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## Drawing the Line of the Scope of the Duty of Care in American Negligence and French Fault-Based Tort Liability

Karel Roynette

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# DRAWING THE LINE OF THE SCOPE OF THE DUTY OF CARE IN AMERICAN NEGLIGENCE AND FRENCH FAULT- BASED TORT LIABILITY

Karel Roynette\*

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## I. INTRODUCTION<sup>1</sup>

American tort law, through its wrong of negligence, may apply lower liability than the reasonable person standard to a defendant while French fault-based tort liability will always hold a tortfeasor liable for his unreasonable behavior. Indeed, under American law, the plaintiff must prove four elements to hold the defendant liable: the existence of a duty of care, its breach, damage, and causation which is further divided into two parts: cause in fact (as determined under the "but for" test requiring that the plaintiff's harm would not have occurred but for the defendant's conduct) and proximate cause (implying foreseeability of the damage).<sup>2</sup> Thus,

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1. This article is dealing only with wrongful liability and not strict liability, which covers two situations in French law (one's strict liability for damage caused by things or persons in one's custody) that probably plays a more important role than in American tort law.

2. DAN B. DOBBS, *THE LAW OF TORTS* § 114, at 269 (West 2001).

not all unreasonable behavior causing damage to the victim leads to liability for the defendant. The tortfeasor must first owe a duty to act reasonably toward the victim, so that the breach thereof can cause him to be liable in negligence to the plaintiff for the damage he brought about. If he is not under such a duty or is bound to a lighter duty, he is excused from liability, causing American tort law to be relative.<sup>3</sup> American scholars mostly justified this solution through the protection of the country's common economic good. Certain actors are to be released from the duty to act reasonably or bound only to a lighter duty when such release far better promotes economic competitiveness and efficiency.<sup>4</sup>

To the contrary, France doctrine provides for fault-based tort liability as applied under the single liability clause embodied in the French Civil Code's articles 1382 and 1383,<sup>5</sup> which governs all of one's intentional and negligent liability. Here, a defendant is liable if three elements are met: a fault (also known as "breach"), damage, and causation.<sup>6</sup> In other words, everyone is bound to a general duty of reasonable care and is found liable for the damage he caused to a victim as soon as he proved to have behaved unreasonably. It need not be shown that the tortfeasor owed the victim a specific duty of care in the first place for liability to

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3. Jean Limpens, Robert M. Kruithof & Anne Meinertzhagen-Limpens, *Liability for One's Own Act*, in [XI/1, Torts] INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, § 2-147, at 70 (André Tunc ed., Martinus Nijhoff Pubs. 1983).

4. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW §55.04, at 308 (2d ed., Thomson West 2003).

5. Civil Code art. 1382 reads: "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it." And art. 1383 provides that "[e]veryone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence."

6. See GENEVIÈVE VINEY & PATRICE JOURDAIN, LES CONDITIONS DE LA RESPONSABILITÉ, TRAITÉ DE DROIT CIVIL, § 246, at 1 (3d ed., Jacques Gesthin ed., L.G.D.J. 2006); WALTER VAN GERVEN, JEREMY LEVER & PIERRE LAROUCHE, COMMON LAW OF EUROPE CASEBOOKS, TORT LAW at 2-3 (Hart Publ'g 2000).

apply.<sup>7</sup> Accordingly, French fault-based tort liability is deemed to constitute a “general principle of liability for fault.”<sup>8</sup>

At first sight, this discrepancy of the scope of wrongful liability may be explained by the different ways these two countries deal with one’s liability under multiple torts or a single one. On the one hand, the United States uses separate torts, inherited from English law, to deal with each liability situation. Negligence is just the specific tort that handles the liability of those who behave carelessly.<sup>9</sup> On the other hand, France implements a single liability clause that provides for the liability of all of those who intentionally or negligently breach the duty of reasonable care.<sup>10</sup> Nevertheless, the American tort of negligence is very close to the French single liability clause. Like its French counterpart, it actually creates a general duty of care upon individuals who are held liable if they negligently (or even intentionally<sup>11</sup>) breach it and cause the victim damage. It is a general, “catch-all” liability rule which potentially offers endless protection against all wrongful misconducts to such extent that a duty of (reasonable or limited) care exists.<sup>12</sup> In this sense, it is very similar to the French

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7. VINEY & JOURDAIN, *supra* note 6, § 441, at 364-66; PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE STOFFEL-MUNCK, *LES OBLIGATIONS* § 53, at 30 (5th ed., Defrénois 2011); FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, *LES OBLIGATIONS, DROIT CIVIL* § 729, at 701 (8th ed. Dalloz 2002); Limpens et al., *supra* note 3, § 2-5, at 5, §2-23, at 13; VAN GERVEN ET AL., *supra* note 6, at 2-3.

8. See, e.g., Geneviève Viney, *Pour ou contre un principe général de responsabilité civile pour faute?*, 49 OSAKA UNIV. L. REV. 33, 34 (2002); MALAURIE ET AL., *supra* note 7, § 52, at 29-30.

9. MALAURIE ET AL., *supra* note 7, § 1, at 2-3; Limpens et al., *supra* note 3, § 2-16 & 2-17, at 10-11.

10. VINEY & JOURDAIN, *supra* note 6, § 450, at 380; Limpens et al., *supra* note 3, § 2-5, at 5, §2-23, at 13; VAN GERVEN ET AL., *supra* note 6, at 2-3.

11. However, in practice, when an American lawyer can argue both the existence of an intentional tort and negligence in a case, he will often choose the intentional tort, because it sometimes has a slightly broader scope and appears more outrageous for judges and juries who are inclined to award higher damages.

12. Limpens et al., *supra* note 3, § 2-18, at 5; CHRISTIAN VON BAR, 1 *THE COMMON EUROPEAN LAW OF TORTS* § 274, at 297-98 (Clarendon Press 1998); KONRAD ZWIEGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 623-24 (3d ed., Tony Weir trans., Clarendon Press 1998).

single liability clause, and the undertaking of a comparison between these two grounds of liability proves very relevant.<sup>13</sup>

Therefore, the issue of the determination of the scope of tortfeasors' liability for fault needs to be addressed in both countries to assess whether France really abides by general fault-based tort liability or if it actually implements relative tort liability to ensure its economic well-being, like the United States. This study claims that France departs from its general principle of liability for fault and instead applies relative tort liability like American law by diverting the *prima facie* case of one's liability for fault (especially the *force majeure* defense, causation and the duty itself). Thus, people in France are not always bound to the duty of reasonable care. They may be under limited liability with no duty of reasonable care at all, or only a lighter one. It is up to the plaintiff to prove that the defendant breached a duty and caused him damage in order to hold him civilly responsible. Otherwise, like in American negligence, he is excused from liability.

It must be emphasized that this piece will rely on hypotheses of both French tort and contract liability for the sake of its analysis. This is based on the fact that French contract law has a broader scope than American contract law and provides for liability that is usually covered in torts in America. Indeed, in American contract law, the general rule is that when a party fails to achieve the promised results and breaches the contract,<sup>14</sup> he is liable for the other contracting party's lost profit (expectations damages).<sup>15</sup> If he also happens to be negligent while performing his contract, he will be held accountable in tort for the property damage and personal injury he caused, unless there is an explicit or implied warranty

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13. GENEVIÈVE VINEY & BASIL MARKENIS, *LA RÉPARATION DU DOMMAGE CORPOREL*, *ESSAI DE COMPARAISON DES DROITS ANGLAIS ET FRANÇAIS* § 12, at 11 (Economica 1985).

14. This paper does not deal with other remedy issues such as the termination of the contract for material breach.

15. ANTHONY M. SKROCKI & CLAUDE D. ROHWER, *CONTRACTS IN A NUTSHELL* §9-2, at 315 (6th ed., Thomson West 2006).

granting the victim such recovery in contracts as well.<sup>16</sup> On the contrary, in France, when two parties freely enter into a contract, they are usually liable in contracts for the damage they cause to each other in the course of the performance of the contract,<sup>17</sup> especially for the damage that a third party would not otherwise suffer.<sup>18</sup> Tort liability cannot add up in these cases.<sup>19</sup> Accordingly, when a party breaches the contract, the breached party is entitled to expectation damages exactly like in American law.<sup>20</sup> Then, when specifically performing a contract requiring the achievement of some work, a party is deemed to be bound to an additional covenant to act like a reasonable person, causing him to be liable under this covenant to the opposing party for his property damage and personal injury if he fails to do so. This covenant similar to a warranty of workmanlike performance can be express<sup>21</sup> or implied (especially in service contracts)<sup>22</sup> in the law. Sometimes, French case law even adds to the contract a specific warranty to assure the other contracting party's safety during the performance of the

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16. EDWARD J. KIONKA, *TORTS IN A NUTSHELL* §10-1, at 191 (4th ed., Thomson West 2004).

17. See GENEVIÈVE VINEY, *INTRODUCTION A LA RESPONSABILITÉ, TRAITÉ DE DROIT CIVIL* § 185, at 327 (2d ed., Jacques Gesthin ed., L.G.D.J. 1995).

18. Specifically when based on the warranty to ensure someone's safety. See VINEY & JOURDAIN, *supra* note 6, § 501, at 470.

