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ABSTRACT

The revision of French tort law is proving to be a long process, starting with a first draft by the working group directed by Pierre Catala and Geneviève Viney in 2005, and only reaching a proposed new law tabled by Senators in 2020. The need for revision arose due to the silence of the current French Civil Code on tortious liability, which was mainly developed over the last two centuries by the jurisprudence, while only five such articles can be found. The intended revision of French tort law looks beyond the codification of jurisprudential solutions and towards legal innovations. This paper will compare French tort law with the regulations of other legal systems, and will evaluate the proposed novelties adopted by French legal texts.

I. INTRODUCTION

The French tort law reform has sparked debate for nearly two decades. A preliminary draft to this reform was made in 2005 by the committee directed by Catala-Viney ("Catala-Viney draft of 2005"),[1] which was followed by a report in 2010 by the working group directed by Fr. Terré ("Terré draft of 2010").[2] A preliminary draft of the law was submitted for consultation in April 2016 ("preliminary draft law of 2016[3]") and a draft law presented on March 17, 2017 ("draft law of 2017") followed.[4] The final development in this law-making process was the proposed law filed by the Senate on July 29, 2020 ("law proposal of 2020"). The result of this legislative push is that the current five articles of tort law in the French Civil Code will be expanded to 56 articles, resulting in an eleven-fold increase in articles. To a large extent, the proposed reform codifies the case law that has been ruled on over the past two centuries since the introduction of the Napoleonic Code in 1804. This is certainly one of many

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[1] L'avant-projet de réforme du droit de la responsabilité, Actes du colloque du 12 mai 2006, Le Manuscrit (edn.), 2006; Pierre Catala, *Proposals for Reform of the Law of Obligations and the Law of Prescription* 1, (2007) (translation of the preliminary draft of 2005).

[2] Pour une réforme du droit de la responsabilité, Fr. Terré (dir.), Dalloz, 2011.

[3] *See* Alice Dejean de La Batie, *Proposals Reforming French Civil Liability Y: Translation of the proposals released by the French Government on April 29th 2016*, 2016, HAL OPEN SCI. (Oct. 28, 2016), https://hal.science/hal-01389343/document.

MINISTERE DE LA JUSTICE (Mar. 2017), http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf.[5] The Civil Code of Quebec entered into force in 1994. *See B. Moore*, Propos introductifs à deux voix: quelle(s) politique(s) juridique(s) pour réformer la responsabilité civile ?, in Vers une réforme de la responsabilité civile française, Regards croisés franco-québécois, Bl. Mallet-Bricout (dir.), Dalloz, 2018, p. 7.

benefits of the reform. However, we are more interested in another aspect of the reform: what new features does it bring? Of course, rewriting the Civil Code is not isolated to France, as civil codes have been reformed in Quebec in 1991,[5] in the Netherlands in 1992,[6] in Germany in 2002,[7] and in Romania in 2011.[8] We also add that there is ongoing reform to the Belgian Civil Code, and we emphasize that Quebec, Romanian, and Belgian[9] civil law were all based on the Napoleonic Code.

Among the innovations provided by the various law drafts, we highlight the transformation of tort liability in that its traditional function of the restoration of damage has been supplemented with preventive and punitive functions as well.[10] Therefore, a legislator no longer approaches tort liability solely in light of restoring the victim to the situation he would have been in if the harmful event had not occurred, but instead now seeks to expand the ends that can be achieved through tort liability.[11] The punitive purpose of compensation has been abandoned in the law proposal of 2020, but it seems this function of liability is now largely accepted in French law, even though it is absent in other European law systems, such as German or Greek law. In the present study, after some preliminary remarks on the structure of the revised tort liability, the tortious events in the law proposal are analyzed, including remedies provided to the victim for protection, and the possibility of invoking a contractual breach by third parties.

II. A SYSTEM OF LIABILITY BASED ON FAULT OR NOT?

In French law, liability requires the fault of the perpetrator and therefore, any behavior can be grounds for liability without considering the protected interests that are affected by this conduct.[12] At the same time, the Civil Code of 1804 contained special provisions in which either the fault of the person concerned was presumed (e.g., the parents of a child in the wrong, the keeper of an animal that destroyed something, or the artisans),[13] or there was an irrebuttable presumption of fault (e.g., of the employers ("commettants") for the actions of the employees

[5] The Civil Code of Quebec entered into force in 1994. *See B. Moore*, Propos introductifs à deux voix: quelle(s) politique(s) juridique(s) pour réformer la responsabilité civile ?, in Vers une réforme de la responsabilité civile française, Regards croisés franco-québécois, Bl. Mallet-Bricout (dir.), Dalloz, 2018, p. 7.

[6] Goossens, Hendrik, *Dutch Civil Code*, DUTCH CIVIL LAW, http://www.dutchcivillaw.com/civilcodegeneral.htm.

[7] Reform of law of obligations of 2002: Bundesgesetzblatt (German Official Journal) 2001 I, 3138.

[8] *R. Dinca*, La recodification du droit de la responsabilité civile. La perspective du droit roumain, in La réforme du droit de la responsabilité en France et en Belgique, Bruxelles, Bruylant, 2020, p. 126.

[9] Eliaerts, et al., *Reform of the Civil Code*, LEXGO (2018), https://www.lexgo.be/en/news-and-articles/5311-reform-of-the-civil-code.

[10] *See, e.g.*, *M. Boutonnet/C. Sintez/C. Thibierge*, Consacrons les fonctions et les effets de la responsabilité civile !, D. 2016, p. 2414; Alexander Bailly and Xavier Haranger, *Coming Soon: Punitive Damages, the French Way*, Morgan LEWIS (Nov. 5, 2018), https://www.morganlewis.com/pubs/2018/11/coming-soon-punitive-damages-the-french-way.

[11] *See id.*

[12] *Introduction to French Tort Law*, BRITISH INSTITUTE AND COMPARATIVE LAW, https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf (last visited Apr. 6, 2023).

[13] THE CODE NAPOLEON (William Benning, Law Bookseller eds., 1804).

("préposés").[14] Since the end of the 19th century, French jurisprudence[15] has established a general liability clause for things under one's custody ("garde de la chose"); which constitutes strict liability without requiring proof of fault and the possibility to absolve one of this liability by proving a lack of fault.[16] A similar development is observed in terms of responsibility for the actions of another person.[17] The intended revision maintains these jurisprudential solutions and adds important clarifications, however, an understanding in how tort liability has been structured in France compared to other countries is important to note.

1. Structural Remarks

In relation to contractual liability, the revisions partially achieve the unification of contractual and tortious liability[18] in terms of the effects of damage recovery, such as the calculation of the damage[19] and the limitation of liability clauses.[20] Moreover, the intended reform confirms the impossible choice between contractual and tortious liability when the conditions of the former are met.[21] This position is also followed by Quebec law, in which the Quebec Supreme Court's recognition of the victim's right to choose between contractual and tortious liability[22] was rejected during the revision of the Quebec Civil Code in 1991.[23] On the other hand, German and Greek law both allow the victim to choose the legal basis of his recourse.[24] Still, there are criticisms against the review method regarding double definitions, like performance *in natura* and *force majeure*,[25] found both in contract and liability law in the

[14] *Id.*

[15] Decision Teffaine, French Supreme Court: Cour de cassation – Chambre civile ("Cass. civ."), 16.6.1896; Decision Jand'heur, Cour de cassation – Chambre réunies, 13.2.1930.

[16] *See id.*

[17] Article 1242 of the French Civil Code, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI00003204 1559; *Introduction to French Tort Law*, *supra* note 12, p. 5 note 11.

[18] *But see D. Bakouche*, De l'ordonnance du 10 février 2016 à l'avant-projet de loi portant réforme de la responsabilité civile : inconstance idéologique?, Responsabilité civile et assurances, 2016, no. 7-8, repère 7; *see also P. Le Tourneau*, Brefs propos critiques sur la « responsabilité contractuelle » dans l'avant-projet de réforme du droit de la responsabilité, Recueil Dalloz (D.) 2007, p. 2180.

[19] Art. 1235 – 1238 of the law proposal of 2020.

[20] Art. 1284 § 1 of the law proposal of 2020: "Clauses having the purpose or effect of excluding or limiting liability are valid". However, in extra-contractual liability, no one can exclude or limit his liability for fault (Art. 1286), while in contractual liability, clauses limiting or excluding liability have no effect in the event of gross negligence or fraud (Art. 1285). Therefore, limitation or exclusion of liability is possible in the case of minor faults (slight negligence).

[21] Art. 1233 § 1 of the law proposal of 2020.

[22] *See* Wabasso Ltd. v. National Drying Machinery, (1981) 1 R.C.S. 578.

[23] *B. Moore* (fn. 5), p. 7, 8.

[24] *See, e.g., O. Berg*, Les relations entre responsabilité contractuelle et extracontractuelle dans les projets français et belge (n. 8), p. 189, 191 ; *M. Stathopoulos*, Law of Obligations, 2004, p. 781, § 15, no 10.

[25] Art. 1218 of the French Civil Code. Art. 1253 of the Draft of Law 2020. In case of contract, the event should be unforeseeable and unavoidable, while in case of tort just unavoidable. However, we consider that the addition of the unforeseeability of the event in case of contractual liability is included in the condition that the event must be unavoidable, since a foreseeable event is avoidable by taking appropriate measures. Cf. *P.-H. Attonmattéi*, Ouragan sur la force majeure, La Semaine Juridique – Édition Générale (JCP G) 1996, 3907; *P. Grosser*, Force

Civil Code. In contrast, Quebec law has a uniform definition of *force majeure* in both contractual and tort liability.[26]

An innovation of the Senate law proposal is the enumeration of four cases of liability instead of the current three liability cases.[27] The three original cases of liability were tortious liability based on fault, strict liability for the actions of another, and the strict liability of the keeper of "a thing" (a thing under one's control or custody). Now, there is strict liability for unusual neighborhood disturbances, as it was already admitted in jurisprudence.[28] Notably, the law proposal successively mentions liability based on fault and cases of liability without fault, without establishing fault liability as a general principle.[29] In addition, a proposition for establishing liability for abnormally dangerous activities[30] has not been adopted, despite the fact that the Principles of European Tort Law (hereinafter "PETL") provide for this type of liability.[31]

Additionally, in the draft law of 2017, the responsibility for the acts of a third party was transferred from the damage-causing events, where the three cases of liability were listed, to a separate chapter under the title "Attribution of Damage Caused by Others."[32] It was argued that the peculiarity of this liability is that the person who committed the tortious event is not liable, but rather another person (i.e., a third party) is liable because of the connection existing between the third party and the person who caused the damage.[33] Therefore, it is not the tortious act that differentiates this case of liability from the other three cases, but instead it is the attribution of liability to a person other than the perpetrator.[34] However, including responsibility for the acts of others among the damaging events is in accordance with existing traditions in French doctrine.[35] Alternatively, the attribution of responsibility to a person is necessary, not only in the case of liability for the acts of others, but in every case of responsibility, such as liability of the parents, the keeper of a thing, and personal responsibility.[36]

majeure - Pertinence des critères cumulés pour caractériser la force majeure en matières délictuelle et contractuelle, JCP G 2006, II 10087; *contra V. Rebeyrol*, L'appréciation de la force majeure par la Cour de cassation, D. 2018, p. 598.

[26] Art. 1470 of the Civil Code of Quebec: "Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics".

[27] Comp. Pierre Catala, *Proposals for Reform of the Law of Obligations and the Law of Prescription* 1, 174 (2007) (translation of the preliminary draft of 2005).

[28] *See* Pierre Catala, *supra* note 27 at 174, 192.

[29] Art. 1240 – 1249 of the law proposal of 2020.

[30] Art. 1362 of the Catala-Viney draft of 2005 (operator of an abnormally dangerous activity) and art. 23 of the Terré draft of 2010 (liability of an operator of a facility subject to classification).

[31] Art. 5:101 PETL ("A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it").

[32] Draft law of 2017 art. 1245-49 (Mar. 2017).

[33] *Id.*

[34] *D. Mazeaud/J.-S. Borghetti*, Imputation du dommage causé à autrui, in Pour une réforme du droit de la responsabilité civile extracontractuelle, F. Terré (dir.) (fn. 2), p. 149, 154.

[35] Draft law of 2017 art. 1245-49.

[36] *B. Waltz-Teracol*, Les responsabilités, une nouvelle présentation quadripartite, in Vers une réforme de la responsabilité civile française (fn. 5), p. 21.

2. The Hierarchy of Protected Interests

We note the easy establishment of liability in French law, as it provides a right to compensation for any damage, while there is no distinction between types of damage, other than the special treatment reserved for bodily injury.[37] Specifically, the law proposal of 2020 sets out a series of provisions that treat the victim who has suffered bodily injury more favorably than other victims.[38] In this way, physical damage is prioritized over the rest of the damages that must be remedied.[39] However, the restoration of any damage is not unique to French law, as Italian law adopts a similar approach.[40]

In a comparative overview, the French tortious liability system differs substantially from German tort law. In German law, there are three cases to establish liability: (1) when there is an infringement of certain absolute rights (e.g., life, body, health, freedom, property, or any right of a third party);[41] (2) when one violates a law protecting the interests of another person;[42] and (3) when there is an intentional infliction of damage which is contrary to public policy (*contra bonos mores*).[43] The jurisprudence added a damaging act directed against an enterprise ("Das Recht am eingerichtenstein und ausgeübten Gewerbebetrieb")[44] and an infringement to a general right to personality to the first case of liability.[45] However, protected rights do not include property or the totality of a person's economic interests.[46] Moreover, the special cases of tort liability provided for in the German Civil Code primarily established a presumption of fault and not strict liability.[47] Liability regardless of fault is provided only for companion

[37] Art. 1262 of the law proposal of 2020.

[38] *Id.* at art. 1262, 1270.

[39] *Id.* at art. 1270.

[40] *St. Porchy-Simon*, La réparation du préjudice moral : quelles limites?, in Vers une réforme de la responsabilité civile française (fn. 5), p. 109, 117; *J. Knetsch*, Les limites de la réparation du dommage corporel, Bruxelles, Larcier, 2017, p. 175 et seq.

[41] Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823 (1) ("A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.").

[42] *Id. at* § 823 (2) ("The same duty is held by a person who commits a breach of a statute that is intended to protect another person.").

