



THE DUTY TO TAKE CARE AND LIABILITY FOR THE ACT OF THE THINGS IN COMPARATIVE LAW.

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ABSTRACT

The twentieth century was extremely rich when referring to the formation of the fundamental bases for liability in both, Civil and Common Law. The present article aims at comparing different solutions for the same problem analyzing three of the most representative cases of that century in each system: *Winterbottom v. Wright* in England and the *Arrêt Teffaine* and the *Jand'heur* case in France.

Key-words

Liability. Torts. Duty of care

RESUMEN

El siglo veinte ha sido extremadamente rico en lo que se refiere a la formación de las bases fundamentales en materia de responsabilidad tanto en los derechos de raíz románica cuanto en el Common Law. El presente artículo apunta a la comparación de diferentes soluciones para un mismo problema recurriendo, para ello, al análisis de tres de los mas representativos casos del siglo en cada sistema: *Winterbottom v. Wright* en Inglaterra y el *Arrêt Teffaine* y el caso *Jand'heur*, en Francia.

Palabras-clave

Responsabilidad. Responsabilidad Civil. Deber de cuidado

1. THE USEFULNESS OR USELESSNESS OF THE NOTION OF DUTY

Among the elements of liability existing in the Common Law, the duty of care represents a unique characteristic peculiar to this system. Its conception was completely unknown in Roman law and there is no a single trace of it in modern Continental systems. Therefore, this element of negligence brings to civil lawyers, the strongest angle for doubts in relation to its utility and scientific adequacy.

Those doubts do not belong exclusively to those coming from the civil law world. In effect, the unanimously recognized intellectual authority of Professor Buckland had already classified it as “an unnecessary fifth wheel on the coach,

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incapable of sound analysis and possibly productive of injustice.”²

In his seminal article “*Duty in tortious negligence*”, Winfield has also pronounced his disapproval in relation to the utility of the concept, maintaining that, in theory, it might well be eliminated from the tort of negligence, for it got there only by a historical accident and it seems to be superfluous. He also remarks that among the extensive set of circumstances in which a man was civilly liable for inadvertent harm in the early times, in not one of them could it be said that there was any formal and conscious postulation of a precedent duty on the defendant’s part to take care. He shows that, in fact, that duty was taken for granted and consisted in the defendant, either having put himself in a position in which any sensible man would act carefully, or in having assumed something like a status which demanded professional legal skill on his part.³

Leon Green has also expressed his disbeliefs saying that duties are usually stated in broad terms like the “duty to take reasonable care” and that, as such, it means little. Even when it is said that a person owes a “duty to take reasonable care (for example) towards other travelers on the highway”, or duty to provide a “reasonable safe place for a servant to work”, and the like, he sustains that those are little more than pious aphorisms. He argues that, in fact, nothing more has been stated than that some interests of travelers on the highway and some interests of a servant are given protection by organized society-government. But what interests and how much protection, or what specifically is required of respective defendants, are in no way indicated.⁴

He also questions the test that is been used and concludes that “the strangest chapter in all tort law” is that the foreseeability test for duty is nothing more than the foreseeability test of negligence, and also the one used for the determination of the violation of that duty.⁵

Professor Stone, in his precious book *The province and function of law*, condemns the pre-requirement of duty as being tautologous with the definition of negligence itself.⁶ Similar observations remark that it is probable that not many cases could be found in which liability has been denied by the Court, on the ground of absence of duty, which could not have been similarly decided on the ground that damage to the plaintiff was not reasonably to have been contemplated.

More recently, Howarth has adhered to the long list of critics emphasizing that the central problem with the duty of care concept is that

² BUCKLAND, W.W. The duty to take care. (1935) 51. *Law Quarterly Review*, p. 639.

³ WINFIELD, Percy Henry. *Duty in tortious negligence*. (1934) 34. *Columbia Law Review*, p. 78.

⁴ GREEN, Leon. The duty problem in negligence cases. (1928) 28. *Columbia Law Review*, p. 1025.

⁵ *Id. ib.* p. 1029.

⁶ STONE, Julius. *The Province and function of law: law as logic, justice and social control; a study in jurisprudence*. Sidney: Associated General Publications, 1946, p. 181.

it appears as *unnatural and artificial*.⁷ As an example of this, he points that to say that it is wrong to run some one over because there is a duty not to run over that particular person sounds extremely peculiar. It is wrong to run some one over because it is wrong to do harm, not because one 'owed a duty' to the victim not to run him over!⁸

Buckland had already put that in evidence. If a person has a defective step on his stairs and another is hurt by it, he says, the negligence certainly does not consist in having a defective stairs. Every one has a perfect right to have a defective stair and to keep it unrepaired. The tort consists in allowing other to be damaged by entering the danger zone without warning or taking other precautions against the damage. No one owes any duty not to be careless, every one has a right to be as careless as he likes. The duty is a duty not to harm others by carelessness and that duty every one owes to everyone, he concludes.⁹

However, some respected authors still consider the duty element as valuable. Fleming, for instance, believed that the question whether a duty exists in a particular situation involved a determination of law for the court, and offered, as a consequence, the procedural advantage of raising the issue as a preliminary question of law (or demurrer) or permitting the case to be withdrawn from a jury, even if there was sufficient evidence for a finding of negligence against the defendant. That circumstance led him to the conviction that the notion of duty aided consistency in the Common law and served as a brake upon the proclivity of juries to indulge their compassion for accident victims, without due regard for the wider implications of their findings in imposing undue burdens on particular activities.¹⁰

Even if this could have been an acceptable argument in former times, Hepple remarks that at the present time, this control is unnecessary now that jury trials in civil cases for negligence have disappeared.¹¹

Lawson contends that the requirement of a legal duty to take care, or something analogous to it, is a necessary feature of any developed law of negligence. Perhaps anticipating critics that the *lex Aquilia* did not mention anything of the kind, Lawson says that it must be remembered that the *lex Aquilia* itself limited liability very strictly to killing and to damage done by a person who *usserit, ruperit, fregerit*, that is, burnt or broke the thing in question; and the jurists, though they enlarged the meaning of *ruperit* to include any spoiling (*corruperit*), insisted that the damage must have been done *corpore*

⁷ Prosser also refers to the artificial character of the concept of duty. In the ordinary case, he says, "if the court should desire to find liability, it would be quite as easy to find the necessary 'relation' in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff." PROSSER, William, KEETON, W. *On torts*. St. Paul: West Publishing, 1984, p. 357.

⁸ HOWARTH, David *Textbook on tort*. London: Butterworth, 1995 p. 157.

⁹ BUCKLAND, W *op.c it.*, p. 639.

¹⁰ FLEMING, John. *The law of Torts*. Sidney: Law Book, 1977, p. 150.

¹¹ HEPPLER, Bob. Negligence: The search for coherence. *Current Legal Problems* (1997), p.78.

corporis, that is, there must have been physical damage to the thing, and a physical contact between it and the defendant.¹²

Stapleton considers that the value of the duty concept is that it allows courts to signal, what she calls, relevant systemic factors going to the issue of liability. A 'countervailing systemic' factor is one which the courts find persuasive in justifying the decision not to impose liability whenever it is present, even if the defendant in a particular case had clearly been careless and caused an actionable form of damage to the plaintiff.¹³

Dias adopted a conciliatory tone arguing that duty of care is a hybrid notion that combines a question of law and of fact, a dichotomy which is apparent in the language of judges and writers. For him, those who seek to defend its utility seem mindful of the element of law in it, while those who attack it are thinking of the element of fact.¹⁴

The undeniable practical wisdom of the Romans discarded any conception equivalent to the notion of duty. Their instinct led them to believe that it was more rational to say that there is always a duty not to harm people by negligence. *Alterum non laedere* (not to cause damage to others) that was the pivotal notion. The Roman law was clear: the tort consisted in damage wrongfully inflicted. The damage done was the cause of action. They did not have to think about a previous relation of any kind, because the relation was created by the damage itself. The duty was to compensate the economic disequilibrium caused by the act of the defendant. But all this functioned through the idea of *culpa*. Not taking the care that a reasonable man would take in the circumstances, as they were or should have been present to his mind was the basis of the notion of culpability, and if any damage resulted as a consequence liability should be imposed.