19. This is to offer actors the possibility to provide for liability limits (unless they commit intentional misconduct, or gross negligence, or they are accordingly entitled to a way out of the contract) that are only legal in contracts and not in torts. See VINEY, *supra* note 17, § 220, at 407.

20. See VINEY & JOURDAIN, *supra* note 6, § 251-2, at 31.

21. For instance, Civil Code art. 1880 reads regarding a loan for use: "[t]he borrower is bound to take care of the keeping and preservation of the thing loaned like a prudent owner."

22. Ex.1: A customer enters into a contract with a mechanic to change his car's brakes under French law. The mechanic fails to install the promised brakes. He is liable for the contract breach to the customer, and the customer may recover from him the extra costs he had to pay to another mechanic to install the right brakes.

Ex. 2: Same facts as in example 1, except that he installs the proper brakes in a defective way, and the customer gets into a car accident causing him to be injured and his car to be damaged. The mechanic is deemed here to be bound to an implied extra warranty of workmanlike performance. Therefore, the customer will recover for his bodily injury and property damage based on the breach thereof by the mechanic.

contract to allow such compensation.<sup>23</sup> Moreover, while a party breaching the contract by failing to achieve the promised result is strictly liable for his breach like in American law,<sup>24</sup> the party bound to such warranties has usually to use only his best efforts to act reasonably while performing the contract and he is only liable for failing to do so (i.e., for fault).<sup>25</sup> Thus, such liability for breach of warranties under French law relates more to tort law like in American law. As a result, this paper will integrate it into its analysis of the scope of limited French torts.

This study will start by emphasizing the American relative principle of negligence liability (Part II). Then, it will describe the traditional general principle of liability for fault in French law (Part III). Furthermore, France's implied limitations on the scope of the defendant's liability for fault will be addressed (Part IV). Lastly, a new approach officially establishing the existence of a limited duty of care in French fault-based tort law will be suggested (Part V).

## II. AMERICAN RELATIVE PRINCIPLE OF NEGLIGENCE LIABILITY

Inherited from English law, American negligence proves relative through the implementation of the duty element and proximate cause that limit the defendant's duty of reasonable care.<sup>26</sup> The defendant must breach a duty of care to which he owes the plaintiff and be able to foresee the risks created by his conduct to be held liable for the damage he caused to the victim. If he is under no duty or cannot predict the damaging result, he is not guilty of negligence. This paper will first deal with the duty of

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23. VINEY & JOURDAIN, *supra* note 6, § 499, at 453; VAN GERVEN ET AL., *supra* note 6, at 281.

24. In French law, this party is said to be bound to an obligation *de résultat*, i.e., to achieve a specific result. See VINEY & JOURDAIN, *supra* note 6, § 541, at 526.

25. French law qualifies this covenant as an obligation *de moyen*, i.e., to use one's best effort to perform it. However, it may be upgraded to an obligation *de résultat* to enhance the defendant's liability. See VINEY & JOURDAIN, *supra* note 6, § 541, at 526.

26. See discussion, *supra* Part I.



reasonable care as applied in negligence (A). Then, it will address the limits that the existence of a lower duty and proximate cause create on the scope of the defendant's duty (B). This present study will not talk about cause in fact and damage, because they do not come into play in defining one's liability limits.

#### *A. Breach of the Duty of Reasonable Care*

At first glance, the defendant is held liable when he breaches his duty of reasonable care (1). This breach is assessed according to several methods (2).

##### *1. Definition of the Duty of Reasonable Care*

The defendant breaches his duty of reasonable care when he behaves negligently (a). This can be varied by certain circumstances (b).

##### *a. Exercise of Reasonable Care*

The default rule is that people owe a general duty of reasonable care to their neighbors.<sup>27</sup> This means that they have to avoid injuring others by negligent conduct. It does not impose a duty to avoid all injury to others. The English landmark case *Blyth v. Birmingham Waterworks Co.* is one of the first cases to give the definition of reasonable care.<sup>28</sup> This case involved a constructor who had installed a water main in the street with fireplugs at various points. During an extremely cold winter, the frost caused the freezing water in the main to break force out the connection between some plugs and the water main. Later, when the main thawed, the water in it leaked out and flooded the plaintiff's house. The trial court found the constructor guilty of negligence and awarded the homeowner damages.

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27. See DOBBS, *supra* note 2, § 117, at 277.

28. *Blyth v. Birmingham Waterworks Co.*, 156 Eng. Rep. 1047 (1856).

The Court of Exchequer reversed the decision. It held that “negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.”<sup>29</sup> Here, the extreme severity of the frost in the year when the damage occurred proved exceptional compared to the usual weather in the area. A reasonable man would not have taken precautions against such extraordinary frosts. Therefore, the defendant was reasonable in not planning for this weather and could not be accountable for negligence.

The Restatement (Second) of Torts section 282 confirms that the defendant’s failure to exercise reasonable care causes him to be liable for negligence: “Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful.”

*b. Influence of Certain Circumstances*

Even though the standard of reasonable care is an objective standard, it depends on specific circumstances. It is said that the defendant must exercise the care that a reasonable and prudent person *under the same circumstances* would have exercised to avoid risks of harm to others.<sup>30</sup> First, external circumstances can relax the standard of reasonable care. Thus, in case of an emergency, the actor’s behavior is evaluated by comparison to the conduct that a reasonable and prudent person would have adopted in this dangerous situation. He is not liable if the reasonable and prudent person would have acted alike, even though in retrospect another course of action would have avoided the damage.<sup>31</sup>

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29. *Id.*

30. See DOBBS, *supra* note 2, § 117, at 277.

31. RESTATEMENT (SECOND) OF TORTS § 296 (ALI 1965); see DOBBS, *supra* note 2, § 129, at 304.

Secondly, the law takes into account the personal circumstances of the actor. On the one hand, this may lead to lighten the standard of reasonable care, especially for those that are of a young age<sup>32</sup> or physically disabled<sup>33</sup> (but not those mentally deficient in intelligence, judgment, memory, etc., the insane, and the intoxicated<sup>34</sup>). Thus, a minor<sup>35</sup> or a physically disabled person<sup>36</sup> is required to adhere to the standard of reasonable care of a minor of the same age or a disabled person affected by the same physical handicap. They are not required to meet the same standard of behavior as adults or those with normal physical capacity. That would be too high a burden to hold them liable for failing to conform to an impossible standard of physical conduct or maturity. On the other hand, special knowledge, skills, and experience may strengthen the standard of reasonable care. This usually involves professionals who perform licensed activities or occupations (physicians, attorneys, pilots, motorists, etc.) which cause the public to rely on them to supply services of quality. Therefore, the actor is held to a specific standard of reasonable care in the sense that he has to act like a reasonable and prudent person with such expertise, and not only with common knowledge.<sup>37</sup>

## *2. Method for Determining the Breach of the Duty of Care*

The plaintiff has to establish that the defendant breached his duty of reasonable care by failing to act like a reasonable and prudent person in order to hold him liable for negligence. The general method for determining whether the defendant breached

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32. See DOBBS, *supra* note 2, § 124, at 293.

33. *Id.* § 119, at 282.

34. *Id.* § 120, at 284.

35. Unless he engages in an adult's activities (such as operating a car or flying an airplane), in which case he is held to an adult standard of care; see, e.g., DOBBS, *supra* note 2, § 125, at 298.

36. Unless a reasonable and prudent disabled person would have behaved like a non-disabled person; see, e.g., DOBBS, *supra* note 2, § 119, at 282.

37. RESTATEMENT (SECOND) OF TORTS § 289; see DOBBS, *supra* note 2, § 122, at 290.

such a duty is to apply the risk-utility balancing test, defined by Judge Learned Hand in *United States v. Carroll Towing Co.* (a).<sup>38</sup> Customs and statutes can also impact the establishment of the duty of reasonable care (b).

*a. Risk-Utility Balancing Test*

In the *Carroll Towing* case, the owner of a barge hired a tug to move a barge containing a cargo of flooring materials belonging to the United States. However, the tug employees negligently moored the barge to a pier. As a result, the barge broke away from its mooring and hit a tanker's propeller, which tore a hole in the barge, eventually sinking it. The barge owner sought compensation from the tug owner for the cost of the cargo, for which he was accountable to the United States, and the loss of its barge. Yet the tug owner claimed that the barge owner had been contributorily negligent in not being continuously on board, and that he had to be found partially responsible for the loss of the cargo and the barge. Thus, the issue was whether it was reasonable for the barge owner not to have a bargee or attendant continuously present on board.

