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Comparative Remarks on Liability for One's Own Acts

FRANCO FERRARI*

I. SINGLE-RULE APPROACH AND PLURALISM

A. History

As all recognize, committing harm has led to responsibility from the earliest of times.¹ But only Roman law succeeded in expressing a comprehensive theory of civil liability.² This liability, although quite different from modern civil liability,³ presents some characteristics also found in modern legal systems. In fact, in Roman law, as in some contemporary systems, liability is often cloaked in the guise of special remedies.⁴

In classical Roman law, only a finite number of well-defined cases created tortious liability, i.e., were considered *delicta*.⁵ The

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1. FERDINAND F. STONE, 12 LOUISIANA CIVIL LAW TREATISE, TORT DOCTRINE 1 (1977) ("[even t]he Codes of Hammurabi and Moses are replete with provisions for retribution, compensation or vengeance.")

2. R.W. LEE, AN INTRODUCTION TO ROMAN DUTCH LAW 268 (1915).

The Roman law of delict, derived from the [Twelve] Tables and from a still more primitive customary law, came in time . . . to express a very complete theory of civil liability. A few simple principles covered the whole ground, and, adopted in modern codes, have been found sufficient to provide for the complexities of modern life.

Id.

3. The Roman law of torts, at least at the very beginning, characterized delict as a penal action. Thus, in principle, the action died with the wrongdoer. STONE, *supra* note 1, at 4. Only "in process of time the distinction between public and private offenses became more and more developed, until ultimately a separation between *crimina publica* and *delicta privata* was fully recognized." PATRICK MAC COMBAICH DE COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW 198 (1988).

4. See Jean Limpens et al., *Liability for One's Own Act*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 5 (André Tunc ed., 1979) (noting that "the concept of liability has always made its first appearance in the guise of special remedies appropriate to particular circumstances").

5. *Delicta*, not unlike contracts, have always been considered sources of obligation in Roman law, while other sources arose later. See, e.g., FRANCO FERRARI, ATIPICITÀ DELL'ILLECITO CIVILE 43 (1992). In fact, Gaius listed only the two aforementioned sources of obligations in his *Institutiones*. See generally WITOLD WOŁODKIEWICZ, OBLIGATIONES EX VARIIS CAUSARUM FIGURIS (1968). At a later date, Gaius mentioned three sources. *Id.* In

most important of these were *furtum*,⁶ *rapina*, *iniuria*⁷ and those stemming from the *lex Aquilia*. The *furtum* initially covered only theft, but later, it was extended to become a comprehensive tort to property.⁸ The *rapina*⁹ was defined as a robbery conducted with violence,¹⁰ while the *iniuria* covered personal injury. As for the *lex Aquilia*:¹¹ "[t]he harm had originally to be caused by a positive act which damaged the property by direct corporeal means,"¹² i.e., the harm had to be *corpore corpori datum*.¹³

This pragmatic case-by-case approach continued to dominate the law of liability into the Middle Ages.¹⁴ After this time, the scope of the *lex Aquilia* expanded to cover even those cases where harm to persons or property resulted only indirectly from actions by another.¹⁵ Roman law, however, never endorsed the general principle that one is responsible for all the harm he causes.¹⁶ Scholars first arrived at this general principle in the seventeenth century.¹⁷ It is upon this principle that the first civil codes based their rules.¹⁸

the post-classical period, the number of sources of obligation increased further. First, there were four sources; then later, in the post-classical period, a fifth one, the *lex*, was added. See 4 E. PACCIFICI-MAZZONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO 147 (1908). Some authors, however, insist the fifth source was added in the Middle Ages. See, e.g., RAYMOND MONIER, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 34 (1970).

6. See A. CARELLI, LA REPRESSIONE DEL FURTO FLAGRANTE (1939); H.F. JOLOWICZ, D. 47.2, DE FURTIS (1940); F. de Visscher, *Le fur manifestus*, NOUV. REV. HIST. 442 (1929).

7. See generally 2 EMILIO BETTI, ISTITUZIONI DI DIRITTO ROMANO 519 (1960); WILLIAM W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 326-28 (1981); ERWIN SEIDL, RÖMISCHES PRIVATRECHT 208 (1963).

8. 2 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 291 (Tony Weir trans., 2d rev. ed. 1987).

