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Volume 9 | Number 3

Article 2

6-1-1987

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Robert F. Taylor

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Recommended Citation

Robert F. Taylor, *No Fault Takes a French Twist: A French Re-Examination of the Nature of Liability*, 9 Loy. L.A. Int'l & Comp. L. Rev. 545 (1987).

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“No Fault” Takes A French Twist: A French Re-Examination Of The Nature Of Liability

ROBERT F. TAYLOR*

I. INTRODUCTION

One of the striking developments of modern times has been the dramatic increase in the number of rules which govern civil liability. Today, much more than in the past, people seek some person or entity to shoulder the financial burden whenever the damage occurs. This increasing exploration into the realm of the “*personne responsable*” is creating fissures in the monolith of classical French concepts of liability.¹ Recent legislation and jurisprudence clearly indicate that French society is abandoning the notion that a lack of discernment or maturity on the part of one objectively responsible for an injury constitutes an obstacle to the imputation of a “fault,” to the recognition of a *fait générateur de responsabilité*,² or so as to reduce a victim’s right to damages. In particular, there has been an increasing imposition of liability among infants and mentally handicapped persons. Indeed, the evolution of French law reflects a measured societal response to a perceived need for security. As judicial and governmental institutions have attempted to provide for more automatic methods of indemnity, the burdens of expanded liability have been tempered by mandatory insurance laws. These developments have pinched the legal system between two logics, which if not mutually exclusive, are at least very different: one of liability, and one of insurance. The result is what has

* B.A., 1977, Samford University; J.D., 1980, Cumberland School of Law; L.L.M., Bus. & Tax., 1982, McGeorge School of Law; Doctoral Candidate, Droit Civil Privé, Strasberg University, France.

1. 1 M. DE JUGLART, *COURS DE DROIT CIVIL*, vol. 2, 225, para. 524 (1978).

2. A *fait générateur de responsabilité* is an act which will result in the attachment of liability, but which does not necessarily require “fault” on the part of the actor. Such a triggering act is not limited to a civil wrong. It may also be found in the commission of a *delict*, one of the three categories of penal responsibility. See generally Catala & Weir, *Delict and Torts: A Study in Parallel*, 37 TUL. L. REV. 573, 593-606 (1962-1963). Thus the links which exist between civil and criminal law create the possibility for civil remedies to be awarded to a victim of a criminal violation. Two of the decisions of the Assemblée Plénière on May 9, 1984, addressed just such a cross-over situation. See *infra* text accompanying notes 87-91.

come to be known in the French legal community as the "liability crisis."³ The philosophical changes which have occurred in this area of continuing friction are reflected in five recent decisions rendered by the Assemblée Plénière⁴ of the Court of Cassation.⁵ In May of 1984, the mixed assembly of France's highest court took the opportunity to reexamine the nature of a small child's liability. Those decisions addressed the issues of whether a child should be held responsible for injuries he or she inflicts upon another, and whether a child's contributory "fault" should be recognized in the absence of proof as to his or her capacity to comprehend the dangerous nature of a particular act.⁶ Although many questions remain unanswered, these five decisions are significant, as they are the first by the nation's highest court to so clearly accept the premise that liability grounded on a theory of fault may attach to persons who are simply unable to understand the consequences of their acts.

The dramatic evolution in the area of a child's liability is attributable, at least in part, to the liability which has recently been imposed on another category of persons: those with diminished mental capaci-

3. Viney, *La Faute de la Victime d'un Accident Corporel: le Présent et l'Avenir*, 1984 *Juris-Classeur Périodique [J.C.P.] I* No. 3155. Grafted onto the traditional notions of liability, since 1804, are new concepts of insurance and risk allocation. Although these concepts have been helpful in the area of damage reparation, their increasing use has served to distort the law's ability to regulate individual conduct. In order to favor the application of a contract of insurance so that victims would not go without recovery, courts found it necessary to enlarge notions of liability to such an extent that the law is in no way fulfilling the role envisaged by the drafters of the code. *Id.* at para. 25.

4. The Assemblée Plénière is a formation of the Court of Cassation, the Supreme Court for nonadministrative matters in France, which is composed of representatives from the five civil chambers and one criminal chamber of the Court. Its jurisdiction is mandatory in those instances when a second appeal to the Court of Cassation is based on the same grounds as one previously entertained by the Court. R. GUILLEN & J. VINCENT, *LEXIQUE DE TERMES JURIDIQUES* 34 (5th ed. 1981). The *Jand'heur* decision is an example of just such a situation. *Cf. infra* text accompanying note 49. It is discretionary, *facultative*, when there are divergent solutions to similar problems being proposed by the various courts of first and second instance, or between those courts and the Court of Cassation. R. GUILLEN & J. VINCENT, *LEXIQUE DE TERMES JURIDIQUES* 35-36 (5th ed. 1981).

5. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 *Recueil Dalloz-Sirez, Jurisprudence* [D.S. Jur.] 528; Judgment of May 9, 1984, Cass. ass. plén., Fr., *id.* at 529; Judgment of May 9, 1984, Cass. ass. plén., Fr., *id.*; Judgment of May 9, 1984, Cass. ass. plén., Fr., *id.*; Judgment of May 9, 1984, Cass. ass. plén., Fr., *id.* at 529-30.

6. Because the existence of a discerning will was perceived to be a condition precedent to the attachment of liability, very young children have, from time immemorial, been considered as incapable of committing a fault. From the inauguration of the Civil Code in 1804 until 1984, this "no liability" principle was supported by *jurisprudence constante* at all court levels. *Cf.* 1984 D.S. Jur. 525. For a general discussion of the distinction between *stare decisis* and *jurisprudence constante*, see *infra* note 64.

ties.⁷ Prior to 1968, it was well-settled law that such persons were incapable of committing a fault which would result in the attachment of liability under the Civil Code.⁸ The question which was posed just after that legislative reform is reiterated in these five 1984 decisions: is French jurisprudence developing a new principle of liability which might be applied in other situations where the incapacity of the actor has traditionally precluded a finding of liability based on fault? Until recently, the courts had strictly adhered to the letter of the 1968 legislation—a text directed towards mentally handicapped adults.⁹ The courts had not expanded their horizons to consider the applicability of that statute to the actions of those who, by virtue of their tender years, are incapable of formulating the necessary intent for the imputation of *faute*.¹⁰ The decisions of May, 1984 reflect a clear deviation from that historical position. Subsequent legislation and jurisprudence echo the dramatic philosophical changes announced by those five decisions. In fact, the promulgation of the law of 5 July 1985, relative to the indemnification of victims of automobile accidents¹¹ has surpassed all previous efforts to assign liability in the absence of recognized fault.

It will be the purpose of this article to examine the evolving notions of French liability, which are grounded in theories of risk socialization rather than classical notions of fault, as these notions relate to persons who have, due to their lack of discerning capacity, been considered beyond the pale of traditional tort liability. A review of recent legislation and jurisprudence will culminate with an examination of the new law of vehicular accidents which went into effect in July of 1985.

II. THE STATUTORY FRAMEWORK

Generally speaking, there are not more than a half-dozen provisions of the French Civil Code which are typically invoked when a victim seeks reparation for injuries which have been inflicted by an-

7. Law of Jan. 3, 1968, No. 68-5, CODE CIVILE [C. CIV.] art. 489-2 (Fr.); 1968 J.C.P. III No. 33756.

8. Barbieri, *Inconscience et Responsabilité dans le Jurisprudence Civile: l'Incidence de l'Article 489-2 Après un Décennie*, 1982 J.C.P. I No. 3057. Article 1382 is the major provision in the French Civil Code which predicates liability on subjective fault. See *infra* text accompanying note 17.

9. See *infra* note 15 and accompanying text.

10. 1978 J.C.P. II No. 18793.

11. Bihr, *La Grande Illusion (À Propos du Projet de Loi en Matière d'Accidents de la Circulation)*, 1985 Recueil Dalloz-Sirez, *Chronique* [D.S. Chron.] 63.

other. For the purposes of this article, the discussion will be limited to the most often applied code provisions. Article 1382 is the "classical fault" provision of the Code which has historically required a showing of subjective fault on the part of the defendant.¹² Article 1382 section 1 is the clause most often employed when the injury is caused by an instrumentality under the control of a person.¹³ Article 1384 section 4 invokes liability on the part of parents when an injury is caused by their minor child.¹⁴ Finally, new article 489-2 imposes liability on mentally-handicapped adults for injuries or damage which they have caused.¹⁵ The four provisions are interrelated, in that each addresses various aspects of the question of injury. Due to their similarities, adjustments in the philosophical underpinnings of any particular provision, as precipitated by doctrine or the jurisprudence of the Court of Cassation, exert significant influence on the development of neighboring articles. An examination of each provision, together with the jurisprudential milestones which have affected its application under the evolving theory of risk socialization, will serve to demonstrate the extent to which French society has evolved in its notions of reparable injury.