Judge Learned Hand set out his formula to determine whether the barge owner was liable:

It is a function of three variables: (1) the probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B is less than PL.<sup>39</sup>

Here, the accident occurred during World War II, when war activities caused barges to be constantly moved in and out of the crowded harbor. Therefore, the likelihood that the job of tying up the barge to the pier could not have been done with adequate care

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38. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

39. *Id.* at 173.

was fairly high. Moreover, the injury to the vessel was likely to be significant because of the presence of a large number of boats in comparison to the size of the harbor. Finally, the burden imposed on the barge owner to maintain an attendant on board was low, because the accident happened in winter, when the working hours of the employees in the harbor were shortened as the result of the fewer hours of daylight. Therefore, the burden of continuously having an employee on board was less than the probability of accident multiplied by the expected loss. In conclusion, the barge owner was held contributorily negligent in not having a member of his staff constantly present on board and received only partial compensation for his damage.<sup>40</sup>

*b. Impact of Customs and Statutes on the Duty of Reasonable Care*

Courts can also use complementary methods for establishing the duty of reasonable care. First, they can rely on customs. For instance, this covers the situation where the plaintiff argues that the defendant was negligent because he did not follow the customary practices in his business field. In this case, the custom is said to be used as a sword. Conversely, the defendant can assert that he followed the customary practice to prove that he did not act unreasonably and was careful. Here, he uses the custom as a shield. Generally, courts consider that customary practices do not set the standard of care, which remains the standard of a reasonable and prudent person under the same circumstances. It only gives some evidence of what this standard is.<sup>41</sup>

Second, judges can refer to the standards of conduct prescribed by statutory provisions to determine the duty of reasonable care. Not only do these include statutes passed by Congress and the state legislatures, but they also encompass municipal ordinances,

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40. This standard has been adopted by the Restatement (Second) of Torts §§ 291-293.

41. See DOBBS, *supra* note 2, § 163, at 393.

administrative regulations and even constitutions.<sup>42</sup> Then, to be admissible as a tort law standard of reasonable care, the statute must have been intended to protect a class of persons that includes the plaintiff against the particular risk of injury neglected by the defendant.<sup>43</sup> Finally, the statute may have varied weight when it is applied. In a few states, the violation of a statute is negligence per se and the defendant is automatically considered negligent.<sup>44</sup> In the majority of states, the defendant who violates a statute is presumed negligent, and he can rebut this presumption of negligence with contrary evidence.<sup>45</sup> In the other states (forming a considerable minority of states), the violation of a statute is merely evidence of negligence, meaning that the statute is considered together with other evidence to determine whether the defendant was negligent according to the Hand Formula.<sup>46</sup>

To hold the defendant liable, the plaintiff must also prove that the defendant's negligence in failing to take the reasonable precautions to avoid injuring him falls within the scope of the duty to which the defendant owes the plaintiff.

*B. Means to Limit the Scope of the Defendant's Duty of Care*

To constitute actionable negligence, the defendant's negligent conduct must fall within the scope of the duty that he owes to the victim. Traditionally, American law limited the scope of the defendant's liability by requiring that he was under such a duty to act reasonably and proximate cause was shown (1). Presently,, both of these principles are actually considered to relate to the same issue of the delimitation of the scope of the defendant's duty of care-based public policies (2).

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42. *Id.* § 133, at 311.

43. *Id.* § 137, at 323-26.

44. *Id.* § 134, at 315; *See* KIONKA, *supra* note 16, at 78.

45. *See* DOBBS, *supra* note 2, § 134, at 315.

46. *Id.* § 134, at 317.

*1. Traditional Limitations by Duty and Proximate Cause*

The defendant's liability was traditionally limited by the application of the duty element (a) and proximate cause (b).

*a. Duty*

Following the English common law of torts, American negligence law has always applied restrictions on the general duty of reasonable care when its enforcement would lead to unfair results.<sup>47</sup> Many categories of specific duties may actually overcome the general duty of reasonable care.<sup>48</sup> On the one hand, the defendant may owe no duty at all. He can never be held negligently liable, even though his conduct was unreasonably risky.<sup>49</sup> On the other hand, he may owe only a limited duty and the plaintiff will have to prove aggravated negligence.<sup>50</sup> For instance, the orthodox view is that no one owes a duty to act affirmatively to rescue someone else in the absence of some special relationship. Thus, a defendant could not be held liable for negligence because he watched a person with a visual disability step in front of a car and did not call out to him, even if it created no inconvenience or danger to do so.<sup>51</sup>

The determination of the existence and measure of the defendant's duty is decided by judges based on policy considerations, such as the extent to which the transaction was intended to affect the plaintiff, the foreseeability of the harm to the plaintiff, the degree of certainty of injury to him, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the

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47. *Id.* § 111, at 262.

48. *Id.* § 225, at 575.

49. *Id.* § 117, at 277.

50. *Id.* § 117, at 277.

51. *Id.* § 227, at 579.

policy of preventing future harm by deterrence, and the administrative problem for courts in enforcing the duty.<sup>52</sup>

*b. Proximate Cause*

The second mechanism by which the law has cordoned off one's liability is proximate cause. At the outset, it must be emphasized that proximate cause is different from cause in fact. Here, causation is established as the defendant's conduct is a necessary antecedent of the victim's damage.<sup>53</sup> Proximate cause rather looks upon policy considerations and holds that the defendant is liable only if, at the time he acted, he could reasonably foresee that the specific risk that his negligent conduct created would injure the victim.<sup>54</sup> It is a jury question that distinguishes it from duty.<sup>55</sup>

The *Wagon Mound* case, decided in England, illustrates this idea very well.<sup>56</sup> In this case, a ship discharged some oil into the water of the port of Sydney, near the dock where the plaintiff's employees were doing welding work. This oil fouled the plaintiff's dock. However, due to its high ignition point, the oil was unlikely to burn. But, randomly, some cotton waste was floating in the oil underneath the dock and caught fire when the worker dropped some molten metal on it. This ignited the oil, and the plaintiff's dock burned down. The plaintiff argued that, since the defendant could foresee that his oil spill could cause the plaintiff some injury by fouling his dock, he should be held liable for the entire damage which actually happened, the fire included. Nonetheless, the Privy Council held that the plaintiff could only recover for the injuries that the defendant should have anticipated at the time it released

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52. See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 379 P2d 513, 29 Cal. Rptr. 33 (1963).

53. See DOBBS, *supra* note 2, § 182, at 447.

54. *Id.* § 180, at 444.

55. *Id.* § 182, at 449.

56. *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (the "Wagon Mound")*, [1961] A.C. 388 (Privy Council 1961).



the oil into the water. Thus, he could recover only for the fouled docks, but not for the fire that was unforeseeable.

Following this case, it was later decided that it is the general risk/harm that must be foreseeable and not the special mechanism that brought it about.<sup>57</sup> In short, it is considered that the defendant is actually released from liability because there is an intervening, superseding event that makes the occurrence of the damage completely unpredictable.<sup>58</sup> For instance, there is such an unpredictable, superseding cause when “a bizarre, unforeseeable event gives rise to a risk different from the one the defendant should have anticipated.”<sup>59</sup> The same also happens when a third party unexpectedly commits an intentional tort, such as a crime.<sup>60</sup>

Accordingly, this actually creates a limit to the duty of reasonable care. One may not be liable while behaving unreasonably by failing to prevent probable damage in general from occurring to the victim. To be held accountable, he still has to be able to foresee the specific damage caused to the defendant as assessed under the reasonable person standard. As a result, he is only bound to a limited duty to preclude the specific damage that he could reasonably foresee.<sup>61</sup>

## *2. Modern Means to Limit the Scope of the Defendant's Duty of Care Based on Public Policies*

The modern approach limits the defendant's liability by requiring that the scope of his duty of care encompass the plaintiff's damage to hold him liable (a). This delimitation of the scope of his duty of care is based on public policies (b).

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57. See, e.g., *Hughes v. Lord Advocate*, A.C. 837 (H.L. 1962); see also RESTATEMENT (SECOND) OF TORTS § 289; and DOBBS, *supra* note 2, § 184, at 454.

58. RESTATEMENT (SECOND) OF TORTS § 186, at 460-661.

59. See RESTATEMENT (SECOND) OF TORTS § 442; JOSEPH W. GLANNON, *THE LAW OF TORTS, EXAMPLES AND EXPLANATIONS* 191 (3d ed., Aspen 2005).

60. See RESTATEMENT (SECOND) OF TORTS § 442; see GLANNON, *supra* note 59, at 192.

61. RESTATEMENT (SECOND) OF TORTS § 182, at 448.

*a. Principle*

Both duty and proximate cause achieve the same purpose. They ask the same policy question: should this particular defendant be liable for this precise damage to this specific victim under those special circumstances?<sup>62</sup> Thus, the defendant may no longer be under the general duty of reasonable care. He may owe the victim no duty at all, or he may be bound to a lighter duty that requires the victim to prove aggravated negligence, such as gross negligence.<sup>63</sup> As a result, they should be combined into the united concept of the scope of the defendant's duty of care.

The famous *Palsgraf* case supports this view.<sup>64</sup> A passenger dropped his package while the railroad company's employees helped him board a train that was leaving the station. The package contained fireworks that exploded when the luggage hit the ground. Then, a remote scale fell as a result of the blast and hit another passenger, Mrs. Palsgraf, who was waiting further down on the platform.

Justice Cardozo, writing for the majority, ruled that the establishment of the train company's duty of care and its ability to foresee the risk caused by its conduct are actually related to the same liability issue of the determination of the scope of its duty of care. The defendant is negligently liable if the scope of his duty encompasses the victim's damage, and this is the case when he is able to foresee the risks created for him. Here, the court deemed that the risk of explosion caused by a passenger dropping his luggage full of explosives while being helped to board the train was foreseeable. However, it was not predictable that the blast would knock a scale down onto a passenger standing hundreds of feet away. Therefore, the railroad did not owe any duty to the

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62. JOHN M. CHURCH, WILLIAM R. CORBETT, THOMAS E. RICHARD & JOHN V. WHITE, *TORT LAW – THE AMERICAN AND LOUISIANA PERSPECTIVES* 187 (Vandeplas Publ'g 2008).