9. See generally HANS HATTENHAUER, GRUNDBEGRIFFE DES BÜRGERLICHEN RECHTS 97 (1982); FRITZ SCHULZ, CLASSICAL ROMAN LAW 581-85 (1951).

10. *Rapina* became a separate action only in 76 B.C., ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 70 (1991).

11. For general discussion of the *lex Aquilia*, see BERNARDO ALBANESE, STUDI SULLA LEGGE AQUILIA (1950); David Daube, *On the Third Chapter of the Lex Aquilia*, 52 LAW Q. REV. 253 (1936); E. Debray, *Le fermier et la loi Aquilia*, NOUV. REV. HIST. 643 (1933); J.M. Kelly, *The Meaning of the Lex Aquilia*, 80 LAW Q. REV. 73 (1964); ANDREAS VON THUR, ZUR SCHÄTZUNG DES SCHADENS BEI DER LEX AQUILIA (1892).

12. 2 ZWEIGERT & KÖTZ, *supra* note 8, at 292.

13. See BETTI, *supra* note 7, at 510; FERRARI, *supra* note 5, at 53.

14. Limpens et al., *supra* note 4, at 5.

15. See, e.g., 2 ZWEIGERT & KÖTZ, *supra* note 8, at 292.

16. *Id.*

17. See Limpens et al., *supra* note 4, at 5. Samuel Pufendorf first recognized this principle. See 3 SAMUEL PUFENDORF, DE IURE NATURAE ET GENTIUM 1 (1672).

18. See Limpens et al., *supra* note 4, at 5-6.

B. The French General Rule

When the French *Code Civil* was drafted in 1804, the principle of general tortious liability was already firmly established in France.¹⁹ Article 1382 codified this principle, stating that "every act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation"²⁰ This rule, which applied where the damage had been caused either intentionally or negligently,²¹ governed the French legal system even before its codification,²² but did not in the beginning apply to all types of cases.

Even at that time, the rule encompassed many different kinds of damages, "[f]rom homicide to a superficial wound, from burning down a great building to smashing up a paltry shack"²³ Nevertheless, this provision did not govern all types of damage. In fact, in the beginning, only the harm caused to *droits subjectifs* (i.e., to rights such as life, property, or honor)²⁴ rendered the person who caused the damage civilly liable.²⁵

It was only twenty years ago that the French rule developed into a *clause général*,²⁶ encompassing all kinds of damages. In fact, until 1970, one could claim damages only if a "legally protected interest of the plaintiff"²⁷ had been violated.²⁸ After a learned decision of the *Cour de Cassation* on February 27, 1970,²⁹ even the violation of a pure

19. *Id.* at 5.

20. *Id.* (quoting CODE CIVIL [C. CIV.] art. 1382 (Fr.)).

21. See C. CIV. art. 1383 (Fr.) ("[E]veryone is responsible for the damage of which he is the cause, not only by his own act, but also by his negligence or by his imprudence.").

22. See PHILIPPE MALAURIE & LAURENT AYNÈS, COURS DE DROIT CIVIL: LES OBLIGATIONS 21 (1985).

23. 13 A. LOCRÉ, LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE 58 (1836-1838).

24. For the prerequisite for the violation of a *droit*, see 1 GUIDO ALPA & MARIO BESSONE, ATIPICITÀ DELL'ILLECITO 283 (1981); FERRARI, *supra* note 5, at 63.

25. See also BORIS STARCK, DROIT CIVIL 52 (3d ed. 1985).

26. The French single rule has been defined as a general clause. *E.g.*, 1 ALPA & BESSONE, *supra* note 24, at 247.

27. STONE, *supra* note 1, at 23.

28. The French speak of an *intérêt légitime juridiquement protégé*. See, *e.g.*, Henri Mazeaud, *La lésion d'un intérêt juridiquement protégé, condition de la responsabilité civile*, D. 39 (1954).

