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A CODIFIED LAW OF TORT—THE FRENCH EXPERIENCE*

André Tunc**

The purpose of this lecture is not to demonstrate any superiority of a codified law system over a system of judge-made law. The speaker does not wish to hide the fact that he strongly believes in the values of codification,¹ but to establish such values is not his present purpose. And, if he were to prepare a case for codification, he would certainly not choose to build it on civil liability, a field of law where decision may depend on subtle variations of facts and which is presently so unstable that one may consider that it is in a state of crisis.²

Nor is the aim of this lecture merely to present a summary of the French law of civil liability, as valuable pictures of this matter have already been drawn.³ Between a demonstration and a mere photography, however, there may still be room for a critical examination. The ambition of the speaker is to evaluate the French law of civil liability and to show, on the basis of experience, its values and its weaknesses. The speaker does not consider that his assessment authorizes any decisive con-

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1. Indeed, the author’s belief is as strong as that of Colonel John Tucker, Jr., to whom this lecture is dedicated.


clusion as to the merits of codification in general, even in the field of civil liability. He would even be the first to underline that no conclusion should be drawn without considering the experiences of other codified law systems, those of Louisiana, Quebec, Germany, and Switzerland, to name only a few. Even Louisiana and Belgium, on the basis of provisions which are very similar to the French ones, have a somewhat different experience. In fact, the similarity between the provisions of the Civil Code in this field in Louisiana and in France is such that the French provisions shall be, at the outset of this lecture, briefly presented in comparison with their counterparts in the Louisiana Civil Code.

As it is well known, articles 1382 and 1383 of the French Civil Code are practically identical to the first sentence of articles 2315 and 2316, respectively, of the Louisiana Civil Code: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," and "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." The French provision does not mention the want of skill.

Article 1384 of the French Civil Code embodies rules comparable to the ones which may be found in articles 2317 through 2320 of the Louisiana Civil Code. It is followed by articles 1385 and 1386 dealing respectively, as do articles 2321 and 2322 of the Louisiana Civil Code, with liability for animals and liability for falling buildings. The rules are different as regards the former, identical as regards the latter.

Most remarkable among such provisions is the first paragraph of article 1384, identical with the first sentence of article 2317 of the Louisiana Civil Code: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or

4. See generally J. Baudouin, La responsabilité civile délictuelle, in 4 Traité élémentaire de droit civil (1973) (Quebec law); 1 R. Dalcq, Traité de la responsabilité civile (2d ed. 1967) (Belgium law); F. Stone, Tort Doctrine, in 12 Louisiana Civil Law Treatise (1977) (Louisiana law).
of the things which we have in our custody." This provision is probably, out of all the articles in the Code, the one which is now the most used by plaintiffs. However, it is clear that it was originally supposed to have no meaning at all. It was a mere élegance de style, a transition between rules on liability for one's own acts and rules on vicarious liabilities and liabilities for one's animal or falling buildings. Although it was technically a mistake to insert such a sentence in a code, in this case, the sentence was destined to have a bright future.

Before evaluating the provisions of the French Civil Code on civil liability, their brevity must be emphasized. The drafters of the Code felt it possible to deal with the matter in five articles. In contrast, at the turn of the century, the matter was governed by thirty-one articles in the German Civil Code. The Civil Code of Ethiopia, enacted in 1962 on the proposals of Professor Rene David, dealt with the matter in one hundred and thirty-three articles. The United States Restatement of the Law on Torts contained five hundred and three sections in its first edition and a few more in its second.

The drafters of the French Civil Code, however, notwithstanding their lack of experience in codification, remarkably had foreseen that the Code would be the mere foundation of the law, not the whole law, and that the courts would have to develop the meaning and the scope of its provisions. Still, it was on a singularly narrow basis that the French law of civil liability was built.

**THE VALUES OF THE FRENCH CODIFICATION**

It is certainly not fashionable at the present time to pronounce oneself in favor of the fault principle. However, the speaker must confess his admiration for the drafters of the French Civil Code having made this principle the cornerstone of civil liability.

To avoid any misunderstanding, the concept of fault must immediately be clarified. In the Roman law tradition, to which the drafters of the French Code intended to remain faithful,

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fault is a departure from the behavior which is expected of a 
bONUS PATER FAMILIAS, the good father of a family, “the prudent 
administrator” to which article 1908 of the Louisiana Civil 
Code refers. The definition is valid in the field of civil liability 
as well as in contractual obligations, but it has an obviously 
outmoded perspective. For instance, a caustic writer has re-
marked that it imposes upon a music-hall girl or even a strip-
tease girl the duty to perform her act “as a good father of a 
family would do,” which is a strange standard to apply to her. 
A more modern formulation could be found. Reference could 
instead be made to the behavior of a reasonable citizen, a per-
son careful, diligent, mindful of his duties towards himself and 
others. The basic idea, however, remains the same; even 
though the speaker shares the modern view that large fields of 
civil liability should be governed by principles which have little 
connection with the fault principle,\footnote{8} he believes that the fault 
principle was rightly chosen as the basis of our law at the 
beginning of the nineteenth century. In its proper field, it re-
 mains of great value.