63. See SHAPO, *supra* note 4, §55.01, at 301.

64. *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

victim and was excused from liability. Thus, duty and proximate cause constitute the same element requiring the scope of the defendant's duty of care to encompass the victim's damage to establish his liability. Whether the victim's harm falls within the scope of the defendant's duty is a question of public policy usually decided by judges.

*b. Public Policies Driving the Limits on the Scope of the Defendant's Duty*

As seen in *Palsgraf* case, the first and most common public policy which limits the scope of the defendant's liability is foreseeability of the risk. Here, similarly to proximate cause,<sup>65</sup> one is no longer required to behave reasonably to prevent probable risk in general from occurring. He is only bound to a limited duty to prevent the specific damage that he could reasonably foresee in order to be held liable for it.<sup>66</sup>

Regarding other public policies shaping the scope of the defendant's duty, Louisiana's *Pitre* case<sup>67</sup> can be cited as an example.<sup>68</sup> Here, a doctor negligently performed sterilization surgery on a woman; she subsequently became pregnant and gave birth to a child with albinism. The parents filed several actions to get their various damages compensated. First, they brought a wrongful pregnancy action. This action included the pain and suffering and the expenses incurred during the unwanted pregnancy and delivery, along with the economic cost of rearing an unplanned child. They also filed a wrongful birth action for the special expenses and the pain and suffering resulting from the child's deformity. Finally, they took a wrongful life action on behalf of the child for his damage for having to live with a defect.

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65. See discussion, *supra* Part II.B.1.b.

66. See *Palsgraf*, 162 N.E. 99 (N.Y. 1928).

67. *Pitre v. Opelousas General Hospital*, 530 So. 2d 1151 (La. 1988).

68. Even if Louisiana is a mixed jurisdiction, it applies the common law principles in tort law.

The Louisiana Supreme Court enunciated the different public policies that determine the scope of a defendant's liability for the damage caused to a victim. This scope depends on the foreseeability of the risk, the moral aspect of the defendant's conduct, the need for compensation, the need for incentive to prevent future harm, the relative ability of each class of litigants to bear and distribute loss, the historical development of precedent, and the efficient administration of the law.<sup>69</sup>

In applying these factors, it was decided that the physician's duty did not extend to compensate the child's defective life under the wrongful pregnancy action and he was, accordingly, excused from liability for it. Indeed, it would imply that the law values the fact of not being born higher than the fact of being born, which the High Court found inadmissible.<sup>70</sup> Then, the surgeon was relieved from the parent's wrongful birth action for the additional cost and pain of raising a disabled child. This handicap was not deemed foreseeable as a result of the surgery in reference to the scientific knowledge at the time.<sup>71</sup> Finally, the court held that the doctor's duty encompassed the wrongful pregnancy action. But, it allowed recovery only for the financial and psychological cost of the pregnancy and delivery. It denied compensation for the normal expenses of rearing a child, because a child is always "a blessing".<sup>72</sup>

Unlike American law, French tort law does not seem to limit the scope of the defendant's duty of reasonable care in determining his liability.

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69. See Pitre, 530 So.2d at 1161.

70. *Id.* at 1158. Moreover, it is doubtful that causation was established. It was the birth that was the cause in fact of the child's defective life, and not the doctor's negligence; see, e.g., DOBBS, *supra* note 2, § 291, at 792.

71. See Pitre, 530 So.2d at 1162.

72. *Id.* at 1161-62.

### III. TRADITIONAL GENERAL PRINCIPLE OF LIABILITY FOR FAULT IN FRENCH LAW

The French general principle of liability for fault is laid down in Civil Code articles 1382 and 1383.<sup>73</sup> According to these provisions, a defendant is held civilly responsible for his intentional or negligent misconduct when three elements are met. First, the defendant must have breached the duty of reasonable care to which everyone is bound. This element is called “fault” in France. Second, the plaintiff has to suffer damages that are of the same types as in American law. Third, some causation similar to American “cause in fact” needs to be proven.<sup>74</sup> There is no additional element that would limit the scope of the tortfeasor’s liability under certain circumstances. He is liable as soon as he behaved unreasonably and caused the victim damage. This section will address the general issue of fault which sets the general fault-based liability rule by dividing it into two aspects: the definition of fault as objective unlawful conduct (A), and its assessment based on the only standard of reasonable care (B). Damage and causation will not be dealt with in this part, since they apparently do not come into play in defining the limits on one’s liability.

#### *A. Definition of Fault as Objective Unlawful Behavior*

The concept of fault has evolved from subjective unlawful behavior (1) to objective illicit conduct (2).

##### *1. Classical Subjective Approach of Fault*

In the past, fault consisted of two elements. The first one required a violation of a pre-existing duty by the defendant. In

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73. See *supra* note 5.

74. In France, this is called “the theory of equivalence of conditions” and it is established when the damage would not have occurred but for the defendant’s negligence. See VINEY & JOURDAIN, *supra* note 6, § 339, at 188, § 355, at 199; MALAURIE ET AL., *supra* note 7, § 92, at 44; and VAN GERVEN ET AL., *supra* note 6, at 419.

other words, the fault was established when the actual conduct of the tortfeasor was inconsistent with the conduct required by legal duties. It was an objective element.<sup>75</sup> The second component demanded that the unlawful conduct be imputable to the actor in order to find him liable. This was the case if the actor had the psychological capacity of understanding and accepting the consequences of his conduct. This element was subjective.<sup>76</sup>

## 2. Modern Objective Conception of Fault

Today, to establish the defendant's fault, the plaintiff only has to prove that he objectively acted in an unlawful way. There is no longer need to demonstrate his conduct was imputable to him, i.e., he could understand that his conduct was unlawful. This evolution took place in two successive steps.

First, the legislature passed the Act of January 1968 to make mentally deficient adults liable for their negligence. This law, which was inserted in the Civil Code at article 489-2, reads: "A person who has caused damage to another when he was under the influence of a mental disorder is nonetheless liable to compensation." Thus, mentally disabled adults can now be held liable for negligence, even though their mental deficiency prevents them from realizing that their conduct is unlawful. The subjective element of imputability is no longer required for them.<sup>77</sup>

Then, the French Supreme Court for civil and criminal matters (*Cour de cassation*), sitting in its highest form, overthrew the requirement of imputability for children in four cases decided on May 9, 1984.<sup>78</sup> For example, in one of them, the Justices held a 13-

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75. See VINEY & JOURDAIN, *supra* note 6, § 443, at 367; see VAN GERVEN ET AL., *supra* note 6, at 301.

76. See VINEY & JOURDAIN, *supra* note 6, § 444, at 370; TERRÉ ET AL., *supra* note 7, § 732, at 703; and VAN GERVEN ET AL., *supra* note 6, at 301.

77. See VINEY & JOURDAIN, *supra* note 6, § 585, at 599; TERRE ET AL., *supra* note 7, § 733, at 704-705; and VAN GERVEN ET AL., *supra* note 6, at 332.

78. Ass. Plén., May 9, 1984, JCP, 1984, II, 20255, note Dejan de la Batie (Fr.), 20256, note P. Jourdain (Fr.), and 20291, rapport Fédou (Fr.); D., 1984, p. 525, note F. Chabas (Fr.).

year-old child contributorily negligent in being electrocuted after he failed to disengage the circuit-breaker prior to screwing the bulb on a light socket defectively assembled by an electrician. The Supreme Court especially denied having to assess the child's awareness of the illegality of his conduct to be able to hold him contributorily negligent. Thus, this decision shows that the actor commits a fault as soon as he objectively acts unlawfully. It is no longer required that his conduct was imputable to him.

French law only assesses the existence of fault based on a breach of the legal duty of reasonable care.

*B. Assessment of Fault Based on the Breach of the Duty of Reasonable Care*

The existence of fault is exclusively measured by reference to the breach of the duty to behave as a reasonable and prudent person placed under the same circumstances (1). This includes negligent actions and omissions (2).

*1. Benchmark of the Reasonable and Prudent Person Under the Same Circumstances*

Fault can first be established by the violation of the duty of reasonable care laid down by statutory provisions. It obviously includes conduct punished by criminal statutes passed by the legislature. It also encompasses behavior prohibited by other legislation enacted by the legislature or regulation decided by the executive or the administration.<sup>79</sup> Unlike American law, these statutes are unconditionally admissible as references of the standard of reasonable care.<sup>80</sup> There is no requirement that they were intended to protect the class of persons within which the plaintiff falls against the specific risk created by the defendant. Any violation of a mandatory statutory rule is also irrefutably

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79. See VINEY & JOURDAIN, *supra* note 6, § 448, at 375; TERRÉ ET AL., *supra* note 7, § 718, at 694-95; and VAN GERVEN ET AL., *supra* note 6, at 305.