[43] *Id.* § 826 BGB ("A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.").

[44] *See* W.H. Van Boom, *Pure Economic Loss - A Comparative Perspective*, Business and Law Research Centre 1, 8 (2004) (Available at SSRN: https://ssrn.com/abstract=555809) ("A right to the undisturbed exploitation of 'established and operative business'").

[45] *Id.*

[46] *G. Mäsch*, La préparation du préjudice purement économique : la situation en droit allemand, in La réforme du droit de la responsabilité civile en France, 8e Journées franco-allemandes, G. Wicker/R. Schulze/G. Mäsch (eds.), Société de législation comparée, 2021, p. 141, 143.

[47] Johannes W. Flume, *Strict Liability in Austrian and German Law*, 12(3) JETL 205, 210 (2021).

animals, while liability is just presumed for animal custodians,[48] parents,[49] supervisors,[50] or principals (i.e., employers).[51] The cases of animals serving the economic activity or subsistence, of the keeper for the actions of minors or disabled persons are comparable to the actions of agents or employees (*culpa in vigilando* or *in eligendo*).[52] Liability for dangerous acts is only provided for in special laws and there is therefore, no general clause comparable to what exists in French law.[53] In terms of reparable damage, moral damage is remedied only in the cases listed by law,[54] to which jurisprudence has added the infringement of the general right to personality.[55] Moreover, it is not possible to restore the indirect damage reflexively suffered by third parties,[56] unless the existence of contractual liability towards the third party is accepted.[57]

Special mention should be made of pure economic loss in German law, such as a loss of present or future profit, like the loss of a person's future income or a business's future profits.[58] The distinction between pure economic loss and normal economic loss depends on whether the infringement involves a tangible or intangible asset.[59] If the economic loss is the result of physical injury or damage to a tangible asset, it is a normal economic loss and must be

[48] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 833 ("If a human being is killed by an animal or if the body or the health of a human being is injured by an animal or a thing is damaged by an animal, then the person who keeps the animal is liable to compensate the injured person for the damage arising from this. Liability in damages does not apply if the damage is caused by a domestic animal intended to serve the occupation, economic activity or subsistence of the keeper of the animal and either the keeper of the animal in supervising the animal has exercised reasonable care or the damage would also have occurred even if this care had been exercised").

[49] *Id.* at § 832 (1) ("A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision")/

[50] *Id.* at § 832 (1) ("A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision. (2) The same responsibility applies to any person who assumes the task of supervision by contract").

[51] *Id.* at § 831(1) ("A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised".)

[52] *Id.*

[53] *See* Flume, *supra* note 47.

[54] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 253 ("(1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law. (2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss".)

[55] Marcus von Weiser, *The essentials of publicity rights in Germany*, LEXOLOGY (Nov. 19, 2019), https://www.lexology.com/library/detail.aspx?g=88b7beff-d158-4551-a89b-80aa4da2496b.

[56] *O. Berg* (fn. 24), p. 446, 450. Exception applies to the cases of § 844 para. 2 BGB.

[57] W.H. Van Boom, *Pure Economic Loss - A Comparative Perspective*, Business and Law Research Centre 1, 9 (2004) (Available at SSRN: https://ssrn.com/abstract=555809).

[58] *Id.* at 10-11. *See H. Boucard*, La réparation du préjudice purement économique dans le projet de réforme français, in La réforme de la responsabilité civile en France (fn. 46), p. 128.

[59] *Id.* at 5.

compensated.[60] On the other hand, pure economic loss does not fall within the scope of § 823 para. 1 BGB.[61] In the case of a violation of a law protecting one person's rights under § 823 para. In 2 BGB, pure economic loss must be restored if the violated rule aimed to avoid this damage.[62] It is possible to restore pure economic loss pursuant to § 826 BGB, however it is difficult to meet the conditions of harmful conduct contrary to public policy.[63] Additionally, pure economic loss is normally recovered in cases of contractual liability,[64] and in German law, contractual liability has an expanded scope. For example, § 311 para. 2 accepts the existence of contractual liability when an expert provides information and advice to a person who shows confidence to the expert; and upon the existence of quasi-contractual liability during the pre-contractual stage.[65] In addition, § 311 para. 3 establishes a contract with protective effect in favor of third parties when (a) the third party benefits from the contractual provision; (b) the contracting party has an interest in extending the protection of the contract in favor of the third party; (c) the liable contracting party knows that the two above conditions are met; and (d) it is necessary to broaden the subjective scope of the contract because no other protection is provided to the third party.[66]

Contrary to German law, French law makes no distinction based on the type of damage; for this reason any established loss must be compensated.[67] In French law, the limitation of the loss to be compensated is achieved by invoking the conditions of liability, such as the harmful event, the causation, and the existence of damage.[68] Therefore, while the non-compensation of pure economic loss is established as a principle in German law and its restoration is possible in the above cases,[69] the principle of restoration of any loss applies in French law.[70] We also note that in Swiss law, pure economic loss, which is related neither to physical damage nor to material damage, must be restored when its protection falls within the

[60] D. *Nolan/J. Davies*, Torts and Equitable wrongs, in Principles of the English law of obligations, A. Burrows (ed.), Oxford, 2015, para. 2.148, p. 172; *H. Koziol*, Recovery for economic loss in the European Union, Arizona Law Review, vol. 48, 2006, p. 871, 872.

[61] However, pure economic loss is recoverable in case of infringement of the 'right to business'. *W.H. Van Boom* (fn. 44), p. 7, 8; *G. Mäsch* (fn. 46), p. 143 et seq.; *M. Fromont/J. Knetsch*, Droit privé allemande, 2nd edn. 2017, Paris, LGDJ-Lextenso éd., p. 209 et seq., no 364 et seq.

[62] *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823, para. 2.

[63] *Id.* at § 826.

[64] § 280, para. 1 BGB. See, e.g., *J. Traullé*, La réparation du préjudice économique « pur » en question, RTD civ. 2018, p. 285 et seq.

[65] According to this Section: "1. the commencement of contract negotiations, 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or 3. similar business contacts".

[66] According to this Section: "(3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract"; *see also G. Mäsch* (fn. 46), p. 147; *O. Berg* (fn. 24), p 195.

[67] *See* Koziol, *supra* note 60.

[68] *H. Boucard*, La réparation du préjudice purement économique dans le projet de réforme français, in La réforme de la responsabilité civile en France (fn. 58), p. 125, 136.

[69] *See* Traullé, *supra* note 64.

[70] *See* Cour de cassation [Cass.] civ. 2e, 16.12.2021, no. 19-11.294, https://www.legifrance.gouv.fr/juri/id/JURITEXT000044571127?init=true&page=1&query=19-11.294&searchField=ALL&tab_selection=all.

protective purpose of the applicable rule,[71] while a general liability clause is provided similar to French and Greek law.[72]

In Greek law, as in German law, monetary compensation is due for extra-patrimonial damage in the cases defined by law, like an insult to personality[73] and torts.[74] In cases of tort, compensation for extra-patrimonial damage applies to the person who suffered an insult to their health, honor or chastity, or who was deprived of their freedom.[75] In the event of a person being killed, compensation may be awarded to the victim's family.[76] Bodily injury falls within the scope of Articles 57 ("right to personality") and 914 ("torts") of the Greek Civil Code.[77] Article 914[78] establishes personal liability under two conditions: illegality and fault.[79] Tortious liability is also provided for inflicting damage on another person in a manner contrary to public policy ("society's morals")[80] according to the model of § 826 BGB.[81] Vicarious liability is strict,[82] and the same applies to the liability of the keeper of an animal that is not used for either a profession or guarding residence.[83] The fault of the keeper of the animal in the latter cases is presumed. Fault is also presumed for a supervisor of another person or an adult who is under judicial support.[84] The liability of the owner of a building for the damage due to its fall is strict.[85]

The system of general clauses followed by French law is completely at odds with the system of English tort law.[86] For example, English tort law provides for a list of acts that give rise to tortious liability, where each has its own conditions of application, requires the infringement of a certain interest, and provides its own remedies.[87] Compensation for harm to

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[71] *P. Wessner*, Les effets de la responsabilité civile dans la perspective d'une révision du code civil français : quelques observations débridées d'un juriste suisse, in L'avant-projet de réforme du droit de la responsabilité (fn. 1), p. 301.

[72] Art. 41 Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches: "Anyone who unlawfully causes damage to another, whether intentionally or through negligence, is obliged to compensate him".

[73] Art. 59 of the Greek Civil Code https://www.ministryofjustice.gr/wp-content/uploads/2019/10/%CE%91%CF%83%CF%84%CE%B9%CE%BA%CF%8C%CF%82-%CE%9A%CF%8E%CE%B4%CE%B9%CE%BA%CE%B1%CF%82.pdf; PENELOPE ALLOPOULOU, BASIC CONCEPTS OF GREEK CIVIL LAW 49, 51 (2005).

[74] Art. 932 of the Greek Civil Code.

[75] *Id.*

[76] *Id.*

[77] *E.g.*, Magistrate's Court of Thessaloniki 526/2020, available at https://www.dsanet.gr/Epikairothta/Nomologia/EirThes%20526.2020.htm.

[78] Art. 914 of the Greek Civil Code: "Anyone who damages another illegally and culpably (by fault) has an obligation to compensate him" (translation). *See* ALLOPOULOU, *supra* note 73 at 225.

[79] *See id.*

[80] Art. 919 of the Greek Civil Code.

[81] *See* § 826 BGB.

[82] Art. 922 of the Greek Civil Code. *See* ALLOPOULOU, *supra* note 73 at 231.

[83] Art. 924 of the Greek Civil Code. *See id* at 223.

[84] Art. 923 of the Greek Civil Code.

[85] Art. 925 of the Greek Civil Code.

[86] *See, e.g.*, Ralph Surma, *A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence*, 8 OXFORD U. COMPAR. L. F. 1 (2000).

[87] *Ph. Remy*, Réflexions préliminaires sur le chapitre Des délits, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 16, 28.

pure economic interests is more widely accepted when the perpetrator has acted intentionally.[88] As a general category of acts inflicting damage, the tort of negligence exists when the unreasonable conduct of one person causes another person a foreseeable damage in breach of the former's duty to look after the latter's interests.[89] In other words, it presupposes a duty of care[90] that takes into account the nature of the damage, and that will be admitted in very limited circumstances in cases of pure economic loss,[91] mental harm, and by omission.[92] Therefore, the duty of care in English law is differentiated from the duty of diligence in French law.[93]

Moreover, cases of liability without fault ("strict liability") are minimal, and include vicarious liability, which does not exclude the employee's personal liability,[94] liability for defective products due to the incorporation of the European Directive,[95] or breach of statutory provisions.[96] On the contrary, the tort of negligence applies to a person supervising another person, and for parents, the duty of care decreases as the child's age increases.[97]

While French law treats all of these cases of liability for another's acts as strict liability, other than the case where someone undertakes the organization of another's life based on a contract, in Quebec law the keeper of a thing has no strict liability, but fault is presumed.[98] The same applies to the responsibility of the parents, who are presumed to be at fault for the custody, education, and supervision of their children.[99] Fault is required to establish liability[100] regarding neighborhood nuisances,[101] despite the original jurisprudence that did not require fault.[102]

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[88] *J. Traullé* (fn. 64), p. 285 et seq.; *D. Nolan/J. Davies* (fn. 60), para. 2.147 et seq., p. 172 et seq. and para. 2.356 et seq., p. 227; *W.H.Van Boom* (fn. 44), p. 11; *See* Mario Bussani & Vernon Valentine Palmer, *Pure Economic Loss in Europe*, CAMBRIDGE UNIVERSITY PRESS (2003) at 22 https://beckassets.blob.core.windows.net /product/readingsample/380169/9780521824644_excerpt_001.pdf.

[89] *See* Danny Watson, Style over Substance? A Comparative Analysis of the English and French Approaches to Fault in Establishing Tortious Liability, 2 MANCHESTER L. REV. 1, 3 (2013).

[90] *S. Taylor/M. Dyson/D. Fairgrieve*, Regards comparatifs sur les projets de réforme français et belge, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 134, 135; *J. Traullé* (fn. 64), p. 285 et seq.

[91] *Ibid.*, p. 139. See also *D. Nolan/J. Davies* (fn. 60), para. 2.148 et seq., p. 172 et seq. Particular criteria taken into account are foreseeability and proximity. *W.H. Van Boom* (fn. 44), p. 11; *J. Traullé* (fn. 64), p. 285 et seq.

[92] *Ph. Remy* (fn. 87), p. 29.

[93] *See* Danny Watson *supra* note 89 at 3.

[94] *S. Taylor/M. Dyson/D. Fairgrieve* (fn. 90), p. 142.

[95] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[96] *See* Cornell Law School, *Products Liability*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/ wex/products_liability (last visited Apr. 3, 2023).

[97] *Ph. Remy* (fn. 87), 30.

[98] *B. Moore* (fn. 5), p. 9.

[99] *Id.*, p. 9. Art. 1459 of the Civil Code of Quebec: "A person having parental authority is bound to make reparation for injury caused to another by the act, omission or fault of a minor under his authority, unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor. A person deprived of parental authority is bound in the same manner, if the act, omission or fault of the minor is related to the education he has given to him".

[100] Ciment St. Laurent v. Barette, (2008) CSC 64.

[101] Art. 976 of Civil Code of Quebec: Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage.

[102] Drysdale v. Dugas, (1896) 26 R.C.S. 64.

Furthermore, despite the advantages presented by the provision of a general clause regarding the restoration of damage, there is a risk that any non-fulfilment of a contractual obligation could be characterized as a fault that also entails tortious liability. In French law, this risk is avoided by the impossibility of concurrent contractual and tort liability.[103] Alternatively, in German law contractual and tortious liability can be concurrent. However, when there is no injury to the contracting party or his property, contractual non-performance usually results in pure economic loss that is not recoverable under tortious liability.[104] Considering that, as a principle, pure economic loss is not recoverable in German tort law, the application of tort law in cases of non-performance is not of interest.[105] As a result, both systems of law use different means to limit the application of tortious liability to contractual misconduct.

