

Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability

Danny Watson

Abstract

The English law and French law methods for establishing tortious liability are stylistically divergent. Casuistry prevails in English tort law, whereas the French law of delict (equivalent to English tort law) proceeds rigidly from a general principle of liability in three spartan articles of the Code Civil. The purpose of this article is to examine, with regard to the role of fault in tortious liability for harm caused by things under one's control, whether these different methods produce substantively different results. The English and French approaches to fault-based liability have evolved near-concurrently. Through examining these policy-based evolutions, it will be shown that both systems have sought to attenuate fault-based liability for harm caused by things under one's control, in favour of a stricter liability regime. This implies that the inflexible theoretical basis of liability in French law has not prevented the French system from incorporating policy just as fluidly as the English system. An exposition of the diminution of fault-based liability thus provides a salient example of how two legal systems with differing methodologies may coalesce in attaining practical solutions.

I. Introduction

The French law of liability for harm caused by things under one's control is founded on a single article¹ of the *Code Civil*. English law relies on the tort of negligence espoused in *Donoghue v Stevenson*², as well as specific nominate torts, to establish liability for things under one's control, demonstrating a very different approach. As will be seen, the broad provision of the French system has been

¹ Article 1384.

² [1932] UKHL 100.

narrowed to establish liability where the courts see fit, just as the casuistic approach of the English system *creates* torts where policy demands it. Despite their methodological differences, both systems produce remarkably similar outcomes in the majority of cases. Subjective (i.e. moral) fault traditionally played an imperative part in founding liability in both systems; however, its role diminished significantly throughout the Industrial Revolution, on the justification that certain activities should engender responsibility for harm irrespective of moral culpability. The similarities and differences between the modern English and French methodologies, and their practical results, will now be examined.

II. The origin and development of strict(er) liability

The policy of *risque-profit* dictates that liability without fault should be imposed on someone who profits from a thing, because he who takes its benefit should bear its potential burden. Similarly, *risque-cr  e* advances the idea that someone who creates a risk should bear its potentially harmful consequences. Both of these arguments, as well as a general humanitarian concern³, underlie the modern English and French approaches to liability for things under one's control.

Unlike French law, there is no general principle of strict liability in English law, the courts relying instead on the principles of negligence⁴ to establish liability for unintentional harm, with occasional statutory⁵ and casuistic intervention⁶. Unlike English law, French law does not refer to the concept of a duty in order to establish liability. However, a breach of a statutory duty for things under one's

3 Paula Giliker, 'Codifying tort law: lessons from the proposals for reform of the French Civil Code' (2008) ICLQ 582.

4 Duty, breach and causation.

5 Consumer Protection Act 1987.

6 *Rylands v Fletcher* (1868) LR 3 HL 330.

control will engender liability. In English law⁷, breach of statutory duty was previously seen as a branch of negligence, but now engenders liability in its own right, distancing breach of statutory duty from fault-based liability.

Liability in English law for things under one's control generally depends on the existence of a duty of care, breach of this duty, and causation: the existence of a duty being based on foreseeable damage, relational proximity⁸ and it being 'fair just and reasonable' to impose a duty to act as reasonable man⁹ (similar to the *homme avisé* in French law) in a given situation. The level of care required will vary according to the probability of harm occurring in a given situation¹⁰. The seriousness of the potential harm¹¹ and the utility of a risky activity¹² will also affect the standard of care. Thus, policy factors weigh heavily on the establishment of liability in negligence, meaning that the English courts may impose strict liability on prevailing policy and/or social justice grounds as they see fit.

To move towards stricter liability the French *Cour de Cassation* established that art.1384.1 transferred the burden of proof for damage caused by things to the defendant¹³; though the 'presumption of liability' did mean that *lack* of fault obviated liability (a similar rebuttable presumption exists in English law under s.2 (1) Misrepresentation Act 1967, and under the doctrine *res ipsa loquitur*¹⁴). Then in 1914, it was established that the custodian of a thing could escape liability only by proving that the damage was due either to *force majeure*, contributory negligence or the act of a third party¹⁵.

7 *Anns v Merton LBC* [1978] AC 728.

8 Between claimant and defendant.

9 *Blyth v Birmingham Waterworks* (1856) 11 Ex 781.