This method of rationalization passed on to all civil systems, which manage without the idea of duty with any detriment of soundness in the structure of the systems, or to the individual adjudication of justice. Markesinis has pointed, in relation to the German law, that if there is any link to the duty to take care, this is done with the broader question of whether or not the law recognizes or protects the type of interest interference which forms the basis of the plaintiff's complaint. In that sense, he thinks it would be better to speak of a plaintiff-protected rights rather than of a defendant's duty, especially when the focus is on the kind of injury the plaintiff has suffered.¹⁵ Fleming noticed that *Tate & Lyle v. GLC* (1983) is a rare case where plaintiff's negligence claim was defeated specifically on the ground that he lacked a legally protected interest (to deep water access to his jetty).¹⁶

¹² LAWSON, Frederic Henry. Duty of care: a comparative study. (1947) 22. *Tulane Law Review*, p.113.

¹³ STAPLETON, Jane. Duty of care: peripheral parties and alternative opportunities for deterrence. (1995) 111. *Law Quarterly Review*, p. 303.

¹⁴ DIAS, Reginald Walter. The duty problem in negligence. (1955). *Current Legal Problems*, p. 198

¹⁵ MARKESINIS, Basil S. *The German Law of Torts*. Oxford: Clarendon Press, 1994.

¹⁶ FLEMING, J. op. cit. p. 150, note 6.

A similar method of rationalization looks particularly hard to imagine in the Common law, especially considering the strong influence of its historical roots. In effect, it is important to remind that trespass itself was a writ of wrong rather than a writ of right, where the plaintiff complained of a wrong rather than demanded the reinstatement of a right. The natural consequence of this was the need to prove the particular wrong that has been committed, instead of emphasizing the general right of not been harmed.

Perhaps, most of the uncertainty that prevails in the Common Law through the whole law of negligence could have been avoided if the general notion of liability for fault of the Civil law had been adopted. It has been said that the rule about setting up a legal duty *in limine* is superfluous, and that exactly the same result would be reached if the law simply said to the plaintiff: “prove that the defendant has harmed you by not acting as a reasonably careful man would have behaved in similar circumstances, and you have then made the case.”¹⁷ In fact, Howarth believes that if that were the case, proximity could have been confined to its proper role as a test of remoteness of damage. He goes beyond and persuasively argues that what Lord Atkin was saying in *Donoghue* was simply that negligence requires both, fault (including foreseeability) and an absence of remoteness.¹⁸

2. WINTERBOTTOM V. WRIGHT AND THE IRREPARABLE DAMAGE RESULTING FROM IT, OR WHEN LORD ABINGER CROSSED THE RUBICON.

Apart from the discussion about its utility, the fact is that in the early times of the evolution of the Common law, the courts and lawyers functioned quite well without the use of the concept of duty of care.¹⁹ In effect, there is no discussion in the earlier cases as to any ‘duty’ that must be antecedently proved to make the defendant liable. Of course, in pleadings of the eighteenth century there were references such as “not regarding his duty in this behalf, conducted himself so carelessly, negligently and unskillfully”, or some others of the kind but, in those cases, the sense of the expression was simply equiparable with the general idea of the Roman *culpa*.

Winfield believes that this ‘duty’ was not made the subject of critical discussion by counsel or by the bench, except to decide whether the action was founded on this, that, or the other branch of the law, i.e. whether the declaration was based on contract, tort, or what not.²⁰ It is certain that before *Winterbottom v. Wright* the plaintiff had always been able to sue without proving the existence of any kind of duty. As Winfield put it, the plaintiff might have lost his action for some other reason, but he had never lost it because he had not proved a duty to take care.²¹

¹⁷ WINFIELD, P. op. cit., p. 73.

¹⁸ HOWARTH, D. op.cit., p. 265.

¹⁹ THE, E.K. Reasonable foreseeability in negligence. (1975) 5. *University of Tasmania Law Review*, 45.

²⁰ WINFIELD, P. op. cit., p. 79.

²¹ *Ibid*, p. 85.

The absence of the necessity of discussion of that element in earlier cases, is probably the reason why old and respected authors, like Pollock have asserted that “duties imposed in tort are fixed by the law and independent of the will of the parties...all members of a civilised commonwealth are under a general duty towards their neighbors to do them no hurt without lawful cause or excuse.”²² This statement has provoked the strong reaction of Hepple, who sustains that as a proposition of law, this was certainly wrong in 1887, since duties of care were recognised only in specific situations, most of them involving direct relations between the parties.²³

Fleming has argued that “the concepts we encounter in the books or in the jurisprudence are often little more than verbal devices, means of formulating conclusions, but not the reasons that dictate them.”²⁴ Even if this is true, no doubt that the preference for one verbal device over the other reveals, some substantial aspects of that system. In that sense, we believe there is a move away from fundamental moral principles lying subtly underneath the notion of duty. It appears to us that to reflect notions of corrective justice, negligence has to have an element that expresses the moral basis of the obligation to compensate. Duty does not do that. Fault does. Professor Howarth seems to agree when he remarks that “duty of care cases are cases in which the defendant says, so what if I was at fault and you were harmed as a consequence, I win anyway.”²⁵

But, how did the idea of duty arise? No doubt, that *Winterbottom v. Wright* was largely responsible for getting into the law the duty idea in negligence.

In the nineteenth century the law of negligence operated mainly within a contractual context. Actions between strangers were the exception rather than the rule. Atiyah has shown that when injury was caused by negligence to a railway passenger, or to a visitor on dangerous premises, or to an employee, there was constantly the presence of a contractual flavour to the nineteenth century lawyer.²⁶ There is no doubt that the division between tort, contract and quasi-contract has been obscure in the Common law until relatively recent times. Winfield says that the boundaries marking off tort, contract, quasi-contract and bailment were so imperfectly realised that even Blackstone himself reflects this confusion.²⁷ A consequence of that obscurity was that in the process of separating contract from tort, in the development of the tort of negligence, a confused notion about *assumpsit* became the germ of the duty idea. It was thought that, as *assumpsit* in contract always showed an ‘undertaking’ of liability, therefore liability in tort must show something equivalent to it, i.e., ‘duty’.²⁸

²² Pollock’s *Law of Torts*. 1887, p. 3.

²³ HEPPLÉ, Bob. op. cit., p. 76.

²⁴ FLEMING. Remoteness and duty control devices in liability for negligence. (1953) 31. *Canadian Bar Review*, p.497.

²⁵ HOWARD, D. op. cit., p. 162.

²⁶ ATIYAH, Patrick. *The rise and fall of freedom of contract*. Oxford: Hart Publishing, 1999, p. 502.

²⁷ WINFIELD, P. op.cit. p. 75.

²⁸ Ibid. p. 97.

Before Winterbottom in relation to common callings nobody talked about a precedent duty to take care; their liability derived from their *status*. As Winfield sums up, the question was not, “Is there a duty?” but, “was the defendant in fact a bailee, common carrier, or the like and, if so, what excuse has he to offer for the harm that has occurred?”²⁹

In trespass, the defendant was liable, provided the harm done was direct and immediate, even if the harm inflicted was unintentional. Any discussion related to a precedent duty to take care would be absolutely incompatible with the essence of trespass. In the overlapped instances of nuisance and negligence, there was no need to show the existence of duty either.

In *Winterbottom v. Wright*, the defendant was a manufacturer and repairer of mail coaches who contracted with the Postmaster-General, to provide coaches for the purpose of conveying mailbags. Under the contract, the defendant also agreed to keep the coaches in a fit, proper, safe and secure state and condition. He failed to comply his obligations and the plaintiff, a mail coach driver, was seriously injured when a vehicle broke down due to lack of repair. The Court denied liability arguing that an action in tort could not be based on the fact that the defendant’s conduct constituted a breach of someone else’s contract. In other words, since it was the Postmaster-General, rather than the coach driver, who had paid the coachbuilders to assume responsibility for the safety of the coach, there was no reason why the coach driver should benefit when the coach broke down. This rule, later described as “the privity fallacy”, was that a plaintiff who was a third party to a contract could not make a claim in tort, that is, a claim based on an independent tort duty, if the conduct of the defendant identified as tortious also happened to constitute a breach of the contract.³⁰

The negligence fate was settled. It was like if the Court had said *alea jacta est*, and crossed the Rubicon. The law took a wrong turn, an unfortunate detour. From the position that a lack of a (contractual) duty was a bar to liability, the courts moved to the position that the existence of a duty to the plaintiff was a necessary condition for liability.³¹ Winfield explained how *the die was cast* in *Winterbottom* showing the very short step that existed from what the Court said and

to say that negligence is not actionable unless there is a duty to take care. True, this was putting a twist upon the older law which was quite alien to it, for duty was not then thought of as an essential of liability for inadvertence. True, again, it was introducing a new element in the more recent law of which negligence had been born as a tort; for, to take only a single instance, and that only a

²⁹ *Ibid* p. 78.