The Draft Common Frame of Reference (hereinafter "DCFR") does not provide for a general recovery clause, but instead makes damage conditional on the presence of a legally relevant damage.[106] This damage occurs when: "(a) one of the following rules of this Chapter so provides; (b) the loss or injury results from a violation of a right otherwise conferred by the law; or (c) the loss or injury results from a violation of an interest worthy of legal protection."[107] However, the interests worthy of legal protection are determined by the judge in the DCFR rather than by a closed list defined by legislators, as is the case in German law.[108] The criteria that the judge should consider for characterizing an interest as fair and reasonable are the nature and proximity of the damage, as well as the reasonable expectations of the victim.[109] The non-limiting list of legally relevant damages includes personal injury,[110] infringement of dignity, privacy,[111] property or lawful possession,[112] providing incorrect advice or inaccurate information,[113] or inducing a third party to not perform its contractual obligation.[114] Furthermore, specific cases of strict liability are set out in Articles VI. 3: 201 – 3: 208, such as the liability of employers, persons who exercise control over an immovable, persons who have an animal, persons who have dangerous substances, or an operator of an installation, while a presumption of fault is established for a parent's liability.[115]

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[103] Cour de cassation [Cass.] civ. 1re, 28.6.2012, no. 10-28.492.

[104] *Ph. Remy* (fn. 87), p. 42.

[105] *Ph. Remy/J.-S. Borghetti*, Présentation du projet de réforme de la responsabilité délictuelle, in Pour une réforme du droit de la responsabilité, Fr. Terré (ed.) (fn. 2), p. 61, 70.

[106] DRAFT COMMON FRAME OF REFERENCE art. III. 1: 102.

[107] Art. VI. 2: 101 (1) DCRF.

[108] DRAFT COMMON FRAME OF REF. ART. VI. 2: 101.

[109] Art. VI. 2: 101 (3) DCRF.

[110] Art. VI. 2: 201 DCRF.

[111] Art. VI. 2: 203 DCRF.

[112] Art. VI. 2: 206 DCRF.

[113] Art. VI. 2: 207 DCRF: Loss upon reliance on incorrect advice or information. Loss caused to a person as a result of making a decision in reasonable reliance on incorrect advice or information is legally relevant damage if: (a) the advice or information is provided by a person in pursuit of a profession or in the course of trade; and (b) the provider knew or could reasonably be expected to have known that the recipient would rely on the advice or information in making a decision of the kind made. Thus, in these cases compensation for pure economic damage is subject to strict conditions. See also Art. VI. 2: 208 (loss upon unlawful impairment of business). This loss reminds us of the protection of an enterprise under § 823 (I) BGB in German law. *See J. Traullé*, fn. 64.

[114] Art. VI. 2: 211 DCRF.

[115] Art. VI. 3: 104 DCRF.

The PETL refer to "material or immaterial harm to a legally protected interest,"[116] implicating an indicative ranking of the protected interests in descending order as follows: life, bodily or mental integrity, property rights, pure economic interests and contractual relationships.[117] No type of damage is excluded from the scope of reparation in the PETL.[118] In addition to the nature of the liability (e.g., intentional harm), the interests of the actor in terms of his liberty of action and exercising his rights are taken into consideration along with public interests.[119] Aside from the strict liability provided for the acts of auxiliaries[120] and for abnormally dangerous activities,[121] a presumption of fault exists for the persons in charge of a minor or a disabled person,[122] or those who engage in a simply dangerous activity that is not an abnormal activity.[123] Moreover, an additional case of liability is laid down for those who have a duty to protect others from damage.[124]

3. Fault in The Revised Law Proposal

The proposed law defines fault by adopting the definition of the Catala-Viney draft of 2005: "A fault is the violation of a legal or regulatory requirement, as well as a breach of the general duty of care or diligence."[125] Thus, the fault can result either from the violation of a legal text or from an error of conduct.[126] This definition equates fault with an illegal act as in the German and Greek law systems, but differs from those two systems in that it omits any reference to the subjective disposition of the perpetrator (i.e., whether willful or negligent). The distinction between an objective element, illegality, and a subjective element, culpability, is also followed by the European drafts.[127] Consequently, a normative role is assigned to "faute" in French law, which determines what acts establish tortious liability, a function performed by the concept of illegality in several other law systems. The deletion of the existing reference to negligence or recklessness in Article 1241 of the French Civil Code can also be justified given that the degree of gravity of fault has no consequences in terms of the restoration of damage in tort liability.[128] Moreover, the subjective attribution of fault to a person has no influence in

[116] Art. 1:101 PETL.

[117] Art. 2:102 PETL.

[118] *J. Traullé* (fn. 64), p. 285 et seq.

[119] Art. 2:102(6) PETL.

[120] Art. 6:102 PETL. See *P. Giliker*, Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective, (2011) 2 JETL 31, 38.

[121] Art. 5:101 PETL.

[122] Art. 6:101 PETL.

[123] Art. 4:201 PETL.

[124] Art. 4:103 PETL.

[125] Art. 1241 of the law proposal of 2020. See art. 1241 of the French Civil Code.

[126] *See id.*

[127] Art. 4:101 PELT ("A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct"); Art. VI. 1:101 DCFR ("(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage").

[128] Art. 1241 of the French Civil Code (notably, there is no longer a reference to "negligence" or "recklessness").

establishing liability, since even those without volition are tortiously liable.[129] For example, the requirement of a subjective attribution of fault was abandoned in 1964 for children[130] and in 1968 for the disabled.[131] However, the intent or negligence of the tortfeasor is also weighed upon in French law, as is apparent from the existing Articles 1240 and 1241 of the French Civil Code.[132]

Furthermore, a particular treatment of disabled persons also exists in German[133] and Greek law.[134] Both allow the judge to award reasonable compensation to the victim. This is imposed as a lenient solution regarding the disabled[135] in order to avoid the risk of the victim bearing the consequences of a loss not caused by himself. A similar solution based on the principle of leniency also applies to the DCFR.[136] Moreover, a rapprochement of both German and Greek law can also be observed in that when the illegality constitutes a breach of duty of care, the objective element is identified with the subjective element.[137] In other words, in this case the perpetrator did not demonstrate diligent behavior of a reasonably prudent person belonging to his trading circle; in order to define the prudent person any particular qualities of the actor should be taken into account.[138] We find that German law requires the violation of an absolutely protected good (e.g., life, body, health, etc.) or the violation of a law that protects an injured interest, and also requires culpability. Similarly, in Greek law, two conditions are required for the establishment of tortious liability: a fault and an illegal act that should fall within the protective purpose of the violated rule (according to correspondence with German law).[139] The general clause of Article 914 of the Greek Civil Code is also applied in the event of a breach of the duty of care, and in this respect, includes behaviors that are qualified in French law as "*faute*."[140] Still, in French law "*faute*" seems to be identified with the concept of illegality.[141]

Regarding causation, the law proposal of 2020 deposited by the Senators does not give any definition of this, nor does the Catala-Viney draft of 2005, although the Terré draft of

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[129] *See* Cour de cassation – Assemblée Plénière ("Cass. ass. plén."), 9.5.1984, JCP G 1984, II, 20256, commented by *P. Jourdain*; Law No. 68-5 of January 3, 1968 (Art. 489-2 of Civil Code)

[130] Cour de cassation – Assemblée Plénière ("Cass. ass. plén."), 9.5.1984, JCP G 1984, II, 20256, commented by *P. Jourdain*.

[131] Law No. 68-5 of January 3, 1968 (Art. 489-2 of Civil Code).

[132] CODE CIVIL [C. CIV.][CIVIL CODE] art. 1241 (Fr.).

[133] § 829 BGB.

[134] Art. 915-918 of the Greek Civil Code.

[135] *C. Bloch*, Définition de la faute, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 101, 109.

[136] It is provided that the child has no responsibility under the age of 7, unless the victim cannot receive compensation from another person, or liability to make reparation would be equitable taking into account the financial means of the parties or the circumstances (Art. VI. 3 :103 DCFR). See also *J.-S. Borghetti*, De la causalité, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 143, 145.

[137] *See M. Stathopoulos* (fn. 24), p. 293, § 7, no. 72; *Ap. Georgiadis*, Law of obligations, 2nd edn. 2015, p. 660, no. 23.

[138] *Id.*

[139] Art. 914 of the Greek Civil Code; *see M. Stathopoulos* (fn. 24), p. 797, § 15, no. 37.

[140] ASTIKOS KODIKAS [A.K.] [CIVIL CODE] 914 (Greece).

[141] *See, e.g.*, Cour de cassation – Chambre criminelle ("Cass. crim."), 16.3.2022, n° 20-86.502, presented by Victor Trouttet, *The mere fact that a victim has committed a faute simple (i.e. mere negligence) reduces his right to compensation*, SOULIER AVOCATS (Apr. 15, 2022), https://www.soulier-avocats.com/en/the-mere-fact-that-a-victim-has-committed-a-faute-simple-i-e-mere-negligence-reduces-his-right-to-compensation/.

2010 did.[142] Similarly, the DCFR gives a definition of causation without providing any criteria,[143] and also refers to collaboration and alternative causation.[144] On the other hand, the PETL define *conditio sine qua non* as a necessary condition,[145] restrict the damage that may be attributed to a person on the scope of liability[146] and include provisions for concurrent, alternative, or potential causes and uncertain partial causation.[147] As for the limiting conditions of liability, although they are also allowed in tortious liability, liability cannot be excluded when there is fault on the part of the actor.[148] This arrangement differs from that of German law, where the limitation of tortious liability is possible, as this liability is not a regulation of public policy.[149]

4. Liability for Acts of Third Parties: Employers, Parents, Persons Entrusted with the Control of the Life or the Activity of Others

Regarding liability for the acts of others, an employer is strictly liable for the acts of his employee, unless the employee acted outside the functions for which he was hired without authorization and for purposes unrelated to his duties.[150] The exemption of the employer from his liability under these three conditions has already been accepted by the jurisprudence (abuse of office).[151] The law proposal of 2020 provides an additional case for exempting the employer from liability when a victim does not legitimately believe that the employee was acting on

[142] *Dalloz*, *supra* note 2.

[143] Art. VI. 4:101 (1) DCFR: "A person causes legally relevant damage to another if the damage is to be regarded as a consequence of that person's conduct or the source of danger for which that person is responsible".

[144] Art. VI. 4:102 and art. VI. 4: 103 DCFR.

[145] Art. 3: 101 PETL: "An activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred".

[146] Art. 3: 201 PETL: "Where an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity; b) the nature and the value of the protected interest (Article 2:102); c) the basis of liability (Article 1:101); d) the extent of the ordinary risks of life; and e) the protective purpose of the rule that has been violated". See also *J.-S. Borghetti* (fn. 136), p. 143, 144.

[147] Art. 3: 102 PETL; Art. 3: 103 PETL; Art. 3: 104 PETL; Art. 3: 105 PETL.

[148] Art. 1286 of the law proposal of 2020 (« En matière extracontractuelle, nul ne peut exclure ou limiter sa responsabilité pour faute").

[149] *O. Berg* (fn. 24), p. 192.

[150] When the employee acted during work time, in the workplace, and using his work instruments, there is no abuse of duties, because the act is within the scope of his duties. Cour de cassation – Deuxième chambre civile ("Cass. civ. 2^{e} "), 17.3.2011, no. 10-14.468, Bulletin civil ("Bull. civ.") II, no. 69.

[151] Cour de cassation [Cass.] ass. plén., 19.5.1988, no. 87-82.654, Bull. ass. plén., no. 5, Gazette du Palais (Gaz. Pal.) 1988, 2, 640, conl. Dorwing-Carter, Revue trimestrielle de droit civil (RTD civ.) 1989, p. 89 commented by *P. Jourdain*; D. 1988, p. 513 commented by *Ch. Larroumet*; Défrenois 1988, p. 1097, commented by *J.-L. Aubert*.

behalf of the employer,[152] which has been admitted by the jurisprudence[153] and takes the victim's fault into account.[154] The existence of a dependency relationship is required for liability, which is defined in the law proposal of 2020 as: "[t]he principal is the person who has the power to give the employee orders or instructions in relation to the performance of his duties."[155] The power to issue orders or instructions suffices, even if the effective exercise of this power is not necessary;[156] this provision would be in contradiction with the jurisprudence that accepts that the person in question has just to have acted in the interest of another (the principal).[157]

The law proposal of 2020 waives the immunity of the agent "in case of intentional misconduct, or when, without authorization, he acted for purposes unrelated to his attributions."[158] We consider civil or penal intentional fault to constitute intentional misconduct.[159] The agent's immunity is extended compared to the case law,[160] which admitted the agent was personally liable in cases of intentional criminal misconduct ("*faute pénale intentionnelle*"),[161] qualified criminal misconduct ("*faute pénale qualifiée*"),[162] or for any criminal offense.[163] Thus, the non-intentional fault, the qualified fault of the agent within the meaning of Article 121-3 of the Penal Code, or the commission of a criminal offense is no longer sufficient for that the agent to be held liable.[164] However, in the law proposal of 2020,

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[152] Art. 1286 § 3 of the law proposal of 2020.

[153] Cour de cassation [Cass.] civ. 2e, 13.11.1992, no. 91-12.143, Bull. civ. 1992, II, no. 261; RTD civ. 1993, p. 371, commented by *P. Jourdain*. Cf. *A. Denizot*, Pour une vraie réforme du droit de la responsabilité civile, RTD civ. 2020, p. 958: The author is critical of this provision and remarks that this jurisprudence concerns only special hypotheses of embezzlement operated by an employee. On the contrary, when the employee has caused bodily injury, it should not be examined if he acted in such a way as to suggest that he was doing so on behalf of the principal.

[154] Comp. the victim is assumed to be in bad faith: footnote 24 under Art. 1359 of the Catala-Viney draft of 2005, in L'avant-projet de réforme du droit de la responsabilité (fn. 1), p. 381. However, the victim was not in bad faith in the jurisprudence concerned.

[155] Art. 1248 of the law proposal of 2020. Cf. jurisprudence is consistent with the proposed definition: Cour de cassation [Cass.] crim., 7.11.1968, no. 68-90.118, Bull. crim., no. 291.

[156] *Id.*

[157] Cour de cassation [Cass.] civ. 2e, 11.12.1996, no. 94-17.870; Cour de cassation [Cass.] civ. 2e, 15.5.2008, no. 06-22.171, Bull. civ. II, no° 108, RTD civ. 2008, p. 680, commented by *P. Jourdain*. See also *O. Sabard/J. Traullé*, Les faits générateurs de responsabilité dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 262, 291.