Let us consider briefly the matter in its historical perspec-
tive.\footnote{9} Whether we observe the laws of Israel, the laws of Rome, 
the Germanic customs, the ancient laws of China or Japan, or 
the customs of Africa or of “primitive” tribes in Papua or in 
the Amazon Basin, we find a catalogue of forbidden acts. Such 
acts entail a liability which may be collective or individual, 
and which is concurrently criminal and civil, the accent being 
on one side or the other depending on the act. Canon law was 
probable the major contributor to the development of the role 
of intent in the law and, more broadly, to an adjustment of the 
law to the morality of the wrongdoer. This fact may be attribut-
able to the confusion of crime and sin. It was nevertheless 
fortunate in its result, as it opened the way to the recognition 
of fault as a decisive factor in the field of civil liability.

The development occurred in two ways. First, criminal 
liability ceased to be measured by the extent of the damage

\footnote{8} See Tunc, supra note 2, at §§ 113-53. Compare G. Williams & B. Hepple, 
FOUNDATIONS OF THE LAW OF TORT 115-22 (1976) with Tunc, supra note 2, at §§ 154-78.

\footnote{9} See Tunc, supra note 2, at §§ 55-70.
inflicted and began to relate to the state of mind of the wrongdoer. Occasionally, this would lead to a complete absence of punishment or to a mere admonition, even for serious damage. Consequently, the idea developed that civil compensation ought to be distinguished from guilt and criminal sanction.

Furthermore, while a list of offenses was necessary for the administration of criminal law, as it seemed unthinkable to entrust the judge with a discretionary power over the liberty of citizens, civil liability, when detached from criminal liability, could be built on a more general principle. The basis of that principle was that one suffering damage from another as a result of faulty behavior should be entitled to obtain compensation from the wrongdoer.

The fault principle thus came to be conceived and expressed by the jurists of the natural law school, in particular by Domat and Grotius. Domat wrote in 1689:

All losses and damage which may occur by the act of any person, whether by imprudence, carelessness, ignorance of what should have been known, or other similar faults, slight as they may be, must be repaired by him whose imprudence or other fault has caused them. For it is a tort that he has done, even though he had no intention to harm. Thus, anyone who imprudently plays ball in a place where there could be danger for the passer-by and in fact injures someone is liable for the harm he causes.

Precisely one century before the French revolution, a revolution had been achieved in the legal conception of civil liability; from a history of specific wrongs, the principle emerged that everyone should be protected against any type of wrong conduct and against all types of loss.

This is the principle which was adopted as self-evident by the drafters of the French Civil Code. To appreciate the boldness of the principle, one may remark that, at the end of the nineteenth century, the drafters of the German Civil Code did

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10. See A. Von Mehren & J. Gordley, supra note 3, at 590-96; K. Zweigert & H. Kötz, supra note 3, at 283-84.
11. 2 J. Domat, Les lois civiles dans leur ordre naturel tit. 8, n° 4 (1689).
not dare to adopt it. Instead, they preferred to state three principles applicable to various wrongs and supplement them by more specific provisions. Additionally, they made unlawfulness a concept independent from that of fault and the latter a condition of civil liability. It was a sophisticated and narrow approach, with little justification as far as the Frenchman can see, and one which has been modernized without losing its complexity.

No less remarkable is the fact that the common law has never formulated a general principle of civil liability. A few decades ago, one could foresee the time when the tort of negligence would absorb all others. Today, however, the evolution appears unthinkable. Progress in legal thinking has shown that many aspects of civil liability need to be governed by principles other than negligence or fault. It thus appears very unlikely, notwithstanding recent advances of a liability based on negligence, that a single principle will ever be formulated, even in the restricted field where it is still valid.

Can it be said, in defense of the present situation of the common law, that no general principle unifying the law of civil liability is acceptable, even within a limited field? One may doubt the validity of the defense. First, one must admit that systems such as Louisiana, Quebec, France, and a number of others, having operated for centuries under what is basically a regime of liability based on fault, have remained satisfied with it provided it is kept in its proper field and restricted so as to allow room for other ideas.

Second, the extension of the tort of negligence may be regarded as an implicit recognition of the validity of liability for fault, even if the remaining technicalities of the law of negli-

13. See K. ZWEIGERT & H. KÖTZ, supra note 3, at 266-73.
15. See Colloque, supra note 14; K. ZWEIGERT & H. KÖTZ, supra note 3, at 266-73.
gence reveal a resistance to a complete application of this principle. Hepple and Matthews remark:

The really striking and all-important development has been the emergence of negligence into a distinct tort and its subsequent octopus-like spread into the waters once occupied by older torts . . . . The creation of new duty-situations in the tort of negligence paradoxically reveals both the flexible, open-ended nature of this tort (e.g. in regard to the duty to control the conduct of others) and the difficulties in formulating a general principle of liability or non-liability (e.g. in regard to loss to economic interests). 17

Finally, it is interesting to read works on torts by common law lawyers and to observe that many of them, at one place or the other, come very close to the idea of liability for fault. Thus, Prosser, after explaining through etymology that “a tort is conduct which is twisted, or crooked, not straight,” continues:

Broadly speaking, a tort is a civil wrong, other than breach of contract [up to this point, a civilian would be satisfied] for which the court will provide a remedy in the form of an action for damages. . . . [T]orts consist of the breach of duties fixed and imposed upon the parties by the law itself. 18

Similarly, John G. Fleming sees in the law of torts “merely a random collection of miscellaneous wrongs which have little or no relation to each other . . . except for a vague notion that harm resulting from anti-social behavior should be compensated” 19—a remark of great interest to the civilian.

