, Bull. IV no. 101, Olivier Moréteau, *France* in EUROPEAN TORT LAW 2012, at 229, 247-49, nos. 43-47 (K. Oliphant and BC Steininger eds., de Gruyter 2013).

Rights.[51] Professor Terré himself wrote a plea for its adoption, insisting that wrongful harm to the reputation of an enterprise may have serious adverse economic consequences. This is certainly true, but should we not characterize such harm as economic loss, though admittedly, it is of a class difficult to assess?[52] It is a good thing to have special provisions for pure non-pecuniary damage, but we should not forget that French law also makes room for the compensation of pure economic loss.[53]

The final provision relies on vast judicial discretion regarding the assessment of non-pecuniary harm, which cannot be tabled in any manner. According to article 69 Terré draft, damages may be nominal or exemplary when the harm was caused intentionally, thereby opening a broad spectrum, which may stretch as far as allowing a punitive element in the assessment of damages. Though mental integrity and human dignity rank very high on the scale of protected interests (article 2:102 PETL), this may not warrant such a generous provision, especially when protection is not limited to natural persons. This exemplary-damages provision does not reflect the spirit of the draft, which aims at the exact assessment of damage, full compensation, and avoidance of unjustified enrichment. Such right is recognized not only to natural persons, but also to juridical persons in case of serious fault, which is controversial, especially in a system where tort law opens

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51. *See* Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, 28.6.2007, (ECHR), recognizing that an association is entitled to the protection of its correspondence. Remy-Corlay, *supra* note 47, at 221.

52. François Terré, *Le préjudice moral*, in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 223 (F. Terré ed., Dalloz 2011). The author recognizes that it is difficult in such cases to distinguish non-pecuniary and economic damage. *Id*. at 224.

53. MARCEL PLANIOL & GEORGES RIPERT, 6 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS, OBLIGATIONS, PART I, at no. 552 (P. Esmein ed., 2d ed., L.G.D.J. 1952), wisely state that a juridical person cannot suffer and therefore cannot be victim of non-pecuniary damage, adding that when courts offer such compensation, either they want to compensate a pecuniary damage that they are unable to assess, or they want to impose a non-criminal penalty, camouflaged under the name of compensation of non-pecuniary damages.

compensation for pure economic loss. Were this to pass into law, it would be hoped that French judges will not use it as a gateway towards punitive damages and will rather make sure that the spirit of the whole reform prevails.

D. Conclusion

It is to be hoped that these remarkable projects will turn into a legislative draft in the not too distant future, in order to rejuvenate the French *Code civil*. We know of too many enlightened drafts that, in other European countries, have not been turned into legislation in this fertile area of the law. The fact that the legislative process starts moving regarding contractual obligations (Project de loi of November 27, 2013) is encouraging.

If a choice is to be expressed, the author has a strong preference for the Terré draft, which is more in harmony not only with the spirit of the French Civil Code, but also with current European trends. It reflects a perfect understanding of the Code dynamic and taxonomy. Its logic is flawless. Its style is impeccable, making Francois Terré a worthy follower of Portalis' philosophy. It may also be praised for leaving article 1382 intact, not only because it is iconic, but because it expresses the essence of the Civil Code.

The Catala attempt to rewrite art 1382 Civil Code is at best questionable, if not iconoclast. It looks as vain as repainting Delacroix' *La liberté guidant le peuple* or re-sculpting Michelangelo's Moses. One may repaint the Eiffel Tower or replace an elevator, but making it higher would change a marker of French identity. Art 1382 is known the world over; it is the Mona Lisa of the legal Louvre. It lives in the eye of the citizen and the judge alike. Changing it is like tampering with the Declaration of the Rights of Man and the Citizen.

Let us fix the minor flaws in the final articles and have the representatives of the French people vote the Terré draft into law,

rather than moving it by delegated legislation as planned for contractual obligations. The Civil Code will be more complete and reflect more European harmony.