10 *Bolton v Stone* [1941] AC 850.

11 *Paris v Stepney BC* [1951] AC 367.

12 *Watt v Hertfordshire CC* (1954) 1 WLR 835.

13 Cp req 30 mars 1897.

14 *Ward v Tesco Stores* [1976] 1 WLR 810.

15 Req 19 Jan 1914 s 1914 I 128.

In this way, the courts 'have made extraordinary changes to fault-based and strict liability without any real modification of the wording of these articles [1382-4]'¹⁶ in order to meet demands of social justice.

Originally, restrictions were imposed on the situations in which one could be held liable under art.1384.1. Firstly, that the thing which gave rise to liability must have been defective¹⁷. This was reversed in *Gare de Bordeaux*¹⁸. Other restrictions, such as that the thing in question must not have been guided by human hand, and that the thing must be dangerous, were rejected in *Jand'heur*¹⁹. Thus the current law states that wherever something is under one's control, one is presumed liable for damage it causes (subject to defences discussed below). All that is required of the 'thing' is that it contributed to the harm²⁰. 'Liability... is founded solely on the question of custody (*garde*²¹) of the object and therefore any attempt to distinguish on the basis of the origin of the damage is irrelevant.'²² It follows that liability may arise for both inert and moving things under one's control.

III. Liability for inert and moving things

In *Colmar*²³, a French case, a woman fainted and injured herself against a scalding pipe in a public bath. It was held that it was 'reasonable' that the pipe was positioned where it was, and there was therefore no liability. However, in *Pialet*, a boy injured himself in a café after having tripped

16 Giliker (n 3) 568.

17 *Teffaire*; Cp Req 30 Mars 1897.

18 Civ 7 novembre 1922.

19 Ch réun 13 février 1930.

20 Civ 9 June 1933 DH 1393, 449.

21 Defined as 'usage, direction and control': *Connot c Franck* Ch réun 2 Dec 1941, S 1941 I 217.

22 R Redmond-Cooper, 'No fault liability on the French roads' (1995) JPIL 293.

23 John Bell, Sophie Boyron, Simon Whittaker, *Principles of French Law* (2nd edn, OUP 2008) 266.

over a chair that was lying in his way²⁴. The inertia of the chair was held to be irrelevant: a *gardien*²⁵ is subject to a presumption of responsibility for damage caused by inert things, which is only rebutted if they prove that what happened could neither have been foreseen nor avoided. It is sufficient that the thing causes damage which would not otherwise have been produced, provided that its positioning is in some way abnormal²⁶.

Two further cases²⁷ reinforce the necessity of the inert thing having an 'abnormal' facet for the *gardien* to be held liable. Therefore the apparently strict liability for things under one's control is heavily qualified in the context of inert things by the notion of abnormality, which is a notion 'tainted with morality'²⁸, and is thus a fault-based approach. Moving things are dealt with via strict liability approach: in a case where a car being driven in a normal way killed a pedestrian in an accident²⁹, the driver was held liable. Thus with moving things we see a move away from fault-based liability, towards an approach where all that need be demonstrated is that the thing of which the defendant was *gardien* was in motion and impacted on the person or property damaged. In English law, liability for inert and moving things relies simply on the principles of negligence (subject to the special liability regimes discussed below), with liability depending upon the variable factors³⁰ weighed by the courts in establishing the existence of duty, breach, and causation, which in the context of inert and moving things will bring about very similar results³¹ to the French system.

24 *ibid* 267.