³⁰ STAPLETON, Jane. Duty of care and economic loss: a wider agenda. (1991) 107. *Law Quarterly Review*, p. 250.

³¹ GIBSON, R.D. A new alphabet of negligence. In: *LINDEN Studies in Canadian Law*, p. 189.

year before *Winterbottom v. Wright*, the Queen's bench decision of *Lynch v. Nurdin* shows express recognition of negligence as a tort, but is silent about duty.³²

In a well-known article, Palmer says that it is immaterial whether the citadel of privity was intentionally or mistakenly built. The fact is that due to subsequent misinterpretation or an original fallacy, *Winterbottom* acquired a meaning well beyond the accepted contract principle, 'if no privity, no contract', and came to stand for the fallacious hegemony of contract over tort: 'if no privity of contract, no action in tort.'³³

The famous part of Lord Abinger's opinion that originated the entrance of privity in the field of torts stated: "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action."

His worries were clearly expressed when he said that "unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

Alderson B. also expressed his fears: The only safe rule, he said, "is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

It has been said that the essence of the decision meant that to compel a negligent worker to indemnify each and every person who might be injured by his negligence would be inexpedient and unjust. The reason alleged was that it would widen unduly the circle of liability, thus producing excessive intricacy of actions, and creating conditions of responsibility, which would deter prudent men from engaging in certain occupations.

Labbat has questioned this saying that, "until the matter has been brought to the test of experience, the burden of proving that this would be the consequence of widening the circle of responsibility, lies upon those who make the assertion, and this burden is not discharged by the mere *ipse dixit* of any judge, however eminent he may be." He completes the idea emphasizing that, in fact, the opinion of a lawyer upon the probable operation of economic forces is of just as great or as little value as that of a layman of equal intelligence and with the same knowledge of the subject.³⁴

Some voices have arisen in defense of *Winterbottom v. Wright*. Bohlen, for instance, argued that the case might have been correctly decided on the

³² WINFIELD. Duty in tortious negligence. (1934) 34. *Columbia Law Review*, p. 85.

³³ PALMER, Vernon. Why privity entered tort. An historical re-examination of *Winterbottom v. Wright*. (1983) 27. *American Journal Law History*, p. 96.

³⁴ LABBAT, C.B. Negligence in relation to privity of contract. 16. *Law Quarterly Review*, p. 188

basis of privity, but only because the plaintiff misled his case in contract and failed to allege negligence. The distinct professor emphasizes that it must be remembered that at the time and in the court before which the case came for decision the utmost accuracy of pleading was still of essential importance.³⁵

His conviction is that, in form, the only obligation alleged was clearly one arising solely by virtue of the contract to which the plaintiff was not a party, but upon which he, knowing of its existence, had chosen to rely. In substance, he says, the breach was a failure to keep the coach in repair. Complementary, he argues that there was no allegation in the declaration that the coach, when delivered to the Postmaster, was in any way defective and also that, with the transfer of possession, the legal duty of repair had passed to the Postmaster and rested solely upon him.³⁶

Atiyah strongly reacted saying that what passes for legal reasoning in students' textbooks cannot satisfy as sound history and declares that the story is almost complete nonsense. He reaffirms that the action in *Winterbottom v. Wright* was fully argued in tort. Besides, he remarks that the privity of contract rule was not even clearly established at that time. Finally, he concludes that it was no logical 'fallacy', but policy arguments, which swayed the Court. In effect, he points out that besides the familiar argument that to allow the action would be to open the door to vast numbers of potential lawsuits, it is of great significance Lord Abinger's statement that "the arrangements between the parties should not be ripped open by this action of tort."

According to Atiyah, what he meant was that the manufacturer sold the carriage to the plaintiff³⁷ at a price based upon the manufacturer's expectations as to his potential liabilities and that these expectations did not cover possible liability to servants such as the plaintiff, because such actions were unheard of. Therefore, if the action were allowed, the manufacturer's expectations and calculations would be upset; the basis of the contract of sale would thus be '*ripped open*'. This, he concludes, was not so much of a privity of contract fallacy, as the Bramwellian fallacy, in a clear reference to one of the strongest supporters of the introduction of limited liabilities for companies.³⁸

From the point of view of corrective justice, this is completely wrong.

³⁵ In fact, it was not until ten years later than the Common Law Procedure Act dropped the requirement that any particular form of action should be mentioned on a writ, and it was not until the Judicature Act of 1873 that the forms of action were abolished completely.

³⁶ BOHLEN, Francis H. *Basis for affirmative obligations in the Law of Tort*. 53. *American Law Register*, p. 281. It is not clear why Bohlen refers to the defendant as if his only obligation was to deliver a perfect coach, when there is no doubt that he was also in charge of the repairs, keeping and maintaining the coach in "a fit, proper, safe and secure state condition". Maybe Bohlen was thinking of a previous necessary condition for the repairs to be made, which was the deliver to the defendant of the object to be repaired.

³⁷ He mistakenly says that the manufacturer sold the carriage to the plaintiff. Obviously, he meant the Postmaster-General.

³⁸ ATIYAH, Patrick. *The rise and fall of freedom of contract*. Oxford: Clarence, 1979, p. 503.

What should matter is that the one who, without justification, harms another by his conduct is required to put things right. Harm-doer and harm-sufferer are to be treated as equals, neither more deserving than the other. The one is therefore not entitled to become relatively better off by harming the other. The balance must be restored.³⁹

Anyways, Atiyah's views are in accordance with the accepted idea that, in general, the courts were happy to make defendant's liable where they had *assumed* responsibility for the care of another by entering into a contract with that other for reward, and that they were less happy about *imposing* on defendants a gratuitous duty to look after others.⁴⁰

Alderson's words that "this is a case of hardship; but that might have been obviated if the plaintiff had made himself a party to the contract", besides being a '*ludicrous suggestion*', as Gardiner⁴¹ has called it, clearly reveals the Victorian belief that individuals should bear all responsibility for their own welfare and that they could not be expected to look for the welfare of others unless they were being paid to do so. In fact, this words are so strong (a fact that has not been sufficiently emphasized by commentators) that a civil lawyer is ready to accept that, almost in the middle of the nineteenth century, a victim in the common law, '*lived at his peril*', and that liability to the world at large would not have a place in it for still a long time (if ever).

Another opinable aspect of Atiyah's remarks is his conviction that Winterbottom was "fully argued in tort". In effect, the references to the contract are so constantly repeated and emphasized that nothing, besides pure reverence to the authority of the former Oxford professor, would lead us to the contrary opinion. Abinger's words also do not leave any margin to doubts about the nature of the action: "a carrier may be sued in either *assumpsit* or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract..."

Palmer adds arguments saying that the report in Meeson and Welby states, "The declaration then averred, that the defendant so improperly conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf that, etc..." He has no doubts that a contractual reference is sandwiched in between others, but he also believes that the allegation of negligence can be read standing on its own to refer to a duty apart from the defendant's contract. However, it seems more accurate to say that the negligence to which Palmers refers, is used in the sense of the way in which the contractual violation was performed.

His other argument that two judges stated without qualification that

³⁹ HONORÉ, Tony. **Responsibility and fault**. Oxford: Hart Publishing, 1999, p. 73.

⁴⁰ GILIKER, Paula. BECKWITH, Silas. **Tort**. London: Sweet & Maxwell, 2000, p. 23.

⁴¹ GARDINER, David. Mc GLONE, Frances. **Outline on Torts**. Sidney: Butterworths, 1998, p. 132.

the plaintiff was 'remediless', does not seem strong either. His conclusion that if they had meant that the plaintiff was only remediless in contract, and not in tort, they would have qualified themselves does not seem that obvious.⁴² In effect, if the action was in contract, what would be the reason for the need of the judges to refer to a tort that had not been even mentioned?

Professor Palmer stresses the fact that the doctrine of privity arose in the context of three factors (which are no longer true today). These were: (i) a rigid tort law not yet in possession of the tort of negligence, (ii) the analytical inability to distinguish between tort and contract except in procedural terms, and (iii) a strong bias, if not a rule, against concurrent actions in tort and contract. In substance, he defends that the privity point was the third step in a lengthier analysis and that the reasoning was first premised upon the non existence of any remedy in tort for the plaintiff, irrespective of the presence of a contract. He also points to the perception that plaintiff's action would disturb the normal rule against the concurrence of tort and contract remedies.⁴³

Palmer believes that the court truly reached a motivated conclusion that plaintiff was altogether remediless in tort quite apart from any privity considerations. He also reminds that Baron Rolfe said it was a case of *damnum absque injuria*, which he considers, as a matter of contemporary authorities, that was not an untrue statement.

