Jonas Knetsch

X. France

A. Legislation

1. Update on Tort Law Reform

1 The year 2021 was almost entirely dedicated to the management of the Covid-19 pandemic and its consequences, both social and economic. As in 2020, the Coronavirus crisis left very little room for legislative acts other than those responding to increasing Covid-19 infection rates, preparing the shutdown of schools and businesses or the ongoing vaccination campaign. It is therefore understandable that the tort law reform, which was initially announced for 2018,[1] did not progress even one inch on the political agenda since last year's edition.[2]

2 In the meantime, as tort law experts are waiting for a new window of opportunity for the tort law reform (not before 2023), the 2017 Draft and the 2020 Bigot-Reichhardt Bill are given constant attention by legal scholarship, as shown by the numerous academic conferences and legal articles devoted to the reform.[3] However, over the last months, the initial enthusiasm for a rapid and comprehensive reform of the civil liability rules has turned into a diffuse sense of consternation and faithlessness. It is becoming increasingly apparent that neither the 2017 Draft nor the 2020 Bigot-Reichhardt Bill reflect the current status of the reform in progress and that it will take a good deal of political will to introduce into Parliament a reform plan, which has reached a dead end during the Covid pandemic.

---

1 For a comprehensive overview of the reform plans, see *J Knetsch*/*Z Jacquemin*, France, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2016 (2017) 191, nos 13–23; *J Knetsch*/*Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 187, nos 1–8; *J Knetsch*/*Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 186, nos 1–5; *J Knetsch*/*Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 178, nos 1–5.

2 In September 2021, a major reform on securities law (*droit des sûretés*) was enacted by the French government, leaving a substantial part of the Code Civil provisions on personal guarantees completely rewritten. The timing of this reform may be surprising and it even seems to put the tort law reform on the back burner. However, one must bear in mind that the government announced a rewriting of civil liability rules by legislative act, which is a more time-consuming approach than a reform by ordinance (as was the case of the reform of securities law and, in 2016, of the contract law reform).

3 See below nos 55, 58, 61, 62, 66, 69, 82, 93, 98.

https://doi.org/10.1515/tortlaw-2022-0010

B. Cases

1. Cour de cassation, Chambre civile 1 (Cass Civ 1) 5 May 2021, no 19-25102: Product Liability; Development Risk Defence

a) Brief Summary of the Facts

While raw milk cheese (*fromage au lait cru*) is, for many people, an integral part of the French *art de vivre*, one must bear in mind that the consumption of dairy products made of unpasteurised milk is not without risk. In the present case, a 15-month-old girl developed severe neurological disorders after eating a piece of raw milk Camembert cheese. The results of the medical analysis showed a specific strain of Escherichia coli bacteria in the girl's intestine, producing Shiga toxins that attack the human nervous system. A food survey, led by the French Institute for Public Health Surveillance, indicated that other people suffered from the same symptoms after the consumption of raw milk cheese manufactured by the same company. Armed with the conclusions of the experts' reports, the girl's parents sued the dairy company for compensatory damages on the basis of product liability, laid out in arts 1245–1245-17 of the French Civil Code. 3

b) Judgment of the Court

After ten years of proceedings, the Nanterre Court of Justice denied damages to the claimant and her family on the grounds that, while the 'defect' of the Camembert was established beyond doubt, the dairy company could not have detected the presence of the bacteria during the manufacturing process. Indeed, for the trial judges, the state of scientific and technical knowledge at the time when the dairy product was put into circulation did not enable the manufacturer to discover the defect. The Versailles Court of Appeal confirmed those findings two years later. The claimant challenged the judgment before the Court of Cassation, contesting the recognition of a so-called development risk in the present case. 4

In its decision of 5 May 2021, the First Civil Chamber of the Court of Cassation upheld the Court of Appeal's decision. The judges noted laconically that 'the Court of Appeal … was right to conclude that society had to be exempted from liability regarding the girl's loss'. 5

c) Commentary[4]

6 French tort law and the 1985 EC Product Liability Directive have always been uneasy bedfellows. It took almost thirteen years for the French parliament to transpose the Directive in the Civil Code and, even after the 1998 transposition act, it needed two European Court of Justice (ECJ) decisions and two acts of amendment to bring the wording of the French provisions in line with the text of the Directive. The causes of the delay and the inaccurate transposition are manyfold and this brief commentary is not the appropriate place to go into all details.[5]

7 One of the most controversial issues during the debate on the transposition of the Product Liability Directive was the necessity of adopting the development risk defence. According to art 15 of the 1985 Product Liability Directive, each Member State was free to decide whether or not to provide in its legislation 'that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered'. After much hesitation, the French lawmakers finally decided to implement this defence, mostly because a different option was seen as a disadvantage for French companies compared with foreign businesses which enjoyed the benefit of that defence.[6]

8 However, until the present case, it was common belief among lawyers that the development risk defence existed only in paper, as there was not a single case since 1998 in which French courts admitted the benefit of the defence, exempting the producer of a defective product from its liability. In fact, every effort had been made by the courts to marginalise the scope of the development risk defence. In particular, the Court of Cassation decided in a landmark case from 2017 that 'the state of scientific and technical knowledge' had to be assessed at the time when the current batch of the contested product was put into circulation and not at the time when the product was put on the market for the first time.[7]

---

4 See also *J-S Borghetti*, La Cour de cassation admet pour la première fois le jeu de l'exonération pour risque de développement, Revue des contrats (Rev contrats) 2021, no 4, 27–31; *L Bloch*, Exonération par le risque de développement en matière de responsabilité du fait des produits défectueux, Responsabilité civile assurances (Resp civ assur) 2021, no 9, 25f.