II. RECENT JURISPRUDENCE IN FRENCH TORT LAW

Over the past ten years, I have had the privilege of reporting on French tort law for the European Yearbook of Tort law, published by the Vienna based European Centre of Tort and Insurance Law.[54] The following are selected cases commented in the five most recent volumes. The first cases deal with the environmental disaster caused by the sinking of the tanker Erika. A second series of cases deals with proportional liability, showing how French courts, whilst dealing with causation problems in a French pragmatic way, happen to be in line with the Principles of European Tort Law.

A. The Sinking of the Tanker Erika and the Advent of Environmental Damage

The tanker Erika split in two off the French Atlantic coast in severe weather on December 12, 1999 and spilled 15,000 tonnes of her heavy fuel oil cargo. The entire crew of 26 was airlifted to safety. The two sections, with a further 15,000 tonnes of fuel oil remaining in the cargo tanks, sank in 120 metres of water about 100 km from the mouth of the River Loire. The spilt cargo was blown east towards the coast and on December 25 the first oil washed ashore. By early January various stretches along a 400 km length of French coastline had been polluted, and thousands of seabirds had been oiled. The State, a number of local authorities, associations, and individuals had initiated criminal proceedings, together with claims in damages (*plaintes avec constitution de partie civile*), against Total, the French multinational oil company

54. Professor Michel Séjean (Université de Bretagne-Sud) has taken over as of 2013.

owning the cargo, the carrier, and other protagonists of the catastrophe.

Criminal proceedings were initiated against the ship-owner, but also against the owners of the cargo, the Total oil company. In a judgment of January 2008, the Paris court of first instance found them guilty of marine pollution, and sentenced them to fines ranging from € 75,000 for individuals to € 375,000 for corporations. In addition, the Paris court found all parties liable, awarding a total of € 165 million to a wide range of victims, including a sum to compensate "damage resulting from harm to the environment."[55]

The carrier's liability was confirmed by the Court of Appeal in Paris in a judgment of March 30, 2010, increasing the total amount of damages to over € 200 million. Criminal sentences were confirmed, also against Total, who had inspected and vetted the vessel. Total was found criminally guilty but not civilly liable, the Paris Court of Appeal reversing the first judgment on this point. Liability was based on the International Convention on Civil Liability for Oil Pollution Damage. The Convention places liability on the carrier, and not on the owners of the cargo.[56]

Appeal (*pourvoi*) was made to the Court of Cassation. In a lengthy, very detailed judgment, the Criminal Chamber of the Court of Cassation upheld the judgment of the Paris Court, reversing on one point only: Total, as owner of the cargo, is also to be found solidarily liable on the basis of the International Convention, for having interfered with the carriage, and based on the trial judge's finding, the Court of Cassation agrees that Total's fault satisfies the requirement of recklessness (the Court uses the

55. TGI Paris, 16 January 2008, commented in Olivier Moréteau, *France* in EUROPEAN TORT LAW 2008, at 264, 278-80, nos. 48–55 (H. Koziol and B.C. Steininger eds., Springer 2009).

56. CA Paris, 30 March 2010, no. 08-02278, JCP 2010, no. 432 (note K. Le Couviour), commented in Olivier Moréteau, *France* in EUROPEAN TORT LAW 2010, at 175, 192-95, nos. 48–58 (H. Koziol and B.C. Steininger eds., de Gruyter 2011).

term *faute de témérité*), meaning that liability can be extended from the carrier to the charterer of the vessel.

The latest Court of Cassation judgment[57] is bringing a long judicial story[58] to a happy end. There would be a lot to say on this very lengthy decision, the longest the reporter has ever read from a court known for the brevity of its judgments (107 pages in two-column fine print in the official Bulletin), but the present report will only focus on the points having an impact on general tort law.

First, the concept of environmental or ecological harm (*préjudice écologique*) is now officially recognized at the highest level of the French judiciary,[59] a concept that will need to be narrowed down in the years to come[60] and may also find legislative recognition in the Civil Code.[61] This is a remarkable achievement, especially as the Advocate General denied the autonomy of environmental harm, arguing that it is not distinct from the harm suffered by the environmental non-profit associations, but rather merges within their non-pecuniary damage.[62]

The Paris *Tribunal de grande instance*[63] declared that compensation of environmental harm was owed to "the local authorities to whom the law grants a specific competence in matter

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57. Cass. Crim., 25 September 2012, no. 10-82938, Bull. Crim. no. 198, D. 2012, at 2711 (note P. Delebecque); RTDCiv 2013, 119 (obs. P. Jourdain); commented in Olivier Moréteau, *France* in EUROPEAN TORT LAW 2012, at 229, 249-52, nos. 48–55 (K. Oliphant & B.C. Steininger eds., de Gruyter 2013).

