

Introduction to French tort law

French tort law was meant in the first place to discourage socially undesirable behavior. But it has evolved in such a direction that today, “ *the law of civil liability not only allows the courts to uphold against those who would disregard the rights already acknowledged to exist, but also contributes to the emergence and protection of rights as yet inchoate and unrecognized. It thus constitutes a method of complementing and improving the legal system and bringing it up to date.*”¹

French civil liability is traditionally divided between tort law and contract law. This rule derives from the *principle of non-cumul des responsabilites*,² or principle of non-concurrence of actions, which states that contractual and tortious liability are distinct, even if complementary. Contractual liability imposes sanctions for the non-observance of contractual obligations, while tort law attaches sanctions to breaches of rules of conduct which are imposed by statute, regulation or case law.

I. The traditional regime

As seen above, except where the liability arose out of a contract³, the general rule is, as set forth by Article 1382 of the French Civil Code (French acronym C.civ) that “*any act*

¹ G. Viney. W.Van Gerven, J.Lever, P.Larouche *Cases, Materials and Text on National, Supranational and International Tort Law*, Hart Publishing 2000.

² Civ 1ere 6 Avril 1927.

³ It should be noted that some authors pointed out that "as regards to tort liability, French law often does not make a clear distinction between contract (Articles 1146 ff C.civ) and tort rules, especially for medical liability." G. Viney. W. Van Gerven, J.Lever, P.Larouche, *Cases, Materials, and Text on National, Supranational and International Tort Law*, Hart Publishing 2000, p 57.

of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it”⁴.

In addition, Article 1383 provides that “*One shall be liable not only by reason of one’s acts, but also by reason of one’s imprudence or negligence*”⁵.

The wording of Article 1382 C.civ clearly shows that three elements are necessary to engage liability:

- a fault
- a damage
- a causal link between the two

The burden of proof of all these elements falls on the claimant.

A fault may result either from the commission of an act or from the omission to perform an act. Fault can be defined as an error of conduct measured against the standard of a reasonable man, as a failure to behave as a *bonus pater familias* or a “*bon pere de famille*”

Furthermore, in French law, in order to commit a tort, one does not necessarily need to be conscious of the wrongful nature of one’s behavior. There does not have to be a specific duty of care towards the plaintiff - the proof of fault, damage and causal link is sufficient for a claim for damages.

Fault is a largely subjective notion and the courts have therefore a lot of discretion in attaching liability in particular circumstances of the case.

In French law, there is little discussion on the scope of protection of tort law. Indeed, from the point of view of French law, it is for instance incorrect to speak of "protected rights" in an exclusionary sense.⁶ The general provision of Articles 1382 and 1383 C.civ have consistently been found not to contain any *a priori* limitations on the scope or

⁴ Art 1382 C.civ: ‘*Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrive, à le réparer*’.

⁵ Art 1383 C.civ: ‘*Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence*’.

⁶ Genevieve Viney, W. Van Gerven, J.Lever, P.Larouche, *Cases, Materials, and Text on National, Supranational and International Tort Law*, Hart Publishing 2000

nature of protected rights and interests. **In principle, all rights and interests are protected.**

The idea of protected rights or interests, if mentioned at all, is linked with the notion of damage, which is one of the three conditions as seen above. Neither in academic writings nor in the case law of the *Cour de Cassation* or *Conseil d'Etat* has the notion of damage been much discussed. Normally the law only deals with the characteristics which the damage must contain in order to be recoverable: the damage must **actually** exist and be **certain**, and it must be directly related to the plaintiff.

In order to further protect plaintiffs, the case law has developed in the last decades a specific injury called “loss of an opportunity”, or “loss of a chance” (*perte d’une chance*). This notion is used when the damage consists in the loss for the victim of an opportunity to obtain an advantage or to avoid a loss. To fulfill the criteria of directness and certainty, the opportunity has to be *real and serious* (*reelle et serieuse*) and not only hypothetical⁷.