5 See eg *J-S Borghetti*, Product Liability in France, in: P Machnikowski (ed), European Product Liability (2016) 205; *J Knetsch*, Tort Law in France (2021) nos 181–183.

6 For an extensive survey of the legislative context of the implementation of the development risk defence by the French legislator, see in particular *S Whittaker*, Liability for Products (2005) 455–461.

7 Cass Civ 2, 20 September 2017, no 16-19643 (liability of the manufacturer of the drug *Mediator*). See also more recently Cass Civ 1, 27 November 2019, no 18-16537.

It is therefore with surprise that French tort law scholars commented the present decision, especially because it seemed to be established that the risk development defence was excluded in cases in which it was a manufacturing defect (*défaut de fabrication*) that caused the harm and not a design defect (*défaut de conception*).[8] It had been argued that producers of defective products were not eligible for the risk development defence in case the manufacturing defect was undetectable, but the producers were aware of its possible occurrence.[9] By confirming the Court of Appeal's decision, the Court of Cassation rejects such a restrictive view of the defence. **9**

Despite this original solution, one should not overstress the significance of the present case, which was not considered important enough to be published in the annual report of the Court of Cassation. Moreover, the First Civil Chamber did not give its opinion on the specific issue of the risk development defence, using a formula ('the Court of Appeal … was right to conclude') that indicates a rather weak control over the legal assessment made by the trial judges. **10**

2. Cass Civ 2, 6 May 2021, no 20-14551: Liability for Traffic Accidents under the *Badinter* Act; Qualification of the User of an Electric Wheelchair as a Non-Driver

a) Brief Summary of the Facts

A handicapped woman was hit by a car when crossing a road in her electric wheelchair, outside a designated crosswalk, in a sparsely lit zone at night. She sued the automobile insurance of the car owner, claiming damages on the ground of the specific liability regime for traffic accidents laid out in the Act of 5 July 1985 (the so-called *Badinter* Act). **11**

b) Judgment of the Court

The Aix-en-Provence Court of Appeal decided that, given the victim's negligence, her right to compensation had to be adjusted and, consequently, the damages reduced to 50 % of the total amount. The victim challenged the decision before **12**

8 *Borghetti*, Rev contrats 2021, no 4, 27. See also *P Stoffel-Munck*, Responsabilité civile, La Semaine Juridique. Edition générale (JCP G) 2021, no 45, 2051, 2055.

9 *J-S Borghetti*, La responsabilité du fait des produits. Étude de droit comparé (2004) nos 402–418 (with many references to the preparatory work of the 1985 Directive).

the Court of Cassation, arguing that the assimilation of an electric wheelchair to a motor vehicle (which was a prerequisite for taking into account the victim's contributory fault) was contrary to the French Constitution and, in particular, to her rights and liberties as a disabled person.

13 In a 2020 interlocutory decision, the Second Civil Chamber of the Court of Cassation refused to bring the case before the Constitutional Court, considering that, in the absence of well-established case law on this issue, there was no 'question of constitutionality' to be settled.[10] The Court of Cassation then had to rule on the merits of the case and to answer the question whether the user of an electric wheelchair ought to be qualified as the driver of a motor vehicle.

14 In the present decision, the Second Civil Chamber quashed the court of appeal decision, holding that 'an electric wheelchair, which is a medical device designed as a mean of transportation for disabled people, is not a motor vehicle under the Act of 5 July 1985 (the *Badinter* Act)'. The decision was issued in the light of arts 1, 3 and 4 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which France ratified in 2010.

c) Commentary[11]

15 To understand the importance of this decision, it is essential to recall some of the basic elements of the French liability regime for traffic accidents, enshrined in the *Badinter* Act.[12] One facet of the originality of this regime is the limitation of the defences available to tortfeasors and their insurers. Regarding contributory fault, arts 3 to 6 of the *Badinter* Act make eligibility depend on the nature of the loss for which compensation is demanded and on the legal status of the claimant. When a non-driver claims compensation for personal injury caused by a traffic accident,

10 Cass Civ 2, 1 October 2020, no 20-14551.

11 See also *P Oudot*, Fauteuil roulant électrique: l'influence de la CIDPH sur l'interprétation de la loi du 5 juillet 1985, Recueil Dalloz (D) 2021, no 26, 1413; *G Raoul-Cormeil*, Qualification du fauteuil roulant électrique et de son utilisateur dans la loi sur l'indemnisation des victimes d'accidents de la circulation routière, JCP G 2021, no 28, 1345; *M Dugué*, Le fauteuil roulant motorisé n'est pas un véhicule terrestre à moteur au sens de la loi Badinter, Gazette du Palais (Gaz Pal) 21 September 2021, no 32, 30; *T James*, La personne à mobilité réduite se déplaçant dans un fauteuil roulant motorisé n'est pas une victime conductrice, Gaz Pal 6 July 2021, no 25, 18; *J Landel*, Un fauteuil roulant électrique, dispositif médical destiné au déplacement d'une personne handicapée, n'est pas un véhicule terrestre à moteur au sens de la loi du 5 juillet 1985, Revue générale de droit des assurances 2021, no 6, 17.

12 For a more detailed presentation in English, see for example *J-S Borghetti*, Extra-Strict Liability for Traffic Accidents in France, 53 Wake Forest Law Review 265 (2018); *Knetsch* (fn 5) nos 174–180.

the sole defence that may be raised is 'inexcusable fault' (*faute inexcusable*) and only to the extent that such fault was the 'exclusive cause' (*cause exclusive*) of the accident.[13] The protection is even stronger for non-driving victims younger than sixteen, older than seventy or suffering from a disability of 80 % or more, since their compensation is excluded only if they 'voluntarily sought the harm suffered'.[14] By contrast, drivers of a motor vehicle who claim damages for a personal injury are given much less protection, as their fault, regardless of its seriousness, limit or even exclude their right to compensation.