58. *See also* Cass. Civ. 3, 17 December 2008, D. 2009, at 701 (note M. Boutonnet), commented in Olivier Moréteau, *France* in EUROPEAN TORT LAW 2009, at 198, 210-213, nos. 35-42 (H. Koziol and B.C. Steininger eds., 2010), decided on another claim generated by the same disaster.

59. It was first recognized by the Paris lower court in the first judgment. *See supra* note 55 & Moréteau, *supra* note 57.

60. Valérie Ravit & Olivier Sutterlin, *Réflexions sur le destin du préjudice économique « pur »*, D. 2012, at 2675.

61. Proposition no. 546 du Sénateur Retailleau, proposing the addition of article 1382-1: "Any act whatever of man that causes damage to the environment obliges him by whose fault it occured to repair it." As noted by Philippe Delebecque (*supra* note 57, at 2712), this would need further elaboration.

62. *See* Jourdain, *supra* note 57, at 120.

63. *Supra* note 55.

of environment, conferring upon them a special responsibility in the protection, management, and preservation of a territory."[64] Only those authorities having proved effective harm to a sensitive zone got compensation.[65] Given its object, the LPO (Ligue de protection des oiseaux) is also eligible. The Paris Court noted the large scope of the disaster on the thousands of birds hibernating in the region, and also the very efficient role of LPO in taking care of the birds during several months, in connecting with the local authorities and population, as well as its national and international representativeness.[66] Such harm appears to be considered objectively rather than in consideration of the person of the victim.[67] It had been recognized before but never with such high scale compensation.[68]

Second, Total had been found guilty of involuntary pollution, and liable for the consequences thereof by the Paris *Tribunal de grande instance*. The criminal part of the judgment had been affirmed by the Paris Appeal Court, but liability was denied. According to the appellate court, the International Convention on Civil Liability for Oil Pollution Damage places liability on the carrier, and not on the owners of the cargo. As a charterer, the oil company is not liable "unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[69] The Paris Court of Appeal recognised that the oil company had been negligent in chartering a tanker that was in an advanced state of decay. Total had after all participated in the vetting process; their representatives knew of the bad state of the

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64. Par. 3.1.2.2.2.3. of the Judgment.
65. *See supra* note 55.
66. Par. 3.1.2.2.6. of the Judgment.
67. *See* Laurent Neyret, *Naufrage de l'Erika: vers un droit commun de la réparation des atteintes à l'environnement*, D. 2008, 2681, 2685.
68. *See id.* at 2681, and Laurent Neyret, *La réparation des atteintes à l'environnement par le juge judiciaire*, D. 2008, 170, 172.
69. Art III(4)(c) of the the International Convention on Civil Liability for Oil Pollution Damage.

vessel. However, in the opinion of the Court, they did not act with full awareness that by so acting, pollution damage was very likely to ensue. Commenting this holding, the present reporter noted: "This part of the judgment should not resist the Court of Cassation scrutiny."[70] Indeed it did not. The highest court wisely recognized that the oil company had been reckless, a judgment found severe by a distinguished scholar who also claims that the duty of Total to control oil carriage is not a sufficient foundation for making the company liable as a carrier.[71]

It is difficult to contend however that the damage was not caused by some omission on the part of the oil company whose representatives participated in the vetting process. The first judges had found Total negligent and not reckless, yet finding them liable. This was wrong, the International Convention requesting recklessness to make the charterer liable. According to the Court of Cassation, rather than denying Total's liability, the appellate court should have characterized Total's fault as a *faute de témérité*, in other words recklessness. They were wrong in characterizing it as excusable.