25 Someone with 'the use, direction and control' of a thing: *Connot c Franck* Ch reun 2 Dec 1941, S 1941 I 217.

26 Civ (2) 19 March 1980, JCP 1980 IV 216, D 1980 IR 414.

27 Civ (2) 24 Feb 2005.

28 Jean Carbonnier, *Droit Civil* Vol 4, *Les Obligations* (22nd edn, 2000) 2369.

29 Civ 29 May 1964.

30 Such as it being 'fair, just and reasonable' to impose a duty.

31 Giliker (n 3) 565.

IV. Defences

There exist two general defences to damage caused by things under one's control in French law: *force majeure*³², where an unforeseeable/unavoidable event, external to the thing³³, causes harm (including the act of a third party); and contributory negligence. *Force majeure* was dealt with in *Trichard v Piccino*³⁴, where a driver was involved in an accident while having an epileptic fit. The *Cour de Cassation*³⁵ held that a mental disorder cannot be 'external' to a *gardien*; therefore the epileptic fit did not exonerate *Trichard*. In contrast, English law reduces liability by the extent to which a mental defect makes, for example, a driver lose control of a vehicle³⁶. As in the French system, an unforeseeable intervening act such as an act of nature may break the chain of causation, thus either reducing or nullifying the defendant's liability³⁷. Furthermore, a claimant's voluntary assumption of risk precludes liability under English law³⁸.

The defence of contributory negligence does not impinge on the extent of liability where for example a negligent pedestrian is hit by a car in French law³⁹, unless the fault of the victim was both 'inexcusable' and the exclusive cause of injury; however, the defence is entirely excluded in the case of those over seventy or under sixteen⁴⁰, unless they voluntarily sought the injury⁴¹. Thus stricter liability is encouraged in such cases, on the rationale of *risque-cr  e*. In

32 Or cas fortuit.

33 Req 22 Jan 1945, S 1945 1 57.

34 Civ 18 December 1964, D 1965, 191.

35 *ibid*.

36 *Roberts v Ramsbottom* [1980] 1 WLR 823.

37 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 252.

38 *Darby v National Trust* [2001] PIQR 372.

39 21 July 1982, D 1982, 449, 487.

40 Unless the victim voluntarily sought the injury: *Desmares, 21 juillet 1982, D 1982, 449 & 487*.

41 *ibid*.

English law, contributory negligence reduces damages to the extent to which the claimant was contributorily negligent⁴², provided that injury was caused by the risk to which the claimant exposed himself through his negligence⁴³. The same degree of moral blameworthiness/negligence will engender different results according to the causative potency of the negligence⁴⁴. Thus, this is a partial defence to, for example, the stricter liability under *Nettleship v Weston*⁴⁵. Both legal systems provide remarkably similar outcomes with regard to defences - though English law takes a more nuanced, less maximalist approach in favour of a greater recognition of the role of fault - and both show that liability under both systems is not absolutely strict.

V. Special liability regimes for motor vehicles, defective products and fire

French legislation enacted in 1985 delineated the manner in which compensation is given for ‘victims of a traffic accident in which a motor vehicle is involved’⁴⁶. The main purpose of the legislation was to improve the likelihood of compensation⁴⁷ through creating stricter liability⁴⁸. The approach under the new law is simply to identify causation and harm, with the presence or absence of physical contact between the vehicle and the person harmed being decisive⁴⁹. Under the 1985 law, a *gardien* cannot rely on *force majeure* against any victims⁵⁰ and *gardiens* involved in a crash caused by black ice, for example, will be liable; as will they be for an

42 s 1 Law Reform (Contributory Negligence) Act 1945.

43 *Barrett v MOD* [1995] 3 All ER 87.

44 *Froom v Butcher* [1976] QB 286.

45 [1971] 2 QB 691.

46 Loi 85-677 5 July 1985 arts 1-6.

47 Alain Bénabent, *Droit Civil : Les Obligations* (11th edn, 2007) 436.

48 Redmond-Cooper (n 10) 302.

49 François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les Obligations* (10th edn, 2009) 920.

50 Loi 1985, Article 2.

accident caused by an unforeseeable and unpreventable act of a third party. As regards the fault of other drivers, *any* fault on their part can reduce or extinguish a defendant's liability⁵¹, again, on the *risque-cr  * justification⁵². Thus, strict liability, while being difficult to circumvent, can be evaded under exceptional circumstances.

English traffic accident law relies on the principles of negligence and the Road Traffic Act 1988. It has long since distanced itself from a fault-based approach by imposing an objective standard of care. In *Nettleship v Weston*, a learner driver was held liable for damage caused in a road accident, despite the fact that it was arguably unfair to expect her to have attained the same level of competency as a qualified driver⁵³. The English system therefore resolves road accidents very much in the same way as the French; i.e. by rendering defendants essentially strictly liable for damage they cause, with the objective standard of care in English law being practically equivalent to the more obviously strict liability of the French system.⁵⁴ Consent to risk is not a defence in either system⁵⁵.