This explains why the legal qualification of an electric wheelchair was crucial **16**
in the present case, as the defendant was only eligible to the contributory fault defence if the claimant were qualified as a 'non-driver' of a motor vehicle. The category of motor vehicles (*véhicules terrestres à moteur*), used by the drafters of the *Badinter* Act, is generally regarded as identical to that mentioned in art L 211-1 of the French Insurance Code (*Code des assurances*), which sets out the scope of compulsory motor insurance. It is commonly admitted that electric wheelchairs moving faster than walking speed are subject to compulsory insurance.[15] Yet, the Court of Cassation departs from this synchronicity between insurance law and tort law, holding that, for the purposes of applying the *Badinter* Act, an electronic wheelchair is *not* a motor vehicle.

The reference to the CRPD and to the medical dimension of a wheelchair **17**
makes it clear that the approach taken by the Court of Cassation is based mainly on legal policy considerations. One of the key premises of the *Badinter* Act was that the most vulnerable road users had to be protected from bearing the consequences of their wrongful behaviour. From this perspective, it would have been inconsistent to refuse disabled persons in an electronic wheelchair the benefit of legal provisions drafted to protect vulnerable individuals for the sole reason that they move around in a motorised means of transport. The Court of Cassation's analysis can thus be seen as a teleological approach to the provisions of the *Badinter* Act.

From this perspective, the present decision raises questions about the appro- **18**
priateness of the specific features of the *Badinter* Act. One may ask how the courts would assess a case in which a disabled person using an electronic wheelchair caused an accident to a pedestrian.[16] Denying the quality of a motor vehicle would

13 The 'exclusiveness' test consists of determining whether there is other fault (of the driver or a third party) that contributed to the traffic accident.

14 Art 3(2) of the *Badinter* Act. In legal literature, this category of claimants is often referred to as 'super-privileged victims'.

15 *James*, Gaz Pal 6 July 2021, no 25, 18.

16 *Dugué*, Gaz Pal 21 September 2021, no 30.

make awarding compensation much more difficult, as the claimant would not be eligible to the specific strict liability regime designed for traffic accidents, but only to the ordinary liability regimes. More generally, some might see in the decision of 6 May 2021 another illustration of the obsolescence of distinguishing between drivers and non-drivers when it comes to the defences that the automobile insurer may raise against the claimant.[17]

3. Cass, Chambre mixte (Ch mixte) 29 October 2021, no 19-18470: No Liability of the Principal for the Fraud of the Agent

a) Brief Summary of the Facts

19 The shares of a company were held by its manager, his wife and children and by another company. The manager was empowered by the other shareholders to sell their shares, together with his own shares, to a third company. The transfer of all shares was executed in accordance with a protocol of sale, bringing the corporation under the full control of the acquiring company. A few days after the transfer became effective, the manager stepped down from this position, which had not been part of the protocol. Consequently, the acquiring company sued the former shareholders for cancellation of the contract and for damages in compensation of the loss suffered from the resignation of the manager. At a later stage of the procedure, the acquiring company waived its right to invoke the cancellation of the contract, only claiming damages from the former shareholders on the ground of extra-contractual liability (arts 1240 and 1241 Civil Code).

b) Judgment of the Court

20 The Paris Court of Appeal granted the acquiring company an amount of € 400,000 in compensation of its economic loss, considering that the former manager had concealed his intent to leave the company. The Court of Appeal qualified this insincerity as a *dol*, that is an attempt to trick the other party with a view to obtaining consent to a contractual agreement. However, they refused to

17 The 2017 draft reform of civil liability suggests to repeal this distinction and to grant claimants who were driving a motor vehicle at the time of the accident full compensation, unless their fault was 'inexcusable' (art 1287(2) of the draft).

extend the liability to those shareholders who had only given the manager the mandate to sell their shares, considering that an agent is obliged to execute the mandate given by the principal and that a false representation by the agent may not be invoked against principals without them participating in the fraudulent scheme.

21 The Court of Cassation dismissed the acquiring company's appeal in cassation and decided to uphold the solution adopted by the court of appeal. Sitting in *Chambre mixte*, the Court of Cassation decided that 'while principals are contractually liable for the loss caused by the failure to the commitments made by agents within their mandate, fraudulent manoeuvres (*manœuvres dolosives*) committed by agents in the exercise of their mandate do not give rise to the principals' liability unless the claimant can establish their personal fault'.

c) Commentary[18]

22 In recent years, the liability of principals (*mandants*) for the fraudulent manoeuvres of their agents (*mandataires*) created a conflict between different divisions of the Court of Cassation. Whereas the Commercial Chamber and the First Civil Chamber decided that an agent's *manœuvres dolosives* could be attributed to the principal,[19] the Third Civil Chamber has become more hesitant and recently opted for the opposite solution, only holding principals liable in cases in which they were directly involved in the fraudulent tactics.[20] According to art L 431-5 Code of Judicial Organisation, a new case had thus to come before a *Chambre mixte*, made up of members taken from all relevant divisions.[21]

23 The issue is indeed complex and reading the Court of Cassation's decisions reveals that judges feel considerable unease when dealing with fraudulent manoeuvres, which can be both a cause of contract cancellation and a cause of action in extra-contractual liability. In the present case, the *Chambre mixte* distinguishes

18 See also *P Jourdain*, Le dol du mandataire n'engage la responsabilité du mandant qu'à la condition de prouver sa faute, JCP G 2021, no 46, 2085; *V Mazeaud*, Le dol du mandataire n'engage pas la responsabilité civile du mandant, Gaz Pal 18 January 2022, no 2, 25; *O Robin-Sabard*, Dol du mandataire et responsabilité du mandant envers son cocontractant, Resp civ assur 2022, no 1, 23.