80. *Id.*

illicit, and amounts to fault. The plaintiff does not need to prove that the tortfeasor acted negligently, imprudently or carelessly, and the defendant cannot bring in contrary evidence to be excused from liability.<sup>81</sup>

Furthermore, fault can result from the violation of the duty of reasonable care defined by case law. Like American law, French judges find defendants guilty of negligence when they did not act like a reasonable and prudent person. This ideal person is called the *bonus pater familias* or good family father, a standard inherited from Roman law and never rephrased despite its sexist overtone.<sup>82</sup> This standard of the reasonable person is an objective one. It is said that courts evaluate the defendant's behavior *in abstracto*.<sup>83</sup>

However, this *in abstracto* analysis does not prevent judges from referring to the conduct of the reasonable and circumspect person under *certain similar circumstances* to determine if the defendant was at fault.<sup>84</sup> External circumstances of the defendant's conduct are taken into account to assess his fault. Thus, the defendant's behavior is compared with that of a person who does the same activity as the defendant and is placed in the same circumstances of time and place. The professional character of the activity falls into this category.<sup>85</sup>

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81. See VINEY & JOURDAIN, *supra* note 6, § 448, at 375; TERRÉ ET AL., *supra* note 7, § 718, at 694-695; and VAN GERVEN ET AL., *supra* note 6, at 305.

82. Olivier Moréteau, *Post Scriptum to Law Making in a Global World: From Human Rights to a Law of Mankind*, 67 LA. L. REV. 1223, 1228 (2007); Olivier Moréteau, *Faut-il éliminer le « bon père de famille » du Code civil?*, [jurexpat.blog.lemonde.fr](http://jurexpat.blog.lemonde.fr) (blog entry, published 01/25/2014); Olivier Moréteau, *Basic Questions of Tort Law From a French Perspective* in BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE PERSPECTIVE no. 1/149 (Helmut Koziol ed., 2015).

83. See VINEY & JOURDAIN, *supra* note 6, § 463, at 401; MALAURIE ET AL., *supra* note 7, § 53, at 30; TERRÉ ET AL., *supra* note 7, § 729, at 701; and VAN GERVEN ET AL., *supra* note 6, at 307.

84. See VINEY & JOURDAIN, *supra* note 6, § 463, at 402; MALAURIE ET AL., *supra* note 7, § 53, at 30; TERRÉ ET AL., *supra* note 7, § 729, at 701; and VAN GERVEN ET AL., *supra* note 6, at 307.

85. See VINEY & JOURDAIN, *supra* note 6, § 464, at 375, § 471, at 410; TERRÉ ET AL., *supra* note 7, § 729, at 701; and VAN GERVEN ET AL., *supra* note 6, at 310.



Courts also account for certain internal circumstances. This is the case for the physical characteristics of the defendant. For instance, judges will assess the fault of a child or a disabled person by comparison with a child of the same age or with a person who is affected by the same disability.<sup>86</sup> However, the psychological traits (intelligence, qualities, mental deficiencies, etc.), and cultural and social characteristics (level of education, background, etc.) do not necessarily matter to establish the standard of the reasonable person.<sup>87</sup>

## *2. Inclusion of Negligent Actions and Omissions*

Contrary to American law, the breach of the duty of reasonable care can result, as a general rule, either from an act or from an omission to act. One of the most famous instances where the law creates a duty to take action lies in Criminal Code article 223-6. This provision imposes a duty to act upon anyone who is able “to prevent by immediate action a felony or a misdemeanor against the bodily integrity of a person” or “to offer assistance to a person in danger . . . without risk to himself or to third parties.” Therefore, the defendant who fails to prevent the perpetration of a crime on the victim or save him from a dangerous emergency, without risk to himself or a third party, commits a fault. As a result, the defendant is accountable to the victim for the damage that the crime or the emergency caused him.<sup>88</sup>

In conclusion, French tort law appears general as it always binds the defendant to only one standard of care, the harsh standard of reasonable care, to establish his liability. Nonetheless, it can be doubted that there are no limitations on the tortfeasor’s liability, which therefore proves to be relative.

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86. See VINEY & JOURDAIN, *supra* note 6, §§ 467-468 at 405-408; TERRÉ ET AL., *supra* note 7, § 729, at 701; and VAN GERVEN ET AL., *supra* note 6, at 310.

87. See VINEY & JOURDAIN, *supra* note 6, §§ 469-470 at 408-409; see VAN GERVEN ET AL., *supra* note 6, at 310.

88. See VINEY & JOURDAIN, *supra* note 6, § 452, at 381; TERRE ET AL., *supra* note 7, § 721, at 696-97; and VAN GERVEN ET AL., *supra* note 6, at 281.

#### IV. FRANCE'S IMPLIED LIMITATIONS ON THE SCOPE OF THE DEFENDANT'S LIABILITY FOR FAULT

France does recognize that the scope of the defendant's tort liability can be sometimes limited based on the enforcement of different public policies, and accordingly appear relative. In this case, he no longer owes the general duty of reasonable care. Instead, he is under a lighter duty or does not owe any duties at all.

However, unlike American law, these limitations are not clearly expressed in the law. They result from the application of various legal mechanisms that are involved in establishing the defendant's civil responsibility. Therefore, it is necessary to identify all of these diverse means that cordon off the actor's liability. First, the defendant can limit his duty of reasonable care by invoking the defense of force majeure (A). Then, causation is used to restrict the scope of tortfeasors' liability (B). Finally, the law itself sometimes implicitly imposes a limited duty on some defendants (C).

##### *A. Limitations of the Duty of Care Based on the Implementation of the Force Majeure Defense*

In French tort law, force majeure is a defense used by defendants who would otherwise be liable for the damage caused to their victims. It consists of an unpredictable, superseding event that makes the defendant unable to foresee and avoid the risk and damage that his behavior actually causes to the victim.<sup>89</sup> It can take three forms. First, it can be a natural event (earthquake, storm, lightening) or third parties' collective conduct (war). In addition, the victim's conduct can constitute such an intervening cause. Third, the intervening event may correspond to a third party's individual conduct (such as the perpetration of a crime).<sup>90</sup>

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89. See VINEY & JOURDAIN, *supra* note 6, § 392, at 265.

90. *Id.* § 383, at 251-52; MALAURIE ET AL., *supra* note 7, §§ 194-195, at 98-99; TERRÉ ET AL., *supra* note 7, § 796, at 755; and VAN GERVEN ET AL., *supra* note 6, at 434.

The traditional approach<sup>91</sup> considered that force majeure actually exonerated an actor from liability only if it was extraneous (foreign) to the defendant, unforeseeable, and unavoidable.<sup>92</sup> Modern case law and doctrine only require that the tortfeasor did not provoke the event,<sup>93</sup> and the intervening cause was unavoidable to immunize him from liability. They especially no longer demand that force majeure be unforeseeable. Indeed, an unforeseeable event is allegedly unavoidable by nature, because no one can prevent something unpredictable from happening. Accordingly, force majeure's unforeseeability element is considered as being encompassed in the unavoidability aspect which only determines the existence of force majeure.<sup>94</sup>

However, whether unavoidable based on its unforeseeability or by itself, force majeure appears to play out as a limitation on the scope of the defendant's duty of reasonable care according to different public policies. On the one hand, when it is deemed unavoidable based on its unforeseeability, it circumscribes the defendant's responsibility to the only risks that he could reasonably anticipate (1). On the other hand, when an unavoidable

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91. See, e.g., Cass. 2e civ., Jan. 5, 1994, Bull. Civ. II, No. 13 (Fr.) (relating to one's strict liability for damage caused by things in one's custody, but also valid for one's responsibility for negligence); see also Ass. plén., Apr. 14, 2006, Bull. civ. Ass. plén. n° 5 (Fr.); JCP, 2006, II, 10087, note P. Grosser (Fr.); D., 2006., p. 1577, note Patrice Jourdain; and VAN GERVEN ET AL., *supra* note 6, at 331, 334.

92. The victim's misconduct that does not qualify as force majeure can still constitute contributory negligence and lead to diminishing his compensation. See, e.g., Cass. 2e civ., Apr. 6, 1987, JCP, 1988, II, 20828, note F. Chabas (Fr.); D., 1988, p. 32, note C. Mouly (Fr.). Likewise, a third party's individual conduct which does not meet the force majeure elements may lessen the defendant's liability. He will still be accountable to the victim for the entire damage according to the French principle of solidary (joint and several) liability between joint tortfeasors. However, he will have a contribution action against the third party for his respective share of liability (at least when liability is based on fault). See, e.g., Cass. 2e civ., Jun. 25, 1970, D., 1971, p. 494, note F. Chabas (Fr.).

93. Thus, a happening that is internal to the defendant may constitute force majeure as long as it is not brought about by him (e.g., a disease). See, e.g., VINEY & JOURDAIN, *supra* note 6, § 385, at 254.

94. VINEY & JOURDAIN, *supra* note 6, § 396, at 270-73; MALAURIE ET AL., *supra* note 7, § 195, at 98, cmt. 83; TERRÉ ET AL., *supra* note 7, § 798, at 757.

event qualifies in itself as force majeure, it releases the tortfeasor from his duty to act reasonably based on the application of other public policies (2).

*1. Circumscribing of the Defendant's Responsibility to the Foreseeable Risks*

The general rule will be given (a) and an example will be provided (b).