Interestingly, courts in the United States are facing a similar challenge in the wake of the oil pollution in the Gulf of Mexico, after the explosion of the Deepwater Horizon offshore oilrig on April 20, 2010. Under the federal Oil Pollution Act, liability of the polluter is limited to $ 75 million in the case of an offshore facility such as the Deepwater Horizon oilrig.[72] However, limitations do not apply against a defendant acting with "gross negligence or wilful misconduct."[73]

Other competing provisions may apply, but the point is that the commonplace concepts of "recklessness" or "gross negligence" are central in the solving of major oil pollution cases. These apparently

70. Moréteau, *supra* note 56, at 193, no. 53.
71. Delebecque, *supra* note 57, at 2715. Professor Delebecque is president of the Chambre arbitrale maritime de Paris.
72. 33 U.S.C.A. § 2704(a)(3).
73. 33 U.S.C.A. § 2704(c)(1)(A).

simple words become the heart of the matter once the provision that enshrines them is found applicable. How are they to be interpreted? May each judge use his state or national standard? Should there be a federal standard (in the case of the United States) or an international one (when an international convention is applicable)? The question is relatively simple when discussing the liability of an individual, but becomes complex when applied to a corporation or a multinational group.

Professor Patrick Martin, an expert in mineral law and scholar in jurisprudence, looks at the matter with comparative law eyes, encompassing the common law, Roman law, and the Louisiana civil law.[74] His approach is primarily linguistic and philosophical. He cites, on the one hand, judges and scholars who find it impossible to identify shades of negligence and to classify it as slight, ordinary, or gross negligence. On the other hand, he cites other United States judges who claim that it is not even necessary to instruct juries on the matter of distinguishing ordinary and gross negligence, so much this distinction is common-sense. He finally cites an 1822 case, *Tracy v. Wood*, where Supreme Court Justice Story, sitting as circuit judge, noted:

> If a bag of apples were left in a street for a short time without a person to guard it, it would most certainly not be more than ordinary neglect. But if the bag were of jewels or of gold, such conduct would be gross negligence. In short care and diligence are to be proportioned to the value of the goods, and the temptation and facility of stealing them and the danger of losing them.[75]

Martin concludes: "the greater the degree of potential (or actual) harm, the greater the degree of negligence."[76] Transferring this to the Erika oil spill, the first Paris judges were no doubt wrong in holding Total liable without checking whether they had

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74. Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Wilful Misconduct,"* 71 LA. L. REV. 957 (2011).
75. Tracy v. Wood, 24 F. Cas. 117 (Story, Circuit Justice, C.C.D.R.I. 1822).
76. Martin, *supra* note 74, at 975.

been reckless and not simply negligent: the Convention could not be ignored. The Paris Appellate judges may be wrong in characterizing Total's fault as excusable in the circumstance. May one reasonably imagine that crude oil can safely be carried in an old and defective tanker around the hazardous coasts of Brittany, without thinking of a possible disaster? Transporting two gallons of oil in a defective container may be regarded as ordinary negligence. Carrying thousands of tons in an old and defective tanker is recklessness or gross negligence. It is good news that the Court of Cassation agrees.

B. Proportional Liability: French and European Perspectives Converge

Proportional liability is on the cutting edge of tort scholarship. The Principles of European Tort Law have proposed proportional liability as a response to causal uncertainty, an issue recently revisited by members of the European Group on Tort Law.[77] In particular cases where there are multiple tortfeasors or uncertainty of causation, various doctrines are applied, where the causation requirement is attenuated.

1. Multiple Tortfeasors, Concurrent and Alternative Causes

French jurisprudence does not accept that a victim may be undercompensated just because one or several of the tortfeasors may be unknown. For the sake of justice, it also wants to avoid shifting the whole burden of compensation on those tortfeasors who have been identified.