A. Article 1382 — The Citadel Of Traditional Fault

The cornerstone of French delictual liability is article 1382.¹⁶ It has traditionally been the provision most often invoked by a claimant when seeking to recover damages for injury caused either negligently or intentionally by another. That section is brief and states in broad yet unconditional terms that: "[a]ny act whatever of man which causes damages to another obliges him by whose fault it occurred to make reparation."¹⁷

The principle established in article 1382 is not new. The laws of

12. C. CIV. art. 1382 (Fr.).

13. *Id.*

14. *Id.*

15. C. CIV. art. 489-2 (Fr.). Article 489-2 of the Civil Code is located in the first chapter of the Eleventh Title, which addresses "majority, and those adults who are protected by the law." *Id.*

16. See Catala & Weir, *supra* note 2, at 577, 602-06.

17. J. DOMAT, CIVIL LAW vol. I, bk. 2, tit. 8 § 4 (1850). This language is identical to that of the Code Napoléon of 1804. Domat, in his analysis of that article, said that all losses, all damages which may come from the act of a person, whether from imprudence, levity, ignorance of what he is bound to know, or other like faults, however trivial they may be, ought to be repaired by him whose imprudence or other fault has caused them. It is a tort that he has committed, though he may have had no intention to injure. *Id.*

Rome had recognized this natural law notion¹⁸ long before the creation of the Code Napoléon.¹⁹ The courts have historically held that the crucial element in a cause of action based on article 1382 is the establishment of fault.²⁰ The dictionary defines civil fault as, "the attitude of a person, who due either to his negligence, imprudence or malice fails to respect his contractual engagements, or his duty to avoid causing injury to others." Historically, this fault required investigation by the finder of fact of the "soul and state of mind of the agent."²¹

It is clear that a fault is an error of conduct.²² Yet in today's rapidly changing world, what standard should be employed to determine whether the author of an injury has committed such an error? Professor Mazeaud has opined that because civil liability is not punitive in nature, civil fault should be measured *in abstracto*, that is, based on an objective standard.²³ According to the objective approach, when weighing a person's actions on the scales of liability, it should not matter that a person believed that he or she was performing in a proper way, if other persons in the same circumstances would have performed the act differently.²⁴ Appreciation of conduct through the use of an objective standard requires that the author of an injury be compared to an abstract model. The quiddam in French law is the *bon père de famille*, of article 1137 of the Civil Code, a francophyle descendant of the *bonus paterfamilias* of the Roman

18. Domat and Pothier, two jurists of the Seventeenth and Eighteenth Centuries whose philosophies exerted profound influence on the drafters of Napoléon's Code, both unequivocally recognized that liability in delict is grounded on fault. A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 593 (2d ed. 1977).

19. This natural law notion was also known as the Aquilian standard of fault. "Among the civil wrongs known to Roman law was one provided for in the *Lex Aquilia*, which was concerned in very general terms with the harm unlawfully caused to another." Catala & Weir, *supra* note 2, at 583. As the definition of "harm" in that statute was broadly written, it became usual for it to be applied in those situations where remedies were not discoverable within the narrower, nominate categories of wrongs. "In the end, this action came to absorb all [of the other] categories of liability. Thus was [begun the notion] that any fault which resulted in damage to another imposed an obligation on the party at fault to repair the damage." *Id.*

20. Judgment of July 19, 1870, Cass. civ. 1re, Fr., 1870 Recueil Dalloz, *Periodique et Critique* [D.P.] I 361; "The existence of a legally imputable fault is one of the essential conditions of an action for damages under article 1383." *Id.*, note Labbé; 1871 Recueil Sirey, *Jurisprudence* [S. Jur.] I 9.

21. Mazeaud, *La "Faute Objective" et la Responsabilité Sans Faute*, 1985 D.S. Chron. 3.

22. *Id.*

23. *Id.*

24. *Id.*; see also G. VINEY, *LES OBLIGATIONS, LA RESPONSABILITÉ: CONDITIONS*, in *IV TRAITÉ DE DROIT CIVIL* 555 (J. Ghestin ed. 1982).

law.²⁵ The objective man is no superman, merely a "man of foresight and direction" very much like his Anglo-American counterpart, the reasonable man.²⁶

Because article 1382, the bastion of liability for personal acts, is firmly grounded on an appreciation of subjective fault,²⁷ developments in both the prediction of liability on notions other than subjective fault, and in the apportionment of damages based on the comparative fault of the parties have come about only lately, and only after substantial theoretical foundations had been established through the recently constructed provision of article 1384 section 1.

B. *Fait Générateur de Responsabilité* — Article 1384 section 1

1. Historical application and jurisprudential discovery

According to French law, "[a] person is responsible not only for the damage which he causes by his own acts, but also for that which is caused by the act of persons for whom he is responsible or for things which he has in his keeping."²⁸ Though drafted in potentially sweeping language, it is clear that the editors of the Civil Code of 1804 had only two situations in mind which would be susceptible to the application of this provision: the liability of a person for the damages caused by his animal, and of a proprietor for injuries caused by his improperly-maintained building.²⁹ The text thus passed largely unused through nearly all of the nineteenth century.³⁰ But with the increase

25. H. MAZEAUD, L. MAZEAUD & A. TUNC, *TRAITÉ THÉORETIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE, DÉLICTUELLE ET CONTRACTUELLE* § 428, at 498 (1965).

26. Catala & Weir, *supra* note 2, at 608-09 n.145.

27. *Id.* at 602.

28. C. CIV. art. 1384 § 1 (Fr.).

29. G. VINEY, *supra* note 24, at 749.

30. Prior to this development, a victim with recourse only to article 1382 would be required to meet the often unsustainable burden of proving either the *faute* of the proprietor, or of the custodian of the instrumentality. By the end of the century, however, the soundness of the "fault principle" in every situation was being attacked by many of the most important French jurists. For example, in 1897 Professor Jossérand commented:

For three quarters of a century we contented ourselves with this conception [of fault] which, because of its requirements, did not always assure to the victim compensation for the harm he suffered. The deficiencies and injustice of this conception were only made clear by the progress of industry and of human activity. Machines took the place of man and horse, production and movement continually increased in an unexpected degree, the number of accidents not only increased, but, and this is more important, changed their character. Accidents came to have very often an obscure origin, an uncertain cause that made it hard to place responsibility. As the accident became industrial and mechanical, it also became anonymous.

L. JOSSERAND, *DE LA RESPONSABILITÉ DU FAIT DES CHOSES INANIMÉES* 6-8 (1897), reprinted in A. VON MEHREN & J. GORDLEY, *supra* note 18, at 600.

in injuries caused by inanimate objects during the industrial revolution, the provision found new and expansive application. Thus, it was in the realm of *accidents anonymes*, those situations where the cause of an injury is unknown, and fault is difficult to prove, that the provision was most utilized. The majority of victims of *accidents anonymes* were workers and employees, and courts recognized the importance of satisfying those claimants who were disarmed in the face of huge and well-organized enterprises.³¹ Article 1384 section 1 was successfully relied upon for the first time in such a situation in 1896, when certain workers were injured by the explosion of a boiler on a barge.³² In that landmark decision, the Court of Cassation ruled that there is inherent in the first paragraph of article 1384 a presumption of liability for injuries caused by instrumentalities, and that such liability is distinct from that envisioned in article 1382.³³

Professor Saleilles, commenting on the *Teffaine* case, presaged its landmark potential, and highlighted the decision's introduction of a new approach to the notion of reparable harm, when he opined: "It may well be that the whole theory of industrial risk has entered through this decision into our case law."³⁴

It should be noted that the French notion of *présomption de faute* carries a greater effect than its cognate in Anglo-American jurisprudence. It is not a presumption of fault in the true sense of those words, because the presumption will not be overcome by the mere showing of an absence of fault. According to the language of the court, the presumption of fault can only be rebutted by demonstrating *force majeure*,³⁵ *cas fortuit*³⁶ or a causation which is not attributable

31. A. VON MEHREN & J. GORDLEY, *supra* note 18, at 600.

32. Judgment of June 16, 1896, Cass. civ. soc., Fr., 1897 S. Jur. I 17, *note* Esmein; G. VINEY, *supra* note 24, at 749.

33. Prior to that time the Court of Cassation had consistently ruled that a person seeking redress under article 1382 for injuries suffered when a boiler exploded must demonstrate, in addition to the accident itself, that the owner had committed a fault which led to the injury. Judgment of July 19, 1870, Cass. civ. 1re, Fr., 1871 S. Jur. I 9, *note* Labbé; 1870 D.P. I 361.

34. R. SALEILLES, *LES ACCIDENTS DU TRAVAIL, ET LA RESPONSABILITÉ CIVILE; ESSAI D'UNE THÉORIE DE LA RESPONSABILITÉ DELICTUELLE* I (1897), *reprinted in* A. VON MEHREN & J. GORDLEY, *supra* note 18, at 610.

35. *Force majeure* has been defined as an event which is unforeseeable and insurmountable, which prevents a debtor from carrying out his or her obligation, and serves to exonerate that person from such duty. It supposes an event which is completely outside the control of the person who asserts it as a defense, whether it be a force of nature, of government, or of a third person. R. GUILLEN & J. VINCENT, *supra* note 4, at 206.

36. Often used synonymously with *force majeure*, *cas fortuit* actually refers to the impossibility of fulfilling an obligation due to internal causes, such as faulty instruments or material. *Id.* at 63. In fact, certain French courts have gone so far as to declare that the two terms are

to the party which is presumed liable.³⁷ The judicial re-interpretation of article 1384 section 1 expressly recognizing a presumption of fault soon opened the door to legislative reforms which addressed the issue of adequate worker's compensation.³⁸ In the years which followed, article 1384 section 1 was also employed to compensate for injuries caused to third parties by fires which began at industrial sites. In the initial decision on point, the article was invoked when some kegs containing flammable substances in an industrial warehouse ignited and destroyed several buildings in the surrounding area.³⁹ The legislative response to the insurance lobby was swift, however, and succeeded in precluding aggrieved victims from subsequently relying on that article for redress. That legislation provided that when the injury was caused by a fire, an additional burden of proof would have to be sustained; that of demonstrating *faute* on the part of the person objectively responsible.⁴⁰

2. The *Jand'heur* decision

The most significant and long-reaching development in the application of article 1384 section 1 came as a result of the rapid expansion of the automobile industry in France after the First World War.⁴¹ In

identical. Judgment of Apr. 10, 1925, Tribunal Civil de Lectoure, Fr., 1925 D.P. 105, 1925 Dalloz, *Hebdomadaire* [D.H.] 400; 1925 Recueil Gazette du Palais [G.P.] II 113.

37. Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. PA. L. REV. 271, 278 (1931).

38. G. VINEY, *supra* note 24, at 750 (discussing Law of Apr. 9, 1898).

39. Judgment of Nov. 16, 1920, Cass. civ. I, Fr., 1920 D.P. I. 169, *note* Savatier; 1922 S. Jur. I 97, *note* Huguency.

40. The law of Nov. 7, 1922, caused the insertion of two additional paragraphs into article 1384, immediately following 1384 § 1. The two paragraphs prescribed that

However, a person who is in possession, regardless of the legal basis thereof, of immovable or movable property in which a fire has originated, shall not be liable toward third parties unless it is proved that the fire was due to his fault or to the fault of persons for whom he is responsible.