*a. General Rule*

French law recognition of unavoidable force majeure based on its unforeseeability actually causes to limit the scope of the defendant's duty of care to the only reasonably foreseeable risks. Therefore, he is bound to a lighter duty of care and no longer owes a duty of reasonable care.

Classic French doctrine contends that the liability relief created by unavoidable force majeure as a result of its unforeseeability does not constitute an independent limitation on the scope of the liability of the defendant who is still under a duty of reasonable care. It argues that the restrictions established by this form of force majeure rather result from the mere implementation of the elements of the *prima facie* case for one's liability for fault, i.e., causation and fault. Thus, on one hand, the existence of unavoidable force majeure due to its unforeseeability allegedly overcomes the defendant's fault in the causal chain. It is only because a subsequent event later intervened and unexpectedly modified the chain of causation leading to the victim's injury that the tortfeasor's conduct "created" this damage. Therefore, the force majeure event is the only cause of the victim's damage, and the actor's conduct is not.<sup>95</sup> On the other hand, the actor is regarded as not at fault. Indeed, a reasonable and prudent person under the same (external) circumstances would not have foreseen the risk

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95. VINEY & JOURDAIN, *supra* note 6, § 403, at 284-85.

created by unavoidable force majeure based on its unforeseeability, provided that the foreseeability of its occurrence is assessed under the same reasonable person standard.<sup>96</sup> Therefore, it was reasonable for the defendant to behave as he did (i.e., injuring the plaintiff), and he committed no fault.<sup>97</sup>

However, it is untrue to assert that the occurrence of unavoidable force majeure based on its unforeseeability terminates the causal relationship between the actor's defective conduct and the injury in question. According to the equivalence of conditions (cause in fact) theory, there is causation: the victim would not have been injured but for the defendant's fault.<sup>98</sup> Therefore, the liability relief created by this kind of force majeure is not based on the mere implementation of the causation element within the framework of the establishment of one's liability for fault.

Likewise, the existence of unavoidable force majeure as a result of its unforeseeability does not necessarily excuse an actor from liability by taking away his fault. He may still have behaved unreasonably in this case by failing to prevent damage in general from occurring to the victim. Therefore, if he is excused from liability based on the occurrence of unforeseeable force majeure proving unavoidable, it is rather because he is only bound to a limited duty to prevent the specific damage that he could reasonably foresee in order to be held liable for it.<sup>99</sup> A slip-and-fall case illustrates this.

*b. Instance of Publicly-Owned Common Carriers' Restricted Duty of Care to Passengers as to the Land Condition*

The *Cour de Cassation*'s ruling of October 9, 1969 shows that the characterization of unavoidable force majeure based on its unforeseeability actually leads to limiting the scope of a

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96. *Id.* § 397, at 273-74, § 399, at 278-80.

97. *Id.* § 403, at 284-85.

98. See discussion, *supra* Part III (Introduction)

99. See discussion, *supra* Part II.B.2.b.

defendant's duty of care to the only reasonably foreseeable risks.<sup>100</sup> Here, a passenger of the Paris subway system slipped and fell on a banana peel that was on the floor in the hallway and sued the state-owned subway company. It must be specified that at that time courts bound common carriers to a warranty to ensure their passengers' safety while carrying them (even between connections) and held them liable for a breach thereof,<sup>101</sup> which was actually similar to tort law.<sup>102</sup>

In its ruling, the higher court considered that the metro station had been swept according to the safety instructions provided by the regulatory authority. As a result, it held that the banana peel incident constituted unavoidable force majeure due to its unforeseeability and released the subway entity from responsibility. Nevertheless, if the subway company failed to behave reasonably in sweeping the station to prevent damage in general from occurring to the victim, it should still have been liable to him for his slip-and-fall. Therefore, this actually limits the duty of the subway entity to prevent only the specific damage that it could reasonably foresee as to its premises such as required by the cleaning regulations, especially when it is a state-owned entity.<sup>103</sup>

On the other hand, when force majeure corresponds to an irresistible event by itself, it limits the scope of the defendant's responsibility based on other public policies.

## *2. Limits on the Defendant's Duty of Care Based on Other Public Policies*

The principle will be laid out (a), followed by a case to illuminate it (b).

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100. Cass. 2e civ., Oct. 9, 1968, Bull. Civ. II, No. 231 (Fr.).

101. This liability for warranty breach was even qualified as strict. See VINEY & JOURDAIN, *supra* note 6, § 553, at 549. Currently, tortious liability applies in this case; see, e.g., VINEY & JOURDAIN, *supra* note 6, § 553, at 551.

102. See discussion, *supra* Part I.

103. See discussion, *supra* Part II.B.2.b.

*a. Principle*

The existence of unavoidable force majeure in itself, which excuses the defendant from liability, creates a specific limit on the scope of his duty of reasonable care based on different public policies. This is what the analysis of French case law shows despite the opposite assertion of the classical doctrine. To classical French scholars, unavoidable force majeure in itself immunizes the defendant because it takes away his fault. Indeed, the actor usually takes all the necessary precautions to prevent the damage from happening. He acts like a reasonable and prudent person under the same (external) circumstances. It is only because there is an extraneous damaging event which is bound to happen that he causes the victim harm. Therefore, the defendant cannot be considered to have committed any fault nor held liable to the victim.<sup>104</sup>

However, it may occur that the defendant is still at fault in this type of case. He may prove to have behaved unreasonably by failing to prevent damage in general from occurring to the victim. Therefore, if he is relieved from liability as a result of the occurrence of unavoidable force majeure in itself, it is actually on the basis that he only owes a limited duty to prevent specific damage based on the enforcement of public policies in order to be held liable for it. A case about landowners' premises liability to third parties shows that.

*b. Example of Landowners' Limited Liability to Third Parties off of their Premises*

The *Cour de cassation's* decision of January 6, 1982 demonstrates that landowners are bound under French law to a

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104. See VINEY & JOURDAIN, *supra* note 6, § 403, at 284-86; see, e.g., Cass. 2e civ., Mar. 21, 1983, Bull. Civ. II, No. 89 (Fr.) (relating to an aero club not at fault for failing to prevent an inexperienced pilot from flying a plane and crashing it into a house after the novice pilot misled the aero club instructor into giving him control of the plane).

lighter duty than the standard of reasonable care when the natural or altered conditions of their premises create risks for people outside their property.<sup>105</sup> Here, a landowner had erected an embankment with various materials on his property. Later, a strong thunderstorm came. Because of the rain, a brook was turned into a violent torrent which washed away the materials. These objects eventually ended up blocking a dam, which caused the waterway to flood a near warehouse and damage all of the merchandise stored in it. The owner of the warehouse sued the landowner for his negligence in not securing the materials when knowing a severe storm was coming.

Referring to Civil Code Article 1382, the French Supreme Court held that the storm was an irresistible event that qualified as force majeure and released the landowner from liability for the damage caused to this third party as a result of the condition of his premises. However, the landowner may still have acted unreasonably in not preventing damage in general as a result of the failure to properly secure the equipment stored on his property in this hilly area of France where violent storms are frequent. Accordingly, the liability relief applied here means that the landowner is only bound to a lighter duty than the duty of reasonable care as to the specific damage that the condition of his premises may cause to third parties.

The French conception of the land possessor's liability can be compared to the American approach, which also applies a limited duty rule. The traditional rule is that the landowner does not owe the persons off the premises a duty to protect them against the risks created by the natural condition of the premises.<sup>106</sup> If the possessor or anyone else has altered the natural condition of the land so as to create or aggravate the risks, the possessor may be bound to a light duty of care.<sup>107</sup> The California case *Keys v. Romley* illustrates this

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105. Cass. 2e civ., Jan. 6, 1982, Bull. Civ. II, No. 3 (Fr.).

106. See DOBBS, *supra* note 2, § 231, at 587.

107. *Id.* § 231, at 590.



view.<sup>108</sup> Romley (through his lessee) built an ice rink on his property and paved around the building with asphalt. Around the same time, the Keys also improved their premises by building a store on it. They placed the dirt that they excavated at the rear of the property, which was adjacent to Romley's parcel. Later, they decided to remove the dirt and the rain run-off started to flow from Romley's property onto their land, which was located at a lower level. The construction of the rink and the paving on Romley's premises was found to be the cause of the flooding.

The Supreme Court of California held that the higher-ground owner who changed the natural system of drainage could be liable to the lower-ground owner according to the servitude of natural drainage. However, this was the case only if he did not take the reasonable precautions to avoid flooding the adjacent property, and the lower-ground owner did not reasonably undertake to remedy the nuisance.<sup>109</sup> Thus, the higher-ground landowner is bound to a light duty of care. He is no longer required to behave reasonably to prevent probable risk in general from occurring. It is only if he acted unreasonably and the defendant reasonably tried to solve the problem that he is liable. In this case, the higher court held that this rule was in the support of the public policy of improving the land and remanded the case to the lower court to determine whether Romley's liability arises from the flow path depending on the reasonableness of the removal of the dirt pile by the Keys.<sup>110</sup>

Judges also use causation as a method for limiting the scope of the defendant's liability.

*B. Application of the Adequacy Theory to Limit Tortfeasors' Responsibility*

French judges may limit the defendant's duty of care by setting aside the equivalence of conditions theory (or cause in fact theory)

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108. Keys v. Romley, 64 Cal. 2d 396 (1966).