With regard to defective products, the former, very strict liability imposed in France was somewhat weakened by the EC Product Liability Directive⁵⁶, which provides that a producer must compensate injury caused by a defect in a product he has put into circulation, 'when it does not provide the safety which a person is entitled to expect, taking all circumstances into account'⁵⁷. This implies the possibility of strict liability; however, a number of defences are available and the range of recoverable harm is restricted. The

51 *ibid* Article 4.

52 Cooper (n 18) 300.

53 *Nettleship* (n 45).

54 Nils Jansen, 'Duties and rights in negligence: a comparative and historical perspective on the European law of extra contractual liability' (2004) OJLS 468.

55 s 149 Road Traffic Act 1988.

56 Dir. 1985/374/EEC.

57 Loi 98-389 19 May 1998.

development risks defence may avoid liability, where the state of technical knowledge available at the time did not enable the producer to discover a given defect⁵⁸. English law also incorporates the development risks defence, and The Consumer Protection Act 1987 imposes an almost identical level of strict liability for defective products to the French system⁵⁹. Liability for fire in English law comes under the Fire Prevention (Metropolis) Act 1774, which dictates that one is not liable for non-negligent fire, whereas French law takes a strict liability approach⁶⁰.

VI. *Rylands v Fletcher* and hazardous substances

*Rylands v Fletcher*⁶¹ established in English law a rule of strict liability for someone who brings on his land anything likely to do ‘mischief’ if it escapes. A defendant will be answerable for all the damage that is the consequence of its escape (provided that the storage of the thing is a ‘non-natural user’ of the land⁶²), subject to reasonable foreseeability⁶³. The hazardous quality of the thing is itself of no import: what matters is the likelihood of damage if it escapes. Thus the rule does not extend to damage caused by hazardous substances in general⁶⁴, contrary to the French system⁶⁵. The Pearson Commission recommended that strict liability be extended by statute to all hazardous substances, though these proposals ‘fell on stony ground’⁶⁶.

58 *ibid.*

59 Simon Taylor, ‘The harmonisation of European product liability rules: French and English law’ (1999) ICLQ 429.

60 *Gare de Bordeaux* Civ 16 Nov 1920.

61 (1868) LR 3 HL 330.

62 The rationale for this being that a ‘non-natural user’ brings with it increased risk, for which the defendant should be liable if damage is caused thereof.

63 *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 1 All ER 53.

64 *Transco plc v Stockport MBC* [2004] 2 AC 1; *Read v Lyons & Co Ltd* [1945] KB 216.

65 Code Civil arts 1349-1351.

66 DK Allen, *Accident Compensation After Pearson* (Sweet & Maxwell 1979).

The defences to the rule in *Rylands v Fletcher*, such as statutory authority and ‘act of God’, demonstrate an approach that is not entirely strict, but which once again - notwithstanding the higher standard of care owed due to the increased risk inherent in the situation - retains a small element of fault.

Risque-cr  e is undoubtedly the underlying explanation for all of the above exceptions to putatively strict liability; it is thus that *force majeure*/unforeseeable acts and contributory negligence may still apply. Liability is still, in a sense, fault-based; one is liable if the ‘fault’ of creating risks through things under one’s control engenders damage. But where damage occurs which cannot in any way be attributed to a thing under one’s control, liability is generally avoided. This is most likely the explanation for the existence of the (restrictive and exceptional) defences in both English and French law to liability for things under one’s control.

VII. Conclusion

It is evident that the divergences in method as between the French and English legal systems’ treatment of fault in establishing liability for things under one’s control are generally more stylistic than substantive. The broad provision of art.1384.1⁶⁷ has been refined over the years to provide strict liability, and thus greater protection for victims, in areas where the courts have seen fit to do so. The English approach to such situations is to impose an objective standard of care that will render someone liable if it is not met, irrespective of any fault. Thus the two systems meet on a broadly similar level⁶⁸. Both systems have moved away from fault-based liability⁶⁹, changing the threshold of liability according to prevailing social and economic normative judgments of responsibility. The graduation towards strict

⁶⁷ *Code civil*.