This provision does not apply to the landlord and tenant relation, which remains governed by articles 1733 and 1734 of the civil code.

The English translation of article 1384 is found at A. VON MEHREN & J. GORDLEY, *supra* note 18, at 621.

That law was clearly reactionary. It was passed under the pressure of insurance companies frightened by the financial consequences of recent court decisions. As with nearly all such laws of exigency, it was found to be insusceptible of facile application. It created in effect an island of liability, with poorly defined parameters. As it applied strict liability to the custodian of a thing without providing a legal foundation, it was narrowly interpreted by the courts. G. VINEY, *supra* note 24, at 646.

41. For an in-depth study of the development of that clause to provide for those persons who were victims of automobile accidents during those early years, see Deak, *supra* note 37, at 271.

the early post-war years, liability for injuries caused by automobiles was established solely according to the mandates of article 1382. A victim thus carried the burden of establishing the fault of the driver. The notion of applying the first paragraph of article 1384 to the problem found no judicial acceptance in those instance where a person was operating the vehicle at the time the injury occurred. Because the instrumentality was "under the control of the hand of man," the accident was not "anonymous," and article 1384 was therefore inapplicable. Inequities inherent in such construction led to virulent doctrinal criticism which was not unheeded by the courts.

Perhaps the most significant jurisprudential (rather than legislative) application of article 1384 section 1 during those early years came in 1930, when Lise Jand'heur was run over by a delivery truck owned by a local department store, *Galeries Belfortaises*.⁴² When Mrs. Jand'heur brought an action for her daughter's injuries under article 1384 section 1,⁴³ the lower court found in its factual investigation that the vehicle which hit Lise was under the direct control of its driver at the time of the accident. Article 1384 section 1 was thus held inapplicable on the grounds that the accident was not "anonymous" within the traditional meaning of the word. The court ruled that in order for Lise's parents to recover, they would have to bring their action under article 1382, and demonstrate either fault on the part of the driver or a hidden defect (*vice caché*) in the truck which caused the injury.⁴⁴ On appeal, however, the Court of Cassation reversed the lower court, and held that there is inherent in article 1384 section 1 a presumption of fault which weighs upon the person responsible for the instrumentality causing the injury.⁴⁵ Further, since article 1384 section 1 makes no distinction between injuries caused by autonomous machines, and those under a person's control, the Supreme Court held that the presumption of liability will attach by virtue of the existence of the instrumentality itself, rather than due to the actions of the person "in control" at the time of the injury.⁴⁶ Because of this presumption, the guardian of an instrumentality would be unable to avoid liability merely by demonstrating his or her own due care. The Court ruled that the presumption of liability in article

42. Judgment of Feb. 14, 1930, Cass. ch. réun., Fr., 1930 D.P. I 57.

43. *Id.* at 57-58, *rapport* Le Marc Ladour, *concl.* M. le Proc. gén. Matter, *note* Ripert; 1930 S. Jur. I 121, *note* Esmein.

44. Judgment of Feb. 13, 1930, Cass. ch. réun., Fr., 1930 D.P. I 57.

45. *Id.*

46. *Id.*

1384 section 1 will withstand all defenses, with the exception of *cas fortuit*, and *force majeure*.⁴⁷ Although the *Jand'heur* decision engendered lively debate, its well-chosen language⁴⁸ and rationale resulted in a long-term philosophical acceptance of a presumption of fault under article 1384 section 1. Thus, a foundation was laid for further development of risk socialization under French law. Because the provision linked liability directly to a person's control over an instrumentality, or to the instrumentality itself (rather than to traditional notions of fault), victims would never again be faced with the unhappy burden of proving the inherent dangerousness of an instrumentality (*vice caché*) or activity, or the actual fault of the operator of the device.⁴⁹

In subsequent doctrinal treatment, the Court of Cassation was subjected to bitter criticism from traditional subjective fault philosophers.⁵⁰ Often responsive to doctrinal censure, the court periodically retrenched from the *Jand'heur* decisions. In one such case the court addressed the question of the "normal condition" of an instrumentality which is subject to a person's use or control under article 1384 section 1. In the *Cad* decision,⁵¹ the plaintiff slipped while leaving a bath in a public bath house, and fell onto a central heating pipe. His suit for damages alleged that the proprietor of the bath house was the guardian of the heating system which was responsible for the injury. The court rejected the claim, however, finding that the pipes were in normal condition. Partisans of subjective liability say this decision recognizes that a guardian would not be held liable if the instrument which caused the injury had been maintained in a normal manner.⁵² Soon thereafter, in the now-celebrated *Franck* decision,⁵³ the court addressed the interesting problem of liability of an automobile owner

47. *Id.*

48. The court carefully chose the language which would be formalized in the decision, employing "presumption of liability" rather than such terms as "presumption of fault," or "obligation to indemnify." *Id.*, *rapport* Le Marc Ladour, *concl.* M. le Proc. gén. Matter, *note* Ripert; 1930 S. Jur. I 121, *note* Esmein.

49. Judgment of Feb. 13, 1930, Cass. ch. réun., Fr., 1930 D.P. I 57; 1930 S. Jur. I 121, *note* Esmein.

50. 1 M. DE JUGLART, *supra* note 1, at 263.

51. Judgment of Jan. 23, 1937, Cour d'appel de Colmar, Fr. (unpublished), *reprinted in* 1 M. DE JUGLART, *supra* note 1, at 276-77.

52. *Id.* Liability would have attached, however, had the proprietor left the instrumentality in an abnormal or defective condition.

53. Judgment of Dec. 2, 1941, Cass. ch. réun., Fr., 1942 Recueil Dalloz, *Critique Jurisprudence* [D.C. Jur.] 25, *note* Ripert; 1941 S. Jur. I 217, *note* Mazeaud; 1942 J.C.P. II No. 1766, *note* Mihura.

for injuries caused by his automobile, after it had been stolen. The court held in that case that liability of an owner will not survive the theft of a vehicle; liability will pass to that person exerting "direction, use and control" over the instrumentality.⁵⁴ The *Franck* decision was a signal victory for the disciples of fault.⁵⁵

Although jurisprudential development of the clause was stifled in its early years by more powerful economic interests,⁵⁶ the philosophy which was at the foundation of its development succeeded through legislation to provide indemnity for victims of airline,⁵⁷ cable car,⁵⁸ and boat accidents.⁵⁹ Article 1384 section 1 also provided the philosophical underpinnings for the "Tunc Project"⁶⁰ which grew to fruition in the form of the law of 5 July 1985.⁶¹ That law provides practically automatic indemnity to persons injured in automobile accidents, without requiring the establishment of fault on the part of the driver of the automobile.⁶²

3. Fault, the establishment of liability, and the apportionment of damages: the jurisprudence of *Desmarest*

It was widely believed that the *Jand'heur* decision effectively created an objective test for the application of liability, thereby negating the necessity of research into questions of fault in those situations where the injury was caused by an instrumentality. Further, the presumption of liability in *Jand'heur* was considered to be irrebuttable, absent a showing of *force majeure*. The harsh results of such an unbending rule caused courts and jurists to seek a humane resolution of two diametrically opposed philosophies. The *force majeure* rule in *Jand'heur* protected a victim in a "faultless injury" even when that victim's actions were not completely above legal reproach. Yet normally, a finding of fault, whether in its original or contributory form,

54. Judgment of Dec. 2, 1941, Cass. ch. réun., Fr., 1942 D.C. Jur. 25, note Ripert; 1941 S. Jur. I 217, note Mazeaud.

55. 1 M. DE JUGLART, *supra* note 1, at 263-64, para. 556.

56. G. VINEY, *supra* note 24, at 776 (Law of Nov. 7, 1922); Larroumet, *Responsabilité du Fait des Choses Inanimées*, in IV RÉPERTOIRE DE DROIT CIVIL 58 para. 627 (P. Raynard ed. 1975).

57. G. VINEY, *supra* note 24, at 750 (discussing Law of May 3, 1924).

58. *Id.* (discussing Law of July 8, 1941).

59. *Id.* (discussing Law of Jan. 3, 1967).

60. A. TUNC, POUR UN LOI SUR LES ACCIDENTS DE LA CIRCULATION 8 (1981); Durry, *Responsabilité Civile*, 81 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 604, 607 (July-Sept. 1982); A. VON MEHREN & J. GORDLEY, *supra* note 18, at 638-39.

61. Law of July 5, 1985, No. 85-667, C. CIV. art. 3 (Fr.).

62. *Id.*

would require a finding of liability upon its author. The fact that the negligent person might have also been the victim in no way reduced his or her contributory fault. In such a situation, how were the courts to avoid leaving at least part of the bill for an injury at the negligent victim's feet? The legal dilemma caused by the tension between these notions of subjective and objective fault also affected the development of article 1384 section 1 in the post-*Jand'heur* years. Among the issues the court had to address was whether a person in control of an instrumentality which causes an injury should be at least partially exonerated from liability, even though the contributory fault of the victim was not so grave as to be characterized as "unforeseeable and unavoidable" according to the theory of *force majeure*.