Liability only arises from a fault if there is a direct causal relationship between the fault and the damage. Neither statute nor case law has given a precise definition of what constitutes a direct causal relationship. The courts have therefore broad discretion.

However, one may note that causation is sometimes viewed in the light of two requirements concerning damage, namely directness and certainty. The requirement of certainty has long been recognised by the *Cour de Cassation*. The former requirement is derived from Article 1151 C.civ which reads: “...damages extend...only to the **direct and immediate consequences of the breach of contract.**” Even if this article only concerns liability for breach of contracts, it is generally seen as the expression of a general principle which applies to tort law as well.

As soon as these three criteria are fulfilled, a person is entitled to claim compensation for a broad scope of injuries: material and financial injuries, bodily injuries, moral injuries (which include several aspects, notably pain, suffering and loss of enjoyment).

⁷ Cass. Civ. 2e, 1st April 1965, Bull. Civ. II, n°336, p230.

French law is then governed by the principle of full compensation (*reparation integrale*). The idea is to make compensation match the harm as completely as possible which can be difficult, especially in terms of non-material harm.⁸ Therefore, the full compensation covers all material injury to the bodily integrity of a person, to his property and to his estate generally, including material loss (for instance, loss of financial support) as well as non-material injury such as pain and suffering by persons suffering from the death or injury to the physical well being of the primary victim.⁹

Articles 1382 and 1383 C.civ are also widely considered not to contain any *a priori* limitation as to the class of protected persons. In other words, under French tort law, there is **no limitation** which might arise from the necessity to prove the existence, under the circumstances of the case, **of a duty of care** towards the plaintiff.

Every plaintiff who can prove fault, damage and causation can claim compensation. From this point of view, French law is very different from English and German law, as it does not impose any limitations at the very outset on the kind of the rights or the group of persons that are protected. Liability of a third-party accomplice to a contractual breach and liability for false advice is also known in French tort law.

Defendants in civil liability lawsuits may assert several causes of exoneration or limitation of their liability.

The first cause of exoneration is *force majeure*. The traditional definition of *force majeure* is an event that is unforeseeable, unavoidable and extraneous to the defendant.

The second cause of exoneration is the fault of the victim, or contributory negligence.

Such a contribution can result either in shared liability¹⁰ or in a complete exoneration.

⁸ For more information, see Seminaires Cour de Cassation “Risques, assurances, responsabilites”, *Une reconsideration du principe de la reparation integrale*, V. Heuze. Courdecassation.fr

⁹ In that connection, it should be noted that in recent times, some doubts have been voiced by legal writers as to whether the principle of full compensation should be as literally and consistently applied as it is by the French courts, particularly with regards to non-material damage. They also pointed out the difficulties the courts are experiencing in translating into money a non-material harm. . W.Van Gerven, J.Lever, P.Larouche *Cases, Materials and Text on National, Supranational and International Tort Law*, Hart Publishing 2000 p60-62

¹⁰ When liability is shared, the apportioning is theoretically calculated on the seriousness of the faults committed by the respective defendants.

Finally, the third classical defence is the act of a third party breaking the chain of causation, which results, if determined, in a complete exoneration.

II. Strict liability

Apart from this general tortious, fault-based regime of liability French law also knows strict tort liability.

Indeed, the fault principle has proved inadequate to deal with some of the social and legal demands of the twentieth century. The major catalysis for this change was the rapid industrialisation which occurred in the nineteenth century, and the related hazards of an age of coal, steel, electricity and manufacturing of chemicals. This led to increased occurrence of accidental damage in which the prime factor was mechanical and anonymous.

Consequently Article 1382 became a defence in the hands of manufacturing defendant companies and more often than not, the victim of a grave injury ended up without compensation.

Consequently, French law sought a compromise between freedom to engage in any activity and liability for all the consequences that it implied.