⁶⁸ Jansen (n 54) 465.

⁶⁹ With the exception of non-negligent fire in English law.

liability varies with the situation. Where a victim is deemed to deserve greater protection, strict liability is imposed. Similarly, high-risk activities are legitimate only if they carry strict liability for damage resulting therefrom. Both systems achieve similar results. However, while both systems' overwhelming objective is victim compensation⁷⁰, the English approach takes a more nuanced view on the issue of fault, in contrast to the more maximalist French approach which provides near-absolute protection for victims. So long as defences such as *force majeure* and contributory negligence continue to exist, it would be erroneous to conclude that either system adopts strict liability as the fundamental principle underlying liability for things under one's control. A *morally-tainted* definition of fault is certainly almost obsolete; but it is liability for the 'fault' of creating certain risks through things under one's control which underlies both systems⁷¹; an idea which is still subject to fault-based defences.

70 Giliker (n 3) 582.

71 *ibid* 582.

BIBLIOGRAPHY**English Cases**

- Anns v Merton LBC* [1978] AC 728
Barrett v MOD [1995] 3 All ER 87
Blyth v Birmingham Waterworks (1856) 11 Ex 781
Bolton v Stone [1941] AC 850
Cambridge Water Co v Eastern Counties Leather Plc [1994] 1 All ER 53
Caparo Industries v Dickman [1990] 2 AC 605
Carslogie Steamship Co Ltd v Royal Norwegian Government [1952] AC 252
Darby v National Trust [2001] PIQR 372
Donoghue v Stevenson [1932] UKHL 100
Nettleship v Weston [1971] 2 QB 691
Paris v Stepney BC [1951] AC 367
Read v Lyons & Co Ltd [1945] KB 216
Roberts v Ramsbottom [1980] 1 WLR 823
Rylands v Fletcher (1868) LR 3 HL 330
Transco plc v Stockport MBC [2004] 2 AC 1
Ward v Tesco Stores [1976] 1 WLR 810
Watt v Hertfordshire CC (1954) 1 WLR 835

French Cases

- Civ 16 juin 1896
Civ 16 novembre 1920
Civ 7 novembre 1922
Cp Req 30 mars 1897
Req 19 janvier 1914 s 1914 I 128
Ch réun 13 février 1930
Civ 9 juin 1933 DH 1393 449
Ch réun 2 mars 1941
Civ 19 février 1941
Req 22 janvier 1945, S 1945 1 57
Civ 29 mai 1964
Civ 18 décembre 1964, D 1965, 191
Civ (3) 4 février 1971 JCP 1971

Civ (2) 19 mars 1980, JCP 1980 IV 216 21 juillet 1982, D
1982, 449

English Statutes

Consumer Protection Act 1987

Law Reform (Contributory Negligence) Act 1945

Road Traffic Act 1988

French Statutes

Loi 85-677 5 July 1985

Loi 98-389 19 May 1998

EU Directives

Dir 1985/374/EEC

English Journals

Giliker P, 'Codifying tort law: lessons from the proposals for reform of the French Civil Code' (2008) *International & Comparative Law Quarterly* 561

Jansen N, 'Duties and rights in negligence: a comparative and historical perspective on the European law of extracontractual liability' (2004) *Oxford Journal of Legal Studies* 443

Redmond-Cooper R, 'No fault liability on the French roads' (1995) *Journal of Personal Injury Litigation*

Taylor S, 'The harmonisation of European product liability rules: French and English law' (1999) *International & Comparative Law Quarterly* 419

English Textbooks

Allen DK, *Accident Compensation After Pearson* (Sweet & Maxwell 1979)

Bell J, Boyron S, Whittaker S, *Principles of French Law* (2nd edn, OUP 2008)

Zweigert K and Kötz H, *An Introduction to Comparative Law* (3rd edn, OUP 1998)

French Textbooks

Bénabent A, *Droit Civil: Les Obligations* (11th edn 2007)

Carbonnier J, *Droit Civil* Vol 4, *Les Obligations* (22nd edn, 2000)

Terré F, Simler P and Lequette Y, *Droit Civil: Les Obligations* (10th edn 2009)