In 1982 the Court of Cassation addressed that issue in the now famous *Desmares*⁶³ decision. That case grew out of injuries caused when Mr. Desmares ran over a pedestrian couple as they were crossing the street. The plaintiffs brought an action under article 1384 section 1 for injuries caused by the automobile which was at the time subject to his use and control. Mr. Desmares asserted that the plaintiffs were themselves contributorily negligent for the injuries they incurred. In the first instance, the judges found that the plaintiffs were negligent in that they had not only failed to use the cross walk, but also they had crossed the street without watching for traffic. The *Desmares* court recognized that according to the *jurisprudence constante*⁶⁴ of the *Jand'heur* decision and article 1384 section 1, only neg-

63. Judgment of July 21, 1982, Cass. civ. 2e, Fr., 1982 D.S. Jur. 449, *rapport* Charbonnier; 1982 J.C.P. II No. 19861, *note* Larroumet; 1982 J.C.P. II No. 18961, *note* Chabas; Durry, *supra* note 60, at 606-07. For additional comment on the issues addressed in the *Desmares* decision, see R. SAVATIER, *LES SOURCES DE LA RESPONSABILITÉ CIVILE*, bk. 1 *TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAISE* 493-500 (2d ed. 1951); H. MAZEAUD, L. MAZEAUD, J. MAZEAUD & F. CHABAS, in 1 *LECONS DE DROIT CIVIL, LES OBLIGATIONS* 655-76 (1986); A. WEILL & F. TERRÉ, *DROIT CIVIL, LES OBLIGATIONS* 752 (4th ed. 1986); P. LE TOURNEAU, *LA RESPONSABILITÉ CIVILE* 254 (3d ed. 1982); Chabas, *Fait ou Faute de la Victime?* 1973 D. Chron. XXIX 40; Lambert-Faire, *Aspects Juridiques, Moraux et Economiques de l'Indemnisation des Victimes Fautives*, 1982 D. Chron. 207.

64. While *stare decisis* cannot be considered as an applicable doctrine in civil jurisdictions, there is a similar doctrine which is recognized and called *jurisprudence constante*.

There are three major distinctions between the doctrines, however. First, a single decision creates a sufficient foundation for *stare decisis*, while a series of adjudicated cases all on point and all in accord is the requisite predicate for the recognition of *jurisprudence constante*. Second, case law in civil jurisdictions is merely law *de facto*, while under common law, it is the law *de jure* as well. Finally, under common law, *stare decisis* is a requirement, while in civil theory, when a court is truly convinced of prior judicial error, a court may derogate from the application of the legislative intent. Comment, *Stare Decisis in Louisiana*, 7 TUL. L. REV. 100, 103 (1932-1933); see also Daggett, Dainow, Hébert & McMahon, *A Reappraisal Appraised: A*

ligence which can be characterized as *force majeure* will exonerate the guardian of an instrumentality from liability for the damage which it causes.⁶⁵ After investigating the facts, those judges held that the two acts of contributory negligence on the part of the plaintiffs did in fact create a situation which was unforeseeable, unavoidable, and beyond the control of the driver defendant, thereby meeting the test for the defendant's application of *force majeure*.⁶⁶ The court of appeals reversed the holding, however, finding the driver fully liable.⁶⁷ That court, after re-examining the facts, found that four lanes of traffic were available to the driver of the automobile, and that the victims' conduct did not amount to *force majeure* so as to break the chain of causation.⁶⁸ The *Desmares* decision merely strengthened the position that when an action is brought under article 1384 section 1, the fault of a victim will exonerate a driver from complete liability in the absence of *force majeure*.⁶⁹ In affirming the decision of the court of appeals, the Court of Cassation recognized that the law imposed no duty in such a situation for judges to address the issue of partial exoneration of the automobile's driver due to the pedestrian's negligence.⁷⁰

In subsequent months the Second Civil Chamber of the Court of Cassation frequently reaffirmed the essentials of the *Desmares* decision, although with some refinements.⁷¹ According to the jurisprudence of that chamber, the holding in *Desmares* was not limited to automobile accidents but was applicable to *tout dommage provoqué par le fait d'une chose* — the entire realm of article 1384 section 1.⁷² Thus, the refusal of a court to apportion liability based on the negligence of a victim was not only inapplicable to motorists and cyclists, but the statute also did not apply to passengers, conductors and bystanders of many kinds. Finally, those persons found liable under this

Brief for the Civil Law of Louisiana, 12 TUL. L. REV. 12, 17 (1937); Tate, *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673, 678 (1970).

65. Judgment of Feb. 13, 1930, Cass. ch. réun., Fr., 1930 D.P. I 57, note Esmein; 1930 S. Jur. I 121.

66. Judgment of Feb. 13, 1930, Cass. ch. réun., Fr., 1930 D.P. I 57.

67. *Id.*

68. *Id.*

69. Viney, *supra* note 3, at No. 3155, para. 12.

70. Judgment of July 21, 1982, Cass. civ. 2e, Fr., 1982 D.S. Jur. II 449, *rapport* Charbonnier, note Larroumet; 1982 J.C.P. II No. 19861, note Chabas; Durry, *supra* note 60, at 606-07.

71. Judgment of Oct. 14, 1982, Cass. civ. 2e, Fr., 1982 G.P. II 597; Judgment of Oct. 27, 1982, Cass. civ. 2e, Fr., 1984 J.C.P. II 20162, note Chabas; Judgment of Jan. 25, 1984, Cass. civ. 2e, Fr., 1984 J.C.P. IV 113; Judgment of Feb. 1, 1984, Cass. civ. 2e, Fr., 1984 J.C.P. IV 113.

72. Judgment of Mar. 10, 1983, Cass. civ. 2e, Fr., 76 Bull. Civ. II 51.

provision would be responsible not only for the inanimate objects under their control, but also for their animals.⁷³ The Second Chamber however, carefully avoided touching on the issue of liability for personal acts (*responsabilité du fait personnel*, article 1382). That court continued to recognize that a defendant might be partially exonerated from liability in the face of a victim's fault, when the action was brought under article 1382.⁷⁴ When an action was couched in articles 1382 and 1384 section 1 concurrently, the court held that a refusal to apportion liability must prevail.⁷⁵ The court also adopted an anti-expansionist position in the face of efforts to soften the definitions of *imprévisible* and *irrésistible*, as portions of the defense known as *force majeure*.⁷⁶

With regard to other formations in the high court, neither the First nor the Third Civil Chambers seemed to take a definitive stance on the subject of partial exoneration of a guardian responsible under 1384 section 1, due to the contributory fault of the victim. On two occasions, however, the Criminal Chamber of the high court, when faced with a finding of a victim's slight negligence (*légère inattention*), struck down lower court rulings which had admitted the apportionment of liability.⁷⁷ Although the interpretation of these cases is somewhat delicate, it is possible to see some sympathy on the part of the Criminal Chamber with the Second Civil Chamber's *Desmares* decision.⁷⁸

Until May of 1984, the courts of appeal were fairly well in accord with the *Desmares* decision. The courts of the first instance, however, were strongly divided.⁷⁹ This division, together with the doctrinal tempest which it engendered,⁸⁰ caused the president of the Court of Cassation to raise the issue of partial exoneration of a defendant due to a victim's contributory negligence. On May 9, 1984, the president of the court submitted to the Assemblée Plénière five cases for review,

73. Judgment of Jan. 18, 1984, Cass. civ. 2e, Fr., 1984 J.C.P. IV 96.

74. 1982 G.P. Somm. 317, note Chabas.

75. Judgment of Dec. 8, 1982, Cass. civ. 2e, Fr., 1984 J.C.P. IV 69.

76. In several decisions the high court censured lower courts' efforts to enlarge the characteristics of "unforeseeable" and "irresistible," as they were applied to the fault of the victim. Viney, *supra* note 3, at No. 3155.

77. Judgment of Jan. 25, 1983, Cass. crim., Fr., 1983 J.C.P. IV 113.

78. Judgment of June 14, 1983, Cass. crim., Fr., 1983 J.C.P. IV 269.

79. Judgments of Dec. 9 & 15, 1982, Cours d'appel de Paris, 1982 D.S. Jur. 153, note Larroumet; Judgment of Jan. 5, 1983, Cours d'appel de Paris, 1983 D.S. Jur. 183, 184, note Larroumet.

80. Viney, *supra* note 3, at No. 3155, para. 7-8.

each of which in some way addressed that issue and which required a uniform judicial touch.⁸¹

In the first of those decisions,⁸² Eric Gabillet, a three-year old child, fell from a wooden plank suspended between two objects, and injured his friend Phillipe Noye with the stick which he held in his hand. Phillipe's parents, acting as legal administrators for their son, brought an action against Eric's parents, alleging that they had failed in the exercise of their duty to oversee their child (*droit de garde*), and that the injury to their son was the proximate result. Their action was couched in article 1384.⁸³ The court of first instance found Eric himself liable for injuries caused by an instrumentality under his control, on a foundation of liability established in article 1384. The presumption of liability found in 1384⁸⁴ resulted in the attachment of liability to Eric's parents. On appeal they argued that the imputation of liability presupposes the capacity to discern the consequences of one's actions, and that article 1384 was improperly applied to the actions of their son. In May of 1984, the Court of Cassation rejected that argument, and found that liability had properly been assigned to the child, even though the lower court failed to make specific findings as to the child's capacity of discernment. Fault sufficient to impose liability on a child under article 1384, with rebounding liability on his parents, was thus found in the absence of a specific finding as to discernment.⁸⁵

In the second decision of May 9, 1984,⁸⁶ a child of seven fired an arrow which struck his friend. An action was brought by the parents of the injured child against the parents of the actor, again under article 1384. The Court of Cassation, having found liability on the part of the child based upon article 1384, had no difficulty translating that liability to the parents. While there was no specific finding as to "fault" of the child, in the traditional meaning of that term, the court did recognize that an act which was "objectively wrong" (*objective-fautive*)⁸⁷ would suffice to entrain the father's liability under article 1384 section 4.

Neither of these decisions should be interpreted to mean that liability of children of tender years is now definitively established. This

81. *Id.*

82. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 529.

83. For details as to the role of article 1384 § 4, see *infra* text accompanying notes 93-96.

84. See *infra* text accompanying note 94.

85. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 529.

86. *Id.*

87. *Id.*

continues to be an area of disparate application.⁸⁸ The decisions are both significant, however, for the developing legal norms which they reflect. Although the *Gabillet* and *Fullenwarth* decisions only addressed the narrow issue of a child as the guardian of an instrumentality, they may be read as the "first fruits" of the long-planted seeds of risk allocation for injuries caused by children. Indeed they represent nothing less than a philosophical acceptance of a child's liability for his or her personal acts.