The key provision in this respect is Article 1384 C.civ which provides that: “*One shall be liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody*”¹¹. The prevailing view soon became that Article 1384 constitutes an explicit acknowledgement that liability could be justified on a basis other than fault. The *Cour de Cassation* held in 1930, in its famous *Jand’heur* decision that the first sentence of Article 1384 constitutes the legal basis of a general and autonomous strict liability for things of all kind.¹²

¹¹ Article 1384 (1) C.civ : ‘On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde’.

¹² Cass. Ch Reunies, 13 February 1930

The regime of this kind of liability is a strict one, where no fault is required: the victim must only prove that the thing caused him an injury.

Under Article 1384 C.civ, the liable person is the “custodian” of the ‘thing’. Custody is defined by case law as ‘powers of use, control and management of the thing’¹³.

Generally, the custodian of the ‘thing’ is its owner. The courts have broadly interpreted the provisions of Article 1384: case law has, with time, introduced nuances in this relatively straightforward definition. Especially, the courts have made a distinction between custody over the structure of the thing (*garde de la structure*), and custody over the “behavior” of the thing (*garde du comportement*).

One may note that in recent years the courts have adopted a markedly more plaintiff-friendly approach.

III. Liability for defective products

Act n° 98-389 of May 19, 1998 transposing the European Product Liability Directive 85/374/EEC into the French Civil Code established a specific regime dealing with defective products. The new provisions are contained in Article 1386-1 to 1386-18 C.civ. It should be noted that this special regime is applicable “*regardless of the existence or not of a contract between the manufacturer and the victim.*”(Article 1386-1 C.civ).

The definition of the term “product” is an extensive one: it includes all movables, including electricity and primary agricultural products (Article 1386-3 C.civ).

A product is considered to be defective if “*it does not provide the safety which a person is entitled to expect*” (Article 1386-4 C.civ).

In order to determine the level of safety a person is entitled to expect, all circumstances should be taken into account, “*including the presentation of the product, the use to which*

¹³ Cass. Ch Reunies 2 December 1941

it could reasonably be expected that the product would be put, and the time when the product was put into circulation” (Article 1386-4).

Liability on the account of defective products is a strict one: the victim does not need to prove the existence of a fault on the part of the manufacturer, but only *“the injury, defect and the causal link between injury and defect”* (Article 1386-9). Then, *“the producer shall be strictly liable”* (Article 1386-11).

However, the transposition of the Directive into the French Civil Code has been held by the European Court of Justice (ECJ) to be incorrect¹⁴. In its decision, the ECJ found that France has incorrectly implemented the Directive in three specific respects: the lack of a threshold for damage, the position regarding the liability of suppliers, and the conditions applying to defences.

First, the lower threshold of 500 Euros had wrongfully been omitted. As to the position regarding suppliers, the ECJ held that French law wrongly equates the position of the supplier with that of the producer, whereas Article 3(3) of the Directive conceives the liability of suppliers as an ancillary one, applicable only where the producer is unknown¹⁵.

Finally, concerning the grounds on which the producer may be exempted from liability, the ECJ held that French Law had wrongly imposed an additional pre-condition, making the application of those grounds of exemption subject to observance by the producer of an obligation to monitor the product.¹⁶

¹⁴ECJ, Case C-52/00, *Commission v France*, 25 April 2002.

¹⁵ In that connection, the ECJ held in March 2006, that France has failed to take the necessary measures to comply fully with the judgment in case C-52/200 concerning its the position of towards the supplier, ECJ, *Commission v France*, 14 March 2006, Case C-177/04. The French Civil Code has recently been accordingly modified (*Law no 2006-406, 5 April 2006*).

¹⁶ Article 1386-12 C.civ provides that a producer is unable to invoke those grounds where the defect in the product was discovered with ten years of putting the product into circulation, and during that period, the producer did not take the appropriate measures to avoid the damaging consequences.

The defective product liability regime is not exclusive of the other liability regimes which existed on the notification date of the Directive (Article 1386-18 C.civ implementing Article 13 of the Directive). The ECJ has recently analysed Article 13¹⁷ and construed Article 13 to allow Member States to maintain liability regimes having a different legal basis from that of the Directive.