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77. PROPORTIONAL LIABILITY: ANALYTICAL AND COMPARATIVE PERSPECTIVES (Israel Gilead et al. eds., de Gruyter 2013). Some of the text that follows reproduces verbatim paragraphs of Olivier Moréteau, *Causal Uncertainty and Proportional Liability in France*, in PROPORTIONAL LIABILITY: ANALYTICAL AND COMPARATIVE PERSPECTIVES 141 (Israel Gilead et al. eds., de Gruyter 2013), more particularly nos. 9-15 and 18-25.

a. The Hunters' Cases

Some reverse engineering is needed to understand the law pertaining to compensation of victims of hunting accidents. Victims must be compensated and will be compensated. If no tortfeasor is identified, this will be done by a compensation fund.[78] If one hunter has been shooting, he may be held liable unless he can prove that his shotgun was pointed in another direction, shot another type of bullet, or that it was defective at the time. Liability may then fall on other identified hunters or an application for compensation may be filed to the compensation fund. If several hunters may have caused the damage, they can be made liable under one of the following doctrines: fault based liability (*faute commune*, *faute collective*), if acting as a group and guilty of a collective fault;[79] custody of the bullets when two guns shot simultaneously and at least two bullets hit the victim (*gerbe unique*);[80] or collective or joint custody of the bullets, also triggering strict liability for the fact of a thing under article 1384 paragraph 1.[81] The case where one hunter is identified and the others are not is not discussed in standard books. This sole identified hunter would most probably be made fully liable, and this would not be regarded inequitable since every hunter must by law carry third party insurance. If this hunter is uninsured or insolvent, recourse can be made to the compensation fund.

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78. A Compensation Fund was created in 1951 to compensate victims of automobile accidents where the tortfeasor cannot be identified. A law of 11 July 1966 extended the benefit of this Fund to victims of hunting accidents where the tortfeasor cannot be identified.

79. Old line of cases starting in 1950. *See* Cass. Civ. 2, 2 April 1997, Bull. II, no. 112; *see* PHILIPPE LE TOURNEAU ET AL., DROIT DE LA RESPONSABILITÉ ET DES CONTRATS. RÉGIMES D'INDEMNISATION no. 1724 (Dalloz 2012-13).

80. Cass. Civ. 2, 5 February 1960, D. 1960, 365 (note H. Aberkane).

81. Cass. Civ. 2, 9 October 1957, JCP 1957, 10308 (note R. Savatier).

b. The DES Cases

A scenario quite similar to the hunters' case can be found in a recent Distilbène case.[82] A woman suffered vaginal cancer allegedly caused by the fact that her own mother had been administered diethylstilboestrol or DES during pregnancy. No evidence was found of the details of the treatment: no prescription, no medical record (the doctor who treated the mother had died, and the record had disappeared). However, experts ascertained that the claimant's pathology was the consequence of her mother taking DES while pregnant. In addition, the victim's parents certified that the mother had taken Distilbène at that time, a fact corroborated by other witnesses. The victim sued UCB Pharma and Novartis, two companies that had produced and marketed diethylstilboestrol in France at the time, one under the name of Distilbène, and the other one under the generic name. However, everyone used the name Distilbène at the time, even to describe the generic DES. The victim could not prove which of the two companies had produced the substance her mother had taken. The Court of Cassation ruled that each of the two defendants had to prove that its product had not caused the damage, thereby creating a rebuttable presumption of causation. The two producers happened to supply the same commodity at the same time, rather than forming a group such as sport people or hunters in the typical cases. The judgment is based on the probability that one or the other of the two defendants caused the damage. It seems that the Court of Cassation decision is conducive of a 50-50 judgment, which may not be fair in the circumstances. At the time of the facts, UCB Pharma's market share was 80 to 90%, leaving only 10 to 20% to Novartis.

82. Cass. Civ. 1, 24 September 2009, Bull. I, no. 187, D. 2010, 49 (note Ph. Brun), RTDCiv 2010, 111 (obs. P. Jourdain); commented in Olivier Moréteau, *France* in EUROPEAN TORT LAW 2010, at 175, 185-87, nos. 29–37 (H. Koziol & B.C. Steininger eds., de Gruyter 2011), largely reproduced (often verbatim) in the present report.

Solidarity is not to be excluded, but Novartis's share should not exceed 20%.

Interestingly, the case may fall under two different provisions of the Principles of European Tort Law regarding causation. It may be regarded as a situation of concurrent causes. According to article 3:102, "In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage." This leads to solidarity because we have multiple tortfeasors.[83] Article 3:103(2) (alternative causes) may be a better fit:[84]

> In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage.