4. The presumption of fault as applied to those with diminished capacity: The *Trichard* decision and article 489-2

The issue of whether liability can be imposed on the author of an injury in the absence of his or her capacity should first be examined from the perspective of articles 1382 and 1383 of the Civil Code. Prior to the legislative upheavals of 1968,⁸⁹ the jurisprudential treatment of this issue was clear: fault presupposed a discerning will, and a person devoid of capacity, for whatever reason, could not be held liable under those provisions.⁹⁰ From a practical standpoint, this approach caused great hardship to the penurious victim, especially when the person objectively responsible was in possession of large sums of money. French jurisprudence tempered that notion by finding fault in the person or persons responsible for the surveillance of the author of the damage (article 1384 section 4). If damages were inflicted through the aid of an instrumentality, the courts could also employ article 1384 section 1 to redress the injury. Indeed, courts largely recognized *Jand'heur's* "presumption of liability" as a societal acceptance of the theory of objective liability based not on fault, but rather on risk.⁹¹

Initially, the Court of Cassation affirmed the presumption that liability predicated on article 1384 section 1 required a finding of subjective fault. Usage, power and direction have been recognized as the essential characteristics of a guardianship over an instrumentality, and those require a modicum of discernment. It was therefore justifiable to negate the presumption of discernment found in article 1384 section 1 with regard to an individual who lacks capacity at the mo-

88. Warembourg-Augue, *Irresponsabilité ou Responsabilité Civile de L'Enfant*, 81 REV. TRIM. DR. CIV., 329 (Apr.-June 1982).

89. Law of Jan. 3, 1968, No. 68-5, C. CIV. art. 489-2 (Fr.), 1968 J.C.P. III No. 33756.

90. Judgment of Oct. 21, 1901, Cass. Req., Fr., 1902 D.P. I 524, 525, *rapport Letellier*.

91. 1 M. DE JUGLART, *supra* note 1, at 262-63, para. 555.

ment that he or she injures a victim.⁹² There was a resistance to that approach, however, both in doctrine and in jurisprudence.⁹³ Beyond the practical problems which have already been mentioned, the requirement of an ability to discern is nowhere mentioned in the Code as a characteristic of a guardian. The person with a reduced capacity who drives an automobile has the usage, direction and control which are enumerated in the provision as the essential elements of guardianship of the instrumentality. That person has the power of control over that instrumentality, and it is statutorily of little import that he or she fails to understand the consequences which might result from certain acts.⁹⁴

In 1956, Mr. Trichard was involved in an automobile accident while in the process of overtaking the plaintiff, Mr. Piccino, on the highway. The plaintiff brought both civil and penal actions against Mr. Trichard.⁹⁵ The defendant was found not guilty in the penal action, due to the fact that at the moment the injury occurred, he was having an epileptic fit. He was thus found to be mentally incapable of harboring the requisite intent under the operative article of the penal code.⁹⁶ In the civil action, however, it was held that the impairment of Mr. Trichard's mental faculties was not an event which might be characterized as a "*cause étrangère*", that is, beyond the control of the custodian of the instrumentality, so as to break the chain of causation and relieve him from liability.⁹⁷ The findings of the court in the penal action thus had no bearing on the civil finding of liability under 1384 section 1. Although subsequent legislation has diminished the *Trichard* decision of much persuasive authority,⁹⁸ the case is still relevant for its historical and theoretical significance. The *Trichard* court accepted the proposition that the guardian of an instrumentality may be found liable under article 1384 section 1 even though completely unconscious of his or her acts.⁹⁹ Such a recognition on the part of the nation's highest court opened the door to claims against many other persons who, for one reason or another, had been previously consid-

92. Judgment of Apr. 28, 1974, Cass. civ. 1re, Fr., 1947 Recueil Dalloz, *Jurisprudence* [D. Jur.] 329, 330, note Lalou; 1947 J.C.P. II No. 3601, 1947 G.P. I 279.

93. Judgment of Apr. 28, 1947, Cass. civ. 1re, Fr., 1947 D. Jur. 329, 331, note Lalou.

94. Judgment of Dec. 18, 1964, Cass. civ. 2e, Fr., 1965 G.P. I 202; 1965 D.S. Jur. 191, *concl.* Schmelck; 1965 J.C.P. II 14304, note Batie.

95. Judgment of Dec. 18, 1964, Cass. civ. 2e, Fr., 1965 D.S. Jur. 191, 193, note Esmein.

96. *Id.*

97. *Id.* at 191, *concl.* Schmelck.

98. 1984 D.S. Jur. 525, 527.

99. Judgment of Dec. 18, 1964, Cass. civ. 2e, Fr., 1965 D.S. Jur. 191, 193 note Esmein.

ered legally immune to actions due to their legally recognized incapacities, such as children and the mentally handicapped.

Specifically rejecting prior jurisprudence on the foundations of liability under article 1384 section 1, the Court of Cassation made two enduring propositions in the *Trichard* decision. First, an epileptic seizure which affects the driver of an automobile while in the course of driving does not affect the nature of his or her guardianship. Second, a guardian's loss of capacity is not a "foreign causation" (*cause étrangère*) which will operate to exonerate him from liability.¹⁰⁰ The rule in *Trichard* was followed in subsequent decisions of the highest court. In a 1967 decision, the Court of Cassation held that deficiencies in intellectual capacity or "psychological disequilibrium" do not constitute a sufficient foreign causation to exonerate a guardian from liability.¹⁰¹ In addition, the court found that a person who has the power over the direction, use and control of an instrumentality remains its guardian, even when he or she is not in a position to properly exercise those powers.¹⁰² By failing to require that a guardian discern the consequences of his actions, the new jurisprudence renders moot those arguments which had been used to negate liability under 1384 section 1, in the absence of delictual fault.¹⁰³

A recent addition to the civil code, article 489-2 codifies *Trichard* and its progeny, by providing that "he who has caused an injury to another will be liable in damages therefore, even though at the time under a mental incapacity."¹⁰⁴ It was unclear at the time of its passage whether or not that provision was intended to speak solely to the needs of victims of mentally-incapacitated adults, or whether it was intended to exert theoretical influence on the rules applicable to liability for personal acts, as codified in articles 1382 and 1383. Under the first hypothesis, the impact of the new text on existing law would have remained limited. Under the second, it would have affected a complete reform in the notions of psychological imputability as an element of civil fault. Ten years of jurisprudence and further

100. *Id.* at 191, *concl.* Schmelck. In truth, only this second proposition was clearly established in the Court of Cassation. The first, only implicitly recognized in the actual decision, was so well set out in written and oral arguments that subsequent doctrine considers that the Court of Cassation adopted it, clearly breaking with prior jurisprudence. 62 REV. TRIM. DR. CIV., 345, 351 (1965).

101. Judgment of Mar. 1, 1967, Cass. civ. 2e, Fr., 1967 Bull. Civ. II No. 96; *cf.* Durry, *Responsabilité Civile*, 65 REV. TRIM. DR. CIV. 828 (1967).

102. *Id.*

103. See *supra* notes 91-92 and accompanying text.

104. Law of Jan. 3, 1968, No. 68-5, C. CIV. art. 489-2 (Fr.), 1968 J.C.P. III No. 33756.

development in the theory of risk socialization clearly indicate that the latter approach has controlled the question.¹⁰⁵ The significance of article 489-2 lies in the power it exerts over the concepts of imputability in all realms of injury.

Yet new article 489-2, for all of its theoretical impact on notions of risk socialization, does not address many of the questions raised when considering injury caused by a person lacking mental capacity. Specifically, the provision only speaks to the liability of mentally-handicapped adults. What of the imposition of liability on other classes of persons, traditionally incapable of harboring the requisite delictual intent? That legislation clearly fails to guide a judge considering the issue of a very young child's liability for personal acts, or for injuries caused by an instrumentality within the child's control.¹⁰⁶ Nor does article 489-2 lend itself to application in those situations where the author of an injury happens to be a mentally-incapacitated minor. As courts have been loath to expand application beyond the parameters of the statute, mentally-handicapped children have so far escaped liability by analogy.

It is clear that the legislative reform of 1968, due to the lacunae in its sphere of application, has not voided the *Trichard* decision of continuing philosophical interest and jurisprudential application. A victim who makes a claim under article 489-2 must prove all of the elements of *faute*, with the exception of imputability. In like manner, that element has also been disposed of when the conditions for the application of 1384 section 1 have been met.¹⁰⁷ *Trichard* is interesting because it clearly distinguishes between liability founded on article 1382 and 1384 section 1. When an action is brought under article 1382, the plaintiff must prove that the injury was caused by the actual fault of the defendant. Under article 1384 section 1, the plaintiff need only prove that the injury was caused by an instrumentality which

105. Barbieri, *supra* note 8, at No. 3057, paras. 2-3.

106. Judgment of Nov. 23, 1972, Cass. civ. 2e, Fr., 1973 J.C.P. IV No. 183391, *note* Wibault. Several decisions have held that the child who has not reached the age of discernment may not be held liable as a guardian. Durry, *Responsabilité Civile*, 77 REV. TRIM. DR. CIV. 652, 653 (1978).

107. J. CARBONNIER, LES OBLIGATIONS, in IV DROIT CIVIL 425-34 § 110 (1979). The presumption of liability found in article 1384 § 1 attaches to the guardian of an instrumentality which has caused an injury to another, even though no fault can be established on his or her part, or if the cause of the injury is unknown. That presumption of liability will withstand all refutation with the exception of *force majeure*, or of a foreign causation which is not imputable to the guardian. *Id.* at 430; *see also* Judgment of Dec. 18, 1964, Cass. civ. 2e, Fr., 1965 D.S. Chron. 191, 192, *concl.* Schmelck; 1965 G.P. I 202; 1965 J.C.P. II No. 14303, *note* Batie.

was under the "guardianship" of the defendant.¹⁰⁸ Proof of classical fault is not necessary. The significance of article 489-2 is that it has effectively created inroads on an action in liability for personal acts, which has been traditionally predicated on article 1382. By substantially weakening the element of imputability as applied to certain types of defendants, it begins to mirror an action against the guardian of an instrumentality under article 1384 section 1.