19 Cass Civ 1, 15 June 2016, nos 15-14192, 15–17370 and 15–18.113; Cass Com, 13 December 2016, no 15–15092. See also Cass Civ 3, 5 July 2018, no 17-20121.

20 Cour de Cassation, Chambre commerciale (Cass Com) 13 December 2016, no 15-15092.

21 On the functioning of a *Chambre mixte* and the difference with an *Assemblée plénière*, see for example *E Steiner*, French Law. A Comparative Approach (2nd edn 2018) 72f.

clearly between both causes, especially since the claimant waived its right to invoke the cancellation of the contract.

24 Indeed, until the present case, it was sometimes suggested that the right to compensation of the tricked contracting party was only a collateral effect of the cancellation of the contract, following the same legal regime as the *action en nullité*. In this context, it is important to note that a *dol* constitutes a ground for the invalidity of a contract, whether it was committed by contracting parties or their representatives, a rule that is now explicitly enshrined in art 1138 Civil Code.[22]

25 In the 2021 decision, the *Chambre mixte* breaks with this solution, considering that the fault of an agent does not necessarily give rise to civil liability of the principal. Reserving the right to sue principals for damages only in cases where their personal fault can be established, the Court of Cassation firmly rejects the idea that agency can lead to the automatic attribution of the agent's tortious behaviour to the principal. Indeed, the legal mechanism of *représentation* is known to be limited, under French law, to 'juridical acts', that is to contracts or other voluntary commitments, and does not apply to factual behaviour, so-called 'juridical facts' (*faits juridiques*).[23]

26 The *Chambre mixte* also seems to rule out the possibility of holding the principal liable on the ground of the liability for the acts of others (*responsabilité du fait d'autrui*). Indeed, an agent cannot be considered as an employee (*préposé*) under art 1242(5) Civil Code,[24] as a 'relationship of *préposition*' is required, implying the right of a person to give orders or instructions to other persons as to how to comply with entrusted tasks. This is clearly not the case under an agency contract, since agents are given a certain degree of autonomy to accomplish their tasks.[25]

---

22 According to this text, '*dol* is equally established where it originates from the other party's representative, a person who manages his/her affairs, his/her employee, or one standing surety for him/her'.

23 See eg *H Barbier*, Du dol émanant des cocontractants des parties au contrat litigieux, Revue trimestrielle de droit civil (RTD civ) 2018, 883.

24 On the liability of employers (*commettants*) for the acts of employees (*préposés*), see *Knetsch* (fn 5) nos 126–143.

25 *P le Tourneau*, v° Mandat, in: Répertoire de droit civil (2017) nos 77–79.

4. Cass Civ 1, 10 November 2021, no 19-24227: No Strict Liability for Hospital-Acquired Infections in Radiology Centres

a) Brief Summary of the Facts

After an arthrogram[26] of his shoulder, a male patient developed a streptococcal infection that could be attributed to this radiological exam. The arthrogram was performed in the office of a radiology centre, situated in the same building as a private clinic. The patient sued the radiologist, the company that operates the radiology centre as well as the clinic for compensation of his personal injury. **27**

b) Judgment of the Court

This case had already led to a decision of the Court of Cassation on a procedural issue. After a first cassation, the Aix-en-Provence Court of Appeal decided to hold liable the company that operated the radiology centre on the basis of the strict liability regime laid out by art L 1142-1–1 Public Health Code, considering that the company could be qualified as a 'health establishment, services or organisation' referred to in this provision. The court of appeal rejected the claim against the clinic, considering that the radiology centre was operated independently, as the cooperation protocol with the clinic did not provide for an exclusivity clause. Aside from this, the patient was referred to the radiology centre by his family doctor who had no relationship whatsoever with the clinic. **28**

The Court of Cassation quashed the decision on both issues. The First Civil Chamber refused to apply the strict liability regime to the company operating the radiology centre, insisting on its corporate purpose (*objet social*). In fact, according to the certificate of incorporation (*extrait Kbis*), the company's purpose was only the 'operating, purchasing, selling and leasing of medical imaging and radiotherapy equipment' but not the undertaking of medical diagnosis (carried out by the radiologists working in the centre on an individual basis), so that it could not be regarded as a 'health establishment'. **29**

However, the Court of Cassation also decided that the clinic could indeed be held liable for the infection, as the protocol between the company operating the radiology centre and the clinic suggested more than a mere geographical proximity between both structures. The First Civil Chamber ordered the trial judges to **30**

26 An arthrogram is a radiological examination used to evaluate the condition of a joint.

investigate further the provisions of the protocol in order to decide whether the radiology centre could not be qualified as the clinic's 'radiology service'.

c) Commentary[27]

31 As has been mentioned in a previous edition of this yearbook,[28] in 2002 the French legislator enacted the Patients' Rights and Quality of the Health System Act (*Loi relative aux droits des malades et à la qualité du système de santé*), which is of utmost importance for the liability of medical practitioners, public hospitals and private clinics.[29] Due to this reform, art L 1142–1, I(1) Public Health Code provides that health professionals and all 'establishments, services and organisations in which medical acts of prevention, diagnosis and care are given, shall only be liable in fault'.[30]

32 However, the legislator included an important exception to the fault principle, codifying a case law principle adopted in 1988 by the *Conseil d'État* (CE) and in 1996 by the Court of Cassation.[31] According to art L 1142–1, I(2) Public Health Code, 'health establishments, services and organisations shall be liable for the harm resulting from nosocomial infections, except if they prove the existence of an external cause'. Yet, this strict liability for care-related infections does not apply to health professionals who are working on an individual basis, outside a private clinic or a public hospital.