109. *Id.* at 409.

110. *Id.* at 411.

and applying other causation standards, such as the adequacy theory. This mostly involves cases where several events combine to cause the plaintiff's indivisible injury.<sup>111</sup> According to the equivalence of conditions theory, each event that is a necessary antecedent of the occurrence of the accident should be recognized as the cause of the damage and lead to the perpetrator's liability.<sup>112</sup> However, under the adequacy theory, courts will qualify as "cause" only those events which, in reference to the scientific knowledge at the time they occur, can normally and foreseeably create the harm.<sup>113</sup> In doing so, courts actually intend to balance the equity and limit certain clumsy actors' duty in order to better punish more delinquent tortfeasors. This especially occurs when defendants commit greatly uneven faults (1) or cause subsequent damage remote in time (2).

### *1. Exoneration of Slight Faults in Presence of a Grave Fault*

Judges use causation to limit the duty of care of actors whose slight faults combine with a more serious one to bring about the victim's damage. They consider that, under the adequacy theory, the gravest fault constitutes the only cause of the injury and excuses all the perpetrators of the slight faults from liability.<sup>114</sup> Nevertheless, all those faults caused in fact the harm and should lead to the defendants' liability. Therefore, this means that France implements relative tort liability and slightly faulty defendants have no duty of care in the presence of a tortfeasor committing a grave fault.

The classical example of an accident caused by a stolen car illustrates this idea. In a March 4, 1981 case, Mrs. X left her car

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111. When defendants' different conducts caused the plaintiff separate damage, their behavior is regarded as the cause of only the part of the damage they brought about. *See* VINEY & JOURDAIN, *supra* note 6, § 381, at 247.

112. *See* discussion, *supra* Part III (Introduction).

113. *See* VINEY & JOURDAIN, *supra* note 6, § 340, at 188-89; MALAURIE ET AL., *supra* note 7, § 93, at 45; and TERRÉ ET AL., *supra* note 7, § 860, at 816.

114. *See* VINEY & JOURDAIN, *supra* note 6, § 357, at 202; *see* VAN GERVEN ET AL., *supra* note 6, at 420.

with the doors unlocked and the key in the ignition in front of her nephew's house at night.<sup>115</sup> Later, the nephew and his delinquent friends stole the car and collided with another car. The driver of the other vehicle sued the aunt for negligence. The *Cour de Cassation* ruled that only the nephew's grave negligent driving was the cause of the collision. Mrs. X's alleged negligence did not constitute the cause of the accident. As a result, it dismissed the claim against the aunt for negligence.

Here, it is of note that negligence on the part of the car owner applies. She unreasonably left her car on a city street, unlocked, with the keys in the ignition, thereby opening the way for a thief to steal it and have a car accident with it. Therefore, cause in fact was established as the thief would not have stolen the car and caused an accident but for the owner's negligence in leaving it unlocked.<sup>116</sup>

Thus, when French Justices consider that the owner's negligence in leaving his car unlocked with the keys in the ignition may never be the cause of the car accident between the thief and the victim, they actually limit his duty of care. According to the equivalence of conditions theory, there is causation. If car owners are not liable in fact, it is rather because their duty does not extend to third parties' criminal conduct.

Defendant's liability is also excluded for subsequent damage too remote in time.

## *2. Liability Exclusion for Subsequent Damage too Remote in Time*

When a prior accident concurred with a second event to bring about new damage, case law often uses the adequacy theory to decide that only the second incident caused the new injury. The previous accident remote in time is left out of the causal chain, though it was a necessary antecedent according to the equivalence

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115. Cass. 2e civ., Mar. 4, 1981, Bull. Civ. II, No. 49 (Fr.).

116. For an example of such a decision in American law, see, e.g., DOBBS, *supra* note 2, § 182, at 449.

of conditions theory. This aims to limit the scope of tortfeasors' liability by releasing them from indefinite responsibility for the subsequent damage brought about by their original negligence.

A *Cour de Cassation* ruling of February 8, 1989 emphasizes this point.<sup>117</sup> Mr. Y became physically disabled after a car accident with Mr. X, who was entirely liable. Mr. Y had to be continuously assisted in moving around. Ten years after the car collision, the bed on which the victim was laying caught on fire, and Mr. Y, who could not move out of his bed, died in the fire. The widow brought a wrongful death and survival action against the negligent driver and his insurance company to recover damages.

The Court of Cassation decided that only the event nearer in time, that is, the fire, was the cause of the disabled man's death. It rejected the argument that the prior car accident which occurred 10 years earlier also concurred to bring about Mr. Y's death. Indeed, after the crash, Mr. X and his insurer had paid Mr. Y damages for getting help to especially prevent this kind of disaster from happening. Therefore, the Court excused the negligent driver and his insurance firm from liability.

However, according to the equivalence of conditions theory, the prior accident is the cause of the subsequent damage, since the latter would not have occurred without the former. In real life, this case demonstrates that judges do not intend to extend the scope of initial tortfeasors' liability to too remote subsequent damage resulting from their original negligence. Otherwise, anyone would be endlessly liable for his negligence.

Finally, French law may itself impose specific limited duty on some tortfeasors to limit the scope of their liability.

### *C. Acknowledgement of Defendants' Specific Limited Duties*

In some instances, defendants may bear a limited duty of care. This is the case for employees' implied limited liability for damage

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117. Cass. 2e civ., Feb. 8, 1989, Bull. Civ. II, No. 39 (Fr.).

to third parties arising out of the performance of their job (1) and some parties' limited warranty liability (2).

*1. Employees' Implied Limited Liability for Damage Arising out of the Performance of Their Job Tasks*

Under French law, the general rule is that employees are subject to limited liability as to the damage they cause to third parties during the performance of their job tasks. In the meantime, it must be emphasized that French employers bear vicarious liability for the torts of their employees when there is an employment relationship and the latter were acting within the scope of their employment, as do American employers.<sup>118</sup> First, an employment relationship exists when the employer has the right to exercise some degree of direction and control over his employee,<sup>119</sup> such as in an employment contract ((whereby the employer determines the physical details (time, place, method, etc.) of the performance of the work and fires his employees))<sup>120</sup> but not in an independent agency contract.<sup>121</sup> An employee is then considered acting within the scope of his employment when he performs his job tasks (or at least was within the place and time of work or used the company's tools or other means when the accident occurred) or follows his employer's instructions or attempts to act for the benefit of the company.<sup>122</sup>

It was the French Supreme Court's case of February 25, 2000 which first decided in favor of French employees' limited liability

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118. See VINEY & JOURDAIN, *supra* note 6, § 809, at 1012; and VAN GERVEN ET AL., *supra* note 6, at 469.

119. See VINEY & JOURDAIN, *supra* note 6, § 792, at 980-82; and VAN GERVEN ET AL., *supra* note 6, at 469.

120. See VINEY & JOURDAIN, *supra* note 6, § 793, at 982-87.

121. *Id.* § 795-1, at 988. Also see MALAURIE ET AL., *supra* note 7, § 160, at 77; and TERRÉ ET AL., *supra* note 7, § 830, at 785.

122. Ass. Plén., May 19, 1988, D., 1988, p. 525, note C. Larroumet (Fr.), Also see VINEY & JOURDAIN, *supra* note 6, § 804, at 1005; MALAURIE ET AL., *supra* note 7, § 164, at 80; and TERRÉ ET AL., *supra* note 7, §§ 834-835, at 789-95.

for damage arising out of the performance of their job tasks.<sup>123</sup> Here, a pilot of a helicopter spread pesticide over a field during a windy day, in accordance with his job tasks. The wind caused the chemicals to reach adjacent fields. Based on former French case law holding that an employee was jointly and severally liable with his employer for his negligence falling within the scope of his employment, the owners of these lands sued the pilot and his employer, the helicopter company, for the damage to their property. Nevertheless, the Higher Court considered that the pilot's negligence (spreading the pesticides during a windy day) arose from *the performance of his job tasks which his employer had entrusted to him* and therefore excused him from liability. Only his employer was to be found liable. Thus, this means that employees, acting within the scope of their employment, have an implied limited duty that excludes liability for the damage caused to victims while performing a specific task which their employer entrusted to them at the time of the accident.

In summary, when an employee follows his superior's order which falls within with his lawful job description, he is immune from liability, and only his employer is vicariously liable for his negligence under the *respondeat superior* doctrine.<sup>124</sup> However, when he violates his lawful job description at his employer's request and commits negligence or intentional torts (that can also be criminal offences), he is liable for the damage to the victim, as is his employer, under vicarious liability. Finally, when he disobeys his superiors' instruction or pursues his own interest with no advantage to the company, he is liable alone (employer's vicarious liability does not apply here).<sup>125</sup>

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123. Ass. Plén., Feb. 25, 2000, JCP, G, 2000, II, 10295, concl. Kessous, note M. Billiau (Fr.); D., 2000, J. p. 673, note P. Brun (Fr.).