The causes of action which are derived from 1384 section 1 and 1382, although pursuing the same goal, proceed from distinct juridical perspectives. Due to their unique points of departure, it has been held that the failure of a cause of action under article 1382, even in the form of a binding judgment, will not necessarily preclude a claim based on article 1384 section 1.¹⁰⁹ In its analysis of these distinct causes of action, the Court of Cassation has ruled that if a plaintiff brings an action ground in article 1382 only, the judge who fails to find fault on the part of the defendant may not raise *sui spondit* a cause of action based on article 1384 section 1.¹¹⁰ The legislature rejected such a formalistic approach when it drafted article 12 of the New Code of Civil Procedure. Clauses three and four of that article provide that the judge has the power to raise *sui spondit* those causes of action (*moyens de pur droit*), thereby changing the grounds for relief which were set out in the statement of claim, even though without the expressed wishes of the parties.¹¹¹

5. Fault and diminished capacity in recent case law

In three other decisions rendered on 9 May 1984,¹¹² the Assemblée Plénière indicated that a judge may find contributory "fault" on the part of infants who are accident victims, without first verifying that those minors were capable of discerning the consequences of their actions. Such findings, together with other recent developments in risk socialization, lead ineluctably to the conclusion that a child may be held liable for his or her acts under article 1382, in the ab-

108. Judgment of Dec. 18, 1964, Cass. civ. 2e, Fr., 1965 D.S. Jur. 191.

109. Judgment of May 14, 1935, Cass. civ., Fr., 1946 J.C.P. II 3178, note Houin.

110. *Id.*

111. The Conseil d'Etat rendered paragraph three of article 12 a dead letter as it affects the deliberations of the administrative courts. Judgment of Oct. 12, 1979, Conseil d'Etat, Fr., 1979 D.S. Jur. 606, 607, note Bénabent; 1980 J.C.P. II No. 19288, *concl.* Franc, note Boré; 1980 G.P. I 6, note Julien. Although that decision only affects claims in the administrative tribunals, it does weaken substantially the philosophical underpinnings of that legislation.

112. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 528; Judgment of May 9, 1984, *id.*; Judgment of May 9, 1984, Cass. ass. plén., Fr., *id.* at 529-30.

sence of a finding of discernment. These cases are significant in that they represent the first successful assault upon the citadel of classical notions of fault as set down in article 1382 of the Civil Code.¹¹³

In the first of these three decisions,¹¹⁴ a girl of five attempted to cross a street in a cross walk, before watching for traffic. Upon seeing a speeding car, she tried to return to the curb. Her efforts were too late, and she was killed. In the penal courts the driver of the automobile was found guilty of involuntary homicide.¹¹⁵ As for civil penalties, his insurance company obtained a reduction of damages, based on the contributory negligence of the victim. When the parents filed a claim against the insurance company, a legal journey of eight years ensued. Finally, in May of 1984, the Assemblée Plénière of the Court of Cassation rejected their appeal, holding that the court of appeals had properly apportioned damages, due to the contributory fault of the child.¹¹⁶ The court records in the first and second instances, however, fail to reflect that either tribunal investigated the deceased child's capacity to understand her actions.

In the second case,¹¹⁷ the Assemblée Plénière addressed the legal issues surrounding the death of a thirteen-year-old child who was electrocuted while installing a lightbulb. The electrician, hailed before the penal courts, was found guilty of involuntary homicide. In the civil action, however, the defendant electrician sought partial exoneration based on the negligence of the child for failing to cut the current prior to commencing work. The judges in the first instance granted the electrician's request for partial exoneration. The Court of Cassation affirmed.¹¹⁸ Again, there were no specific findings of fact as to the deceased child's capacity of discernment in either of the proceedings in the first or second instance.

In the last decision,¹¹⁹ a nine-year-old child, together with his parents, was found liable for the damages caused by the child's incineration of a truck. The plaintiff's claim for relief was based upon article 1382 of the civil code, and on article 435 of the penal code.¹²⁰

113. 1984 J.C.P. II 20921, *rapport* Fedou; Viney, *supra* note 3, at No. 3155, paras. 7-8; 1984 D.S. Jur. II 525, 526.

114. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 528.

115. *Id.*

116. *Id.*

117. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 529-30.

118. *Id.*

119. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 528.

120. Law of Feb. 2, 1981, No. 81-82, C. civ. art. 435 (Fr.) provides:

Although the court recognized the general principle that a minor is not responsible for his or her penal infractions,¹²¹ the provision of the penal code relied upon by the plaintiff supposed that the person objectively responsible acted with understanding, or willfully (*avec intelligence ou volente*). The Court of Cassation refused to re-examine the findings of fact in the first instance; that the child's acts had been "willful."¹²² That level of awareness, sufficient to establish liability under article 435 of the penal code, resulted in the attachment of article 1382 on the issue of civil damages.¹²³ That finding of willfulness on the part of the child was supported by evidence that he had previously stolen the keys to the truck.

Prior to the *Djouab* decision, the courts had consistently followed a 1977 decision which rejected the assertion of liability on a child who set fire to a hay stack which eventually caused destruction of an entire farm.¹²⁴ Although some claim that the 1977 decision is still good law on its facts, the *Djouab* decision makes it impossible to say with any degree of confidence that the Assemblée Plénière of the Court of Cassation will look beyond mere objective fault of a child or of a child victim when an action is grounded in article 1382. The reader only slightly versed in the subtleties of French delictual liability might think that these three decisions of the Assemblée Plénière brought to a close the experiences inaugurated by *Desmares*, by definitively adopting the solution which had been used prior to that decision. It should be recognized, however, that the decisions of the Assemblée Plénière addressed the issue of liability as invoked under article 1382. It may be argued, therefore, that the ruling in *Desmares*, being an action couched in article 1384 section 1, emerges from the decisions of 9 May 1984 unscathed.¹²⁵ One can only wonder why, given the simi-

Whoever shall have voluntarily destroyed or damaged the personal or real property belonging to another through the use of an explosive or incendiary substance, or by any other method which by its nature endangers the safety of others, shall be punished by imprisonment for five to ten years and a fine of not less than five thousand nor more than two hundred thousand francs.

1981 J.C.P. III No. 50907.

121. That general principle is derived from article 64 of the Penal Code, which provides that "il n'y a ni crime, ni délict, lorsque le prévenu était en état de demence au temps de l'action." (There is neither crime nor delict when the accused was in a state of dementia at the moment of the action.) CODE PENAL art. 64 (Fr.), 1981 D.S. Chron. 295.

122. Judgment of May 9, 1984, Cass. ass. plén., Fr., 1984 D.S. Jur. 528.

123. *Id.*

124. Judgment of Dec. 7, 1977, Cass. civ. 2e, Fr., 1978 D.S. *Informations Rapides* 205; 1978 J.C.P. IV 46; 1980 J.C.P. II No. 19339, note Wibault; Barbieri, *supra* note 8, at 3057, para. 10.

125. Viney, *supra* note 3, at 3155, para.1.

larity of the fact situations, the courts were able to reach such divergent results. Indeed, the coexistence of several regimes for the determination of liability poses a problem of logical coherence, with some jurisdictions recognizing the propriety of apportioning responsibility when there is fault on the part of the victim, while other jurisdictions reject such a division.¹²⁶ The distinctions between liability founded on article 1382 and 1384 section 1 are logically untenable, and provoke careful reflection on the legal foundations of each purported solution.

C. 1384 Section 4—Liability Of Guardian

The father and the mother, insofar as they exercise their obligation as guardian, will be jointly liable for the injury which is caused by their minor children which live with them.¹²⁷

The recent legal developments wherein liability has been visited on children and other persons "*dépourvu de capacité*" exert a wider influence than merely upon the lives of children and the mentally-handicapped. There are certain instances in French law where liability attaches to third parties merely by virtue of the fact that liability has been found in another. Such a clause is article 1384 section 4 of the Civil Code. That clause, after enumerating the persons who will be responsible for the acts of another, makes clear that for certain persons, (especially parents, guardians, and artisans), a presumption of liability will lie. In French law, a father's liability for the injuries caused by his cohabiting minor flows from his obligation to watch over and direct that child.¹²⁸ In order to give probative value to the presumption of fault found in this provision, that is, that a parent is presumed to have committed a fault when his or her child causes damage to a third person, the legislature linked the provision to the guardianship provisions (*droit de garde*) which have traditionally attached to the mother and the father.¹²⁹

126. *Id.*

127. Law of June 4, 1970, No. 70-459, C. CIV. art. 1384 § 4, 1970 J.C.P. III No. 36698.

128. *Id.*

129. If an act committed by one person which causes injury to another person is to be recognized as the *faute* of yet a third person who did not commit the act, it is clearly necessary that the liable party have had the possibility of stopping the act of the first. G. VINEY, *supra* note 24, at 965 § 872. It will thus also be necessary to prove an act or an omission committed by the parents of not preventing the child's injurious act. This presumption of surveillance or *garde* lasts until the child reaches eighteen years of age. *Id.* at § 873. Emancipation of the child prior to that time, however, negates that presumption. There must also be a *lien de filiation* between the author of the injury and the person called upon to respond in damages.

Although in such a situation the law presumes the father's liability, that presumption may be refuted by demonstrating that the father acted in a reasonably prudent manner, and would not have been in a position to prevent the child's injurious act. A father will not be liable for negligent entrustment of an instrumentality to the control of the child, unless it was foreseeable, due to either the instrumentality or the inexperience of the child, that an injury would occur by virtue of such entrustment.¹³⁰ The presumption of liability which is found in article 1384 section 4 requires that the injury be caused by the child. Until recently, a much more difficult question was whether or not the child's act must constitute a *faute* in the classical sense. Traditionally, there was a belief that the act must have been at least unusual (*anormal*).¹³¹ Although many decisions addressing this issue have been careful to require a showing of true fault on the part of the child, the modern trend is definitely away from that stance.¹³² For example, there are a certain number of decisions by the Court of Cassation which deem it sufficient that the act of the child be "objectively wrong" (*objectivement illicite*).¹³³ Although liability predicated on article 1384 section 1 invokes the legal fiction that the child or instrumentality within the child's possession remains within the custody (*garde*) of the parents, it is also clear that a minor may be found personally liable as a guardian of objects in his possession, such as a bicycle, gun or dog, provided that he or she has attained the "age of reason."¹³⁴ In the event of such an occurrence, he or she will be personally liable based on article 1384 section 1 or 1385, without the plaintiff having to prove actual fault on his or her part. However, as such children are normally insolvent, a victim will often prefer to

Id. at § 874. Article 1384 establishes another requisite to parental liability for the act of a child, which is cohabitation. The infant must live with the parent at the moment that the injury is committed. It is clear, however, that the jurisprudence on this point is expanding the notion of cohabitation to include grandparents and other third persons. As this *communauté habituelle* expands, it is also becoming increasingly clear that the nature of the household will not be broken by a few hours or even days of absence or displacement. *Id.* at 968-69, § 876.