The European Group on Tort Law agreed that in cases of mass torts the burden of proof should not be too heavy on the victim,[85] which is precisely what the Court of Cassation is doing when creating a presumption of causation. The Court did not rule whether liability is joint or solidary. Logically, alternative causation excludes solidarity.[86]

We do not know whether in the present case the victim's mother took medication manufactured by one producer only, which may be one or the other (alternative causes). She may have been treated with the product of one, and then with that of the

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83. The case falls under art. 9:101(b) PETL:

> (1) Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where:
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> . . .
>
> b) one person's independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person.

84. *See* LE TOURNEAU ET AL., *supra* note 79, at no. 1732-2 (discussing the case under *alternative causation*).

85. Art. 3:103 PETL, cmt. J. Spier, 49 no. 9.

86. Solidarity implies plurality of causes: LE TOURNEAU ET AL., *supra* note 79, at no. 1736; *see also* art. 9:101(b) PETL.

other,[87] during the time of the pregnancy, in which case we have concurrent causes. The good news is that both articles lead to the same solution, though the "alternative causes" provision is more conducive of proportional liability, which looks like the best solution in the present case. Additional good news is that the French Court of Cassation ruled in compliance with the Principles of European Tort Law, even before the publication of the French edition by the *Société de législation comparée*.[88]

Another case decided by the same first Civil Chamber of the Court of Cassation, on June 17, 2010,[89] confirms the willingness of the Court to rely on presumptions of causation. A man had contracted a nosocomial infection after having spent time in two different hospitals but it was impossible to prove in which hospital he had actually contracted the infection. The Court ruled that "where there is evidence of a nosocomial infection but the latter may have been contracted in several health institutions, each of those whose liability is sought has to prove that it did not cause the infection." Though the facts are different, this is exactly what the Court ruled in the Distilbène case, in a case of alternative causes under the PETL.[90]

c. Asbestos Cases

Similar to hunting accidents, one must proceed by reverse analysis. Asbestos related damage is covered by the national health system (*Sécurité sociale*), with 100% coverage where the patient is recognized as suffering from long term condition (*longue maladie*). A compensation fund has been created by the law of December 23, 2000, so that no asbestos victim may be left without

87. Doctors sometimes shift to the generic form to save costs.
88. *See supra* note 1.
89. Cass. Civ. 1, 17 June 2010, Bull. I no. 137, D. 2010, 1625 (note I. Gallmeister); RTDCiv 2010, 567 (obs. P. Jourdain), JCP 2010, no. 1015, p. 1917 (obs. C. Bloch).
90. Art. 3:103 PETL.

compensation,[91] making proportional liability a moot question. Specific legislation has been adopted since 1975,[92] and tort law might apply, if necessary. An appellate court held an employer liable for damage suffered by the employee's spouse who suffered from lung disease as a consequence of the asbestos on her husband's clothing: the employer was held to have retained custody of the asbestos particles, which were not under the employee's control.[93] Employees may also sue employers on the basis of fault, and the Court of Cassation insists that this is an inexcusable fault (*manquement à une obligation de sécurité de résultat*),[94] thus triggering additional compensation by the *Sécurité sociale*.[95]

2. Uncertainty of Causation and Loss of a Chance

French courts routinely apply the doctrine of loss of a chance (*perte d'une chance*) whenever of the opinion that the defendant's activity deprived the victim of the opportunity of a favorable event when the victim can do nothing to remedy the situation. Loss of a chance is regarded as direct and certain damage. The French find it convenient to shift from causation to damage.[96] Rather than admitting that causation is partial or uncertain and follow a path similar to articles 3:101 to 3:106 of the Principles of European Tort Law (PETL), French courts regard loss of a chance as a head of damage that will be fully compensated.[97] As unorthodox as things may look from a theoretical point of view, it serves very pragmatic

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91. Law no. 2000-1257 of 23 December 2000, art. 53, creating the *Fonds d'indemnisation des victimes de l'amiante* (FIVA), financed by the *Sécurité sociale* (75%) and the State (25%). *See*, for more detail, LE TOURNEAU ET AL., *supra* note 79, nos. 8490–8494.