Palmer's opinion is questionable. In fact, two and a half years after the publication of the first volume of Blackstone's Commentaries on the Laws of England, Francis Buller, in his Introduction to the law relative to trials at *Nisi Prius*⁴⁴ had already set a striking formulation of the principle of negligence. "Every man ought to take a reasonable care that he does not injure his neighbor; therefore, wherever a man receives any hurt through the default of another, though the same were not willful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained."⁴⁵

As Ibbetson emphasizes these ideas were not indigenous and all of them can be traced into those Natural lawyers of the seventeenth and eighteenth centuries, who were particularly influential in England, such as Grotius, Pufendorf, Burlamaqui and Barbeyrac.⁴⁶ In other words, the substance was there, it was the Court of Exchequer's job to use it.

Winfield restated the significance of *Langridge v. Levy* and *Winterbottom*

⁴² PALMER, V. op.cit.

⁴³ Ibid. p. 93.

⁴⁴ The text was first published anonymously in 1767. The attribution to Buller appears in the edition of 1772. According to the dedication in this edition, it was based on manuscript notes of his uncle, Henry Bathurst.

⁴⁵ PRICHARD, M.J. Trespass, case and the rule in *William v. Holland*. (1964) *Cambridge Law Journal*, p. 234.

⁴⁶ IBBETSON, David. *A historical introduction to the law of obligations*. Oxford: University Press, 1999, p. 165.

v. Wright saying that they were the forerunners of a long chain of decisions reducible to the following type: (i) There was a contract or agreement between A and B whereby A was bound to do something for B, or was permitted by B to do something, or was bound to supply B with something. (ii) C, who was no party to the contract, was injured by A's imperfect, but unintentional misperformance of his contract or agreement with B, or by abuse of B's license. (iii) C sued A for the tort of negligence. (IV) You, C, are a stranger to that contract. How can I be under duty to you? (V) Hence, the courts were forced to deal with the question, "Was there a duty towards C"? And thus the consideration of this question became of prime importance and duty became an essential in negligence.⁴⁷

No distinctions were made between duty as contractual obligations and duty as the obligation against the world to refrain from harming others, or as Heuston puts it, between the warranty that care has been taken and the duty to take care.⁴⁸ And that was how, those very peculiar ideas of morals and justice (or the lack of it) of the Court, based on the fear of impeding industrial development and overwhelming the courts, drew the shape of manufacturer's liability (or the lack of it) during almost a century, labeling actual acts of negligence (no matter how gross) as simply incidents of the activity.

3. THE CODES OF THE ENLIGHTENMENT

By the time of *Winterbottom v. Wright* the Enlightenment had already given birth to one of its most significant products: codification; this is, the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation, consciously planned in a rational and transparent order. As a result, in 1842, there were in continental Europe three civil codes in force: the Prussian, the Austrian and the French civil code.

The Prussian code of 1794 is considered to be the first of the modern kind of national codifications. The early steps towards a codification took place in the eighteenth century. In 1746, Frederick II (the Great) instructed his Grand Chancellor, Samuel Cocceji, to devise a code to replace "that law which is written in Latin and has been compiled without system or order". According to the instructions, the law was to be rational and comprehensible as to the form, and as to the substance, it was to be based on natural reason and the constitutions of the component territorial units.

After some drafts produced before the death of Frederick II a code, called the Common Territorial Law of Prussian States (*Allgemeines Landrecht für die preußischen Staaten*, the ALR) was finally promulgated by Frederick William II in 1794. It was a massive and exhaustive code, which covered not only matters of private and public law, but also church, criminal and feudal law,

⁴⁷ WINFIELD. Duty in tortious negligence. (1934) 34. *Columbia Law Review*, p. 86.

⁴⁸ *Donoghue v. Stevenson* in retrospect. (1957). *Modern Law Review* 20, p. 10.

descending to the regulation of cases in extraordinary detail, in the vain hope of foreseeing and regulating all possible cases.⁴⁹ The legislator's passion for completeness and comprehensiveness and the enlightened wish to make the Code comprehensible, popular, and educational, led him to abandon juristic and conceptual consistency and to adopt a style of language, which was discursive and pedagogic. With almost 17.000 paragraphs, the Code (a "monstrous anti-intellectual undertaking", according to Kunkel) was extremely hard going and impossible for anyone to master.⁵⁰

The details account for the Prussian Code's failure to achieve greater success.⁵¹ However, it remained in force in all territories governed by the Prussian monarchy until the German Civil Code replaced it in 1900.

The most influential and long-lasting Germanic codification of this period is undoubtedly the Austrian code of 1811, the *Allgemeines Bürgerliches Gesetzbuch*, or ABGB. Wieacker remarks that, in Austria, the process of codification ran parallel with that in Prussia which shows that the Enlightenment, of which the codes are the product, was a pan-German affair.⁵²

Plans for a codification of civil law in the Hapsburg Empire had begun in the eighteenth century under the empress Maria Theresa (1740-1780). The intention was to produce a code of general private law for the hereditary lands of Austria. It was to be based upon the *ius commune* and the Law of Reason.

The first part of this code was promulgated under Joseph II, in 1786, but it was not completed until 1806 by Franz von Zeiller and finally promulgated in 1811.

The whole content of this code, that excludes public law and commercial law, witnesses to an amalgam of Roman law and natural law ideas. With the exception of significant modifications in 1914-16, the Austrian code remains in force to the present day.

Watkins points out that the Prussian and Austrian code were specifically described as codifications for a particular territory or the subjects of a particular dynasty. The French Civil code of 1804 was altogether more ambitious in its scope. If nature manifested to human reason the laws by which mankind should live, it followed that those laws were immutable, the same for all societies at all times. A rational code of law, therefore, should not be limited in its application to subjects of one ruler or the inhabitants of one territory. In the new age of freedom and equality, a rational system of law could and should be devised which was capable of serving any human society, regardless of place or time.⁵³

⁴⁹ CAENEGEM, Van R.C. *An historical Introduction to Private Law*. Cambridge: University Press, 1988, p. 124.

⁵⁰ ZWIEGERT, Konrad. KÖTZ, Hein. *Introduction to comparative law*. Oxford: Clarendon, 1998, p. 138.

⁵¹ RIEGERT, Robert. *The west german civil code, its origin and its contract provisions*. (1970). *Tulane Law Review*, Vol. 45, p. 51.

⁵² WIEACKER, Franz. *A history of private law in Europe*. Oxford: Clarendon, 1995, p. 267.

⁵³ WATKIN, Thomas Glyn. *An historical introduction to modern civil law*. Cornwall: Ashgate, 1999, p. 133.

Codification attempts began with the vote by the Constituent Assembly on 5 July 1790 “that the civil laws be reviewed and reformed by the legislators and that there would be made a general code of laws, simple, clear and appropriate to the constitution”. The first title of the constitution of 1791, establishes that “a Code of civil laws common to the whole kingdom will be enacted.” Nevertheless, actual work on codification only began under the convention (1792-95). Various drafts were formulated between 1793 and 1799 by different commissions presided by Cambacérès, who was a member of the national Convention in 1792. In 1793, he presented a first draft which was immediately rejected on the ground of being too comprehensive and complicated, although it had only 697 articles. The next year, Cambacérès presented another draft with only 297 articles, but the national Convention found it too sparse and terse. A third draft was yet offered in 1796, but its consideration was interrupted by Napoleon’s taking power in 1799.⁵⁴

In August 1800, Napoleon appointed another commission of four members to do the task, which was finished in the astonishing short period of four months. Two of them (Tronchet and Bigot de Préameneu) came from the north of France, where customary law prevailed, and two from the south (Portalis and Maleville) where Roman law prevailed. This shows the conscious effort to treat customs and Roman law on an even footing. These different penchants, rather than frustrating collaboration, were ideal for producing a code blending the two basic elements of the then existing French law in its dispersed condition. Portalis refers to this, in particular, in his *Discours Préliminaire*: “We have made a compromise, if such an expression may be used, between the *droit écrit* and the customs, whenever we have been able to reconcile their provisions or to modify each in the light of the other, without infringing the unity of the system or causing widespread dissatisfaction.”