[158] Art. 1248 § 2 of the law proposal of 2020.

[159] *O. Sabard/J. Traullé* (fn. 157), p. 272.

[160] Agent's immunity was established as a principle in the decision Costedoat, Ass. plén., 25.2.2000, no. 97-17.378.

[161] Decision Cousin (intentional criminal offense), Cour de cassation [Cass.] ass. plén., 14.12.2001, no. 00-82.066, Bull. civ. ass. plén., no. 17; RTD civ. 2002, p. 108, commented by *P. Jourdain*; D. 2002, p. 1230, commented by *J. Julien*; *ibid*. somm. 1317, commented by *D. Mazeaud*; JCP G 2002, II, 10026, commented by *M. Billiau*; *ibid*. I, 124, nos. 22 et seq., commented by *G. Viney*.

[162] Cour de cassation [Cass.] crim., 28.4.2006, no. 05-82.975.

[163] Cour de cassation [Cass.] civ. 2e, 21.2.2008, no. 06-21.182, D. 2008, p. 2125, commented by *J.-B. Laydu*; JCP 2008, I, 186, commented by *Ph. Stoffel-Munck*.

[164] Victor Trouttet, *The Mere Fact That a Victim has Committed a Faute Simple (i.e. Mere Negligence) Reduces His Right to Compensation, Soulier Avocats* (Apr. 15, 2022), https://www.soulier-avocats.com/en/the-mere-fact-that-a-victim-has-committed-a-faute-simple-i-e-mere-negligence-reduces-his-right-tocompensation/#:~:text=Article%20121%2D3%20of%20the,it%20is%20a%20careless%20mistake.

an agent will be personally liable when he is acting without authorization and for purposes unrelated to his duties.[165] In other words, when two of three existing criteria for abuse of office are met, but not when the agent acts outside the functions for which he was hired, the victim can act against both the agent and the principal.[166]

When the victim can appeal against the principal, the insurer of the latter cannot bring an action ("*action récursoire*") against the employee, only against the employee's insurer.[167] However, if there is a contract between the victim and the employer, only contractual liability will exist, and the application of the provisions concerning tort liability will be excluded.[168] We consider that if the victim can choose to turn against the agent or principal, as in German and Greek law[169], it would grant the victim autonomy. In other words, the general principle of dealing with liability for the acts of another allows the combination of the liability of both the person who acted and the person who is liable for the acts, and should not be limited as far as the employer's liability is concerned.

Interestingly, the proposal that was formulated in the Catala-Viney draft of 2005 regards the complementarity of the liability of the employee; he should only bear responsibility if the victim cannot be satisfied by the employer.[170] The benefit of discussion relating to the guarantee in which a creditor must turn first against the principal debtor and then against the surety allows for a deeper understanding of the law.[171]

According to the law proposal of 2020, a distinction should be drawn between whether a person organizes and controls the way of life of another, or just controls the activity of another.[172] In the first case, the reform confirms the existing jurisprudence where a person is liable for the acts of another if he organizes and controls permanently the way of life of that person, by judicial or administrative decision.[173] This rule was established in 1991 by the *Blieck* decision[174] in which the liability of an institution for the acts of a disabled person was accepted, and it has been argued that liability for the acts of another has been established as a general principle.[175] However, the law proposal of 2020 rejects this general principle and seems to restrict the liability for acts of another only in cases that will be provided for in the revised Civil

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[165] Art. 1248 of the law proposal of 2020. *See* art. 1249, preliminary draft of 2016, *Alice Dejean de La Batie*, *supra* note 3 at 5.

[166] *See O. Sabard/J. Traullé* (fn. 157), p. 272.

[167] Cour de cassation – Première chambre civile ("Cass. civ. 1re"), 12.7.2007, nos. 06-12.624 and 06-13.790, Bull. civ. I, no. 270.

[168] *A. Outin-Adam*, Responsabilité des employeurs et salariés, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) 187, p. 157, 158.

[169] Eugenia Dacoronia, *Tort Law in Greece. The State of Art*, NAT'L AND KAPODISTRIAN UNIV. OF ATHENS 1, 15-16.

[170] Art. 1359-1 of the Catala-Viney draft of 2005.

[171] *See Tenets of Surety Law*, SURETY ASPECTS OF BANKRUPTCY LAW AND PRACTICE (last accessed Apr. 15, 2023), 4, https://www.americanbar.org/content/dam/aba-cmsdotorg/products/inv/book/411453539/chap1-5190564.pdf.

[172] *Comp.* art. 1247 et seq. of the preliminary draft law of 2016; Alice Dejean de La Batie, *supra* note 3 at 5.

[173] Art. 1246 of the law proposal of 2020.

[174] Cour de cassation [Cass.] ass. plén., 29.3.1991, Bull. civ. I, no. 1; D. 1991, p. 324, commented by *Ch. Larroumet*; RTD civ. 1991, p. 312, commented by *J. Hauser*; *ibid.*, p. 541, commented by *P. Jourdain*.

[175] Fr. Terré/Ph. Simler/Y. Lequette/F. Chénedé, Droit civil. Les obligations, 12e edn., Paris, Dalloz, n° 1034.

Code.[176] The same solution, strict responsibility, is also established for persons assigned to permanently organize and control the life of a minor,[177] but it does not apply to those assigned to organize the life of a major in accordance with the jurisprudence.[178]

Regarding the organization and control of the activity of another, the law proposal of 2020 establishes a presumption of fault under two conditions: (1) the person has assumed this role by contract; and (2) that he is acting as a professional.[179] In addition, a new case not existing in jurisprudence is provided for in the law proposal when a person undertakes under the above two conditions the supervision ("surveillance") of another person, and his fault is also presumed.[180] Consequently, the jurisprudence concerning cheerleading clubs[181] or amateur sports centers,[182] which are not acting as professionals, is abandoned. Clubs have no longer a strict responsibility and are only to be held liable if it is established that the victim has entered a contract with them. The case law had admitted that a person entrusted with the custody of a minor or an adult by a contract does not bear strict responsibility; this solution is also abandoned.[183] The lack of custodian's strict responsibility was justified in first case by the fact that parents are liable for the acts of a minor and cannot exclude their responsibility by contract; in the second case the personal freedom of movement is recognized for adults.[184] Furthermore, the transfer of supervision by contract is possible; thus summer camps, boarding schools, and baby-sitters, and establishments that accommodate adults with mental disabilities could all be subject to the presumption of fault.[185]

As for parents, their liability for the actions of their child is strict[186]; an important jurisprudence confirmed by the proposed reform.[187] The responsibility of parents is significantly impacted by the reform.[188] On one hand, their cohabitation with the child is no

[176] Art. 1243 of the French Civil Code: "One is liable for damage caused by others in the cases and under the conditions laid down by articles 1244 to 1248".

[177] Art. 1245 3° of the law proposal of 2020. It is also clarified that in this case, the responsibility of the parents or employers cannot be engaged.

[178] Cour de cassation [Cass.] civ. 2e, 25.2.1998, D. 1998, p. 315, JCP G 1998, II, 10149, commented by *G. Viney*.

[179] Art. 1247 of the law proposal of 2020.

[180] *Ph. Brun*, Avant-projet de réforme du droit des obligations : le fait d'autrui, in L'avant-projet de réforme du droit de la responsabilité (fn. 1), p. 193, 197; *P. Januel*, Réforme du droit de la responsabilité civile : annonce d'une proposition de loi sénatoriale D. 2020, p. 1519.

[181] Cour de cassation [Cass.] civ. 2e, 12.12.2002, no. 00-13.553, Bull. civ. II, no° 289.

[182] Cour de cassation [Cass.] civ. 2e, 22.5.1995, no. 92-21.871, Bull. civ. II, no° 155.

[183] Cour de cassation [Cass.] civ. 1re, 15.12.2011, JCP G 2012, p. 205, commented by *D. Bakouche* and p. 530, commented by *Ph. Stoffel-Munck*; RTD civ. 2012, p. 321, commented by P. Jourdain; Cour de cassation [Cass.] civ. 2e, 24.5.2996, RTD civ. 2006, p. 779, commented by P. Jourdain.

[184] *O. Sabard/J. Traullé* (fn. 157), p. 289.

[185] *Id.*, p. 289. E.g., regarding summer camps, compare this with the existing jurisprudence that admits contractual liability (an obligation of means and not an obligation of result): Cour de cassation [Cass.] civ. 1re, 10.2.1993, no. 89-14.889, Bull. civ. I, no. 66, D. 1993, p. 605, commented by *J. Bonnard*; Cour de cassation [Cass.] civ. 1re, 10.2.1998, no. 96-14.623, Bull. civ. I, no° 57.

[186] Decision Bertrand, Cour de cassation [Cass.] civ. 2e, 19.2.1997, no. 94-21.111, Bull. civ. II, no. 56, D. 1997, 265, commented by *P. Jourdain*; D. 1997, somm. 290, commented by *D. Mazeaud*; Gaz. Pal. 1997, 2, 572, commented by *Fr. Chabas*; Dr. fam. 1997, no. 83, commented by *P. Murat*. See also B. *Waltz-Teracol* (fn. 36), p. 19, 28.

[187] *See* Catala, *supra* note 27, at 178 (stating parents are "placed at the head of the list of those persons on whom strict liability for the acts of minor children is imposed").

[188] *See id.* at 178-179 (deeming "it seemed necessary to tie this liability to the exercise of parental authority.").

longer required, as it suffices just that they exercise parental authority.[189] This is logical as the strict responsibility of parents was already widely accepted without them being able to absolve themselves of their responsibility by proving their lack of fault in supervising the child.[190] In fact, this strict responsibility of parents is explicitly provided for in the draft law of 2017.[191] On the other hand, the fault of the direct tortfeasor, the child, is required, whereas case law admits that a simple causal fact was sufficient for parents be responsible.[192] As a result, parents can be held liable for an act which their child is not responsible.[193] The law proposal of 2020 adopts this general principle for all cases where a person is responsible for the actions of another person, in that the existence of an event that can establish the responsibility of the person who acted is presupposed.[194]

5. Maintaining the Liability of the Keeper of a Thing: An Extended Liability in French Law

As for the responsibility of the keeper of a thing ("gardien de la chose"), the proposed law of 2020 establishes jurisprudential solutions where the liability of that person is strict.[195] This occurs when the "thing" was in motion and came into contact with the place where the risk occurred,[196] or if the "thing" was stationary; in both situations the victim must prove either the defectiveness, or the irregularity of the position, the condition or the conduct of the "thing".[197] On this point the Catala-Viney draft of 2005 is followed;[198] rather than the Terré draft of 2010, as the latter rejected the presumption of liability when the thing is in motion under the above-described conditions.[199] Additionally, in the proposal of the Terré draft of 2010, the responsibility of the keeper of the thing exists only in the case of an insult to the body and the mental state of a person as a manifestation of the priority of protected interests;[200] this solution was rejected by the law proposal of 2020. Furthermore, the law proposal provides that

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[189] *See id.* at 179.

[190] Decision Bertrand (fn. 186).

[191] *See* Draft law of 2017, art. 1246 *supra* note 4.

[192] *See e.g.,* Decision Levert, Cour de cassation [Cass.] civ. 2e., 10.05.2001, Bull civ. II, No. 96.

[193] Decision Levert: Cour de cassation [Cass.] civ. 2e, 10.5.2001, no. 99-11.287, Bull. civ. II, no. 96, RTD civ. 2001, 601, commented by P. Jourdain; D. 2001, 2851, report done by *P. Guerder*, commented by *O. Tournafond*; D. 2002, somm. 1315, commented by *D. Mazeaud*; JCP 2002 I, 124, commented by *G. Viney*.

[194] Art. 1244 of the law proposal of 2020.

[195] Art. 1243 of the law proposal of 2020.

[196] Cour de cassation [Cass.] civ. 2e, 29.3.2001, Bull. civ. II, no. 68, Appeal No. 99-10.735.

[197] *E.g., see* Cour de cassation [Cass.] civ. 2e, 1.11.1995, Bull civ. II, No. 18; Cour de cassation [Cass.] Civ. 2e, 24.2.2005, Bull civ. II, No. 51, Appeal No. 03-13.536, RTD civ. 2005, p. 407, commented by *P. Jourdain*; Cour de cassation [Cass.] civ. 2e, 17.6.2021, Bull civ. II, Appeal No. 20-10.732.

[198] Art. 1354-1 et seq. of the Catala-Viney draft of 2005. *See* Catala, *supra* note 27, at 189.

[199] *See* art. 20 of Terré draft of 2010.

[200] *See* Olivier Moréteau, *France: French Tort Law in the Light of European Harmonization*, 6 J. OF CIVIL L. STUDIES 759, 772 (2013) (stating that under Article 20 of the Terré draft liability for an act "is limited to physical and psychological harm.").

this responsibility only concerns tangible things rather than intangible things.[201] The doctrine already criticized imposing liability for providing information pursuant to this basis.[202]

It is noteworthy that this general clause greatly expands liability; compensation for bodily injury is subject to a special regime and use of this liability will be made mainly for pure economic loss, such as loss of profit, where there is no physical injury to a person or his property.[203] Currently, this general clause is only provided for by Italian[204] and Quebec law, however the latter requires an independent act of the "thing".[205]

Reservations have been expressed about this solution because the recovery of economic loss in no fault cases may be considered to constitute an infringement of commercial and industrial liberty. Although economic loss is restored under the general clause in French law when there is fault on the part of the tortfeasor, it does not extend it to cases that help maintain the competitiveness of French law against other national laws. Notwithstanding these reservations to reparable damage, we consider that maintaining the liability of the keeper of the "thing" as a general clause as formulated by the jurisprudence and codification of the existing solution[206] would have a positive result. In contrast to the individualism and liberalism that influenced German law,[207] French law is more protective of the victim. The same need to protect the victim from the emergence of machines and the evolution of technology should remain active, for example, regarding the application of artificial intelligence.[208]

6. Disturbance beyond normal neighborhood nuisance

Under the proposed regulation, which also codifies case law, the person who causes a disturbance beyond normal neighborhood nuisance is liable for the damage resulting from that disturbance.[209] Even if an administrative decision had authorized the harmful activity, the judge can award damages or even order reasonable measures to end the disturbance,[210] as is also provided for in the Catala-Viney draft of 2005.[211] Although this regulation concerns real property law, the jurisprudence has established this case as autonomous and based on the

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[201] Article 1242 of the law proposal of 2020.