In England, Jolowicz, in the ninth edition of Winfield on Tort, considered it necessary (after Lord Atkin, to whom he refers, in Donoghue v. Stevenson 20) to stress that the fault principle should be kept within limits and thus stated:

17. B. HEPPLE & M. MATTHEWS, TORT: CASES AND MATERIALS 2 (1974). The same authors deplore the lack of coherence and unity of the English law of tort. Id. at 1.
20. [1932] A.C. 562, 580 (Eng.).
In fact the law cannot even go so far as to order every person whose action may be regarded as morally culpable to make redress to those who suffer by it: "Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy."\(^{21}\)

Since the time this famous pronouncement was made, however, the limits to the range of complainants and the extent of their remedy have consistently been expanded. Furthermore, one of the most perceptive writers in the law of torts, Tony Weir, uses language strangely similar to that of one familiar with the fault principle: "[T]he law of torts determines when one person must pay another compensation for harm wrongfully caused . . . . [I]n tort the plaintiff says that the defendant did something he should not have done."\(^{22}\) He also states that "the typical complaint of the plaintiff in tort is: 'You did something wrong' . . . . [T]he victim can sue the firm if he establishes the fault of the driver,"\(^{23}\) and again:

In most cases it is not enough to discover simply that the defendant acted, and thereby caused the damage. His act must be legally qualified before liability follows. Here the prevalent test is whether the defendant acted *reasonably*. On the whole, if the defendant acted reasonably, he is not going to have to pay damages.\(^{24}\)

Of course, other developments do emphasize the difference between the common law of torts and the Louisiana or French law of civil liability. However, it is striking to see that some basic statements could have been subscribed by a French jurist. One can even find in Williams and Hepple the following statement: "Sooner or later . . . one is driven back to the fault principle

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23. Id. at 5.

24. Id. at 6.
as the foundation of liability in tort."" 25 Equally impressive is the question of Professor Heuston, the present editor of the classical Salmond on the Law of Torts: 26 "Could we not adopt the simplicity of French law?" 27

It is striking also to realize that the alternative to the application of the law of torts is no-fault compensation. The social value of the fault principle probably provides the basis for the closeness of the principle to certain exponents of the common law.

Let us ask ourselves what is the basic function of law in general, and more particularly of the law of civil liability. It is a mere platitude to say that law is the tool which permits a maintenance of the balance between man's freedom and powers, and his social duties. One may quarrel with the famous saying of Kant defining law as the means to assure "the coexistence of freedoms." Society is not merely a coexistence of free individuals. It is also built on a solidarity within a community of citizens. Life in society does not only restrict the otherwise unlimited freedom that we would enjoy if we were living alone (assuming man could live alone), it also entitles us to some form of brotherhood. The aim of law, therefore, is not only to protect and harmonize our freedoms, but also to permit and promote the development of our personalities.

This is true of all branches of law: family, contract, property, social security and even taxation. But this is especially true of the law of civil liability. Its main purpose is to harmonize the relations between persons who have no special tie between them. If I live in an apartment, may I play the piano or enjoy rock music records? Yes, but to a certain extent only. All occupants of the building need to make some noise, but they also need to rest and to sleep. I shall therefore have to place limits on the fulfillment of my desires. A regulation of the city or of the management of the building may provide that I should not make any significant noise after, say, ten o'clock in the evening. In any event, I have to live, not like Robinson Crusoe on his island, but as a tenant in a building where fellow citizens

25. G. WILLIAMS & B. HEPPEL, supra note 8, at 115-16.
27. Id. at 242.
live and sleep. More broadly speaking, in all situations I should behave as a reasonable citizen, aware that he is living in a society and therefore must adjust himself to his duties as a member of that society. This harmonization of personalities can be realized in two ways: (1) by regulation, including criminal law, and/or (2) by civil liability. Since regulation cannot cover every aspect of our activity (and since the prospect of a society where every activity would be submitted to regulation appears dreadful), civil liability is a very important tool of life in a society. We then see how justified and valuable it is to require that every citizen permanently adjust himself to his duties as a member of a society and incur liability for every harm caused by departure from this standard. This is precisely the fault principle.

It is a well-known aphorism that “general propositions do not decide concrete cases.” With respect to its author, Justice Holmes, the statement is not substantiated by experience. The judge, of course, is no more a slot machine in a codified system of law than in a common law system. However, it is our common experience, as Louisiana and French jurists, that the legal propositions contained in a code may unquestionably be applicable to some sets of circumstances. In such a situation these propositions either “decide concrete cases” or at least offer valuable guidance to citizens, lawyers and, if need be, judges.28

This has been true even of the extremely broad proposition that one shall be liable for the damage caused by his fault. Of course, the application of this proposition has given rise to more numerous and basic questions than any other principle of our Civil Code. A few such questions may be enumerated. Are all kinds of damage capable of “compensation” and which rules will govern the assessment of such damages? How can one be compensated, for instance, for the loss of a spouse, a child, or an arm? If one’s earning capacity is reduced, shall he be entitled to a lump sum or to periodic payments? Shall we take into account a mere reduction of his earning capacity or only an actual reduction of his earnings? What about the loss of a hope or an increased threat to one’s health?