By “consolidation, moderation and compromise”, Napoleon, working with a small team of lawyers, transformed the laws of the Revolution into a valuable system of Codes and, after several political wrangles with the various organs of the legislative body, the civil Code was eventually enacted on 21 March 1804.⁵⁵

The purpose of the drafters of the Code, to deliberately restrain in the proliferation of detailed rules, is transparently explained by Portalis: The task of the Code, he says, is “to express, in broad terms, the general maxims of the law, to settle principles fertile in consequences and not to go down in the details of questions which may arise in every topic. It is the task of judges and lawyers, engrained with the general spirit of the law, to conduct the application of those principles. There is a science of legislators as there is one for the judges; and one is not similar to the other. The legislators’ science consists in finding in every matter the principles most favorable to a general rule; the judge’s science is to

⁵⁴ ZWEIGERT *op. cit.*, p. 82.

⁵⁵ CRUZ, Peter de. *Comparative law in a changing world*. London: Cavendish, 1999, p. 63.

make such principles operative, to ramify them, to extend them by a wise and reasoned application to given cases.”⁵⁶

These views would probably appear strange to Justice Holmes, to whom “general propositions do not decide concrete cases”, and therefore, should believe that a code is unworkable.

The best known example of this compressed style of legislation is found in articles 1382-1386 of the French Civil Code. These five laconic paragraphs cover virtually the whole of French tort law in a handful of majestic, if trivial propositions. Austria, having only half as many paragraphs as the code, devotes about 40, and the German Civil code, 31.

The Civil code presented the law in clear, concise and readily understandable language, addressed to the average citizen of France. Merryman said that the French Civil code was envisioned as a kind of popular book that could be put on the shelf next to the family bible.

It is a novel piece of substantive law which fused *droit écrit* and the *coutumes*, and created a unified law for the whole country. At the time of the Revolution, France was divided into the land of customary law (*pays de droit coutumier*) and the land of written law (*pays de droit écrit*) of basically Roman character. Its drafters declared that the code is a collection of rules of civil law in that it derives from Roman law as it was practiced in France – a *ius commune* – a modernized form of Roman law. However, it did not simply reproduce Roman law and there were obvious differences between the code’s approach to certain legal concepts, and that of previous interpretations of Roman law.

The structure of the French Civil Code is that of the system of the Law of Reason and it shows the strong influence of two great lawyers. In effect, Domat had already indicated the order in which a rational code should be arranged in his seminal book *Les lois civiles dans leur ordre naturel*. Pothier, in turn, during the eighteenth century, particularly in his *Traité des Obligations*, also had begun the task of arranging the substance of the roman law of the Digest and the principles of the customary laws of France according to a rational scheme.

Following Gaius *Institutes*, the Code is composed of three “Books” or divisions, preceded by a brief Preliminary Title containing six articles to introduce the purpose of the Code. Book One is headed “Of Persons”; Book Two “Of Property and Different kinds of ownership” and Book Three “Of the different ways of acquiring property”. Each Book is divided into Titles. These are again divided into Chapters and, in several instances, these Chapters are divided into Sections. The ultimate units are the articles and there were originally 2281 of these.

Although the Civil Code has undergone several revisions and amendments, being overtaken in many areas by supplementary legislation,

⁵⁶ Apud TUNC, André. *Methodology of the Civil law in France*. (1976). *Tulane Law Review*, vol. 50, p. 463.

it has certainly stood the test of time as a model codification. This result is attributed to the clarity of its concepts, the accessibility of its language to the ordinary citizen, and the fact that it was, in Portalis' words, "the result of the experience of the past, the spirit of centuries." Other great codes came into force later in Central and Western Europe, but beyond doubt, the French Code civil is intellectually the most significant and historically the most fertile.

4. LIABILITY FOR THE ACT OF THE THINGS IN THE FRENCH CIVIL CODE (ART. 1384 PARAG. 1)

The classical theory of French law is that fault (*faute*) is a necessary condition of civil liability. This principle, asserted by Domat, appears clearly stated in art. 1382, the central opening rule of Chapter II related to Delicts and Quasi-Delicts: "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation."⁵⁷ The onus of proving this fault, as well as that it was the cause of the damage rests on the plaintiff.

Complementing this notion, art. 1383 establishes that: "Each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence."

It is clear that the drafters of the Code sustained through this conception that civil liability was nothing else but a particular aspect of moral responsibility. To condemn anyone who, without fault, causes damage would be like condemning an innocent man. Until very recent times it was believed that, whenever, in exceptional circumstances, liability without fault was accepted, it could possibly be justified on notions of social utility, but never on moral bases.

Following arts.1382/3 that establish the general rules for intentional (art. 1382) or negligent (art. 1383) harm, the following articles enumerate specific cases of liability: art. 1384 sets liability for persons (parents, masters and teachers) or things; art. 1385 liability for animals and art. 1386 liability for collapsing buildings due to default of maintenance, or defect in its construction.

The traditional theory considered that the code had established a presumption of fault in articles 1385 and 1386, so the victim did not have to prove the negligence of the defendant, as in general cases. Therefore, anyone who had not been "lucky" enough to be bitten by a dog, kicked by a horse, or hurt by the fragments of a collapsing building, but instead had been hurt by an explosion, for instance, had had, according to the Civil Code, to prove the fault of the allegedly liable.⁵⁸

On the second half of the nineteenth century, the huge transformations

⁵⁷ "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer".

⁵⁸ STARCK, Boris. *Droit Civil*. Obligations. Paris: Librairies Techniques, 1972, p. 27.

introduced by the industrial revolution gave way to the first doubts and objections about the adequacy of the principle of fault to the new and emergent social needs. As Walton remarked, before the days of steam and electricity and dynamite the worker could, as a general rule, protect himself by the exercise of ordinary care. His tools were few and simple. None of them moved except when he handled them, and no one was in a hurry. It was, therefore, not to be wondered at if the law gave him no claim against his employer, unless some fault on the part of the employer could be proved.⁵⁹ Industrialization changed this bringing an enormous increase in the number of accidents at the workplace, as well as others. Complicated swift-moving machine explode, boilers burst, scaffoldings fall apart, trains collide, or are derailed. All this added, not only an increase in the number, but also a particular obscurity on the origin of many of them so intense that led some authors to say that the accident had become *anonymous*.⁶⁰

The requirement of the Code imposing the victim the need of proving the fault of the defendant would frequently represent the impossibility of proving that fault, either because the cause of the accident was due to an unforeseeable mechanical deficiency (where no fault could be attached to anyone), or even if there was a fault at the origin of the accident, the victim was not able to establish it, because of lack of witnesses, or due to a technical impossibility to know what really happened, etc.

In this crucial period, many influential writers, among them Louis Josserand (*La responsabilité du fait des choses inanimées*) and René Saleilles (*Les accidents du Travail*) advocated a radical change in the law of torts, consisting in the rejection of fault as the sole basis for liability and in a wide adhesion to 'objective' (i.e., no-fault) forms of liability.⁶¹

The main idea of their theory was that a person who benefits from an activity that involves a risk (an employer, a driver) should bear the burden of the damage caused by that risk. Other formulation asserted that liability for accidents occurring in the pursuit of monetary profit should not depend upon the presence of fault in the defendant, but should simply be a charge against the profits. The risk was thus correlative to the profit: *ubi emolumentum ibi onus*.

On this context, a new interpretation of art. 1384 was going to represent the most dynamic and significant change in contemporary civil law, transforming an irrelevant sentence, with no legal meaning and quietly ignored for three quarters of a century, into the most frequently applied of all the Civil Code provisions.

In effect, art. 1384 enacts that "A person is liable not only for the

⁵⁹ WALTON, F.P. Liability for damage done by things. (1937) 49. *Juridical Review*, p. 364.

⁶⁰ STARCK, Boris. The foundation of delictual liability in contemporary French law. *Tulane Law Review* (1974) p. 1045.

⁶¹ GALAND-CARVAL, Suzanne. *Unification of Tort Law: Strict Liability*. London: Antony Rowe, 2002, p. 127.

damage he causes by his own act but also for the damage which is caused by the act of persons for whom he is responsible, or by things which he has under his guard.”⁶²

Until the end of the nineteenth century, it was accepted without question by French courts and writers, that the reference to liability for things was taken to be simply a preliminary indication of the liabilities imposed by art. 1385 and 1386 on the guardian of an animal and the owner of a building. The sentence was considered a transition, a mere *elegance de style*, to paraphrase Tunc’s expression. It did not express any rule of law; it was not meant to be applied and had no place in a code.⁶³

The new interpretation argued that in ordaining liability for the things ‘which one has under one’s control’, art.1384 par.1 was not simply making a preliminary announcement that art.1385 and 1386 were about to impose liabilities for animals and ruinous buildings but, on the contrary, had an independent force of its own and was applicable in all cases in which any thing under the defendant’s control had caused harm in any form.