33 The present decision of the Court of Cassation has to be interpreted in the light of this limitation. Most probably, the claimant could not establish the fault of the radiologist who does not fall within the scope of art L 1142–1, I(2) Public Health Code. He had no choice but to sue the company operating the radiology centre and the neighbouring clinic. As the Court of Cassation did not want to hold

---

27 See also *S Hocquet-Berg*, La responsabilité de plein droit des établissements de santé s'étend aux infections nosocomiales survenues au sein des sociétés de radiologie qui sont considérées comme leur service de radiologie, Resp civ assur 2022, no 1, 26; *M Dugué*, Précisions sur le champ d'application de la responsabilité sans faute à raison des infections nosocomiales, Gaz Pal 18 January 2022, no 2, 25.

28 *P Brun*, France, in: H Koziol/BC Steininger (eds), European Tort Law 2002 (2003) 179, nos 1–63.

29 See on this major legislative reform *S Taylor*, Clinical Negligence Reform: Lessons from France? 52 International & Comparative Law Quarterly (ICLQ) 737 (2003) and, more recently, *id*, Medical Accident Liability and Redress in English and French Law (2015) 24–60. See also *Knetsch* (fn 5) nos 90–94.

30 The translations are borrowed from *Taylor*, 52 ICLQ 737 (2003) 27, 40.

31 CE 9 December 1988, no 65087; Cass Civ 1, 21 May 1996, no 94-16586.

liable the operating company (that seemed to have no other object than to allow the radiologists to share premises and equipment), the clinic's strict liability would indeed have been the only way to not leave the patient without (full) compensation. This solution, however, implies that the clinic may be liable for an infection that affects a completely unknown patient, since he was referred by his family doctor.

Things would have been easier if the legislator had decided in 2002 to adopt strict liability for care-related infections also for independent health professionals. As a commentator has noted, it is not likely that an extension of the current liability regime to doctors would have a serious financial impact on the medical liability insurance market, since the overwhelming majority of 'nosocomial infections' occur in hospitals and clinics.[32] **34**

5. Personal Injury

a) Cour de cassation, Cass civ 2, 11 February 2021, no 19-23525: Bereavement Damages for a Child Conceived before the Death of a Family Member

Can children who were conceived before and born alive after the accidental death of a family member claim compensation for bereavement, although they never knew the relative in their lifetime? Over the last 15 years, French courts have been shifting their response from a negative to a positive one, as is confirmed by the present case, in which the granddaughter of an individual killed in a knife attack was awarded bereavement damages by the Guarantee Fund for Victims and Other Offences.[33] **35**

Until recently, the Court of Cassation refused to compensate the non-pecuniary loss of children who were not born at the time of the death of their relatives, considering that there was no causal link between the tortious act and their moral distress.[34] In a landmark decision of 2017, the Second Civil Chamber abandoned this principle, attributing a right to compensation to children who were not born, **36**

32 *Hocquet-Berg*, Resp civ assur 2022, no 1, 27.

33 On the scope of the intervention of this Guarantee Fund, subject to the civil liability rules, when it comes to the assessment of damages, see *D Miers*, State Compensation for Victims of Violent Crime, in: I Vanfraechem/A Pemberton/F Mukwiza Ndahinda (eds), Justice for Victims: Perspectives on Rights, Transition and Reconciliation (2014) 105. See also *Knetsch* (fn 5) nos 200, 281, 351.

34 Cass Civ 2, 24 February 2005, no 02-11999. See also more recently Cass Civ 2, 4 October 2012, no 11-22764.

but already conceived, at the time of death.[35] Behind this new solution is the traditional rule that allows children to claim rights arising out of situations which took place at a time when they were as yet unborn, but already conceived (known as the *infans conceptus* rule). In November 2020, the same solution was adopted by the Criminal Chamber[36] and is now well established in the Court of Cassation case law.

37 In the present decision, the First Civil Chamber applied this solution for the first time to a case in which the claimant was not the child, but the grandchild of the direct victim, extending the circle of relatives eligible to bereavement damages. There is no legal principle standing in the way of this extension, which is consistent with the *infans conceptus* rule and the rules on the assessment of damages of indirect victims. However, the present decision illustrates the rather arbitrary delimitation of bereavement damages, as children who are conceived shortly after the death of a relative are categorically excluded from the right to compensation, as the Court of Cassation confirmed in two cases one month after the present decision.[37]

b) Cour de cassation, Cass civ 2, 6 May 2021, nos 19-23173 and 20-16428: Professional Impact (*incidence professionnelle*) of the Personal Injury and Social Devaluation of the Claimant

38 According to the *nomenclature Dintilhac*, which lists the recoverablity of items of loss in personal injury litigation,[38] claimants can obtain damages not only for loss of income, but also for the 'professional impact' (*incidence professionnelle*) of their injury. This generally covers the loss of retirement income and the loss related to denied professional advancements, but extends also to non-pecuniary losses, such as the lack of professional satisfaction, an increased arduousness of work or the 'devaluation' of the claimant on the job market.