28. See Methodology, supra note 1, at 464.
Another critical problem which often emerges is that of the causal connection between the damage complained of and the fault. Finally, the concept of fault itself is not free from ambiguity. Is the definition of fault applicable to an insane person? To a physically handicapped person? To a mentally handicapped person? To a very young boy or girl or to an elderly person? Should we apply the same rules for judging behavior to the wrongdoer and to the victim? Should inaction be considered a fault in certain circumstances and should it be judged by the same standard as an action? Is there not an excuse in some circumstances for departing from the ordinary behavior of a good and reasonable citizen? For instance, is the physician at fault if, in rushing to answer an emergency call, he disregards the speed limit or takes a chance in passing a car?

These are but a few of the many questions which have faced the courts in their application of the fault principle. One may readily admit that some of these questions would be better answered by the legislature, or that a modern codification should give more guidance to the judge than does the French Civil Code. Still, one may feel that the fault principle constitutes an excellent approach to the general problem of civil liability—excellent not only from a philosophical point of view, but also because it gives many problems of civil liability their proper foundation and background. The speaker confesses that he considers the approach of the French Civil Code to civil liability greatly superior to the complicated approach of the German Civil Code or to the fragmented approach of the common law.29

29. The speaker is reluctant to engage in a demonstration of this point because he had, in 1975, already tried to present this demonstration at a Colloquium organized in Canberra on Problems of Codification by Professor S.J. Stoljar, and he does not want to repeat himself. He has opposed the simplicity of the fault principle to the complexities of the rules of common law or of the German Civil Code in this field. He has tried to show by examples that the fault principle was a valuable regulator of activities and behaviors, not only for the man in his apartment, as evidenced before, but for the writer, the businessman or the corporation, for example, in their competition with others, in their relations with the customers or in their dealings with retailers. See Codification, supra note 1. As regards invasions of the right of personality, see K. Zweigert & H. Kötz, supra note 3, at 347-51; R. Lindon, LA CRÉATION PRÉTORIENNE EN MATIÈRE DE DROITS DE LA PERSONALITÉ (1974).
Obviously, the task of the judge in the application of the fault principle is not always an easy one. He often has to harmonize conflicting social values as best he can. It is true also that, in some cases, an unqualified application of the fault principle may lead to excessive liability, and thus it might be wise to give to the judge an equitable power of mitigation of the damage. Nevertheless, the fault principle places civil liability on a general, but reasonably firm, basis which does not exist when the principle is not accepted.

It is not enough to assess only the merits of the fault principle inscribed in articles 1382 and 1383 of the French Civil Code. As earlier recalled, the Code contains three other articles pertaining to civil liability, which will be briefly considered here.

Article 1384 contains the rule governing vicarious liabilities. The father (or now the father and the mother jointly) are liable for the damage occasioned by their minor children residing with them. However, they are discharged of any liability if they can prove that "they have been unable to prevent the fact which gave rise to the liability"—a rule which can also be found in the last paragraph of article 2320 of the Louisiana Civil Code. These provisions have given rise only to a limited and acceptable amount of litigation. However, the second of these rules, inspired by the logic of the fault principle, has

30. One thinks mainly of the problem of economic losses which may result from an inadvertence and which seems more properly covered by one-party insurance. See K. Zweigert & H. Köt, supra note 3, at 292-93. On the latest developments on this question, see Buxton, Built Upon Sand, 41 MOD. L. REV. 85 (1978); Cane, supra note 16; Thomson, supra note 16.

If French law appears unsatisfactory on this problem, the same may be said of the English common law. More generally, the development of one-party insurance is one of the factors which would justify granting to the judge an equitable power of mitigation of the damage.

31. See Tunc, Les problèmes contemporains de la responsabilité civil, 19 Rev. Int'l dr. Comp. 757, 776-77 (1967) [REVUE INTERNATIONALE DE DROIT COMPARÉ] (Fr.).

32. C. Aubrey & C. Rau, Droit civil français n°8 418-21 (7th ed. 1975); P. Le Tournaud, La responsabilité civile n°8 1637-87 (2d ed. 1976); H. Mazeaud, L. Mazeaud & A. Tunc, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle n°8 732-83 (6th ed. 1965).
proved barely manageable. Construed as it has been by the courts, it would oblige the father and the mother to prove that they have been good educators—a burden of proof which is not easily met. On the other hand, assuming they have given sufficient evidence of their qualities as educators, the rule would discharge them whenever the damage occurred by accident or while they were away at work—a rule which would often leave the victim without protection. The doctrine of Louisiana on this point is certainly preferable.