29. See, *e.g.*, Giuseppe Branca, *Morte di chi convive more uxorio e risarcimento*, FORO IT. 142 (1970); Combaldieu, *La réparation du dommage subi par la concubine à la suite de l'accident dont le concubin a été victime*, FORO IT. 141 (1970); Vidal, *L'arrêt de la chambre mixte du 27 février 1970, le droit à la réparation de la concubine et le concept de dommage réparable*, J.C.P. 2390 (1971).

interest could give rise to a claim for damages.³⁰ In the aforementioned case, the court stated that even a concubine might claim compensation for grief caused by the killing of her partner.³¹

The French legal system is not the only one based upon a general clause. Quite the contrary, nearly all legal systems of the "romanistic legal family,"³² whose private law has been largely influenced by the French *Code Civil*,³³ are governed by a general clause or a single rule of general civil liability.³⁴ These countries include: Argentina, Belgium, Bolivia, Brazil, Chile, Italy, Luxembourg, Mexico, Panama, Puerto Rico, Spain, Quebec, Venezuela, the formerly Socialist countries, the Scandinavian³⁵ countries, as well as the state of Louisiana.³⁶ This does not mean, however, that all these legal systems impose civil liability as broadly as the French system does. While some legal systems, such as those of Mexico³⁷ and Rumania,³⁸ do so others, such as

30. See, e.g., 1 ALPA & BESSONE, *supra* note 24, at 297.

31. 2 ZWEIGERT & KÖTZ, *supra* note 8, at 312.

32. For the use of the expression "romanistic legal family," see, e.g., 5 Heymann, *Romanische Rechtsordnungen*, in *HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT* 151 (Schlegelberger ed., 1928).

33. For a discussion of the reception of the *Code civil*, see generally Sir Maurice Amos, *The Code Napoléon and the Modern World*, 10 J. COMP. LEGIS. 222 (1928); Jean Limpens, *Territorial Expansion of the Code*, in *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 92 (Bernard Schwartz ed., 1956); Imre Zajtay, *Les Destinées du Code civil*, 6 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 792 (1954).

34. Limpens et al., *supra* note 4, at 5. Some argue that "no legal systems of the French type abandon the principle of general civil liability." *Id.* at 6. For a more complete list of European countries governed by a single rule, see Franco Ferrari, *Tipicità e atipicità del fatto illecito. I. I contrapposti modelli francese e tedesco*, in *ATLANTE DI DIRITTO PRIVATO COMPARATO* 136 (Francesco Galgano & Franco Ferrari eds., 1992). For a list concerning the American continent, see Paolo Gallo, *Tipicità e atipicità dell'illecito in common law*, in *ATLANTE DI DIRITTO PRIVATO COMPARATO*, *supra*, at 147. For another list, see Limpens et al., *supra* note 4, at 5-6.

35. See, e.g., Jan Hellner, *Développements et rôle de la Responsabilité Civile Délictuelle dans les Pays Scandinaves*, 11 R.I.D.C. 779 (1967).

36. See Limpens et al., *supra* note 4, at 5-6.

37. For the Mexican rule relating to non-marital cohabitation, see CÓDIGO CIVIL PARA EL DISTRITO FEDERAL art. 1635 (1). See also Giutron Fuentevilla, *México*, in *DES CONCUBINAGES DANS LE MONDE* 117 (J. Rubellin-Devichi ed., 1990) (commenting on this provision); KARL AUGUST PRINZ VON SACHSEN GESSAPHE, *DAS KONKUBINAT IN DEN MEXIKANISCHEN ZIVILRECHTSORDNUNGEN* (1990).

38. The Rumanian legal system also permits a partner to pursue a claim for damages against a tortfeasor where its partner has been wrongfully killed. This civil action was judicially created by the Rumanian Supreme Court. See, e.g., Judgment of November 13, 1959, n.1241, published in *CULGERE* 183 (1959). Some critics, however, oppose this broadening of basis for civil liability. See ANGHEL ET AL., *RASPUNDEREA CIVILA* 261 (1970). Nevertheless, the court continues the trend. For a more recent decision by the Supreme Court supporting

that of Italy,³⁹ are not as broad. This explains why the Italian system does not yet allow a concubine to recover damages when its cohabitant party has been wrongfully killed.⁴⁰

C. *Pluralism and the Law of Torts*

Although many legal systems have adopted the single-rule approach, even today, the principle of general civil liability is not universally accepted.⁴¹ Indeed, some legal systems refused to give official sanction to the aforementioned single-rule, even where it was already implanted in tradition. For example, in Germany, the legislature preferred a solution that avoided "taking the crucial step to the great general clause,"⁴² even though some regions, such as Prussia⁴³ or Baden,⁴⁴ had already adopted one. The German legislature's alternate solution avoided giving judges unfettered power to define and discover particular torts, as such action was inconsistent with its conception of the judicial function.⁴⁵ Thus, "German law, unlike French law and

the aforementioned right of a surviving partner recovering damages, see Judgment of December 15, 1978, *REVISTA ROMANA DE DREPT* 51 (1979).