39 In this context, the situation of a personal injury victim without any prospect whatsoever of resuming a professional activity was a specific one, since the Court of Cassation decided in 2018 that damages for the loss of income could not be cumulated with damages for the 'professional impact' of an injury.[39] In the present

35 Cass Civ 2, 14 December 2017, no 16-26687.

36 Cour de Cassation, Chambre criminelle (Cass Crim) 10 November 2020, no 19-87136.

37 Cass Civ 2, 11 March 2021, nos 19-17384 and 19-17385.

38 On this document, see the extensive study cited below no 43. See also *Knetsch* (fn 5) nos 292, 313–316.

39 Cass Civ 2, 13 September 2018, no 17-26011.

decision, the Second Civil Chamber rectified this anomaly, considering that the impossibility of carrying on occupations could imply a certain 'social devaluation' (*dévalorisation sociale*), which had to be compensated under the label of *incidence professionnelle*.

c) Cour de cassation, Cass civ 1, 16 September 2021, no 20-10712: Assessment of the Personal Injury of a Second-Year Student; Loss of the Chance to Engage in a Professional Activity

40 It is well known among comparative tort lawyers that the French civil liability rules attach particular importance to the doctrine of 'loss of a chance'.[40] Indeed, the scope of compensation under French law embraces both future losses and *perte d'une chance*, which can be defined as the loss of a positive eventuality, that is the opportunity either to realise a benefit or to avoid a loss. In the field of personal injury litigation, the 'loss of a chance' doctrine is widely used, for example in cases in which claimants did not have any professional income due to their status as students or pupils, but could reasonably argue that they would have income in the future.[41]

41 The present case illustrates the difficulties arising from this concept. A 20-year-old student in psychology was involved in a traffic accident, her personal injury preventing her from carrying out the professional activity she aspired to for a long time, that is working as a clinical psychologist. She thus claimed compensation of her loss of (future) income, qualifying it as a future loss rather than a loss of a chance.

42 The Court of Cassation confirmed the analysis of the trial judges who considered that the prospect of a professional future as a clinical psychologist was not a certain one and that, for the sake of the assessment of damages, a probabilistic analysis had to be undertaken in the light of the loss of a chance doctrine. In particular, the First Civil Chamber insisted on taking into account all hazards when 'imagining' the professional life the victim could have had without the accident. In the present decision, the 'hazard' rate was established at 60 %, allowing the

40 For a more extensive survey of this concept, see in English *O Moréteau*, Basic Questions of Tort Law from a French Perspective, in: H Koziol (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) paras 1/131–1/140 and *id*, Causal Uncertainty and Proportional Liability in France, in: I Gilead/MD Green/BA Koch (eds), Proportional Liability: Analytical and Comparative Perspectives (2013) 141. See also *Knetsch* (fn 5) nos 299–305.

41 See *Moréteau* (fn 40) para 1/139.

claimant to be awarded damages for a substantial share of the income which an average clinical psychologist would have earned during her career.

C. Literature

1. Doctoral Theses and Monographs

43 *J Antippas*, Pour un droit commun de la responsabilité civile des personnes privées et publiques [A plea for common civil liability rules for private and public persons] (Paris, Dalloz 2021) coll Les sens du droit. Essai

44 *E Augier-Francia*, Les nomenclatures de préjudices en droit de la responsabilité civile [*Nomenclatures* of losses under tort law] (Bayonne, Institut Francophone pour la Justice et la Démocratie 2021) coll Collection des thèses, préface *S Porchy-Simon*

45 *H Gali*, Le préjudice moral. Étude de droit de la responsabilité civile [Moral harm and tort law] (Paris, LGDJ 2021) coll Bibliothèque de droit privé, préface *L Neyret*

46 *Z Jacquemin*, Payer, réparer, punir. Étude des fonctions de la responsabilité contractuelle en droits français, allemand et anglais [Payment, compensation and punishment. On the functions of contractual liability under French, German and English law] (Paris, LGDJ 2021) coll Bibliothèque de droit privé, préface *B Fauvarque-Cosson*

47 *E Lemaire*, Risques sanitaires sériels et responsabilité civile. Étude comparée des droits français et anglais [Mass public health risks and tort law. A comparative study of French and English law] (Paris, L'Harmattan 2021) préface *M Goré*

48 *E Petitprez*, La responsabilité du fait des choses incorporelles. Contribution à l'étude du droit commun [Civil liability for the act of intangible things. Contribution to the study of common tort law rules] (Aix-en-Provence, PUAM 2021) coll Laboratoire de droit privé & de sciences criminelles, préface *S Pellet*

2. Textbooks

49 *A Astegiano-La Rizza*, Risques de responsabilité et assurances des entreprises [Liability risks and insurance guarantees of companies] (Antony, L'Argus de l'assurance éditions 7th edn 2021) coll Les fondamentaux

50 *M Bacache-Gibeili*, Les obligations. La responsabilité civile extracontractuelle [Law of obligations. Extra-contractual civil liability] (Paris, Economica 4th edn 2021) coll Traité de droit civil

J-F Barbièri, Responsabilité civile des experts-comptables [Civil liability of accountants] (Levallois-Perret, Éditions Francis Lefebvre 2021) coll Thèmexpress **51**

H Belrhali, Les grandes affaires de responsabilité de la puissance publique [Landmark cases on State liability] (Paris, LGDJ 2021) coll Systèmes **52**

M Fabre-Magnan, Droit des obligations, vol 2 Responsabilité civile et quasi-contrats [Law of obligations. Vol 2 Civil liability and quasi-contractual relations] (Paris, PUF 2021) coll Thémis **53**