[202] *G. Danjaune*, La responsabilité du fait de l'information, JCP G 1996, I, 3895.

[203] *See J.-S. Borghetti*, Des principaux délits spéciaux, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 163, 174.

[204] Art. 2051 of Italian Civil Code. *N. Vardi*, Les faits générateurs de responsabilité dans les projets français et belge : faute ou risque ? Point de vue de droit italien, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 310, 317.

[205] Art. 1465 of Civil Code of Quebec: "The custodian of a thing is bound to make reparation for injury resulting from the autonomous act of the thing, unless he proves that he is not at fault". We remark that only a presumption of fault is established. See *B. Moore* (fn. 5), p. 9.

[206] *See* Catala, *supra* note 27, at 189.

[207] *R. Schulze*, L'état actuel du droit allemand de la responsabilité civile, in La réforme du droit de la responsabilité civile en France (fn. 46), p. 39, 41.

[208] *Comp.* Catala, *supra* note 27, at 189.

[209] *Id.* at 192.

[210] Art. 1249 of the law proposal of 2020.

[211] Art. 1244. In contrast, the Catala-Viney draft of 2005 draft did not provide the judge with the ability to order the cessation of the injurious activity if administrative permission had been obtained.

general principle that no one should cause an unusual nuisance to the neighborhood.[212] Proof of fault is not required, only excessive nuisance,[213] assessed against the effect an activity produces,[214] even if this activity is legal or licensed. However, there is no mention of what the nuisances might be, nor are there any criteria for when or how excessive nuisance will occur.[215] For example, in Greek law, a relevant provision in the section regarding property law mentions the emission of smoke, soot, fumes, heat, noise, vibrations, or other similar effects coming from another property as neighboring nuisances.[216] According to the same provision,[217] two criteria are considered to determine if it is a nuisance or not: (1) if the disturbances do not significantly impair the use of the neighbor's property, or (2) if the disturbances come from normal use for real estate in the area of the property from which the damage is caused.[218] Similar criteria are considered in Quebec law.[219]

III. THE REMEDIES PROVIDED TO THE VICTIM

1. Performance *in natura* as a Means of Redressing the Damage

The performance in nature is an interesting point dealt with by both contract law reform and tort law reform.[220] The law proposal of 2020 acknowledges that reparation may be in kind or in the form of damages.[221] The tortfeasor-debtor of the compensation will have the choice of enforcement: performance in kind or payment of damages.[222] However, performance in kind cannot be imposed on the victim if the latter does not agree to it.[223] The judge cannot impose reparation in kind if this performance is impossible or if there is an obvious disproportion between the costs for the person responsible and the victim's interest,[224] as it can

[212] Cour de cassation [Cass.] ass. plén., 9.5.1984, no. 79-16.612, Bull. ass. plén., no. 4, RTD civ. 1984, 508, commented by *J. Huet*; JCP 1984, II, 20255, commented by *N. Dejean de la Bâtie*.

[213] *D. Mazeaud*, Synthèse Le juge et le droit de la responsabilité civile : bilan et perspectives, Revue des contrats, 7.12.2017, no. 114, p. 158.

[214] *M. Lacroix*, Regard québécois, in Vers une réforme de la responsabilité civile française (fn. 5), p. 79, 91; *B. Waltz-Teracol* (fn. 36), 19, 26.

[215] *B. Waltz-Teracol* (fn. 36), 19, 26.

[216] Art. 1003 of the Greek Civil Code.

[217] *Id.*

[218] *Id.*

[219] Art. 976 of Civil Code of Quebec: "Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage".

[220] Ordinance No. 2016-131 of February 10, 2016, reforming contract law, the general regime and proof of obligations.

[221] Art. 1260 and 1261 of the law proposal of 2020. *Comp.* Catala, *supra* note 27, at 195.

[222] *Comp.* Catala, *supra* note 27, at 201. The Catala-Viney draft of 2005 provided for rules special to the reparation of losses resulting from damage to property.

[223] Art. 1261 § 1 of the law proposal of 2020.

[224] Art. 1261 § 2 of the law proposal of 2020.

also be in the event of a contract.[225] However, in the latter case, the debtor's good faith is considered, which should motivate us to consider the perpetrator's degree of fault. In addition, monetary satisfaction and performance *in natura* may be pronounced. This differs from contractual liability solutions, where the right to choose the type of compensation belongs only to the creditor and not to the debtor so that the former can choose the instrument that best meets his legal expectations based on the contract.[226] Combining damages with execution in kind is also possible in the case of contracts.[227]

The law proposal of 2020 provides that the judge may also authorize the victim to take the reparation measures in kind.[228] This provision achieves the preventive function of tort liability. It could allow the victim and also a third party to repair the damage at the expense of the person responsible for the damage without having to consider the application of the provisions of *negotiorum gestio*, especially when the third party is a family member of the victim and provides permanent assistance to a disabled person. Under Swiss law, compensation for damage resulting from the care provided to the victim as part of the recoverable damage is also possible.[229]

Moreover, the DCFR[230] allows the judge to choose type of the compensation for damage (*in natura* or monetary compensation), while the PETL[231] provide for a prioritization of the means of redress for damage, with the payment of compensation as the principle and execution in kind as the exception.[232] The PETL also take into account the cost to the person in charge.[233] German law places performance in kind as the basic principle,[234] and the payment of

[225] Art. 1221 of the French Civil Code. See, e.g., *D. Mazeaud*, L'exécution forcée de nature dans le droit des contrats, D. 2016, p. 2477.

[226] *P. Remy-Corlay*, De la réparation, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 191, 194. Philippe Hameau et al., *Reform of the French Civil Code on contract law and the general regime and proof of obligations*, NORTON ROSE FULBRIGHT LLP (Oct. 2016), https://www.nortonrosefulbright.com/en/knowledge/publications/2a563f12/reform-of-the-french-civil-code-on-contract-law-and-the-general-regime-and-proof-of-obligations.

[227] Code civil [C. CIV.] [Civil Code] art. 1217 (Fr.).; *Ph. Delebecque*, L'articulation et l'aménagement des sanctions de l'inexécution du contrat, Dr. et patrimoine 2016, p. 62; *Y.-M. Laithier*, Les sanctions de l'inexécution du contrat, RDC 2016, no. hors-série, p. 39; *Présentation des articles 1217 à 1218 de la nouvelle section 5 L'inexécution du contrat*, UNIVERSITE PARIS 1 (last accessed Apr. 7, 2023), https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre3/stitre1/chap4/sect5; Raphaël Dana, et al., *Contracts, Negotiation and Enforcement in France: overview*, WESTLAW (Nov. 1, 2019) https://us.practicallaw.thomsonreuters.com/9-634-2031.

[228] Art. 1261 § 3. Likewise the draft law of 2017.

[229] *P. Wessner* (fn. 71), p. 303.

[230] Art. VI 6: 101 (2) DCFR: "Reparation may be in money (compensation) or otherwise, as is most appropriate …".

[231] Art. 10: 101: "Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm".

Art. 10: 104: "Instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party".

[232] PETL, tit. VI, art. 10:101.

[233] Art. 10: 104 PETL.

[234] § 249 BGB: "(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred". An exception is provided: "2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration".

monetary compensation as a complementary way of enforcement when the former is not possible.[235] On the contrary, Greek law establishes monetary compensation as a principle and performance in kind as an exception, when one of the parties requests it and restoration of the previous situation does not affect the interests of the injured party.[236] French law regards these two forms of execution as equivalent, although it provides limitations on enforcement in kind so long as it is not impossible or entail disproportionate costs, and the victim agrees.

2. The Civil Fine as a Means of Preventing Acts of Particular Gravity

The most innovative point discussed in the reform of tort law is the introduction of a civil fine in the presence of a lucrative fault, a fault deliberately committed in order to obtain a profit or save an expense for an economic gain ("un gain ou une économie").[237] This has been characterized as an important point because we are moving away from the restorative function that French liability law has provided to add a sanctioning function.[238] This reminds us of the punitive damages in Anglo-Saxon law or in Quebec law, but with a notable difference.[239] In the latter, it can only be imposed in cases where a law specifically provides for it.[240] In this way, the question of the legality of the sanction is avoided, although it remains up to date in French law.[241] Since a civil fine can be compared to a criminal penalty, the principles applicable in a criminal penalty must be respected, namely; (1) the principle of legality; (2) the principle of proportionality; (3) the principle of non-retroactivity of more severe punitive law; (4) the principle of the individualization of the punitive sanction; and (5) the principle *non bis in idem*.[242]

The legality of penalties means that a sanctioned act must be sufficiently descriptive, precise, and foreseeable.[243] The French Constitutional Council has already ruled that the legislator could:

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[235] § 250 BGB: "(1) To the extent that restoration is not possible or is not sufficient to compensate the obligee, the person liable in damages must compensate the obligee in money. (2) The person liable in damages may compensate the obligee in money if restoration is only possible with disproportionate expenses".

[236] Art. 297 of the Greek Civil Code. See, e.g., *Ap. Georgiadis* (fn. 137), p. 169, § 11, no. 39.

[237] Art. 1266-1 of the draft law of 2017. See *J. Prorok*, L'amende civile dans la réforme de la responsabilité civile, RTD civ. 2018, p. 327; *F. Rousseau*, Projet de réforme de la responsabilité civile. L'amende civile face aux principes directeurs du droit pénal, JCP G 2018, p. 1177; *F. Graziani*, La généralisation de l'amende civile: entre progrès et confusion. Commentaire de l'article 1266-1 du projet de réforme de la responsabilité civile, D. 2018, p. 428; *M. A. Chardeaux*, L'amende civile, LPA, 30.1.2018, p. 6; *I. Vingiano-Viricel*, La faute lucrative : une notion en construction en droit français, RTD com. 2017, p. 19; Alexander Bailly and Xavier Haranger *supra* note 10.

[238] See Solene Rowan, *Punishment and Private Law: Some Comparative Observations*, in Punishment and Private Law 63 (2021).

[239] *See* Draft law of 2017, *supra* note 4, art. 1266-1.

[240] Article 1621 of the Civil Code of Québec ("Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose."); *see* Art. 49 § 2 Charter of Human Rights and Freedoms.

[241] *See* Charter of Human Rights and Freedoms, Art. 49 § 2.

[242] *See, e.g., N. Rias*, Regard français, in Vers une réforme de la responsabilité civile française (fn. 5), p. 63, 67.

[243] *See, e.g., S. Carval*, Le projet de réforme de la responsabilité civile, JCP G 2017, no. 401.

> [m]ake the violation of certain obligations subject to a civil fine on condition that he respects the requirements of Articles 8 and 9 of the Declaration of 1789, among which is the principle of the legality of offenses and penalties which imposes on him to state in sufficiently clear and precise terms the prescription of which he sanctions the breach.[244]

Thus, the question arises in whether the fact that one deliberately committed the fault to obtain an economic gain meets the foreseeability requirement. Even if the provision in the draft law of 2017 requires conscious and foreseeable behavior of the actor, the wording remains quite vague.[245] As for the principle of proportionality, the Constitutional Council considers that it is up to the judges to ensure the effectiveness of the principle of proportionality when imposing a fine.[246] Under the jurisprudence of the European Court of Human Rights (ECHR), violation of the principle *non bis in idem* will be possible when the same act has been punished criminally.[247] In this case, no civil fine shall be levied where a penalty has already been imposed by a criminal court.[248]

The draft law of 2017 also provided that the criteria for determining the fine were: the seriousness of the offense; the financial capabilities of the tortfeasor; and the profits the tortfeasor obtained from this activity.[249] Additional criteria could include whether a sentence has already been imposed by a criminal court, as well as the extent of the restorative damages awarded.[250] Quebec law considers the same criteria.[251] Moreover, in French law the attribution of the fine to the Public Treasury does not provide the victim with any motivation to make this request; therefore, measures to discourage such behavior may prove to be ineffective.[252] Nevertheless, payment to the Public Treasury prevents the undesirable result of enriching the victim.[253] Besides, Quebec law reassures us that the penalties imposed will be moderate and

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[244] Conseil constitutionnel, Decision No. 2010-85 QPC, 13.1.2011, § 3.

[245] *See* Art. 1266-1 of the draft law of 2017.

[246] Conseil constitutionnel, Decision No. 2001-455 DC, 12.1.2002, §§ 85 and 86.

[247] ECHR, Judgment of 23.10.1995 – 15963/90 (Grandinger v. Austria). Under Art. 4 of Protocol No. 7 of the European Convention on Human Rights: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence of which he or has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". Even if the French government has issued a reserve relating to article 4 of the Additional Protocol n ° 7, condemnation is possible as in the case of the Italian government, which had formulated a similar reservation: ECHR, Judgment of 18.3.2015 – 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (Grande Stevens et al. v. Italy).

As for the jurisprudence of the European Court of Justice allowing double procedures, e.g. ECJ, Judgment of 26.2.2013 – C-617/10 (Aklagaren v. Hans Åkerberg Fransson), § 34; see *D. Tsiaklagkanou/I. Morozinis/ G. Lekkas/I. Mpekas*, Market abuse regulation and market abuse directive: happy markets without happy investors?, Zeitschrift für Internationale Strafrechtswissenschaft, p. 439, 443, available at www.zfistw.de.

The French Constitutional Council also allows double procedures, Conseil constitutionnel, Decision No. 2016-546 QPC, 24.6.2016, § 24.

[248] See, e.g., *Fines, Penalties, and Sanctions*, WILLKIE COMPLIANCE, https://complianceconcourse.willkie.com/resources/sanctions-enforcement-fines-penalties-and-sanctions/ (last visited Apr. 21, 2023).

[249] Art. 1266-1 § 2 of draft law of 2017.

[250] *P. Wessner* (fn. 71), p. 300.

[251] Art. 1621 of Civil Code of Quebec.

[252] *See* Art. 1266-1 § 2 of draft law of 2017.