Until then, the traditional interpretation was that, when referring to the action of persons for whom the defendant must answer, the draftsmen had in mind the persons mentioned in the latter part of the same article, children, apprentices, and workmen. Similarly, when referring to the action of things in the defendant’s control, the draftsmen had in mind the animals and buildings mentioned in articles 1385 and 1386.⁶⁴ But in 1896, in the famous *Arrêt Teffaine*⁶⁵, the plaintiff argued that the letter of the text permitted its application to all inanimate things, and her contention was sustained by the *Cour de Cassation*. The adoption of that view, already expressed by Saleilles and Josserand, was now to become the starting point for revolutionary change in the law of delict.

In that case, the victim had been killed in the explosion of a steamer’s engine. The widow sought damages from the owners, for herself and for her minor children, basing her action upon the fact that the accident occurred because of a latent defect in the machinery. The owner of the steamer was held liable, as ‘keeper’ of the engine, notwithstanding the fact that he did not know, and could not know, of the existence of the defect.

⁶² Art. 1384 (1) “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”.

⁶³ TUNC, André. It is wise not to take the Civil Codes too seriously. In: *Essays in Memory of Professor F.H. Lawson*. London: Butterworths, 1986, p. 71.

⁶⁴ AMOS Maurice. WALTON, Frederick. *Introduction to French Law*. Oxford: Clarendon, 1963, p. 204.

⁶⁵ Several years before that decision, Germany had adopted the first workmen’s compensation act in history and, at the very moment the boiler case was under consideration, England was favourably debating a similar statute which was adopted the following year. It is fairly to be expected that the French court should be inclined similarly to protect the French workers from the dangers of industrial machinery by interpreting art. 1384 of the civil Code, so as to produce a result similar to that which would have been reached under the compensation acts in neighbouring countries. MALONE, Wex. *Ruminations on liability for the acts of things*. 42. *Louisiana Law Review* (1982) p. 984.

The court of first instance held that the plaintiff could not recover, as no fault could be proved on the part of the defendant. Art. 1382 was not applicable. On appeal, the *Cour d'Appel* of Paris reversed this decision primarily on the basis of a breach by the employers of their implied contractual obligation to provide a safe machine. A further appeal to the *Cour de Cassation* was rejected, allowing the claim, not on the basis of art. 1382, nor for breach of contract, but by application of art. 1384!

According to the decision, art. 1384 imposed a presumption of liability that could not be excluded by proving the fault of manufacturer of the engine, or the latent character of the defect; it was necessary to show that the accident occurred by *cas fortuit* or *force majeure*, and this, of course, was excluded by the finding that the explosion was due to a defect in construction.⁶⁶

In effect, the Court held that "Whereas...the explosion of the engine...was due to a defect in construction; as under article 1384 of the Civil Code this finding, which excludes the *cas fortuit* and *force majeure*, established, as to the victim of the accident, the responsibility of the owner of the tug, the owner cannot avoid this responsibility by proving either the fault of the builder of the engine or the hidden character of the fault in question..."

In spite of some critics, many jurists pointed to the essential justice of the conclusion that the person who profits by the use of a thing should be liable for the damage which it causes.

In 1898, the enactment of a statute which gave workers injured in industrial accidents a claim for damages against the employer, whether he was at fault or not, did away with the principal reason for an extensive construction of art. 1384 par.1. Conservative voices argued that there was no longer the need to put an extensive interpretation upon art.1384⁶⁷ and that the decision of 1896 should be construed as establishing merely a presumption of fault in the case of dangerous things. For many years the Court of Cassation followed this interpretation.⁶⁸ The presumption seemed to admit a rebutting, not only by proof of fault on the part of the victim or of a third party, but by mere negative proof of absence of fault.

However, the Court of Cassation went a stage further in a decision of 19 January 1914 establishing that a custodian of a thing could escape liability in damages under art. 1384 par.1 only by proving that the damaging occurrence was due (a) to *force majeure*, (b) to the fault of the victim, or (c) to the fault of a third party.⁶⁹

Thenceforth, it was clear that proof by the defendant custodian that

⁶⁶ RYAN, K.W. *An introduction to the Civil Law*. Sidney: Halstead, p. 121.

⁶⁷ "C'était une jurisprudence tendancieuse et dont la valeur est tout relative: ses motifs qui étaient temporaires ont disparu." PLANIOL. *Revue Critique*, 1906, p. 90.

⁶⁸ AMOS, M. WALTON, F. op. cit., p. 204.

⁶⁹ ZWEIGERT, Konrad. KÖTZ, Hein. *An Introduction to Comparative Law*. Oxford: North-Holland Publishing, 1977, p.323.

he was not to blame for the occurrence of the harm was not enough to free him from liability.

Motor vehicle accidents presented particular problems. At first, the courts tended to limit the applicability of art. 1384 to cases where the cause of the accident was some latent defect in the vehicle itself. Where the accident was caused by the act of the driver of the vehicle, it could not be said that it was caused by a thing which the driver has under his guard, and liability would depend upon proof of fault.

But in 1930, in the celebrated *Jand'heur* decision of the *Chambres réunies* of the *Cour de Cassation* this limitation was rejected. In that case, a truck had mounted a pavement and had gravely injured a girl who was walking upon it. The court held that no distinction was drawn in art. 1384 whether the thing was or was not driven by a human agent, that the presumption was not limited to dangerous things and that the defendant could not exclude liability by proving that he had committed no fault, or that the cause of the injurious event remained unknown: he had to prove affirmatively an external cause for which he was not to blame, or show that the case was one of *cas fortuit* or *force majeure*.

Following the conclusions of the *Procureur Général*, the Court established that:

Whereas the presumption of responsibility established by that article as to one who has under his guard an inanimate object that has caused harm to another can be rebutted only by proving a *cas fortuit*, a *force majeure*, or a *cause étrangère* that cannot be imputed to him; as it does not suffice to prove that he did not commit any fault or that the cause of the harmful act has not been ascertained; whereas, on April 22 1925, a truck belonging to the *Compagnie Les Galeries Belfortaises* knocked down and injured the minor *Lise Jand'heur*; as the challenged decision refused to apply the article cited above on the ground that an accident caused by an automobile in movement, under the impulsion and direction of an individual, does not, so long as it has not been shown that the accident was due to a defect in the automobile, constitute the act of an object that one has under his guard within the meaning of paragraph 1 of article 1384, and that, in consequence, the victim must, in order to obtain compensation for the injury, establish a fault imputable to the driver. But whereas the law does not distinguish, for purposes of application of the presumption that it has established, whether the object that caused the harm was or was not put in motion by man; as it is not necessary that there be a defect in the object capable of causing the damage as article 1384 attaches the responsibility to the guard of the object, not to the object itself. From which it follows that, in ruling as it did, the challenged decision reversed the legal burden of proof and violated the article of law cited above. For these reasons, quash...

The *Jand'heur* decision brought the french law of liability essentially to

its modern position. The liability of railways and tramways, of custodians of motor vehicles and of operators of installations for the production, storage or transmission of electricity, gas or dangerous substances are all covered by art. 1384 par.1 and the cases which construe it.

The first precondition for liability under art. 1384 is that the harm must have been caused by 'the action of a thing'. 'Thing' here includes every corporeal object, whether they are defective or not, natural or artificial, dangerous or not dangerous, movable or immovable. The *Cour de Cassation* applied art. 1384 par.1 for the first time to an immovable thing in 1928, in a case in which someone suffered damage as the consequence of an accident with a lift. Later the court also applied the provision to other immovable things like a falling tree⁷⁰, a landslide, a burst dyke, and accident on an escalator.⁷¹ Buildings, which are mentioned in art. 1386, are to be included except when the damage has been caused by their fall. The composite form of the object is immaterial: fluid and gases are included, as are radioactive materials and electrically energised wires.