J Knetsch, Tort Law in France (Alphen, Kluwer Law International 2021) coll International Encyclopaedia of Laws (Tort Law) **54**

P Jourdain, Les principes de la responsabilité civile [The principles of tort law] (Paris, Dalloz 10th edn 2021) coll Connaissance du droit **55**

J-J Thouroude, Responsabilité hospitalière [Hospital liability] (Paris, Berger-Levrault 2021) coll Les Indispensables **56**

3. Symposium Proceedings and Collective Works

G Cerqueira/*V Monteillet* (eds), Le projet de réforme du droit de la responsabilité en France. Études à la lumière de la proposition de loi sénatoriale du 29 juillet 2020 [The French civil liability reform. Contributions in the light of the 2020 Senate Reform Bill] Proceedings of 22 October 2021 Conference at the Nîmes University (Paris, Dalloz 2021) coll Thèmes & Commentaires **57**

C Dudognon/*B Foucher*/*E Honorat* (eds), Responsabilité civile et assurances en matière sportive: enjeux et perspectives [Civil liability and insurance in the field of sports: challenges and perspectives] Proceedings of 5 July 2019 Conference at the Cour de Cassation, Jurisport 2021, suppl to no 2017, 1–74 **58**

F-X Fort (ed), Le contentieux climatique [Climate litigation] Semaine Juridique. Edition Administrations et Collectivités Territoriales 2021, no 26, 14–38 **59**

S Huber/*J Kleinschmidt* (eds), Die Reform des französischen Haftungsrechts im europäischen Kontext [The reform of French civil liability rules from a European perspective] Proceedings of 24 May 2019 Conference at the Trier University (Tübingen, Mohr Siebeck 2021) coll Rechtsvergleichung und Rechtsvereinheitlichung **60**

A Jacquemet-Gauché (ed), Les contentieux potentiels en droit de la responsabilité administrative [Potential litigation in State liability] Proceedings of 19 March 2021 Conference at the Clermont Auvergne University, Actualité juridique Droit administratif 2021, no 22, 1249–1277 **61**

P Jourdain/*B Lecourt*/*H Matsopoulou*/*G Viney* (eds), Mélanges en l'honneur du Professeur Suzanne Carval (Paris, IRJS éditions 2021) **62**

G Wicker/*R Schulze*/*G Mäsch* (eds), La réforme du droit de la responsabilité civile en France. 8^{e} journées franco-allemandes [The civil liability reform in **63**

France from a French-German perspective] Proceedings of 18–19 October 2019 Association Henri Capitant Conference at the Bordeaux University (Paris, Société de Législation Comparée 2021) coll Droit comparé et européen

4. Articles

64 *C Albiges*, Propos sur un nouveau droit de la responsabilité civile. Nouveaux enjeux, nouveaux concepts [Thoughts on a new tort law: new challenges, new concepts] Mélanges en l'honneur de Jean-Patrice et Michel Storck (Paris, Dalloz 2021) 3–14

65 *M Bacache*, La responsabilité médicale, entre droit commun et régimes spéciaux [Medical liability, between common rules and specific regimes] Mélanges en l'honneur de la Professeure Annick Batteur (Paris, LGDJ 2021) 17–35

66 *J-F Barbièri*, Sur la faute source de responsabilité civile pour les associés [On fault as a ground for the civil liability of associates] Mélanges en l'honneur de Jean-Patrice et Michel Storck (Paris, Dalloz 2021) 119–132

67 *J Bauerreis*, De quelques réflexions de droit international privé autour de l'assimilation des fautes contractuelles et délictuelles [Some thoughts on the assimilation of contractual and non-contractual fault from a private international law point of view] Mélanges en l'honneur de Jean-Patrice et Michel Storck (Paris, Dalloz 2021) 15–30

68 *B de Bertier-Lestrade*, Réforme de la responsabilité civile: le traitement préférentiel promis aux victimes de dommages corporels [Civil liability reform: the preferential treatment of personal injury cases] Revue Lamy Droit Civil (RLDC) 2021, no 194, 42–47

69 *A Bories*, Essai sur la responsabilité contractuelle du fait d'autrui [Essay on contractual liability for the acts of others] Liber Amicorum en l'honneur du Professeur Didier Ferrier (Paris, LexisNexis/Dalloz, 2021) 65–81

70 *S Bros*, La transformation inachevée de la responsabilité du contractant à l'égard des tiers [The unfinished transformation of the liability of contracting parties vis-à-vis a third person] Les transformations du droit. Mélanges en l'honneur du Professeur François Colly (Paris, La Mémoire du Droit 2021) 185–200

71 *P Brun*, Remarques sur quelques avatars récents du projet de réforme du droit de la responsabilité civile [On some recent avatars on the civil liability reform] Mélanges en l'honneur de Pascal Ancel (Bruxelles, Larcier 2021) 279–288

72 *K Buhler Bonafini*, Les 30 ans de l'arrêt Blieck : l'âge de raison ? [30 years since the *Blieck* case: the age of reason?] RLDC 2021, no 192, 11–16

73 *M-P Camproux Duffrène*, Le préjudice écologique et sa réparabilité en droit civil français de la responsabilité ou les premiers pas dans un sentier menant à

un changement des rapports Homme-Nature [Environmental harm and its redress under French tort law] Revue juridique de l'environnement 2021, no 3, 457–474

M-P Camproux Duffrène, L'admission dans le Code civil de la réparabilité du préjudice écologique [The redress of environmental harm recognised under the Civil Code] Mélanges en l'honneur de Jean-Patrice et Michel Storck (Paris, Dalloz 2021) 31–43 **74**