Two remarks, in the speaker’s opinion, can be made in regard to article 1384. The first is that the fault principle is a valuable foundation of civil liability, but should not be allowed to control it alone. If codal liability of the parents for the misdeeds of the children is established, it may be a wise policy to go further than did the drafters of the Civil Code and to make it a strict one. This would have the result of giving a better protection to the victims of children’s misdeeds, of giving greater incentive to the parents to control their children, and of avoiding litigation on problems which in fact escape evidence. Additionally, the present availability of liability insurance would protect the parents against excessive hardship. The second observation is that the case law which developed for the application of these rules could and should have been clearer if the work of our supreme court, the Cour de cassation, was performed in a more efficient manner. This is a very important point to which it will be necessary to return in the second part of this lecture.

Article 1384 also contains comparable rules on the liability of teachers and artisans for the damage caused by their scholars and apprentices. However, liability of artisans has never created any problem, and the presumption of liability bearing upon teachers was abolished by a 1973 statute.

34. See Carbonnier, Foreward to P. Ollier, LA RESPONSABILITÉ CIVILE DES PÈRES ET MÈRES (1961).
36. C. Aubry et C. Rau, supra note 33, at n 422-23; P. Le Tourneau, supra note 33, at n 1668-74; H. Mazeaud, L. Mazeaud et A. Tunc, supra note 33, at n 852-56.
37. C. Aubry et C. Rau, supra note 33, at n 417, 436; P. Le Tourneau, supra
Finally, the most important segment of the vicarious liabilities is the liability of masters and employers for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. This liability is expressed in similar terms by article 1384 of the French Civil Code and by article 2320 of the Louisiana Civil Code. However, the former, in contrast with the latter, does not provide that "responsibility only attaches, when the master or employers . . . might have prevented the act which caused the damage, and have not done it." In the speaker's view, for reasons which cannot be elaborated here, the French regime is the better of the two. It has been applied by the courts without any special difficulty except with respect to one point: the qualification "in the exercise of the functions in which they are employed" has given rise to great uncertainty. The Cour de cassation has recently passed upon the matter, but one may doubt whether the decision will clarify the confusion. The problem is a difficult one and has created perplexities in all jurisdictions.

Thus, subject to some qualification, a French jurist will normally feel that the codification of the law of civil liability in his country has been very valuable. This, however, is only a temporary conclusion. Experience has revealed some weaknesses of this codification, which will be set forth in the second part of this lecture.

THE WEAKNESSES OF THE FRENCH CODIFICATION

The fault principle may be thought of as a great social regulator; it is valuable to govern activities of all kinds. It is capable of governing both the lives of tenants in a collective building and the conduct of large corporations engaged in fierce

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note 33, at n° 1676-91; H. Mazeaud, L. Mazeaud et A. Tunc, supra note 33, at n° 784-835.

38. See C. Aubry et C. Rau, supra note 33, at n° 424-28; P. Le Tourneau, supra note 33, at n° 1692-778; H. Mazeaud, L. Mazeaud et A. Tunc, supra note 33, at n° 857-949; K. Zweigert & H. Kötz, supra note 3, at 300-03.


40. As regards Louisiana, see F. Stone, supra note 4, at § 91.
competition with each other. Yet, at our stage of civilization, the fault principle is often too vague, and more precision must be added to the law by regulations of all natures. This is the first weakness of the French codification.

An obvious example is the need for traffic regulations. It is not enough to state that every automobile driver should drive carefully. For example, the law must tell him whether he should drive on the right or on the left side of the road, whether he shall have the right of way at an intersection if another car is coming. However, the law goes even further. It does not only harmonize the traffic. It makes driving safer by requiring any prospective driver to obtain a license after examination and by specifying the equipment of vehicles and providing for their inspection. The development of regulation in this field is too obvious to require elaboration.

What should be briefly underlined, however, is that the same explosion of regulation has occurred in nearly all fields of activity. Fairness in competition is still governed by the fault principle, but also by many strict and detailed rules. A corporation must deal fairly with the public when it offers securities, calls for a general meeting of its shareholders, or issues some statements. But such fairness is now heavily regulated and controlled. Again, the phenomenon is too obvious to require further development.

The main weakness of the French codification in the field of civil liability, however, probably lies in the inability it has shown to cope effectively with the problem of accidents. Possibly the French judge might have made better use of the codal provisions, at least in the last few decades. Thus, the criticism


The scholars who, in the last decades, have underlined the need for a fresh approach to the problem of accidents are so numerous as to defy citation. Perhaps, however, a special tribute should be paid to Harper and James who, more than twenty years ago, devoted the entire part two of their treatise (nearly 1,000 pages) to accidents. See 2 F. Harper & F. James, The Law of Torts 729-1675 (1956).
should be addressed, not to codification as such, but to codification in this field as it has been utilized by the French courts. There is probably great truth in the suggestion. However, accidents generally require specific legislation.