92. LE TOURNEAU ET AL., *supra* note 79, at nos. 8486–8489.

93. CA Caen, 20 November 2001, JCP 2003, II, 10045 (note F.G. Trébulle).

94. Cass. Soc., 28 February 2002 (six cases), Bull. V, no. 81; RTDCiv 2002, 310 (obs. P. Jourdain).

95. LE TOURNEAU ET AL., *supra* note 79, no. 8484.

96. VINEY & JOURDAIN, *supra* note 35, at no. 370.

97. Moréteau, *Causal Uncertainty and Proportional Liability in France*, *supra* note 77, at no. 2 .

purposes and has spread to other countries, both in the Romanist and Germanic branches of the civil law family.[98]

Loss of chance is frequently applied in cases of medical malpractice. Causation is tricky in medical malpractice cases due to scientific uncertainty. In a recent case,[99] a child was born in a clinic with severe and multiple handicaps caused by a neurological disorder. The parents sued the general practitioner and the gynecologist who monitored the pregnancy. They also sued the clinic where the mother delivered the child, together with the midwife, an employee of the clinic. All defendants were found liable *in solidum* for fault or negligence during the pregnancy and at the time of childbirth. They had proved that, unknown to the doctors at the time of the facts, the mother had a pre-existing condition that, in the opinion of experts, had a decisive but immeasurable influence on the handicap. However, the Court of Cassation concluded that the defendants' faults had in part caused the damage, which justify solidary liability for loss of a chance by the child to experience a lesser degree of cerebral infirmity, "regardless of the degree of uncertainty of the first origin of the handicap." Based on the judgment of the lower court, the victims were therefore to receive 75% compensation.

This is a typical example where to some extent, but to an unknown extent, the loss is in the victim's sphere, since the mother had been suffering from a pre-existing condition. The point was discussed at length by the European Group on Tort Law. According to article 3:106 of the Principles of European Tort Law, "The victim has to bear his loss to the extent corresponding to the

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98. HELMUT KOZIOL, BASIC QUESTIONS OF TORT LAW FROM A GERMANIC PERSPECTIVE 152-53 (Jan Sramek Verlag 2012).

99. Cass. Civ. 1, 28 January 2010, Bull. I, no. 19, D. 2010, 947 (note G. Maitre); JCP 2010, no. 474 (note S. Hocquet-Berg), RTDCiv 2010, 330 (obs. P. Jourdain); commented in Olivier Moréteau, *France* in EUROPEAN TORT LAW 2010, at 175, 182-84, nos. 20–28 (H. Koziol & B.C. Steininger eds., de Gruyter 2011), largely reproduced (often verbatim) in the present text. *See also* Moréteau, *Causal Uncertainty and Proportional Liability in France*, *supra* note 77, at nos. 23-25.

likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere." The Comments give the example of a medical malpractice case with a victim falling seriously ill, where "the illness may well have a 'natural' cause. The doctor is liable to the extent his malpractice may have caused the illness."[100]

Applying the doctrine of the loss of a chance to our case leads to a similar result. Rather than lamenting on an unorthodox use of loss of a chance,[101] one cannot but trust judges to make a reasonable assessment as to the percentage of liability to be placed on the defendant, when challenged with inconclusive evidence. In such doubtful cases, proportional liability is no doubt to be preferred to an "all-or-nothing" approach.

French law only allows for the compensation of a loss that is actual and certain.[102] The compensation of uncertain future loss is not permissible unless regarded as a loss of a chance.[103] French doctrine has identified two types of future losses.[104] The loss is virtual (*préjudice virtuel*) where it potentially exists as a consequence of the blameworthy conduct: all the conditions of its existence in the future already exist at the time of the facts, much like an embryo contains all the elements necessary for the development of a human life. The loss is hypothetical (*préjudice éventuel*) where its existence depends on events that may or may

100. Art. 3:106 PETL, cmt. J. Spier, 58 no. 13.

101. *See* Jourdain, *supra* note 99.

102. The following paragraphs reproduce Moréteau, *Causal Uncertainty and Proportional Liability in France*, *supra* note 77, no. 26-31.