124. See VINEY & JOURDAIN, *supra* note 6, § 812-1, at 1025.

125. *Id.*

## *2. Parties' Limited Warranty Liability*

When a party performs his contract requiring the achievement of work or services, he may be bound to a limited warranty lighter than the warranty of workmanlike performance (which is similar to U.S. tort law). As a result, he bears limited liability for the bodily injury and property damage caused to the opposing party while performing the contract.<sup>126</sup>

For instance, in a bailment, unless there is monetary consideration or the bailee benefits from it, the bailee is bound to a warranty to care as much for the property in his possession as he does for his own property.<sup>127</sup> As a result, if he is used to caring for his belongings worse than a reasonable person does, he will be bound to a limited warranty causing him to have lighter liability for the property damage to the bailor.

In conclusion, French tort law appears to be based on a misunderstanding. On the one hand, it states that it applies general fault-based tort liability, and everyone is bound to the duty of reasonable care. On the other hand, it diverts the different elements of the *prima facie* case for people's liability for fault to limit the scope of their duty of reasonable care and implements relative tort liability. Therefore, it would be better to publicly recognize that there is no longer a general principle of liability for fault and the scope of one's fault-based liability may be limited for public policy considerations.

## V. A NEW APPROACH IN FRENCH LAW: THE INTRODUCTION OF THE (LIMITED) DUTY REQUIREMENT INTO FAULT-BASED TORT LIABILITY

The official acknowledgement of the existence of limitations on the scope of the defendant's duty would definitively cause French tort law to switch from a system based on general fault-

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126. Noting that parties can also provide for their own liability limitations in the contract. *See* discussion, *supra* Part I.

127. *See* arts. 1927 & 1928 C. CIV.

based tort liability to a system that applies relative responsibility. France could continue to implement a single liability clause providing for the liability of those who intentionally or negligently breach the duty of care. However, tortfeasors would not always be bound to the duty of reasonable care. They could owe a lighter duty or no duty at all. It would be up to victims to prove the existence of duties of care on the part of defendants to hold them liable.<sup>128</sup> According to the French traditional principle of separate power, the legislature should determine the various public policies driving the duties of care, and the judiciary should only implement them.

This relative liability approach would present two main advantages. First, it would improve the organization of the law (A). Second, French tort law would become more consistent with the Principles of European Tort Law<sup>129</sup> and other European countries' tort law to improve economic efficiency in the European Union (B).

#### *A. Improved Organization of the Law*

The adoption of the concept of relative tortious liability leads to better foreseeability of the law (1) and helps draw the line between liability for fault and other liabilities (2).

##### *1. Better Foreseeability of the Law*

One of the advantages of circumscribing the scope of individuals' duty is to establish clear and abstract categories of negligence liability situations according to public policies and a hierarchy between the various protected rights. Everyone would know when he is liable to certain classes of people for specific types of risks, and when he is not. Thus, individuals can predict the

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128. This approach is already implemented when the defendant's liability is based on a breach of warranties; *see* discussion, *supra* Part IV.C.2.

129. As set forth in EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW (Springer 2005).



outcome of their behavior, and in some cases, adjust it in order to be immunized from liability. This foreseeability enhances the economic efficiency of society.<sup>130</sup>

For instance, it could be highlighted that economically weaker victims are usually protected by the law. This is illustrated by employees' liability exclusion for damage caused during the performance of the specific task which their employers entrusted to them within their job descriptions.<sup>131</sup> Here, employees are subject to indemnification claims by their employers who compensate victims under the *respondeat superior* doctrine. However, these employees did not profit from their wrongdoing and are not usually insured for it, unlike their superiors. Therefore, they are the economically weakest parties and are immunized from liability.

At the same time, it could be pointed out that French law promotes economic efficiency. For instance, courts allow business entities to operate at a lower cost to ensure the provision of valuable public services by freeing them from certain unforeseeable liability, such as shown in frivolous slip-and-fall cases.<sup>132</sup> In addition, a landowner can reasonably improve his land to conduct affairs without risking unjustified lawsuits.<sup>133</sup> Lastly, the law sets limits on people's liability for subsequent damage resulting from their original negligence. It does not want them to be infinitely liable for their conduct and dissuade all economic ventures.<sup>134</sup>

## *2. Drawing the Line between Fault-Based Tort Liability and Other Liabilities*

First, the adoption of the relative liability rule could allow French law to better distinguish between fault-based tort liability

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130. See DOBBS, *supra* note 2, § 182, at 450.

131. See discussion, *supra* Part IV.C.1.

132. See discussion, *supra* Part IV.A.1.b.

133. See discussion, *supra* Part IV.A.2.b.

134. See discussion, *supra* Part IV.B.2.

and strict liability.<sup>135</sup> As a general rule, according to the Latin adage *specialia generalibus derogant*, judges must exclusively rely on the specific law of strict liability when they decide a case which falls within the framework of this regime. They cannot apply fault-based liability in its stead. It said that liability without fault excludes civil responsibility for fault. In other words, if the plaintiff does not meet the requirements to hold the defendant strictly liable, he cannot then invoke his fault as a second shot at the defendant. He is barred from recovery. Liability for fault only applies when there are no other specific regimes which preempt it.<sup>136</sup> However, in practice, judges loosely follow this rule and often turn to fault-based liability when strict liability cannot be established.<sup>137</sup> The remedy for this problem could be that courts neutralize the defendant's duty of care in civil responsibility for fault (which therefore would no longer apply) when strict liability applies. Thus, judges would be bound to apply only strict liability when they decide a case which falls within the boundaries of this regime. It would be impossible for them to resort to liability for fault in this situation.<sup>138</sup>

Second, it could be argued that the defendant's limited duty of care under one's liability for fault is restricted if he fails to act reasonably while performing a contract. As a result, his liability would only be dealt with under warranty breach, so that he can be able to provide for contractual liability limits.<sup>139</sup>

The adoption of the scope of duty approach in French law would make it closer to the Principles of European Tort Law which intend to harmonize the European Union countries' tort law.

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135. See *supra* note 1.

136. See VINEY, *supra* note 8, at 44-45.

137. *Id.* at 45.

138. *Id.* at 45.

139. See discussion, *supra* Part I.

*B. Harmonization with the Principles of European Tort Law*

The public acknowledgement in France of the existence of limitations on the scope of defendants' duty within the framework of its single liability clause would line French law up with the Principles of European Tort Law.<sup>140</sup> Indeed, this European tort law project<sup>141</sup> adopts the single liability clause providing for the civil liability of all those who cause damage by intentionally or non-intentionally breaching the duty of care (called fault).<sup>142</sup> It also recognizes that the scope of defendants' liability may be limited based on the enforcement of public policy considerations. They may not always be bound to a duty of reasonable care—it can be a lighter one. As a result, the Principles of European Tort Law implement the principle of relative tort liability. It is set forth in chapter 3, section 2, article 3:201, which reads:

Art. 3:201. Scope of Liability

Where an activity is a cause within the meaning of Section 1 of this Chapter [cause-in-fact], whether and to what extent damage may be attributed to a person depends on factors such as:

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time and space between the damaging activity and its consequences, or the magnitude of the damage in relation to the normal consequences of such an activity;

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140. See EUROPEAN GROUP ON TORT LAW, *supra* note 129.

141. The Principles are an attempt to harmonize the European Union countries' tort law and create set of united rules to be implemented in European countries. They have been drafted by the European Group on Tort Law mainly composed of European scholars specializing in the field, but also including leading scholars from the United States, Israel, and South Africa. They have not been enacted as such by the different European countries or the European Union itself, and, therefore, do not have statutory authority. They only have the authority as the product of the scholars' piece of work. In this sense, they are very similar to the American Restatements of the Law. See Bernhard A. Koch, *The "European Group on Tort Law" and its "Principles of European Tort Law"*, 53 AM. J. COMP. L. 189, 189-93.

142. EUROPEAN GROUP ON TORT LAW, *supra* note 129, at art. 4:101. However, the comments emphasize that strict liability (risk based liability and liability for others) constitutes an exception to the single liability clause. See *id.* at art. 4:101, cmt. 6.

- b) the nature and the value of the protected interests (article 2:102);
- c) the basis of liability (article 1:101);
- d) the extent of the ordinary risks of life; and
- e) the protective purpose of the rule that has been violated.<sup>143</sup>

Further, this would not cause an important change in French law. Indeed, when France diverts the different elements of defendants' liability for fault to limit the scope of their responsibility, it does so based on the enforcement of the same public policies as in the Principles. Thus, the scope of the defendant's duty can be limited to the foreseeable risks in both systems.<sup>144</sup> Conversely, tortfeasors are bound to a full duty of reasonable care when they cause death or severe bodily injury. Finally, the adoption of the limited liability rule in France seems to be highly advantageous to further integration with the other EU countries.

## VI. CONCLUSION

The general principle of liability for fault as applied by France proves insufficient to organize people's liability for their misconduct and allocate the loss caused by each other. Modern societies have to carry on the rule of relative responsibility and limit the scope of individuals' duty of reasonable care in certain situations. This leads to more efficient apportionment of harm between the different actors. Depending on public policies, France jurisprudence itself already limits the scope of such a duty of care by diverting the elements of one's liability for fault. This demonstrates that French law should go further in this direction, and French doctrine should openly recognize the existence of limited duties of care under the single clause governing fault-based

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143. *Id.* at art. 3:201.

144. *See, e.g.*, discussion, *supra* Part IV.A.1.a.

tort liability in order to be harmonized with its European neighbors' tort law.