Through the centuries the advance of the law of civil liability brought it closer to the idea of liability for fault. In the process, the problem of accidents was more and more left aside. The philosophy of civil liability is that man is free; that he has to choose between good and evil, between right and wrong; and that, should he make the wrong choice, his victim should receive compensation. This is a somewhat simplistic, but still sound, philosophy. However, it is justified only as regards deliberate decisions made by an individual. It should not govern the realm of accidents. An accident is an unfortunate event, which may occur purely by mishap, which probably is the result of some human failure, but which, even in that case, occurs against the will of its author. Thus, the classical fault philosophy has little application to it. Furthermore, in most cases, the human failure which caused the accident is not as much a “fault,” as it is an error that reasonable persons might commit. It is obvious that no one can play tennis or football without often missing the ball. If is therefore absurd to imply that the boy who has missed the ball while playing with a friend has committed a fault. Research has shown that even a good driver will commit errors which, in an unfortunate set of circumstances, may produce an accident. It is therefore no less absurd to consider at fault the driver who has committed an error of this kind. An error is a behavior which is theoretically regrettable, but statistically unavoidable. Finally, quite often the author of an error injures himself, his spouse, or someone in his family. It is clear, therefore, that a mere appli-


44. This is however what has been held by the French Cour de cassation in Judgment of 1er déc. 1965, Cass. civ., J.C.P.1966.2.14567. See Tunc, Tort Law and the Moral Law [1972 A] CAMBRIDGE L.J. 247.

Some subsequent decisions follow this path, while others take a different view of the problem. See Tunc, Enigmatique maladresse, in FESTSCHRIFT FÜR ERNST VON CAEMMERER 1117 (1978).
cation of the fault principle in the field of accidents would be morally unjustified, logically unsound, and socially pointless.

Accidents have always occurred. It was probably as a response to the problem of accidents that special rules came to life under Roman law that can still be found in our codes today. These rules dealt with those forms of accidental damage which were the most common at that time: damage caused by an animal or by the fall of a building. It was only with industrialization, however, that accidents multiplied and became a social problem.

During the greater part of the nineteenth century, the French courts merely applied the law of civil liability to the problem of accidents. The victims of work accidents only received compensation if they could give evidence of a fault of the employer. Most of the time, however, the accident was the result of their own "fault," that is, a split-second lapse of attention during a ten-hour work day. As a consequence, the victims and their families were left in distress.

The solution was criticized by a number of writers who, by various well-known arguments, asked for a reform of the law. It is remarkable that the Cour de cassation was willing to follow their views as early as 1896, in the famous Guisnez, Cousin et Oriolle v. Teffaine cause. An explosion had occurred aboard a steam tug and a member of the crew had been fatally injured. The lower courts found that the explosion was probably the result of a defect in the boiler. The court of appeal then reasoned that there was in the contract of labor an implied obligation to compensate the victim against the damage suffered as a consequence of an explosion and that, furthermore, the explosion of the tug could be considered as the fall of a building. Therefore, the owners of the tug were liable to the victim's family. The Cour de cassation did not approve the reasoning, but it maintained the solution. In a few words, it held that the explosion was not a case of vis major and that, therefore, under

46. See A. Von Mehren & J. Gordley, supra note 3, at 600-05.
article 1384 of the Civil Code, the owners of the tug were liable. This was a revolution. The Court had followed the lead of various text-writers and given an autonomous meaning to the meaningless words of article 1384, identical to the first sentence of article 2317 of the Louisiana Civil Code: "We are responsible ... for the damage ... caused by the act ... of the things which we have in our custody." 48

The new doctrine became useless almost immediately. A statute was passed in 1898 giving workers an automatic right to some compensation in case of industrial accidents. 49 This was probably the reason why the Cour de cassation did not immediately expand its new theory. On the contrary, in 1897, when the bill which became the 1898 Act was already before the Parlement, the Court refused to apply the new doctrine in a case of explosion where the cause of the accident was totally unknown and no defect of the boiler had been found. 50 In fact, the new theory did not reappear until 1919. Again, the machine, a locomotive in this case, had been well built and properly maintained, and had successfully passed the tests provided by regulations. However, the owner was held liable to those injured following an explosion of the machine. 51

After World War I, the problem of accidents became mainly the problem of traffic accidents. It was soon agreed that an autonomous meaning should be given to the last words of article 1384 and that a distinct liability for damage caused by things should be established. However, there was great hesitation in determining the proper scope of this new liability. Should it apply to all kinds of things or only to dangerous things? Should it even apply to an automobile, since most traffic accidents occur, not by the fact of the vehicle itself, but as a result of human failures? Those questions received different answers in Belgium and in France. In Belgium, the Cour de cassation decided that automatic liability would attach to

48. LA. CIV. CODE art. 2317.
49. See A. Von Mehren & J. Gordley, supra note 3, at 611-12.
the "keeper" (gardien) of a thing only if evidence was "given that the damage was caused by a vice of the thing." This is the doctrine which was espoused by the Louisiana Supreme Court in *Loescher v. Part* and which seems the wisest, at least in certain respects. In France, *Jand'heur v. Les Galeries Belfortaises*, a very famous case decided in 1930 by the *Cour de cassation* in full chambers, stated that the keeper of a thing, whatever the thing, was under a "presumption of liability" which could be discharged only by evidence of the fault of the injured party or of a third person or of the occurrence of vis major.