Specific causes of exoneration are provided. Article 1386-11 C.civ provides that the manufacturer shall be strictly liable except if he proves that:

- he did not put the product into circulation
- the defect did not exist when he put the product into circulation
- the product was not intended for sale or any form of distribution
- the state of scientific and technical knowledge did not allow at the time when the product was put into circulation, to detect the existence of a defect
- the defects results from a compliance with legislative or regulatory mandatory rules.

IV. State liability

One of a distinctive feature of the French judicial system is that it is divided between judicial and administrative order of courts.

Therefore, cases against the State go before the administrative courts, with the *Conseil d'Etat* at its helm. But since that specific liability regime covers the activities of many public institutions, or private law entities performing tasks of general or public interest, it often deals with issues which are similar to those arising under general tort law.

Thus, State liability has been developed through case law, mainly that of the *Conseil d'Etat*.

¹⁷ ECJ, *Gonzales Sanchez v Medicina Asturiana SA*, 25 July 2002, Case C-183/00

Following a social trend according to which someone must be held civilly or criminally liable for every injury, various compensation schemes have been created.

For instance, a public indemnification fund has been set up to compensate HIV contaminations as a result of having received contaminated blood products.¹⁸

A fund has also been established to compensate victims of asbestos related diseases, the FIVA (*Fonds d'Indemnisation des Victimes de l'Amiante*)¹⁹ and another one for the victims of medical injuries.²⁰

¹⁸ Act no 91-1406 31 December 1991

¹⁹ Act no 2000-1257 of 23 December 2000

²⁰ Act no 2002-303 of 4 March 2002.

Class-Actions in France

France is considering changing its legal code to allow class-actions lawsuits, just as President Georges W. Bush is seeking to limit the scale of such controversial collective actions in the US.

France is the latest European country to consider ways of facilitating collective legal actions against companies, this after a string of financial and health scandals that have left confidence in the corporate sector at unprecedented lows.

Pursuant to Article 31 of the Code of Civil Procedure (French acronym NCPC), a law suit is admissible only if the plaintiff has standing and an interest to act.

Standing to an act consists in the legal right to bring or oppose a claim and to defend a specific interest in court.

Natural persons bringing a civil action in liability generally are presumed to have a standing to act.

However, it is more problematic when a legal person, an association for instance, purports to defend the collective interests of a category of persons or a “social cause”. Indeed, one of the major principle in French law is that “*No one shall plead by proxy*” (Nul ne plaide par procureur), another one being the principle of the relative effects of judgments.

Therefore, individual interests may not be aggregated and even if they are grouped together in a single lawsuit, each plaintiff will have to formulate his own claims, which are evaluated separately. As a result, class actions as such do not exist under French Law.

However, there are a few legislative exceptions to this rule.

- Consumer associations

Pursuant to the Consumption Code (C.Cons), consumer associations may bring collective civil actions under specific conditions.

Article 421-1 C.Cons provides that consumer associations may bring civil suits on behalf of either several consumers, or the collective interest of consumers as a whole.

“Duly declared associations whose statutory object specifies the protection of consumer interests may, if they are approved for this purpose, exercise the rights conferred upon civil parties in respect of events directly, or indirectly, prejudicing the collective interest of consumers.”

It further provides that *“Where two or more identified consumers, natural persons, have personally sustained damage due to the acts of a same professional and having a common origin, any authorised (consumer) association that is recognized to be representative on a national level ... may, if it has been mandated by at least two of the consumers concerned, bring a claim in compensation before any court in the name of these consumers.”*

This last provision has been rarely used. Indeed, associations can inform consumers of the existence of an action only through the press. Also, powers-of-attorney must be obtained before the action is initiated.

- Labour unions and professional associations (orders professionnels)

Defence by an association of a general collective interest before the courts is already possible for labour unions and professional associations of the professions which are recognized by law as having the right to go to courts by taking actions against perpetrators of acts directly injuring the interests of these specific groups.