[253] *P. Wessner* (fn. 71), p. 299.

that we can avoid the sometimes excessive penalties found in other North American legal systems.[254]

While, this measure was present in all of the preliminary drafts and projects, it no longer appears in the law proposal of 2020, so it does not seem that it will be adopted.[255] The Senate preferred to avoid regulating issues that have caused reactions in theory.[256] It is worth noting that the Terré draft of 2010 provided that in cases of wrongdoing, intended for profit, the victim could be awarded the amount corresponding to this profit, and the additional amount paid in respect to restorative damages should not be covered by liability insurance.[257] The restitution of the profit could also be achieved by unjust enrichment; however in many countries, this is not allowed to be brought simultaneously with the action for compensation for tort liability.[258] In French law, the attribution of obtained profit is provided for in the event of trademark or patent infringement.[259]

The DCFR does not provide for punitive damages; but a provision does exist for the restitution of profits as a form of compensation.[260] Additionally, according to Regulation 864/2007[261] the awarding of punitive compensation and not restorative compensation may be considered contrary to the public order of a state if deemed excessive.[262] Opposition to public policy has also been accepted in Swiss law.[263] However, French and German case law have admitted that punitive damages are not contrary to international public policy.[264] Moreover, Quebec law does not limit the application of punitive damages to non-contractual liability, as it applies to contracts as well.[265]

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[254] *See* Art. 1621 of Civil Code of Quebec.

[255] *See* Law proposal of 2020: statement of reasons at 4.

[256] *Id.*

[257] Art. 54 of the Terré draft of 2010. See *R. Mésa*, L'opportune consécration d'un principe de restitution intégrale des profits illicites comme sanction des fautes lucratives, D. 2012, p. 2754.

[258] *P. Remy-Corlay* (fn. 226), p. 201; (e.g., it is not allowed in France, Germany, Greece, while it is allowed in Italy, Austria, Spain).

[259] *E.g.*, Art. L. 615-17, L. 521-7, L. 623-28, L. 716-14, L. 722-6, L. 331-1-3 of the French Intellectual Property Code. See also *G. Viney*, Quelques propositions de réforme du droit de la responsabilité civile, D. 2009, p. 2944.

[260] Art. VI. 101 (4) DCFR: "As an alternative to reinstatement under paragraph (1), but only where this is reasonable, reparation may take the form of recovery from the person accountable for the causation of the legally relevant damage of any advantage obtained by the latter in connection with causing the damage".

[261] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[262] Recital 32. See also *P. Remy-Corlay* (fn. 226), p. 200.

[263] Decision of 10.10.1996, M. v. B, ATF 122 III 463, JT 1997 I 250. *P. Wessner* (fn. 71), p. 298.

[264] The French and the German Supreme Court have admitted that since the principle of proportionality between the amount of the punitive damages and the loss suffered by the injured party has not been respected, the exequatur of a decision awarding damages should be refused. As a result, if the principle of proportionality was respected, no contradiction to public policy would exist. Cour de cassation [Cass.] civ. 1re, 1.12.2010, D. 2011, p. 24, commented by *I. Gallmeister/F.-X. Licari* (*ibid.*, 423); *B. Fages*, RTD civ. 2011, 122; *P. Remy-Corlay*, RTD civ. 2011, 317; *J. Juvénal*, JCP G 2011, 140; *Ph. Stoffel-Munck*, JCP G 2011, 415. German Supreme Court (Bundesgerichtshof, BGH), 4.6.1992, IX ZR 149/91; RTD civ. 1994, 457, commented by *Cl. Witz*.

[265] Art. 1621 of Civil Code of Quebec.

3. An Additional Protection Provided to the Victim: To Put an End to the Illegal Act

A second function added by the reform is prevention by making it possible to order the cessation of illicit acts.[266] It is left to the judge's discretion to prevent (*ante damnum*) or terminate the tortious event (*post damnum*) and, therefore, this order differs from the compensation corresponding to the restorative nature of the tort liability by giving new functions to it.[267] This measure aims to limit the loss at the source of the damage and to conform the act in dispute with the rule of law from which it deviates.[268] The illegality of the act is required for this measure to be implemented, while neither the fault of the perpetrator nor the existence of damage is necessary.[269] It differs from compensation in that the latter is not sufficient to ensure that the existing infringement does not continue.[270] It also differs from interim measures as it does not presuppose *imminent* damage. Additionally, interim measures can be pronounced in order to put an end to a *manifestly* unlawful disturbance.[271] The cessation or prohibition of any infringement is provided for in several European directives[272] and in some articles of the French Civil Code,[273] and it is also well-known in German law.[274] Moreover, this order can be imposed not only on the perpetrator, but on anyone who is in a suitable position to put an end to the illegality, like an internet service provider for illegal infringement of intellectual property rights by a user of the services.[275] A comparison could be made with acts of unfair competition where the jurisprudence reprehends behavior that increases the risk of damage,[276] and there are decisions which accept compensation for expenses incurred for prevention purposes.[277]

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[266] Art. 1268 of the law proposal of 2020.

[267] *See N. Rias* (fn. 242), p. 63, 74.

[268] *C. Bloch/Ph. Stoffel-Munck*, La cessation de l'illicite, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 87, 90.

[269] *See* Art. 1268 of the law proposal of 2020.

[270] *See* for compensatory damages Sophie Bienenstock, *The Different Effect of French Liability Law: the Example of Abusive Contract Terms*, 129 DANS REVUE D'ÉCONOMIE POLITIQUE 205, 219, 220 (2019).

[271] Art. 835 of the French Code of Civil Procedure.

[272] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, Art. 11 § 2; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Art. 18 § 1; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Art. 11; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, Art. 2.

[273] Art. 9 of the French Civil Code: invasion of privacy; Art. 16-2 of the French Civil Code: protection of the human body; disturbances exceeding the normal inconveniences of the neighbourhood. See also the law of July 29, 1881 regarding press offenses.

[274] For the prevention of illegality, the following legal remedies are provided: the Vorbeugender Unterlassungsanspruch to prevent the illegality, and the Verletzung Unterlassungsanspruch to prevent it from being repeated. The Beseitigungsanspruch is provided to stop the illegality. See *C. Bloch/Ph. Stoffel-Munck* (fn. 268), p. 91; *J. Traullé* (fn. 64), p. 285 et seq.

[275] *See* Art. 1268 of the law proposal of 2020.

[276] Cour de cassation – Chambre commerciale et financière (Cass. com.), 29.11.1976, no. 75-12.431, Bull. civ. IV, no. 300.

[277] Securing the edge of a cliff threatening to collapse: Cour de cassation [Cass.] civ. 2e, 15.5.2008 – 07-13483, Bull. civ. II, no. 112, D. 2008, p. 2894, commented by Ph. Brun. The storage of straw or hay in stacks outside or stored in a barn is indeed likely to pose a risk, since it was carried out on the property line and in the immediate

However, if damage has not yet been produced, we wonder whether one can speak of liability, and whether the interim remedy which is provided for in existing law is sufficient. The cessation of the illicit act after a prejudice is already present, and avoiding its aggravation is desirable; however it remains uncertain if this objective should be considered in the context of extra-contractual liability. However, it seems effective that a judge who tries a case on the merits[278] can also order measures to prevent or terminate an illegal act. Although the existence of damages is a condition of non-contractual liability, future damages deriving from a certain and direct extension of a current situation are also recoverable.[279] The same degree of certainty can be admitted for the infliction of damage as for the presence of an illegal act.

4. Confirmation of Opportunity Loss as a Form of Compensation

Compensation for loss of an opportunity ("perte de chance") is admitted in French jurisprudence, although in principle, compensated damage must be specific and not hypothetical.[280] The theory of loss of chance provides a palliative against the uncertainty affecting the causation.[281] The law proposal of 2020 defines the loss of opportunity as: "reparable harm when it consists of the actual and certain disappearance of a favorable eventuality," as the existing jurisprudence has already determined.[282] An example is when a doctor delays the administration of a treatment, but it cannot be proven that the treatment would have prevented the patient's death.[283] While earlier treatment would have given the patient a chance to improve his health,[284] it is questionable whether the doctor's failure to inform the patient of risks should be considered as a loss of opportunity to avoid damage. It is possible that even if the patient had been informed, he still would have chosen to undergo this treatment, with the result that the treatment is causally linked to the patient's decision and not to the information provided by the doctor.[285] Nevertheless, we believe that the patient's decision is

vicinity of a dwelling building: Cour de cassation [Cass.] civ. 2e, 24.2.2005 – 04-10362, Bull. civ. II, no. 50, JCP G 2005, I, p. 149, chr. *G. Viney*.

[278] *See The French Legal System,* MINSTÈRE DE LA JUSTICE (Nov. 2012), at 4-5, 8, https://www.justice.gouv.fr /art_pix/french_legal_system.pdf (discussing the role and authority of judges within the French legal system).

[279] Art. 1236 of the law proposal of 2020. *See* preliminary draft law of 2016, Alice Dejean de La Batie, *supra note* 3 at 2.

[280] *E.g.*, Cour de cassation [Cass.] com., 4.2.2014, no. 13-10630, Bull. civ. IV, no. 28.

[281] *M. Bacache*, Les méandres du lien de causalité dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 366, 368; *Fr. Terré/Ph. Simler/Y. Lequette/Fr. Chénedé*, Droit civil – Les obligations, 12th edn. 2018, § 924, p. 1007.

[282] Art. 1237 § 1 of the law proposal of 2020; Cour de cassation [Cass.] crim., 18.3.1975, no. 74-92.118, Bull. crim. no. 79; Cour de cassation [Cass.] civ. 1re, 21.11.2006, Bull. civ. I, no. 498, JCP G 2007, I, 115, no. 2, commented by *Ph. Stoffel-Munck*.

[283] *See Loss of Chance Doctrine*, BORDERS L., https://www.borderslaw.com/legalnews/medical-malpractice/loss-of-chance-doctrine/index.html (last visited Apr. 4, 2023).

[284] *See* Cour de cassation [Cass.] civ. 1re, 14.10.2010, no. 09-69.195, commented by *F. Patris*, L'essentiel, Droit des assurances, Nov. 2010; *Cl. Grare-Didier*, Du dommage, in Pour une réforme du droit de la responsabilité, Fr. Terré (dir.) (fn. 2), p. 131, 137.

[285] *See* Bryan Murray, *Informed Consent: What Must a Physician Disclose to a Patient?*, 14 AM. MED. ASS'N J. OF ETHICS 563 (2012).

made by considering various parameters, including the knowledge of the risks associated with treatment, which is of paramount importance. The silence of the doctor influences the patient's decision, and the patient could have refused the intervention or treatment if properly informed.[286] We highlight the restoration of the loss of a customer, even if in this case, apart from the unfair behavior of the competitor, the customer's decision intervenes.[287]

Considering that the loss of opportunity is a peculiarity of French law when determining the award of compensation, its acceptance is not favored in systems that base tort liability on a general clause.[288] For example, the DCFR does not provide a similar provision, while the PETL do not provide for the restoration of such damage outright, although this result can be achieved through the flexibility offered by causation.[289] Loss of a chance is also found in English law, where it has been admitted for pure economic loss,[290] even though it has been rejected in cases of medical negligence, such as in the presence of an error in the diagnosis of cancer and consequently a delay in applying the proper treatment to the patient.[291]

Furthermore, the law proposal of 2020 also clarifies that this damage must be measured by the chance lost and cannot be equal to the advantage that this chance would have provided if it had occurred, as it has also been judged in the case law.[292] Given the uncertainty that exists as to whether avoiding the injurious event would have been sufficient to prevent future loss, full recovery of damage must be refused.[293] When calculating damages, the innovation brought by the law proposal of 2020 should be noted: the amount of compensation corresponding to each type of damage must be stated separately, while the overall amount, without further clarifications, will not be sufficient.[294]

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[286] This solution has been accepted by the jurisprudence: Cour de cassation [Cass.] civ. 1re, 7.2.1990, Bull. civ. I, no. 39; Cour de cassation [Cass.] civ. 1re, 8.7.1997, Bull. civ. I, nos. 238 and 239, JCP G 1997, II, 22921, rapp. *P. Sargos*.

[287] It suffices that behavior under consideration increases the risk of damage. Cour de cassation [Cass.] com., 29.11.1976, no. 75-12.431, Bull. civ. IV, no. 300.

[288] *See Introduction to French Tort Law*, BRITISH INST. OF INT'L & COMPAR. L., https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

[289] Art. 3: 106 PETL: "The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere". Comp. Art. 3: 103: "(1) In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage".

[290] Allied Maples Group Ltd. v. Simmons & Simmons (1995) 1 WLR 1602.

[291] Gregg v. Scott (2005) 2 WLR 268. See *A. Burrows*, Judicial remedies, in Principles of the English law of obligations (fn. 60), para. 4.77 et seq., p. 346 et seq.: The author remarks that when an event has occurred in the past, the court decides on the balance of probabilities, whereas if the event is a future or hypothetical one, the loss of chance approach will be applied. Idem Jeremy Liang Shi Wei/Kee Yang Low, Recognising Lost Chances in Tort Law (2014) Sing. J.L.S. 98, 107.

[292] Art. 1237 § 2 of the law proposal of 2020; Cour de cassation [Cass.] civ. 1re, 9.4.2002, Bull. civ. I, no. 116.

[293] *See* Jeremy Liang Shi Wei & Kee Yang Low, *Recognising lost chances in tort law* (July 2014) Singapore Journal of Legal Studies, 98, 108.

[294] Art. 1262 § 4 of the law proposal of 2020.