The basic principle laid down in the *Jand'heur* case still remains valid. It has given rise, however, to a number of variations. What had been a "presumption of fault" before the *Jand'heur* case and had become with this case a "presumption of liability" became for some years "prima facie liability" (responsabilité de plein droit) before fading away and taking the colorless name of "the liability of article 1384, para. I." There has also been great hesitation to identify the "keeper." For the purpose of this lecture, suffice it to say that it is usually

52. R. Dalcq, supra note 4, at §§ 2012, 2137-61.
53. 324 So. 2d 441 (La. 1975).
54. See F. Stone, supra note 4, at §§ 61, 310; Tunc, *Louisiana Tort Law at the Crossroads*, 48 Tul. L. Rev. 1111 (1974). In effect, the solutions adopted in Louisiana and Belgium seem similar. There is, however, some difference in their theoretical presentation. In Belgium, strict liability for a defective object is considered as such, without reference to the idea of fault. In Louisiana, Justices Tate and Barham, who have been the main architects of the new construction (Justice Barham having left the supreme court at the time of the *Loescher* decision), speak in terms of a "legal fault": the failure of a person "to prevent the person or thing for whom he is responsible from causing" an "unreasonable risk of injury to others." 324 So. 2d at 441, 446. Liability for damage caused by the vice of a thing under article 2317 is thus integrated in a general doctrine which covers both liability based on articles 2315 and 2316, and the other strict liabilities, including vicarious liabilities, which are found in article 2318-22. See 2 H. Mazeaud, L. Mazeaud, et J. Mazeaud, *Traité théorique et pratique de la responsabilité civile* n° 1312-28 (6th ed. 1970) (theory of faute dans la garde).
57. See generally K. Zweigert & H. Kötz, supra note 3, at 322-29.
the owner. There has been even greater confusion as to which events may discharge the keeper of the liability bearing upon him. The present situation is the following: (a) the keeper is discharged of this liability if he can prove that an event external to himself and to the thing, which was unforeseeable or normally unforeseeable, has made the accident unavoidable; this event can be a natural event, such as ice, fog, storm, or the fault or “fact” (fait) of the injured party or a third party; (b) the keeper's liability is reduced if the keeper can prove that a fault or “fact” of the injured party (and not a natural event or third party’s fault or “fact”) has concurred in the production of the damage; liabilities are then assessed on the basis of the comparative causations; the Cour de cassation makes it clear that the “fact” of the victim needs not be a fault to produce that effect; we must assume, however, that the “fact” needs to be an abnormal one: someone lying on the pavement and run over by a car is not entitled to compensation, even though he was on the pavement because he had been stricken by a disease or had been knocked down by some robber, but a pedestrian on the sidewalk is certainly entitled to compensation if a car comes and hits him. Thus, the law developed on the basis of article 1384 rests on two foundations: (a) a rule of evidence: a presumption of fault or, more precisely, a presumption of causation, which can be rebutted by evidence that the damage was caused by a “(normally) unforeseeable and irresistible” external event; and (b) a rule of substance: an absolute liability for the damage resulting from a defect of the thing or a failure (even health failure) of one of the parties (the failure of the injured party discharging, of course, the keeper).

The courts were, for a while, very proud of the ability of their construction of article 1384, para. I, to respond to the

59. C. Aubry et C. Rau, supra note 33, at n° 8450-54; P. Le Tourneau, supra note 33, at n° 81812-39; H. Mazeaud, J. Mazeaud et L. Mazeaud, supra note 54, at n° 81155-89; A. Von Mehren & J. G ordley, supra note 3, at 667-78; K. Zweigert & H. Kötz, supra note 3, at 325-26; Tunc, supra note 54, at 1119.


plight of traffic accident victims. Presently, however, there is widespread dissatisfaction with this solution for two main reasons.

First, the law itself is uncertain. Although the basic principle is nearly fifty years old, there has been a wavering in its formulation and in the qualifications it should receive. As a result of this wavering and of the difficulty of establishing the facts, the rights of the injured party are very uncertain in most cases. Consequently, the injured party either has to accept the settlement offered by an insurer, or go to the courts and wait for the outcome of the litigation. But the volume of litigation, in turn, contributes to the uncertainty of the law. Every year, hundreds of cases of traffic accidents reach the Cour de cassation and are settled by it. When so many decisions are made by the Supreme Court of a nation, they no longer clarify the law, but, to borrow a well-known expression, they add smoke to the fog.

Furthermore, the present law is basically unsound—to the point of being paradoxical. Automobile liability insurance was made compulsory by a 1958 statute. Drivers, therefore, are no longer liable for the damage they cause to others. Instead they pay annual premiums to transfer to an insurer the risks they cause while driving and even the consequences of the most serious negligent acts they may commit while driving. All of the severity of the law of civil liability is now concentrated on the victim. The courts do not even distinguish between fault and mere error, since the injured party is accountable for the slightest failure, even if it be statistically unavoidable. The law, therefore, does not deter us from killing or injuring others in traffic accidents, but only from being killed or injured—which is hardly necessary. The system works against ethics, accident prevention, and common sense. As already mentioned, the injured party is even left without compensation for a mere “fact,” or when he is victim to a sudden formation of ice on the road, causing a car to slide and hurt him. This

62. See Tunc, supra note 54.
basic defect, however, is not special to French law. The common law is just as problematic, but French law has been incapable of developing the elements which would have eliminated it.