B de Clavière, Bientôt 40 ans de régime européen de responsabilité du fait des produits [Almost 40 years of European product liability rules] Revue du droit de l'Union européenne 2021, no 1, 59–72 **75**

C Corgas, La responsabilité civile du fait des animaux: un classicisme persistant [Civil liability for the acts of animals, a persistant classicism] Revue de droit rural 2021, no 490, 27–29 **76**

Y Dagorne-Labbe, Les causes de limitation ou d'exclusion de la responsabilité de l'agent de voyages [Causes for exemption or limitation of the liability of travel agents] JurisTourisme 2021, no 242, 40–43 **77**

V D Do, La responsabilité civile des arbitres ordonnant la mesure provisoire dommageable [The civil liability of arbitrators ordering harmful interim provisional measures] Revue de droit des affaires internationales 2021, no 1, 127–141 **78**

A Dumery, La responsabilité civile du fait du risque sanitaire. La démesure du champ d'application de la responsabilité du fait des produits défectueux [Civil liability for public health risks. The unreasonable scope of product liability rules] Cahiers de droit de l'entreprise 2021, no 5, 28–30 **79**

S Dutus, La responsabilité de l'État et les promesses du législateur [State liability and legislative promises] Actualité Juridique Droit administratif 2021, no 11, 598–605 **80**

L Fériel, L'avenir de la réparation du préjudice [The future of the reparation of loss] Resp civ assur 2021, no 2, 5–12 **81**

D Galbois-Lehalle, Responsabilité civile pour l'intelligence artificielle selon Bruxelles: une initiative à saluer, des dispositions à améliorer [Civil liability and artificial intelligence according to Brussels] D 2021, no 2, 87–88 **82**

A Guégan, Responsabilité civile et hospitalisation privée [Private hospitals and civil liability] Revue de droit sanitaire et social 2021, no 6, 1038–1046 **83**

G Hilger, Présentation des dispositions intéressant le droit du dommage corporel contenues dans la proposition de loi sénatoriale n° 678 portant réforme de la responsabilité civile [Overview of the provisions regarding the reparation of harm of the 2020 Senate bill on civil liability reform] Revue générale de droit médical 2021, no 78, 141–168 **84**

J Knetsch, The French Medical Accident Compensation Scheme. A Critical Assessment of the Patients' Rights Act of 4 March 2002, in: Compensation **85**

Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings (Cham, Springer 2021) 179–193

86 *C Lachièze*, Vers un régime de responsabilité propre à l'intelligence artificielle? [Towards a specific liability regime for artificial intelligence] JCP G 2021, no 17, 797–798

87 *M Lanna*, La responsabilité de l'État en matière de police du médicament. L'exemple de la Dépakine [State liability and drug legislation, the Dépakine case] Revue du droit public 2021, no 4, 933–943

88 *C Latil*, Les sons et odeurs de la campagne : d'une intégration au patrimoine commun de la nation vers une éventuelle réforme de la responsabilité pour trouble anormaux du voisinage [Sounds and smells of the countryside, from common national heritage to a reform of civil liability for nuisance] RLDC 2021, no 193, 40–44

89 *S Lavorel*, Le rôle des juges dans l'émergence d'une responsabilité climatique des États [The role of judges in the rise of State liability for climate changes] RJE 2021, no 1, 37–62

90 *E Lutfalla/A Decramer*, Un point sur la responsabilité nucléaire [An update on nuclear liability] RLDC 2021, no 196, 15–18

91 *T Mastrullo*, La responsabilité civile des dirigeants de sociétés en état d'insolvabilité dans l'UE sous l'angle des conflits de juridictions [The civil liability of managers of insolvent EU companies from the perspective of conflict of jurisdictions] Mélanges en l'honneur du Professeur Gilbert Parleani (Paris, IRJS éditions 2021) 351–362

92 *C Mathis*, Quelle responsabilité juridique pour les responsables de la conformité? [Which civil liability rules do we need for compliance managers?] Droit & Patrimoine 2021, no 316, 48–49

93 *S Messaï-Bahri*, La responsabilité civile des dirigeants sociaux depuis la loi Pacte [The civil liability of corporate managers since the Pacte Act] Mélanges en l'honneur du Professeur Gilbert Parleani (Paris, IRJS éditions 2021) 415–424

94 *M Poumarède*, Intelligence artificielle, responsabilité civile et droit du travail [Artificial intelligence, civil liability and labour law] Droit social 2021, no 2, 152–156

95 *S Prosper/D Morel*, L'impact de la réforme de la responsabilité civile sur le sport [The impact of the civil liability reform in sports] Jurisport 2021, suppl to no 217, 38–45

96 *J Traullé*, Le renouveau des présomptions en droit de la responsabilité civile [The renewal of presumptions in civil liability] D 2021, no 7, 360–365

97 *Q Urban*, Le droit de la responsabilité et les groupes transnationaux [Civil liability and transnational corporate groups] Revue trimestrielle de droit commercial 2021, no 2, 479–489

V Varet, La responsabilité des services de partage en ligne de contenus protégés: une révolution en droit d'auteur ? [The liability of online sharing providers of protected content: a revolution of copyright law?] Légipresse 2021, no 395, 420–423 **98**

L Viaut, Responsabilité et intelligence artificielle [Liability and artificial intelligence] Petites Affiches 2021, no 16, 9–10 **99**

G Wiederkehr, Vie et mort de l'obligation de sécurité [Life and death of the *obligation de sécurité*] Mélanges en l'honneur de Jean-Patrice et Michel Storck (Paris, Dalloz 2021) 101–108 **100**