103. The Court of Cassation accepts, in certain circumstances, that compensation be made conditional: a patient diagnosed with HIV after a faulty blood transfusion was awarded conditional damages, with payment subject to medical evidence that he developed AIDS as a consequence of contamination: Cass. Civ. 2, 20 July 1993, Bull. Civ. II, no. 274, RTDCiv 1994, 107 (obs. P. Jourdain). Likewise, where the sale of an immovable is nullified partly as a consequence of the notary's fault, the notary is under no obligation to compensate the buyer unless the latter proves that he failed to obtain restitution of the price from the seller, which again, makes compensation conditional: Cass. Civ. 1, 29 February 2000, Bull. Civ. I, no. 72, RTDCiv 2000, 576 (obs. P. Jourdain).

104. LE TOURNEAU ET AL., *supra* note 79, at no. 1414.

not occur, much like the eventuality of a human being to come to exist in case two persons of the opposite sex and able to procreate have intimate intercourse. If a CEO is prevented from concluding a promising contract because of an accident, the loss of benefit is regarded as hypothetical, since no-one knows whether the contract would have been concluded had the CEO not been prevented from conducting the negotiation.[105] The line is thin however, and one may want to decide that the CEO was presently and certainly deprived of a favourable opportunity, which is the test to decide whether a loss of a chance exists according to the most recent jurisprudence.[106]

A loss has to be virtual, not hypothetical, in order to be compensated as a loss of a chance. This may happen in cases where the occurrence of any future harm is uncertain, but also where the scope of the future harm is uncertain.

In the example of the CEO who was prevented from concluding a promising contract due to an accident, the occurrence of future harm is uncertain: nobody can tell for sure that the deal would have been concluded. French law applies a form of proportional liability whenever judges find that the plaintiff was presently and certainly deprived of a favourable opportunity. As explained above, compensation will be apportioned in the sense that it will be calculated as a share of the plaintiff's various heads of damage.

The compensation of loss of a chance in such situations has caused no unreasonable surge in litigation. The fact that damages are likely to be quite low may help keep floodgates sufficiently proof. On the other hand, compensation of loss of a chance has caused no known over-deterrence in the exercise of professional activity such as legal or medical practice. In dubious cases, courts

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105. Cass. Civ. 2, 12 June 1987, Bull. II, no. 128, RTDCiv 1988, 103 (obs. J. Mestre).

106. *See* the discussion of Cass. Civ. 1, 28 January 2010, *supra* note 99, and accompanying text above.

are more than likely to describe the loss as hypothetical and reject the claim, as eventually happened in the CEO case.

Cases in which harm has already been caused but the scope of this harm in the future is unknown are common. All cases where a victim suffers personal injury causing some form of disability seem to fall into this category. The loss of vision in an eye, the limitation in the use of an arm, or the loss of the ability to procreate, is no doubt existing harm. However, the scope of the loss for the future is unknown. The young person losing the opportunity to procreate may elect for a lifestyle where this causes no impediment or may be deprived of the chance of raising a small or larger family. Such unknown harm can be described as virtual since the condition exists at the time of the harm. It may be repaired as a loss of a chance.

However, French courts are likely to indemnify as *préjudice d'agrément*. This may cover the loss of a precise activity such as the possibility to do sports or to play the violin, in situations where the victim had already some practice.[107] However, Geneviève Viney voiced concern that such a narrow understanding of the *préjudice d'agrément* would be "elitist,"[108] expressing support for the extension to the general agreement of a normal life, as sometimes defined by the courts.[109] This is a form of non-pecuniary damage, the assessment of which is of course problematic, and will never be fully adequate in the parties' eyes.

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107. LE TOURNEAU ET AL., *supra* note 79, at no. 1586.

108. Geneviève Viney, *Responsabilité civile (Chronique d'actualité)*, JCP 1995, I, 3853, at no. 22.

109. Cass. Crim. 2 June 1964, D. 1964, 629 (*joies légitimes que l'on peut attendre de l'existence*); Cass. Crim. 5 March 1985, Bull. Crim., no. 105, D. 1986, 445 (note H. Groutel) (*privation des agréments d'une vie normale*).