130. Judgment of Oct. 12, 1955, Cass. civ. 2e, Fr., 1956 D.S. Chron. 301; 1955 J.C.P. II No. 9003.

131. By way of comparison with other civil law jurisdictions in germanic law, and in socialist countries, the act must be illicit, which requires more than just abnormal behavior. G. VINEY, *supra* note 24, at 965, § 874.

132. Boré, *La Responsabilité des Parents Pour le Fait des Choses, ou des Animaux Dont Leur Enfant Mineur a la Garde*, 1968 J.C.P. I No. 2180, paras. 9-12.

133. Durry, *Responsabilité Civile*, 73 REV. TRIM. DR. CIV. 306, 311 (1975); 1978 J.C.P. II No. 18793, note Batie.

134. G. VINEY, *supra* note 24, at 972, § 878.

move against the parents under article 1384 section 4. The question then raised is whether it will be sufficient for the claimant to prove merely "*le fait d'une chose*", and rely on the imposition of liability by mere fact of the instrumentality, or whether the higher standard of *faute* on the part of the child must be established. The Second Civil Chamber of the Court of Cassation ruled in 1966 that parents will be liable even though actual fault on the part of the child has not been established.¹³⁵ Further precision is required. What standard of care should be exacted from a child "*privé de discernement*", that is, lacking the mental capacity to understand the consequences of his or her acts in order for liability to attach? It has been demonstrated that, traditionally, a person unable to appreciate the probable results of his or her actions could not be held liable based on a theory of pure fault. Such a standard approach has also been employed when addressing the problems of injuries caused by young children who have not yet attained the "age of reason."¹³⁶ Yet before and after the 1966 decision mentioned above, there have been other decisions which have held parents liable under article 1384, if the act was "objectively wrong."¹³⁷ That theory also applies to injuries caused by mentally-handicapped children.¹³⁸

In 1966 the Second Civil Chamber of the Court of Cassation ruled that the liability of a father under article 1384 section 4 presupposes that the liability of the child has already been established.¹³⁹ The language of that 1966 decision indicates that as long as the child's liability has been proved, the court will not concern itself with the grounds upon which such liability was predicated. The parents' liability under article 1384 section 4 will lie. Further, liability grounded under articles 489-2 or 1384 section 1 will suffice to invoke the liability of the parents under 1384 section 4.¹⁴⁰ These changes reveal that by a purely spontaneous evolution, the jurisprudence of France has joined forces with the germanic and socialist jurisdictions which apply the presumption of fault to those legally responsible for the care of

135. Judgment of Feb. 10, 1966, Cass. civ. 2e, Fr., 1966 Recueil Dalloz Sirey, *Sommaires* [D.S. Somm.] 332. "*Attendu, en effet que si la responsabilité du père suppose que celle de l'enfant a été établie, la loi ne distingue pas entre les causes qui ont pu donner naissance à la responsabilité de l'enfant.*" *Id.* at 335; 1968 J.C.P. II No. 15506.

136. Boré, *supra* note 132, at 2180, para. 2; G. VINEY, *supra* note 24, at 974, § 880.

137. Durry, *supra* note 133, at 311; G. VINEY, *supra* note 24, at 971-72, § 877.

138. G. VINEY, *supra* note 24, at 972, § 877.

139. Judgment of Feb. 10, 1966, Cass. civ. 2e, Fr., 1966 D.S. Somm. 332, 335; 1968 J.C.P. II 15506.

140. G. VINEY, *supra* note 24, at 975, § 880.

another person, whenever injury is attributable to an act or an omission which is "*anormal*" or "*illicit*", rather than requiring a showing of fault in the traditional sense.¹⁴¹

It would be incorrect, however, to think that each time the conditions required for the application of the presumption of 1384 section 4 are met that the father and the mother will necessarily be held accountable. The presumption is of limited effect. The foundation of the presumption is that when an infant has caused an injury, it is due to a fault in the surveillance on the part of the parents. This "fault" is largely one of improper education. In order for the parents to be released from this presumption they must carry the burden of proving either that there was no *faute* in the education of the child, in the surveillance of the child's activities, or by breaking the chain of legal causation according to the requirements of *force majeure*.¹⁴²

Contemporary jurisprudence tends to admit the cumulative nature of article 1384 section 4, that is, its compatibility with all other forms of liability, when the requisite elements have been met. For example, the Criminal Chamber of the Court of Cassation has said that when a child has been penally incriminated, civil actions can be brought against either the child under article 1382, or the parents under article 1384 section 4.¹⁴³ In most instances, however, the liaison is between articles 1384 section 4 and 1382 of the civil code. In that situation, the jurisprudence allows the victim to choose the most favorable path, and even the right to simultaneously invoke article 1384 section 4 against the parents and article 1382 against the child, which might result in a judgment *in solidum*.¹⁴⁴

When the conflict is between article 1384 section 4 and the application of articles 1384 section 1 and 1385 for an injury caused by an instrumentality or an animal, the victim may move directly against the parents, provided they were exercising the role of "guardian" of the instrumentality or the animal which caused the damage, employing article 1384 section 1, 1384 section 4 or 1385.¹⁴⁵ When the child himself was actually in charge of the object or animal, the victim may invoke the tests cumulatively in order to establish liability on the part

141. *Id.*

142. *Id.* at 984, § 890.

143. *Id.* That case recognized the fact that although a father would not be criminally liable for the criminal act of his son, that would not preclude a civil action against the father under article 1384 § 4. *Id.* at 984 n.137.

144. *Id.* at 984-85, § 891.

145. *Id.*

of the parents, without having to prove the fault of the minor. Often the parents can escape liability if the injury occurs at school while the child is under the control of the *instituteur* or *patron*.¹⁴⁶ If the act was sufficiently wrong, however, it might be attributed to a *faute d'éducation*, in which case the parents would themselves be inculpated.¹⁴⁷

The inconsistent jurisprudential application of article 1384 section 4 is reflected in the frequency with which parents escape liability under the "pretended fault" theory, on the grounds that they are nonetheless excellent parents.¹⁴⁸ In addition, the presumption of liability found in the article receives inconsistent application, depending upon whether a child is an adolescent or an infant. As a result, victims remain unsatisfied, and predictability of outcome is reduced to a fantasy.¹⁴⁹

III. THE LAW OF 5 JULY 1985

It is clear that article 1384, the legislative creation of another age, needed some adaption to exigencies of modern life. In fact, efforts to amend article 1384 to more ably address the needs of those injured in automobile accidents are as old as the automobile itself.¹⁵⁰ The necessity of change, having been recognized by judges and gradually implemented over the course of this century, has now given way to a legislative avalanche.¹⁵¹ It has been said that the law of 5 July 1985 characterizes the plight of man in Twentieth Century society, by replacing the first three lines of article 1384 section 1 with forty-eight new articles.¹⁵² The new law has effectively swept away the notions of *force majeure* and the intervening acts of a third person (*le fait d'un tiers*) which have traditionally acted to limit the liability of one objectively responsible for the injuries arising out of automobile accidents.

146. *Id.* at 985, § 891.

147. *Id.*

148. *Id.* at 986, § 892.

149. *Id.* at 986-87, § 892.

150. Initial legislative proposals on the subject were made as early as 1906. That proposed enactment would have added the following two paragraphs to article 1386:

The owner of a motor vehicle is, and without regard to his personal fault, liable for the damage caused by his vehicle.

The liability can be avoided only by clear proof of grave fault on the part of the victim. 6 BULLETIN DE LA SOCIÉTÉ D'ÉTUDES LEGISLATIVES 318 (1907).

151. *Cf.* Joliet, *Le System de Protection Juridictionnelle dans la C.E.E.*, 1985 D.S. Chron. 65.

152. Law of July 5, 1985, No. 85-667, 1985 J.C.P. III No. 57405.

According to the provisions of that law, no driver of a motor vehicle may invoke the act of a third person or *force majeure* to escape liability for an accident in which he was involved.¹⁵³ In addition to abrogating traditional notions of *force majeure* and *le fait d'un tiers*, the new statute has succeeded in relegating the notion of a victim's contributory fault as a mitigating factor, to the realm of the legal archivists. Here are some of its pertinent provisions.

The legislature has not defined the "age of reason" according to the readings of Tintin or Trebonian.¹⁵⁴ For the purposes of the act, the age of reason is located somewhere between sixteen and seventy years of age. The legislators have decided that if one is less than sixteen or more than seventy years of age, or has been certified as being more than eight per cent handicapped, then one may not be held liable for one's injuries absent a showing that the actor voluntarily assumed a grave personal risk (*dommage volontairement recherché*).¹⁵⁵ Such a burden of proof will be virtually impossible to sustain. A child, an old person, and a handicapped person are thereby legislatively irresponsible for their actions in the realm of automobile accidents. Absent proof that such persons willingly threw themselves in front of an automobile, they will be indemnified for one hundred per cent of their damages.¹⁵⁶

Persons between sixteen and seventy years of age, and less than eighty per cent incapacitated, will be indemnified in spite of their fault, unless a two-tiered burden of proof can be met. First, the act of the victim must have amounted to a *faute inexcusable*, and second, such *faute* must have been the exclusive cause of the injury.¹⁵⁷ The questions which such standards engender attend judicial resolution on a case by case basis. Is it inexcusable to cross a street against a traffic signal, or for a pedestrian or cyclist to cross a highway? Although the notion of "inexcusable fault" remains vague, development of the case law should provide some assistance for future actions. Yet even if such actions are defined to be inexcusable faults, a second hurdle must be cleared in order to avoid liability. That fault must also be found to be the exclusive cause of the accident. Thus, even if the driver of the

153. *Id.*

154. 1985 G.P. 452.