There is good reason to argue that the present failure of French law to deal adequately with the traffic accident problem is largely attributable to the working methods of the Cour de cassation more than to codification as such. The work of the Cour de cassation presents two unfortunate features. First, there is no mechanism for selection of the cases it will decide, with the result that the six chambers together decide eleven thousand cases per year. Currently that is twenty cases in an afternoon for the chamber which deals with civil liability. Second, the Cour de cassation deliberately makes its decisions as barely reasoned as possible, often to the point of being cryptic.5 Those two features seem extremely regrettable and have been criticized by various writers, including one of the highest judges of the country, the Procureur General près la Cour de cassation.6 A new attack, based on a comparative study, has recently been published.7 However, even though it is launched in cooperation with the Premier President Pierre Bellet, the head of the Cour de cassation, it will be difficult to change deep-rooted habits.

If the Cour de cassation were not working under such terrible time pressure, and if it could devote proper consideration to traffic accident compensation, it could bring great improvement to the law. The decision made in 1930 in the Jand'heur case was a remarkable one, both on account of its boldness and the balance it established between the interests of motorists and automobile victims. The new developments which have resulted during nearly a half-century—compulsory insurance, progress and refinement in legal thinking and particularly ac-

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66. Touffait et Tunc, Pour une motivation plus explicite des décisions de justice, notamment de celles de la Cour de cassation, 72 Rev. trim. dr. civ. 487 (1974).
knowledgment of the necessary distinction between fault and error, publication of the results of numerous research projects on the unavoidability of errors, and rising expectations toward security—would call for a new assessment of the desirable rules of law. The Cour de cassation, which was bold enough to make the Jand'heur decision, would require much less courage and imagination to curtail the defenses presently available to the driver—or rather the driver's insurer—and to create a nearly absolute liability. This liability would recede only upon evidence of an unexcusable fault on the part of the injured party.68

Thus, a new law of traffic accident victim compensation lies in the power of the Cour de cassation, nearly at the tips of its fingers. This law would be free of the irrationalities which beset the present one and would insure compensation to a great number of victims who need and deserve such compensation but are presently deprived of it. In order to avoid an increase in insurance premium rates, the Cour de cassation could eliminate or greatly reduce damages for non-economic losses. That solution also lies within its power. However, two limits on the power of the court do exist. In creating a new law in the frame of civil liability, even coupled with insurance, the court cannot assure compensation to the driver whose car collides not with another car, but with a fixed obstacle. Furthermore, the court cannot eliminate the present adversary process of indemnification to replace it by a system under which victims should as much as possible claim compensation from their own insurers—a system of first party insurance which seems to have greatly improved, where it is in operation, the functioning of insurance.69


The courts are, a fortiori, powerless to introduce systems of compensation comparable to the one which now exists in New Zealand. See Palmer, Accident Compensation in New Zealand: The First Two Years, 25 AM. J. COMP. L. 1 (1977). Vennell,
A few observations may conclude this lecture. First, one should be warned that the creation and development of a liability for damage caused by things in France is not in the least typical of the operation of the law in a codified system of jurisprudence. The responsibilities of the courts in the application and construction of the codal provisions have usually been much narrower than in the field of law presently considered. As foreseen by Portalis, a few problems emerged in the application of provisions and the courts solved them. However, nowhere else than in the field of civil liability had they to build a new law, entirely new and practically without any foundation.\footnote{L'indemnisation des dommages corporels par l'Etat: les résultats d'une expérience d'indemnisation automatique en Nouvelle-Zélande, 1976 Rev. Int'l Dr. Comp. 73.}

Secondly, the judgment that one may pass on the work of the courts in the field of civil liability is a qualified one. The Jand'heur case was an admirable decision; it showed the work of a codified system of law at its best, facing a formidable challenge. The decision was the result of collective research and discussion where courts of first instance, courts of appeal, the Cour de cassation, and doctrinal writers all played the roles which were expected of them. The decision was creative and well balanced.

Unfortunately, the law in this field presently seems to have lost its momentum and to be, as is said of American law in another field, "wandering aimlessly on treacherous moors."\footnote{See THE CODE NAPOLEON AND THE COMMON LAW WORLD (B. Schwartz ed. 1956); R. DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY (Kindred trans. 1972); Methodology, supra note 1.} One may feel, however, that this is due not to the inability of a codified law system to deal adequately with new problems or old problems in a new environment; within certain limits, which have been enunciated, the law could be adjusted to the present needs. It is submitted, rather, that if the needed ad-
justment has not taken place, it is mainly because the Cour de cassation, flooded by an ever-increasing flux of cases, did not dare to make a selection among them and consider only the cases where it could have modernized and clarified the law. It is also because the Cour de cassation prides itself in rendering anonymous decisions as short as possible and deprived of the necessary explanations. If this is true, one may venture to think that French jurists, who seem to master statutory law reasonably well,\(^{72}\) have much to learn from the common law tradition as regards the development of judge-made law. Thus, it appears that jurisdictions such as Louisiana and Quebec, where the civil law tradition benefits from the common law approach to judicial developments, can make an invaluable contribution both to the civil law and to the common law worlds.\(^{73}\)


\(^{73}\) See generally The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions (J. Dainow ed. 1974).