It is irrelevant whether the thing caused the harm as a result of being impelled or not. Therefore, although the *Jand'heur* case concerned a motor vehicle, later decisions have extended the principle to motorcycle and bicycle accidents, to trees, ships, electric installations, explosive gases, locomotive fumes, and even to a razor-blade in a soap.⁷² Nor is it necessary that the thing be intrinsically or potentially dangerous so as to require delicate handling or constant supervision. Such limitation has been refused either on the ground that the text of the article makes no such distinction or that such a distinction is impractical or difficult to make. In effect, it has been said that what looked dangerous yesterday, may not be anymore today due to a technical evolution. On the other hand, a thing considered 'inoffensive' or 'harmless' (a flowers vase, for instance) that nevertheless causes an accident, proves that it was in fact dangerous, considering its location at the time of the accident (at the edge of a window on a fourth floor). For a time the courts accepted this distinction as a means of limiting what might otherwise seem the boundless area of application

⁷⁰ With a similar text in the Louisiana Civil Code, the courts only very recently launched a new interpretation of custodial liability, being the tremor from a magnolia tree that finally awakened the principle of art. 2317 of that Code. In *Loescher v. Parr*, plaintiff brought suit when a rooted 60-foot magnolia tree on his neighbour's property fell and destroyed plaintiff's Cadillac. The tree appeared healthy to the naked eye, thus the owner was unaware of the magnolia's diseased condition. Nevertheless, he was held liable for the loss because he was guardian of the defective thing which caused the damage. MEAUX, J.M. *Ross v. La Coste de Monterville: The extension of Loescher v. Parr*. 1988 (62). *Tulane Law Review*, p. 279.

Before that, Louisiana attempted to solve the problem by importing the doctrine of *res ipsa loquitur* and applying it to things under one's custody. TEHALL, Gary E. *Things in one's custody*. *Tulane Law Review*, 43 (1969) p. 909.

⁷¹ DAM, Cees van. *European Tort Law*. Oxford: University Press, 2006, p. 303.

⁷² STONE, Ferdinand. *Liability for damage caused by things*. In: *International Encyclopedia of Comparative Law*, Vol. 1, Tubingen: Mohr, 1978, p.7.

of art. 1384 par.1, but the *Jand'heur* decision made it clear that nothing turns on the dangerousness of the harmful object.⁷³

The term 'action' seems to imply that the thing must have played an active part in the event that has caused the damage, and decisions have indicated that the custodian may rebut the presumption of responsibility by showing that the thing played a 'purely passive role' in the accident. The distinction is not between moving and inert things, but rather between things that are normal and normally placed and managed, and things that are abnormal or abnormally placed or managed. Thus, a motor car in motion, driven carefully and in accordance with the rules of the road, would be regarded as playing a 'purely passive role', while a car parked dangerously near a corner on a main road, although physically static, would be regarded as playing an active part in any consequential accident.

A further requirement for liability under art. 1384 par.1 is that the person being sued for damages be the custodian (*'le gardien'*) of the thing which caused the harm.

According to the decision of the *Chambres réunies* of the *Cour de Cassation* in *Connot v. Franck*, a person is guardian of a thing if on the facts he has the use, management and control of it (*"le pouvoir d'usage, de direction et de contrôle"*), that is, if he has the power of physical disposition over it. However, many questions arise, like what is 'use'? What is 'direction'? Or what is 'control'? Is one a 'keeper' if he has only one or two of these three elements?

The concept of guardian is a factual, rather than a legal one, and is instrumental to the idea of enabling claimants to easily identify the liable person without having to deal with the legal relationship someone has with the thing.

The owner is usually the guardian, and for that reason, the courts will presume that the proprietor is the guardian of the thing. However, he may be able to show that he transferred the custody (*'garde'*) of the thing to someone else, either pursuant to a contract of lease or services or by some purely factual act. Thus, an owner who allows his employee to use a vehicle retains custody as long as the employee is using the vehicle in the scope of his employment, but if the employee takes it on an unpermitted trip, the custody of the vehicle passes from the employer. The owner also loses custody of a vehicle if it is stolen or if he takes it to a garage for repair.⁷⁴ However, some have argued that liability was based, not on fault, but on the fact of ownership. The person who profited from the use of a thing should support the risks which were incidental to its use. Therefore, even when a car had been stolen, its owner was responsible for the damage which its use by the thief had occasioned. A few cases adopted this reasoning, but they were overruled by the *Chambres réunies* in *Connot v. Franck*, where it was held that in such a case the dispossessed owner was not

⁷³ STARCK, B. op. cit., p. 156.

⁷⁴ ZWEIGERT, K. KÖTZ, H. op. cit., p. 325.

liable, as he no longer had it under his guard, because it was impossible for him to exercise any supervision over it. The injured party must prove fault on the part of the owner. In other words, it is not excluded the possibility to file a claim against the owner, based on art. 1382, if he has been negligent in taking precautionary measures against theft.

An interesting question is raised by a situation in which an owner of a thing has custody of it, but has contracted out the responsibility for maintaining it. It may be argued that the maintenance firm has custody by virtue of its contract. Alternatively, it may be argued that the owner retains custody, but has a possible contractual right of indemnity from the maintenance firm. In Louisiana, in *Leaber v. Jolley Elevator Corp.* the court chose this latter approach. There, an elevator fell, with plaintiff inside, due to hydraulic leakage. The owner had a contract with Jolley for the maintenance of the elevator system. The court held the owner strictly liable, citing arts. 2317 and 2322, finding that the owner was the custodian.⁷⁵

An important distinction is made between '*garde du comportement*' (custody of the thing's conduct) and '*garde de la structure*' (custody of the thing's structure or composition). In most cases these two aspects will be in one hand: usually that of the owner. In other cases, however, the two aspects can be distinguished: transporters or keepers can be liable for the '*garde du comportement*' whilst the '*garde de la structure*' stays with the owner. Also, the manufacturer stays '*gardien de la structure*' after having put his product onto the market and he can be liable if the product's structure appears to be defective.⁷⁶

In the *Jand'heur* case it was said that art.1384 established a presumption of responsibility.⁷⁷ This presumption cannot be rebutted merely by proof of absence of fault. In other words, he cannot exonerate himself by showing that he has acted with all the care and skill that could be expected of him and that, whatever the cause of the accident, it was occasioned by no fault on his part. However, liability can be excluded if the custodian of the thing can prove that the harm was due to *cas fortuit* or *force majeure*, or by proof that the accident is attributable exclusively either to the victim⁷⁸ or to a third party.

⁷⁵ VERLANDER, David E. *Art. 2317 Liability: An analysis of Louisiana Jurisprudence since Loescher v. Parr.* 25 *Loyola Law Review* (1979) p. 270.

⁷⁶ DAM, C. op. cit., p. 303.

⁷⁷ Since the judgment of 1930, the Court of Cassation has used the expression presumption of liability, which in itself is devoid of sense. The function of the courts is to decide whether there is or there is not liability, and not to presume it. ESMEIN, Paul. *Liability in French law for damages caused by motor vehicle accidents.* 2. *American Journal of Comparative Law* (1953), p. 160.

⁷⁸ More recently, the Cour de Cassation has virtually banished the defence of victim's fault in the context of custodian liability. In the 1982 *Affaire Desmares*, the court ruled that the guardian under art. 1384 cannot exonerate himself, even partially, by proving the fault of the victim, unless the victim's behaviour was unforeseeable and unavoidable. PALMER, Vernon. *A general theory of the inner structure of strict liability: common law, civil law, and comparative law.* 1988 (62). *Tulane Law review*, p. 1333.

Force majeure always refers to an act external to the defendant, but in the context of art. 1384 it also requires that the event should be external to the thing that was under the defendant's care. The event must also be both, unforeseeable and unavoidable in its consequences. It is upheld on the causal ground that an irresistible and unforeseeable force absorbs all the causal connection between the defendant's conduct and the plaintiff's harm. The cumulative nature of the requirement (unavoidable and unforeseeable) means that the event must be regarded as abnormal in the surrounding circumstances. A patch of oil on a highway which causes a vehicle to skid will only constitute *force majeure* if it was quite impossible for an attentive and careful driver to see the oil on the dark road.

One important effect of the rule that the cause must be 'external' or 'outside' the thing which does the harm is that a latent defect in the thing, such as a failure in the brakes, a blowout of a tire, or a defect in the steering mechanism, does not release the defendant. This is not going to be different even if it was quite impossible for him to discover and remove the defect.

Natural events are only regarded as *force majeure* if they occur with unforeseeable suddenness and irresistible violence and the custodian in the case could not possibly or reasonably have taken the steps required to prevent the harm. Traditionally, the incident had to be exclusively caused by *force majeure*, independent of any legal fault of any person. This meant that the combination of the force of nature with a legal fault of a person which caused an injury would not permit the defense of irresistible force to be maintained. For example if a storm was sufficiently strong to destroy a weakened tree, but not a healthy tree, even though unforeseeable, would not exclusively have caused the damage; rather, it would be conjoined with the legal fault of the guardian of the tree, and he would be liable. However, a recent line of decisions allows the custodian to be held liable for just *part* of the harm.