5. The Specific Regulation of Physical Damage as Opposed to Other Damages

The reform also specifies that bodily injury is an additional category of damage to material and moral damages and provides for a special regime for this type of damage.[295] This harm is defined in the Senate law proposal of 2020 as an insult to a person's physical or mental integrity.[296] The term of "bodily injury" is found in two provisions of the Civil Code: Article 1404 concerning the property system applicable in conjugal relations in the absence of agreement,[297] and Article 2226 on the limitation period.[298] In contrast, the Law on Traffic Accidents of 5 July 1985 ("Badinter Act")[299] makes a distinction between damage to property and injury to a person, as does the directive 85/374/EEC concerning liability for defective products incorporated into Article 1245-1 § 1 of the French Civil Code.[300]

An innovation in cases of bodily injury is that only serious fault ("faute grave") of the victim can partially reduce the liability of the perpetrator of the damage,[301] despite the general rule that the fault of the victim partially relieves the tortfeasor of his liability.[302] This provision can be compared to the existing regulation in the Badinter Act, where the fault of the victim who is not a driver is only taken into account if it is an inexcusable fault.[303] Grave fault in the draft law of 2017 is a broader concept than inexcusable fault ("faute inexcusable").[304] Furthermore, in the presence of bodily injury, clauses limiting or excluding liability are prohibited.[305] We note that despite the fact that this principle seems to be accepted before the revision, the jurisprudence has not expressly adopted it.[306] A similar provision is found in the Civil Code of Quebec, however this also concerns moral damage.[307]

An additional modification to the existing law regards the extra-contractual liability action that the victim may exercise, even in the presence of a contract. The law proposal of 2020 has abandoned the possibility provided for in the draft law of 2017 that the victim invokes the contractual rules that are more favorable to him than the tort law rules applicable in the

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[295] *Comp.* preliminary draft law of 2016, art. 1267 et seq.; Alice Dejean de la Batie, *supra* note 3, at 9-10.

[296] Art. 1269 of the law proposal of 2020.

[297] Code Civil [C. civ.] [Civil Code] art. 1404 (Fr.).

[298] There is a ten-year statute of limitations in the case of bodily injury, rather than the five-year statute of limitations applicable to claims for other damages.

[299] Law No. 85-677, Art. 3; *see also D. Gardner*, La consécration des dommages spéciaux dans la réforme de la responsabilité civile en France, in Vers une réforme de la responsabilité civile française (fn. 5), p. 173, 175.

[300] This article provides that: "The provisions of this chapter apply to compensation for damage resulting from personal injury".

[301] Art. 1254 of the law proposal of 2020.

[302] *E.g.*, regarding the liability of a keeper of a thing, Cour de cassation [Cass.] civ. 2e, 6.4.1987, Bull. civ. II, no. 86; D. 1988, 32, commented by *Ch. Mouly*.

[303] Law No. 85-677, Art. 5.

[304] *O. Gout*, Le dommage corporel, in Vers une réforme de la responsabilité civile française (fn. 5), p. 15.

[305] Art. 1270 § 2 of the law proposal of 2020. Ozan Akyurek, *The Preliminary Draft of the Civil Liability Reform in France*, FINANCIER WORLDWIDE (Oct. 2016), https://www.financierworldwide.com/the-preliminary-draft-of-the-civil-liability-reform-in-france#.ZDIa63bMK38.

[306] *O. Gout*, Le dommage corporel, in Vers une réforme de la responsabilité civile française (fn. 5), p. 150. See also D. Mazeaud, Les conventions portant sur la réparation, RDC 2007, p. 149.

[307] Art. 1474 § 2 of Civil Code of Quebec: "He may not in any way exclude or limit his liability for bodily or moral injury caused to another".

case. .[308] We approve of this modification made by the Senate, as the 2017 draft seemed to allow the victim to invoke the rules of contractual liability and the rules of tortious liability simultaneously. Under the initial draft, a regime was provided that was neither contractual nor extra-contractual but a synthesis of the two for the victim's benefit.[309] It is worth noting that the preliminary draft law of 2016 did not provide for the possibility of choice between contractual or tort liability, as tort liability was mandatorily applied.[310]

It is now possible for the victim to bring an action either on the basis of contractual or tort liability.[311] The possibility of choosing between the two responsibilities was preferred because the protection of a contracting party may have been less than that of a third party, since a distinction is made between the obligation of means[312] or the obligation of result borne by the debtor for contractual liability, while the liability of the keeper of a thing is strict in tort liability, and this responsibility has a wide scope.[313] The result was that the security obligation borne by a contractor had been widened to achieve satisfactory protection of the victim in many cases.[314] However, the protection of bodily integrity escapes contractual arrangements,[315] and it is artificial to bring in contractual liability regarding broken arms and dead men.[316] It is a welcome improvement that the victim can choose between contractual and tortious liability, and that tortious liability is not mandatory, because in some cases contractual liability appears more favorable to the victim. For example, in regard to the liability of a person who uses another person to perform a task, a relationship of dependence of the agent on the principal is required, however, in the case of contractual liability, it is easy to establish that the principal has responsibility for the persons he uses in his service.

We approve of the possibility of acting in extra-contractual liability, whereas case law only recognized a security obligation resulting from the contract that could be an obligation of means or an obligation of result which could give rise to inequalities with respect to victim compensation. Moreover, causing bodily injury does not seem to come within the scope of what is expected in the context of a contract for this damage to be repaired.[317] However, we must

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[308] Art. 1233-1 § 2 of the draft law of 2017.

[309] *See H. Boucard*, Les relations entre responsabilité contractuelle et extracontractuelle dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 174, 187; *N. Vézina*, La responsabilité civile dans tous ses états, Perspective québécoise sur la nouvelle présentation des dispositions consacrées à la responsabilité et la dualité entre les régimes extracontractuel et contractuel dans le projet français, in Vers une réforme de la responsabilité civile française (fn. 5), p. 58.

[310] Art. 1233 § 2 of the preliminary draft law of 2016. Alice Dejean de La Batie, *supra* note 3 at 1. See *Cl. Kleitz*, Réforme du droit de la responsabilité civile : c'est parti!, Gaz. Pal., 10.5.2016, no. 264, p. 5.

[311] Art. 1233 § 2 of the law proposal of 2020.

[312] *E.g.*, in the event of a wheelchair accident, the safety obligation was accepted which was an obligation of means (Cour de cassation [Cass.] civ. 1re, 10.3.1998, no. 96-12.141), while in the case of tortious liability (i.e., in the absence of a contract) the tortious liability of the keeper of the thing applies (Cour de cassation [Cass.] civ. 2e, 29.3.2001, Bull. civ. II, no. 68). See also an obligation of means in case of the operator of a climbing gym, Cour de cassation [Cass.] civ. 1re, 25.1.2017, no. 16-11.953, commented by *St. Gerry-Vernières*, Gaz. Pal., 25.4.2017, no. 293, p. 21.

[313] *Introduction to French Tort Law*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (last visited Apr. 9, 2023), https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

[314] *See, e.g., Ph. Remy/J.S. Borghetti* (fn. 105), p. 61, 73.

[315] *O. Gout*, Le dommage corporel, in Vers une réforme de la responsabilité civile française (fn. 5), p. 149.

[316] J. Carbonnier, Droit civil, t. 4, Les obligations, 22 edn., PUF, 2000, no. 595, p. 520.

[317] *See, e.g., Introduction to French Tort Law*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (last visited Apr. 9, 2023), https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

point out the peculiarity of French law for the specific regulation on bodily damage. On one hand, a bilateral distinction between material and immaterial damage is made in the PETL,[318] while on the other hand, the DCFR[319] refers to economic or non-economic loss, which reminds us of the distinction made by the French doctrine between patrimonial damage and extra-patrimonial damage.[320]

6. Limitation of Compensation Due to the Victim: The Victim is Asked to Minimize his Damage

We are adding a new possibility available to the judge that is capable of reducing the damages awarded to the victim, except in cases of bodily injury[321] where the victims have not mitigated damage (corresponding to the Anglo-Saxon "mitigation of loss" regarding both contracts and tort law),[322] which was not possible in the case law until today.[323] Consequently, victims find themselves, by the mere fact of their status, liable for the new obligation of managing their damage.[324] However, contrary to English law,[325] there is no obligation imposed on victims to reduce the damage sustained; rather there is an obligation to avoid further aggravation of the damage.[326] In English law, this obligation concerns bodily injury as well. We consider this obligation to be a manifestation of good faith and fair behavior. Characteristically, an appellate decision of a Canadian court notes that this rule is an extension

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[318] Art. 2: 101 PETL: "Damage requires material or immaterial harm to a legally protected interest".

[319] Art. VI. 2: 101 DCFR: "Loss, whether economic or non-economic, …".

[320] *E.g*., *H. Boucard*, Répertoire de droit civil : Responsabilité contractuelle – Teneur du préjudice contractuel, July 2018 – updated on June 2022, Section 2, Art. 2 § 1, nos. 484 et seq ; Cour de cassation [Cass.] civ. 2e, 3.2.2011, no. 10-15.236.

[321] Art. 1264 of the law proposal of 2020. Regarding bodily injury, the existing jurisprudence is maintained: Cour de cassation [Cass.] civ. 2e, 19.3.1997, no. 93-10.914, Bull. civ. II, no. 86, RTD civ. 1997, 675, commented by *P. Jourdain*; *ibid.*, p. 632, commented by *J. Hauser*; Cour de cassation [Cass.] civ. 2e, 19.6.2003, no. 00-22.302, Bull. civ. II, no. 203.

[322] *A. Burrows*, Judicial remedies, in Principles of the English law of obligations (fn. 60), para. 4.43 et seq., p. 337, and para. 4.84, p. 347; *M. Huir Watt*, La modération des dommages en droit anglo-américain, LPA, 20.11.202, p. 45.

[323] Cour de cassation [Cass.] civ. 1re, 2.7.2014, no. 12-17.599, D. 2014, p. 1919, commented by *C. Boisman*; RTD civ. 2014, p. 893, commented by *P. Jourdain*; JCP 2014, 1034, commented by *Y. Dagorne-Labbé*; *ibid*., 1323, commented by *M. Bacache*. See, e. g., *F. Leduc*, Les règles générales régissant la réparation du dommage, JCP G, supp. no. 30-35, 25.7.2016, p. 39.

However, in two decisions the victim's behaviour had been taken into account. Reference to a reasonable management measure: Cour de cassation [Cass.] civ. 2e, 22.1.2009, no. 07-20.878, D. 2009, p. 1114, commented by *R. Loir*, RTD civ. 2009, p. 334, commented by *P. Jourdain*. Reference to the fault of the victim: Cour de cassation [Cass.] civ. 2e, 24.11.2011, no. 10-25.635, D. 2012, p. 141, commented by *H. Adica-Canac*; RTD civ. 2012, p. 324, commented by *P. Jourdain*.

[324] *L. Clerc-Renaud*, Les effets de la responsabilité et la réparation des dommages. Unité ou diversité des formes de réparation dans le projet français, in La réforme du droit de la responsabilité en France et en Belgique (fn. 8), p. 508, 528; *A.-L. Fabas-Serlooten*, L'obligation de minimiser le dommage dans le projet de réforme de la responsabilité: la victime responsable de la gestion de son dommage, RTD civ. 2018, p. 21.

[325] *S. Taylor/M. Dyson/D. Fairgrieve* (fn. 90), p. 147.

[326] Pierre-Louis Merer, *Pierre-Louis Merer: The dawn of a duty to mitigate damages in French law*, THE SHIPOWNERS' CLUB (Jul. 5, 2018), https://www.shipownersclub.com/pierre-loius-merer-the-dawn-of-a-duty-to-mitigate-damages-in-french-law/.

or application of the general principle of good faith.[327] In addition to Quebec law, we find relevant regulation in German law,[328] Greek law,[329] Italian law,[330] and Swiss law,[331] and in the Vienna Convention.[332]

In the context of tortious liability in French law, it is questionable whether good faith conduct can be clearly defined in the absence of a contract and in the absence of foreseeability of the parties' obligations.[333] However, an obligation of loyalty seems to be present even in extra-contractual liability according to Article 1241 of Civil Code.[334] French jurisprudence seeks to limit the remedied damage by resorting either to the concept of causation or to the victim's fault.[335] Therefore, the damage must be an immediate and direct consequence of the infringement and the victim must not have participated in inducing the damage.[336]

We note that in contrast to French law, Swiss law allows the judge to take into account the fact that the victim was not subjected to certain medical care, as long as it did not involve any obvious danger and did not entail particular pain when considering compensable damage.[337] Similarly, Quebec law does not provide for a limitation on the victim's obligation to avoid aggravating the injury (Civil Code 1991).[338] In 1985, the Supreme Court of Canada accepted that although one may refuse to undergo surgery, it must be assessed whether this refusal is reasonable by taking into account the seriousness of the consequences of refusing to undergo surgery, the advantages the operation presents, and the risk to which the victim is exposed.[339] The PETL do not provide for a relevant provision in tort liability, while the DCFR accepts this possibility in a wording that is unclear.[340] In Quebec law this obligation of the victim is admitted in both types of liability.[341]

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[327] Court of Appeals of Quebec, Consoltex Inc. C. 155891 Canada Inc., (2006) QCCA 1347, § 57, available at: https://www.canlii.org/fr/qc/qcca/doc/2006/2006qcca1347/2006qcca1347.html.

[328] BGB § 249 and 254 para. 2.

[329] Art. 300 of Greek Civil Code (duty to mitigate).

[330] Art. 1227 of Civil Code.

[331] Art. 44 and 99 of Swiss Code of Obligations.

[332] United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, Art. 77.

[333] *P. Remy-Corlay* (fn. 226), p. 191, 198.

[334] *A. Pelissier*, Assurances de responsabilité civile, Revue générale du droit des assurances 2012, p. 424.

[335] See *supra* note 68. Causation as a condition of tort liability, *see Introduction to French Tort Law*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE L., https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

[336] *P. Remy-Corlay* (fn. 226), p. 198, 199.

[337] Decision of Federal Tribunal, 13.12.1955, Blaser v. Ackermann, ATF 81 II, JT 1956 I 237; *P. Wessner* (fn. 71), p. 304.

[338] Art. 1479 Civil Code of Quebec: A person who is bound to make reparation for an injury is not liable for any aggravation of the injury that the victim could have avoided; *see also N. Vézina* (fn. 309), p. 39, 46. The author notes, however, that jurisprudence and theory cautiously apply this rule in the case of bodily injury.

[339] Janiak c. Ippolito, (1985) 1 R.C.S. 146, § 31.

[340] Art. VI. 6: 202 DCFR: "Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or *the means to prevent it*".

[341] Lebel v. 9067-1959 Quebec Inc., 2014 QCCA 1309, § 47; Entreprises Lacènes Inc. v. Épiciers Lacènes Inc. v. Épiciers Unis-Metro-Richelieu Inc., 1996 CanLII 4412 (QC CS), § 51. See *P. Deslauriers/S. Fernandez*, L'encadrement de la réparation du préjudice au Québec, in Vers une réforme de la responsabilité civile française (fn. 5), p. 121, 131.