Article L-411-11 of the Labour Code (C.Trav) provides that labour union may bring actions to defend the collective interest of the employees they represent. In addition,

pursuant to Article L 321-15 C.Trav, they may bring actions in the interest of individual employees that are in specifically listed situations.

This exception to the principle “*No one shall plead by proxy*” is however limited by the obligation incumbent on the labour union to inform the employees whose interests are at stake of the lawsuit they plan to bring, and by the possibility for one employee to prevent the union from doing so.

In his New Year Speech to the economic forces of the nation on January 4, 2005, the French President Jacques Chirac notably asked his government to propose a modification to the existing French legislation that would permit class actions in some market sectors.

An *ad-hoc* task was set up in April 2005.

It submitted a report to the Government on 16 December 2005. This report did not provide a definitive view of how class actions should be applied in French law.

Instead three options were suggested:

- The first, which is supported by the MEDEF, France’s largest employer union, would simply modify the existing system of “joint representation action” that allows accredited associations to bring suits in various sectors.
- The second option, supported by the leading French consumer group, UFC-Que Choisir, would be to create an opt-out class action system in which the plaintiff would identify themselves, after a judgment had been rendered, to receive a compensation if they so chose.
- Other consumers groups support the third option of a two step procedure in which the judge overseeing the action would first determine whether the defendant was liable for the damage alleged, and if so, would then determine the amount of damage to be paid to each participant in the class action.

As said above, the task force did not reach a final position (it is supposed to make another report this month). But one may say that the system to be introduced in French law is likely to be very different from the American class action concept, because of:

- the lack of availability under French law of discovery, contingency fees and punitive damages.

- The prohibition of advertisement for lawsuits.
- The heavy regulation of success fees.

The French National Bar Association (Conseil national des barreaux, CNB) did indicate in February 2006, that it may support the introduction of limited advertising for advertising for class action suits, if overseen by a judge.

It should be noted that a website was created in May 2005, www.classactions.fr, by several Parisian lawyers trying to recruit claimants for “class-actions” suits. It enables users to sign up to lawsuits for as little as 12 euros.

The Civil Court of Paris handed down a severe ruling against the site and its operators on 5 December 2005, saying that it broke the ethical rules of the legal profession in France, including the prohibition against soliciting clients.

Close to 1000 plaintiffs have signed up on line for two pending lawsuits:

- The first accuses movie distributors of breaching consumer rights by copy protecting DVDs

The second seeks damages for misleading financial information allegedly given to Vivendi Universal SA shareholders

Compensation to victims of crime

The victims of intentional violent offences enjoy a special status and are eligible for national solidarity.

To ensure that certain victims are compensated for personal injuries caused by criminal acts, Act No 77-5 of 3 January 1977 established Victims Compensation Commissions (CIVI). The restrictive conditions laid down at the time have been relaxed in stages by Acts No 81-82 of 2 February 1981, No 83-608 of 8 July 1983, No 90-589 of 6 July 1990 and No 2000-516 of 15 June 2000.

The victims of facts, whether or not committed deliberately, that constitute criminal offences have access to a self-contained compensation scheme in relation to a whole series of offences. Applications for compensation do not have to be made in the course of criminal proceedings and it is not necessary for the offender to be identified.

There are two compensation schemes:

- For the victims of serious offences (murder, rape...) against the persons, full compensation is payable.
- For the victims of offences against the person entailing total inability to work for less than one month and the victims to offences against property, compensation is subject to means-related amounts.

The benefits paid by the CIVI are paid by the Fonds de garantie des victimes des actes de terrorisme et autres infractions (FGTI) which can proceed reimbursement against the offender. It is also financed by a contribution charged on property insurance premiums and contracts (3,5% in 2005).

In 2004, 16877 applications were processed by the FGTI. The benefits paid in 2004 came up to 209 541 638 euros.