Liability under art. 1384 par.1 is further excluded if it was the behavior of the victim that caused the harm. The defense will lie even though the victim's fault was not the sole cause of the damage. In each case the courts ask how far the harm was due to the behavior of the victim and to the 'act' of the thing respectively.⁷⁹ Liability under art. 1384 par.1 can be wholly avoided if the conduct of the victim was such that it could not normally have been foreseen by the custodian.

The same is true if the harm was caused by the behaviour of a third party, not including those for whom the custodian of the thing is rendered liable by art. 1384 par.5 nor yet those to whom he has entrusted the management or use of the thing. For instance, he must not be a worker or a contractor hired by the custodian, nor a borrower who has permission to use the thing. The third person's act must also be of the nature of an irresistible and unforeseeable occurrence that deprives the thing in custody of all causal significance.

⁷⁹ ZWEIGERT, K. KÖTZ, H. op. cit., p. 326.

5. IF WINTERBOTTOM HAD GONE TO FRANCE...

In 1896, in France, Wright would probably have been held liable if Winterbottom had sued him there. The central issue would have been, *who was the guardian of the thing?* The facts are not too clear if Wright sold the defective coach to the Postmaster-General, or if he simply had rented it. It is said in the originals that the defendant was a contractor for the 'supply' of mail-coaches and that he had contracted 'to provide' the Postmaster a mail-coach, but both expressions admit either interpretation. Atiyah, without paying much attention to this fact, assumes that it was a sale; others, on the contrary, refer to 'the hire'. If this was the case, Wright remained the owner and, as such, would easily have been found liable under art. 1384 parag. 1. On the contrary, if it was a sale, the question would have been, if the existence of a contract of maintenance could have been invoked by Winterbottom, not to claim the benefit of any right emerging from it, but simply as a fact to prove the condition of guardian that Wright was holding at the time as a result of the existence of that contract.

We have no doubts that this would be perfectly admissible and that no substantial, neither procedural rule had been violated with the admission of such a proof. We have already seen that the notion of 'garde' is a factual, rather than a legal one, therefore, no obstacles should be opposed if the plaintiff decided to choose the existence of a contract as the basis to show that, in fact, the guard had passed from the owner to somebody else.

Some doubts remain in relation to why Winterbottom chose to sue Wright, instead of the Postmaster-General. The most natural answer would be that the election was purely practical, not technical: the postmaster was his employer and he did not want to affect the present relationship, introducing a conflict that could prevent, in the future, the continuity of that business partnership. For some strange reason (maybe pedagogical reasons) the authors, when referring to this case, omit to mention that, in fact, Winterbottom had not been contracted by the Postmaster, but who did this was a firm managed by Mr. Nathaniel Atkinson, who was under a contract with the Postmaster-General to supply horses and coachmen. In other words, his employer was Atkinson and not the Postmaster. Having clarified that, the question still remains, why he did not sue Atkinson instead of Wright?

If the reasons were technical, and not practical as suggested before, the possible answer is that, according to the existing common law rules of the time, he really thought that his legal basis against his employer were very weak and, in fact, it was better to sue Wright.

It is not easy try to think as a nineteenth century lawyer would have done, but is certainly comprehensible to see why Winterbottom's lawyer was so confused, as to the point of not knowing whether he was suing on torts, or on contract. In fact, it is not sufficiently clear if his relationship with Atkinson was one of the kind master-servant that would give rise to liability. It looks

more as if he was an independent contractor, in which case his chances were, in fact, very few, to say the best. If this was the case, his strategy of choosing Wright as a defendant could have been adequate.

In France, this aspect would have been relevant if the cause of action was liability for third persons, but not in a case of liability for the *act of the things*, where the facts would concentrate, exclusively, on the determination of who was the guardian of the thing at the moment of the accident. It would have not been necessary to prove that the thing was defective. (Can anyone think this would be really necessary after the fact that it broke down in pieces leaving a man lamed for life?) It would also have been irrelevant to prove that the thing was intrinsically dangerous (would have not been enough to show the tragic results as an evidence of the danger that it carried?) It would have been enough simply to show Winterbottom's leg and the broken coach in order to get the comprehension of the court.

In that sense, Atiyah's economic analysis is incomplete (or wrong) when he says that the manufacturer *sold* the carriage (or *hired*, we'd say) to the Postmaster at a price based upon the expectations as to his potential liabilities, in which were not included servants as Winterbottom, and that those calculations would be upset in case of an unfavorable decision of the Court. In fact, Wright had supplied a coach, the price of which was that of a perfect good coach and it was not; according to its real defective conditions, it should be much cheaper. The benefit of the difference was on Wright's pocket; the losses on Winterbottom's lamed leg. That was the balance that the Court of Exchequer failed to restore. The cause of action was not a contract duty that had been dishonored, but a negligent act that caused harm!

The decision of the court established an absurd economic equation. Let us imagine that to hire the coach at a price X and to keep it in proper conditions, Wright had to invest a certain quantity of work, represented in effort, time and materials by the value Y and that not doing a proper job (working less hours, or using cheaper materials) that value would be Y-1. It could also be assumed that the reduction in his efficiency would represent an increase in the created risk (in the seriousness and number of potential victims) for the society as a whole, that could be represented by R+1 (original risk plus the increase due to the inefficiency) together with an increase in his benefits B+1 (original benefits plus the increase due to the savings in effort, time and materials). If the quality of the maintenance work got worse, let us say to Y-2 or Y-3; the created risk increases to R+2 or R+3 and the benefits increase to B+2 or B+3; and therefore, we have a perfectly established legally recognized equation where the bigger the risk, the bigger the profits and with absolute no liability derived from the creations of that risk. This should be unacceptable under any law system, and only a lack of sufficient reflection or an intellectual laziness of the Court could have given way to such a deviation from the most basic principles of Justice.

Did the Postmaster also loose money paying a higher price than he should? Yes and no. He actually did not loose money because he charged the

transports according to what he paid. Did he lose a better bargain? Yes, because he could have kept charging his clients the same amount, having paid a lower price. In other words, he did not lose, in the sense that he was not any poorer than he was before the transaction, but he could be better off having paid less, had he known of the real conditions of the coach.

Nevertheless, the real '*fallacy*' is saying that, because it was the Postmaster who had paid for the safety of the coach, Winterbottom (or anybody else) could not benefit when the coach broke down. He was not suing for a broken coach, he was suing for a broken leg, and to do that he did not need to show that he had paid anyone a single penny for the safety of his body!

That some judges felt the injustice of the decision is clear, not only from the dissenting of Justice Peacock, but specially from Rolff B.'s words: "this is one of those unfortunate cases...a hardship upon the plaintiff to be without remedy".

The different reaction or sensitivity of the courts is significant. On the one hand, (the English Court of Exchequer) nothing but resignation in front of what seemed to be an unrecognized tort, a case of *damnum absque injuria*; worries about what could represent the "*most outrageous consequences*" (meaning overwhelming days of work in the courts) and total insensitivity about a person who had just become lamed for life. On the other hand, (the French *Cour de Cassation*) departing from the victim's point of view, and feeling that the balance between harm-doer and harm-sufferer had to be restored decides to make the most extraordinary intellectual effort reinterpreting art. 1384 to bring some justice to the victim of somebody else's fault.

The utility of a theory such as *the act of the things* is evident when we see how a complicated issue like Winterbottom's is reduced to the most simple pair of questions, what was the thing that caused the damage? And who was its guardian?

The flexibility of the civil law rules also show its benefits when compared to the Procrustean bed that the precedent system represents. This could be appreciated in the vain efforts of Justice Peacock trying to demonstrate that Winterbottom was a case like Landgridge v. Levy. On the contrary, the generosity of the civilian general principles unchain the courts from those burdens facilitating the inclusion of hard cases when the sense of justice indicates so.

Anyways, this is a game of imagination where we are cheating on the facts, or we better say, the dates, because by the time that Winterbottom v. Wright was judged, the *Arrêt Teffaine* had not taken place yet and, therefore, Winterbottom would have had to prove that some fault on the part of the defendant was the cause of the mischief. It would have made no difference if it was an action or an omission because both are contemplated in the general rules clearly established in arts. 1382 and 1383. But, this is another story, and we should leave it for some other day...

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