155. The legislators have succeeded in injecting into the judge's calculus the notion of "willingly seeking out injury." New interpretations and theories as to the extent of this notion will undoubtedly flourish. *Id.*

156. Law of July 5, 1985, No. 85-667, 1985 J.C.P. III No. 57405.

157. *Id.*

automobile is found to be speeding or in any slight way contributorily negligent, the pedestrian or cyclist who inexcusably crossed the street will be completely indemnified.

The driver of the automobile, however, no matter what his age, physical or mental status, will not benefit from the new law. He will continue to recover according to the rules established in *Desmares* and its progeny. Thus, the driver may not assert the contributory negligence of a victim when that victim sues him for damages, unless that contributory negligence was so gross as to constitute a *force majeure* and thereby shift the element of causation to the victims themselves. Yet under the new law, the fault committed by the driver will limit or exclude his indemnity for injuries he has personally sustained.¹⁵⁸ On the other hand, every victim who has committed a fault will enjoy complete indemnification.¹⁵⁹ With regard to *préjudice par ricochet*,¹⁶⁰ the damages of those "*ayant droit*"¹⁶¹ will also be indemnified, according to current legislation and jurisprudence.

The logical question to follow the creation of these new "rights" is "who is going to pay for all of this virtually unlimited recovery?" To that end, the statute provides that the bills will be paid by the insurer of the vehicle, but that the insurance company will have recourse against the insurer of other persons involved.¹⁶² It was intended that the increased financial burdens would fall upon the insurance companies, rather than the victims directly. In addition, a special fund known as the "*fonds de garantie*" will be established for the purpose of indemnifying those injured by unknown or uninsured tortfeasors.¹⁶³ The law of 5 July imposes serious penalties on insurance companies which fail to meet their obligations under the law. The company will have eight months to offer a payment to the

158. *Id.* at § I, art. 4.

159. Replacement prostheses, glasses and wheel chairs are exceptions. *Id.* at § I, art. 5.

160. When a person is injured, those who are close to him sustain, or may sustain, an indirect injury. This is known as *préjudice* or *dommage d'intérêts*, and that category is further subdivided into *dommage matériel* and *dommage moral*. *Dommage matériel* results notably in the cessation of assistance provided by the deceased, and might be called in English legal terms "loss of support." *Dommage moral* is the sadness which is caused by the loss of a loved one, and might be called "loss of affection" in English. For a detailed analysis of damages in France, see Catala & Weir, *supra* note 2, at 678-85.

161. This term, synonymous with the term *ayant cause*, refers to a person who has a legally secured right, by virtue of a familial relationship (ascendant, descendant or conjugal), or due to a communal relationship or economic dependency. R. GUILLEN & J. VINCENT, *supra* note 4, at 46.

162. Law of July 5, 1985, No. 85-667 § II, art. 8, 1985 J.C.P. III No. 57405.

163. *Id.* at § II, art. 9.

victims.¹⁶⁴

Who will gain from this change in regime? Perhaps the victim. Surely the social security system. This reform entrains not only a certain improvement in the indemnification of victims, but also a transfer of the cost of such indemnity. The law provides for increased indemnification for automobile accident victims, and the augmented disbursements will have to be financed one way or another, whether by the insurance companies, or the social security system. Although there was testimony by the Garde de Sceaux in hearings before the Assemblée Nationale that the ministry for economics and finance foresaw no increase in insurance rates,¹⁶⁵ such an appraisal would seem sanguine, if not a blink at reality. The rise in insurance rates, which is certain to result from the enhanced disbursements, creates a ripple effect throughout the economy, for as rates are raised, so does the percentage of non-compliance with mandatory insurance laws rise.¹⁶⁶ As the portion which remains uninsured will be financed by the social security system, those payments will be passed on to the taxpayer, directly or indirectly.

IV. CONCLUSION

The traditional French rule regarding the establishment of liability, in existence long before the codification of the Code Napoléon, is one of subjective fault. This *in concreto* standard requires an investigation by the finder of fact into the state of mind of the author of the injury.¹⁶⁷ The application of such a hard and fast rule resulted in the denial of remedy to those who had been injured by children, or mentally-handicapped tortfeasors, (considered by the law to be incapable of committing a "fault"), or in situations where the facts did not conclusively establish responsibility (*accidents anonymes*). The drastic increase in such "faultless accidents" inaugurated by the industrial revolution, led to a societal recognition that in certain situations liability should attach in spite of an inability to prove actual fault.¹⁶⁸ Thus a new basis for the assignment of liability was created, "*responsabilité pour la fait d'une chose*" (article 1384 section 1). This modest

164. *Id.* at § II, art. 12.

165. Bihr, *supra* note 11, at 63, 64.

166. Mandatory insurance laws were enacted in France on February 27, 1958. Law of Feb. 27, 1958, No. 58-208, 1958 Recueil Dalloz, *Legislation* 124.

167. Mazeaud, *La "faute objective" et la responsabilité sans faute*, 1985 D.S. Chron. 13.

168. Law of Jan. 3, 1968, No. 68-5, C. CIV. art. 489-2 (Fr.); 1968 J.C.P. III No. 33756; *cf.* Barbieri, *supra* note 8, at No. 3057.

acceptance of a theory of risk socialization sounded the death knell for the institution of pure fault — fault determined *in concreto*. As the notion of liability for *accidents anonymes* under article 1384 section 1 expanded, it also affected the way the courts considered liability under articles 1382 and 1384 section 4. In 1968 the legislature further diluted the subjective standard of fault, by enacting article 489-2¹⁶⁹ of the civil code, a provision which caused adults with diminished mental capacities to answer for their torts in the absence of a finding of true "fault." The victims of persons lacking requisite capacity did not go unnoticed by the courts as they addressed the claims of those injured by other persons "legally" immune to the attachment of traditional "fault," such as those too young to recognize the consequences of their actions. The most recent legislative nail in the coffin of subjective fault was the law of 5 July 1985,¹⁷⁰ which, by abrogating traditional defenses such as *force majeure* and independent acts of a third person (*fait d'un tiers*), has resulted in the adoption of a standard of strict liability in the realm of automobile accidents.

Society has historically dictated that each person pay his or her dues — all that is owed — and no more.¹⁷¹ Recent developments in the theory of risk allocation have not succeeded in expunging this "bronze law of liability"¹⁷² from the collective consciousness. Yet the modern world is one of vehicles and machines in motion. While in the past it was considered appropriate that each person bear the burdens for his or her negligent acts, the technical difficulties which attend contemporary efforts to assign liability, together with increasing reliance on insurance as a diffuser of risk, has resulted in the modification of our notions of what is a "reasonable burden." While traditionally there was no question as to the legal propriety of denying all or a portion of the plaintiff's recovery, due to his or her momentary lapse of judgment or negligence, evolving theories of risk allocation have caused a re-examination of those traditional policy considerations. Efforts to clearly define an act which results in the attachment of civil liability (*fait générateur de la responsabilité civile*) have been directed toward the discernment of actual fault (*faute délictuelle*) as set out in articles 1382 *et. seq* of the Civil Code. Yet as more and more occasions arise where the establishment of pure fault is simply impossible,

169. Law of Jan. 3, 1968, No. 68-5, C. civ. art. 489-2 (Fr.).

170. Law of July 5, 1985, No. 85-667, 1985 J.C.P. III No. 57405.

171. J. INST. 3 (J. Moyle 5th ed. 1912).

172. Judgment of July 21, 1982, Cass. civ. 2e, Fr., 1982 G.P. 391, *concl.* Charbonnier; 1982 J.C.P. II No. 19861.

we are called upon to make difficult value judgments. On one hand, should society permit a victim to be stranded without protection of any sort on the grounds that fault had not been established? At the other extreme, is society's role that of ensuring a victim's unlimited recovery in the absence of the author's proven fault? Indeed, the gradual merging of notions of fault and risk has resulted in the disappearance of pure fault as a requirement for the imposition of civil liability in France. As the employment of a pure fault test whereby civil liability attaches to the author of an injury has disappeared, so also have the traditional defenses to liability based on fault, such as *force majeure* and *le fait d'un tiers*, fallen into disuse.

It should be recognized that an objective standard of liability will in no way guaranty a uniformity of outcome. It is clear that many times it is difficult to differentiate between the objective and subjective test when assigning liability. For example, should the act of a person of diminished mental capacity be compared to that of a similarly impaired person living in the same community? Should a child of tender years be measured against the actions of another infant of comparable age and experience? Certainly not. As these persons are exempt from liability grounded in "fault," their liability, if any, must be based upon comparisons with normal, sensible citizens. They will be considered to have committed a fault when a person of normal sensibilities would not have acted in the same way. This is exactly what the French Legislature accomplished in the area of liability of mentally-handicapped adults (*déments*) in 1968, and what the courts have done to children in the Nineteen Eighties.¹⁷³

Many years ago, Professor Carbonnier foresaw the day when society itself would mend all of its misfortunes. No such reforms come without cost, however. He predicted that on that day of universal recovery, indemnity would be provided, not through insurance, but rather by society at large, through taxes. It is far too early to predict whether the benefits of increased and easier recoveries will outweigh the augmented financial burdens which are certain to result. If one were to hazard an opinion, however, it might be predicted that today's remnant pretorian notions of fault, in statute and jurisprudence, will soon be relegated to historical footnote, and that Carbonnier will have accurately predicted the demise of *Delict*, a victim of its own hypertrophy.¹⁷⁴

173. 1982 J.C.P. II No. 19861, note Chabas.

174. J. CARBONNIER, *supra* note 107, at 448-55.