However, not requiring such behavior in the event of bodily injury remains debatable.[342] Moderation of the damage can be legitimately expected if it does not concern treatment on the body, but rather concerns other measures which may be reasonable; for example, the arrangement of a person's house so that the help of a third party would be less necessary, contrary to what French jurisprudence accepts.[343] In terms of compensation, it is provided that the victim is free to dispose of the amount awarded to him at will, without being obliged to use this amount for a specific purpose;[344] this decision by the reforming groups[345] confirms the existing case law.[346]

IV. CONTRACT AND TORT LIABILITY REGARDING THIRD PARTIES

Among the innovations of the proposed reform is a provision for the liability of a contracting party towards a third party to the contract when a contractual fault causes damage to the third party. The French jurisprudence originally considered that tortious fault was required for the establishment of tort liability; not only contractual non-fulfilment,[347] but later the assimilation of contractual non-fulfilment into tortious fault was accepted.[348] This question was then taken up by the plenary session of the French Supreme Court in the Myr'ho or Boot shop decision of 2006, which held that contractual non-fulfilment was automatically equated with tort.[349] However, the relevant debate was not closed, and the French Supreme Court held otherwise in subsequent decisions.[350] With a new decision in 2020 (Sucrerie Bois rouge), the

[342] Andrew Tetley, *Does French law recognise a duty to mitigate?*, REED SMITH (Dec. 1, 2014), https://www.reedsmith.com/en/perspectives/2014/12/does-french-law-recognise-a-duty-to-mitigate.

[343] Cour de cassation [Cass.] civ. 2e, 25.10.2012, no. 11-25.511, D. 2013, p. 416, commented by *A. Guégan-Lécuyer*.

[344] Art. 1265 of the law proposal of 2020.

[345] Art. 1377 of the Catala-Viney draft of 2005 and Art. 55 of the Terré draft of 2010.

[346] Cour de cassation [Cass.] civ. 2e, 8.7. 2004, Bull. civ. II, no. 391.

[347] Cour de cassation [Cass.] civ. 1re, 7.11.1962, Bull. civ. I, no. 465. See *Contractual and extra-contractual liability*, LGT LAW., https://www.ljt.ca/en/expertises/contractual-and-extra-contractual-liability/ (last visited Apr. 4, 2023).

[348] Cour de cassation [Cass.] civ. 1re, 15.12.1998, nos. 96-21.905 and 96-22.440, Bull. civ. I, no. 368. Contra Cour de cassation [Cass.] com., 17.6.1997, no. 95-14.535, Bull. civ. IV, no. 187.

[349] Cour de cassation [Cass.] ass. plén., 6.10.2006, no. 05-13.255, Bull. ass. plén., no. 9, D. 2006, p. 2825, commented by *I. Gallmeister*, commented by *G. Viney*; *ibid.* p. 2007, p. 1827, commented by *L. Rozès*; *ibid.* p. 2897, commented by *P. Brun*/*P. Jourdain*; *ibid.* p. 2966, commented by *S. Amrani-Mekki*/*B. Fauvarque-Cosson*; Revue de droit immobilier (RDI) 2006, p. 504, commented by *P. Malinvaud*; RTD civ. 2007, p. 61, commented by *P. Deumier*; *ibid.* p. 115, commented by *J. Mestre/B. Fages*; *ibid.* p. 123, commented by *P. Jourdain*. The owners of a property leased it to a company that entered into a "location-gérance" agreement with another company. The latter brought an action against the landlords due to non-maintenance of the property. *G. Rouzet*, La responsabilité à l'égard des tiers à raison d'une faute contractuelle. Avant-propos, in La réforme du droit de la responsabilité civile en France (fn. 46), p. 153, 154.

[350] Cour de cassation – Troisième chambre civile (Cass. civ. 3e), 18.5.2017, no. 16-11.203; Cour de cassation [Cass.] com., 18.1.2017, no. 14-16.442; *contra* Cour de cassation [Cass.] civ. 1re, 9.6.2017, no. 16-14.096.

Plenary Session of the French Supreme Court reaffirmed the decision it originally made in 2006.[351]

The law proposal of 2020 sets the conditions that must be met to establish tortious liability, and contractual non-performance itself does not automatically constitute a tortious fault.[352] In this respect, it approaches the solution that is accepted in German law, in which contractual non-performance is not sufficient to establish tort liability.[353] Greek law adopts the same position.[354] However, in the French law proposal of 2020, it is possible for a third party with a *legal interest* in the good performance of a contract, and who cannot bring another action to recover damages suffered due to the poor performance of the contract, to invoke contractual non-performance as a ground for establishing tort liability, provided he has suffered a loss as a result.[355] In this case, the conditions and limits of liability that apply between the contracting parties are also applicable to the third party.[356]

We note that the Senate law proposal of 2020, as well as the draft law of 2017 (following the Catala-Vinay draft of 2005) provides for the protection of non-contracting third parties who have suffered damage, but limits this regulation in terms of the objective and subjective scope.[357] On the one hand, contractual non-fulfilment is required, i.e., a breach of an obligation of means or an obligation of result that does not necessarily constitute a tortious fault.[358] On the other hand, the third party who has a legal interest in the performance of the contract is entitled to compensation; [359] the courts should interpret this provision to mean that not every third party will be allowed this possibility, because otherwise the legislative intervention will become useless.[360] Therefore, the French Senate is reforming the jurisprudential solution of the French Supreme Court in a way that is not favorable to the victims, since it allows them to turn against a third party who violated a contractual obligation towards his counterparty with an additional condition, the proof of a legal interest.

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[351] Two companies are engaged in the production of sugar and have entered into a mutual production assistance agreement between them. Each of them has entered into a contract with third-party companies for the provision of energy necessary for their operation. It was not possible to supply energy to one company (A) for four weeks and the other sugar company (B) had to process a large quantity of sugar belonging to its counterparty under the cooperation agreement between them. B's insurance company then sued the company that was supposed to supply A with energy. Cour de cassation [Cass.] ass. plén., 13.1.2020, no. 17-19.963, D. 2020, p. 416, and commented by *J.-S. Borghetti*; *ibid.* p. 353, commented by *M. Mekki*; *ibid.* 394, commented by *M. Bacache*; RTD civ. 2020, p. 96, commented by *H. Barbier*; AJ contrat 2020, p. 80, commented by *M. Latina*; Laura Ngoune, *Mind the Third Party Gap: Breach of Contract, Third-Party Liability*, LITIGATION COMMITTEE (Apr. 2020) (available at https://www.ibanet.org/article/F0F05246-5B40-40F8-803F-73A4C022F492)

[352] Art. 1234 para. 1.

[353] *Th. Kadner Graziano*, La responsabilité à l'égard des tiers à raison d'un manquement contractuel. Le contrat avec effet protecteur envers des tiers en droit français?, in La responsabilité du contractant défaillant à l'égard des tiers (fn. 46), p. 175, 187.

[354] Greek Supreme Court, no. 2215/2007, Nomiko Bima (Legal step) 2008, p. 988; Greek Supreme Court, no. 1210/2001, Nomiko Bima (Legal step) 2002, p. 1270.

[355] Art. 1234 para. 2. of the law proposal of 2020.

[356] *Id*.

[357] *N. Ferrier*, La responsabilité du contractant défaillant à l'égard des tiers, in La réforme du droit de la responsabilité civile en France (fn. 46), p. 159, 163 et seq.

[358] *Id*., p. 164.

[359] Laura Ngoune, *supra* note 351.

[360] *Id.*, p. 168; *G. Viney*, La responsabilité du débiteur à l'égard du tiers auquel il a causé un dommage manquant à son obligation contractuelle, D. 2006, 2825.

It is worth noting the special importance the French law gives to the enforceability of a contract against third parties, as the contract is considered a social fact the third parties must respect.[361] The "radiation," or opposability, of the contract to third parties has even been expressly provided for in Article 1200 of the French Civil Code during the revision of the contract law.[362] Thus, an argument in favor of the existing jurisprudential solution, is that since third parties must respect any contract in which they are not a party, they should be able to receive compensation from a contracting party who, by violating his contractual obligation, causes them damage. Nevertheless, the partial evolution of this solution was chosen by the legislators as a way of limiting third parties who can benefit from the breach of a contract in which they are not a party; however, a rather broad formulation (like the term "legal interest") is adopted that needs further definition.

The academics who participated in creating the Catala-Viney draft of 2005 were inspired by German law, specifically by the contracts with protective effects in favor of third parties, and for this reason they decided that third parties who have a legal interest in the execution of a contract could turn against the person who breached a contractual obligation. However, the provisions on contractual liability should be applied in conjunction with the limiting terms of liability that are agreed upon by the contracting parties.[363] This way, there are protections for the interests of a contracting party who will be called upon to compensate a third party, but under the conditions that the contracting party would also have to compensate his counterparty.[364] Under the current case law, the contracting party would have to compensate all of the damages that the third party suffered, and not only those damages foreseeable under the contract,[365] without being able to object to the third party in regards to the terms that limit the liability.[366] Indeed, the law proposal of 2020 expressly provides that "[t]he conditions and limits of liability that apply in the relations between the contracting parties are opposable (to the third party)."[367]

A further approximation of French and German law could be proposed so that the third party entitled to sue a contracting party in a contract to which he is not a party is determined under the conditions laid down by German jurisprudence,[368] where the third party has suffered damage to the same extent that the counterparty could have suffered, the counterparty has a special interest in the third party's protection, and the liable contracting party knows that both of these conditions are met.[369] However, this interpretation adds to the provision conditions that do not exist, while the French jurisprudence tends to adopt solutions more favorable to the victim.[370] We consider as a more correct interpretation that the third parties who have a legal interest in the execution of the contract are those who are interested precisely in the fulfilment of the characteristic provision of the contract, which is not the

[361] *See* Laura Ngoune, *supra* note 351.

[362] Article 1200 of French Civil Code: "Third parties must respect the legal situation created by the contract".

[363] *See* Art. 1234 of the law proposal of 2020.

[364] *See id.*

[365] Provision maintained by the law proposal of 2020, art. 1251.

[366] *N. Ferrier* (fn. 357), p. 170; *M. Latina*, La fin de l'unité des fautes contractuelle et délictuelle ?, L'ESSENTIEL Droit des contrats, 1.7.2017, no. 110, p. 1.

[367] Art. 1234 para. 2.

[368] *See* KADNER GRAZIANO, *supra* note 353 at 175.

[369] *See id.* at 175, 187.

[370] *See* Art. 1234 of the law proposal of 2020.

payment of the financial consideration, or in other words not those who simply derive a financial benefit from the execution of the contract. That is, the members of a tenant's family are interested in the proper maintenance of the lease by the property owner. On the contrary, if a party fails to fulfil his contractual obligations to its counterparty, the latter's creditors who have only a financial claim will not fall within the subjective scope of this provision.[371] As a result, according to this interpretation, both the Boot shop and the Sucrerie Bois rouge case law will be preserved after the review.[372]

There are still questions that should be answered by the jurisprudence, such as whether the liable contracting party can oppose the contractual terms to third parties in any case or, at least, these terms should have been made known to the counterparty (the third party will not, as a rule, know these terms).[373] If the third party has entered into a contract with a creditor of the person liable, the third party should not claim from a non-contractor (the person liable) a higher compensation than he could receive from his own counterparty (the creditor of the person liable).[374]

V. CLOSING REMARKS

The revision of French tort law is proving to be a lengthy process, with five texts having been processed so far. It is apparent that important contested points such as a civil fines or strict liability in cases of abnormal dangerous activity have been abandoned for now, which is a choice that could be criticized. Regarding a civil fine, the example of Quebec law can be followed, and the imposition of this would be possible in the cases determined in the law.[375] Regarding liability for dangerous activities, the introduction of such liability would constitute an approach of French law to the PETL.[376] However, the maintenance of the extended liability of the keeper of a thing rendered the provision of a new case of liability rather useless. Moreover, the responsibility of the keeper of a thing has been established jurisprudentially and is part of the tradition of French tort law to take more care of the protection of the victim, rather than considering that the accidental damage should be ultimately borne by the victim (*casum sentit dominus*).[377]

As a result, the law proposal of 2020 largely constitutes a codification of the existing jurisprudence and clarifications are given for an opposite solution to certain issues (e.g., regarding the responsibility of the parents, an act is required that establishes the responsibility of the child and not just an event causally linked to the damage, and the cohabitation of parents with the child is not required).[378] However, the innovations that are intended to be introduced in relation to the existing law remain important.[379] We must point out how much emphasis is

[371] *See id.*

[372] *See Cour de cassation* [Court of Cassation], *Assemblée plénière*, 6.10.2006, 05-13.255, *Bull. ass. plén., no. 9*; *see also Cour de cassation* [Court of Causation], *Assemblée plénière*, 13.1.2020, 17-19.963, *Publié au bulletin*.

[373] *N. Ferrier* (fn. 357), p. 171.

[374] *Id.*

[375] *See* Civil Code of Québec, C.C.Q. 1991, c 64, art 1621 (Can.).

[376] *See* Art. 4:103 PETL.

[377] *See, e.g.*, *J.-S. Borghetti*, La réforme du droit de la responsabilité civile en France, LPA, 13.3.2014, no. 52, p. 16.

[378] Art. 1245 of the law proposal of 2020.

[379] *See id.*

placed on bodily harm, in relation to Article 16-3 of the French Civil Code, which prohibits any offense to bodily integrity.[380] We also mention the obligation of the victim to ensure that his damage is not aggravated, the possibility of an order of cessation of an illicit act, or the reversal of the existing jurisprudence that equates contractual non-fulfilment with tortious fault.[381] Also of interest is how tort liability is structured, its relationship with contractual liability, and the addition of a fourth damaging event.[382]

The dialogic relationship that the intended reform develops with other legal systems is also evident, but this is done without altering the basic characteristics of the French system of tort liability. We find the general clause of fault again, while maintaining the principle of reparation of any damage, without the limitations of the reparable damage that characterize other legal systems. We can only hope that this draft will form the future legislative framework soon, and in this way fill the existing legislative gap in the regulation of tort liability in French law that has resulted in the shaping of liability by the jurisprudence.

[380] *See* 1269 et seq.; *see also* Code civil [C. civ.] [Civil Code] art. 16-3 (Fr.).

[381] *See* Art. 1264, 1268 and 1234 of the law proposal of 2020.

[382] *See id.* at art. 1249.