39. For discussion of the scope of the Italian general clause, see generally *LA RESPONSABILITÀ CIVILE, UNA RASSEGNA DI DOTTRINA E GIURISPRUDENZA* (Guido Alpa & Mario Bessone eds., 1987); MASSIMO FRANZONI, *I FATTI ILLECITI. ART. 2043-59* (1993); Francesco Galgano, *Le mobili frontiere del danno ingiusto*, *CONTRATTO E IMPRESA* 1 (1985); GIOVANNA VISINTINI, *I FATTI ILLECITI* (1987).

40. Even though the Italian Supreme Court disallows the possibility of claiming damages in wrongful death cases of a cohabiting partner, some lower courts permit it. See, e.g., the decisions of the court of Verona on December 3, 1980, published in *RESP. CIV. PREV.* 74 (1981); the decision of the *Pretura di Genova* on May 21, 1981, *FORO IT.* 1460 (1982).

Furthermore, at the beginning of the century, the Italian Supreme Court itself considered the possibility of allowing a claim for damages for the wrongful death of a partner. See, e.g., its decision on May 19, 1911, *FORO IT.* 798 (1911).

A recently drafted compulsory car insurance law includes a provision for the surviving partner to claim damages in case of a cohabiting partner's wrongful death. This draft has not yet been enacted. The author criticized it and suggested a new proposal in Franco Ferrari, *La tutela aquiliana della convivenza more uxorio*, *CORRIERE GIURIDICO* 931 (1992).

41. Limpens et al., *supra* note 4, at 5.

42. 2 ZWEIGERT & KÖTZ, *supra* note 8, at 293.

43. *Id.* (citing the Prussian General Land Law that provides that "a person who injures another intentionally or by gross negligence must pay full compensation to that other").

44. When the German legislature drafted its civil code, both Baden and the area west of the Rhine followed the French *Code Civil*. *Id.* For discussion of the influence and reception of the French *Code Civil* in Germany, see generally Gustav von Boehmer, *Der Einfluß des Code civil auf die Rechtsentwicklung in Deutschland*, 151 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 289 (1950); 151 Karl H. Neumayer, *Deutsche und französische Zivilrechtswissenschaft - Besinnliches zu einem Nachbarschafts und Partnerschaftsverhältnis unter Verwandten*, in 1 *IUS PRIVATUM GENTIUM* 165 (1969).

45. 2 ZWEIGERT & KÖTZ, *supra* note 8, at 294. Nevertheless, at the time of the German

many other legal systems, has supplemented [its three] general clauses by a small number of 'special' delicts."⁴⁶

This does not mean that the common law and the German law approach are equivalent. While common law torts are diversified and numerous, the German law lays down three main rules concerning general civil liability.⁴⁷ The first rule attaches civil liability to the violation of certain rights, the so-called *Rechtsgüter*, or absolute rights,⁴⁸ such as physical integrity, freedom, and property. The second rule covers violations of so-called *Schutznormen*, provisions designed to protect individuals' interests.⁴⁹ The third imposes civil liability for damages caused by improper conduct.⁵⁰ These rules, however, do not yet allow a victim to recover for all types of damages. For example, in

Civil code's enactment some scholars favored the "great" general clause. See, e.g., H. LISZT, *DELIKTSOBLIGATIONEN* 25 (1898).

46. 1 E.J. COHN, *MANUAL OF GERMAN LAW* 154 (2d ed. 1968).

47. These statutes include cases involving action which endangers a third person's credit (BÜRGERLICHES GESETZBUCH [BGB] § 824), induces a woman to engage in illicit intercourse (BGB § 825) and breaches a civil servant's official duty (BGB § 839). 1 COHN, *supra* note 46, at 159.

48. Limpens et al., *supra* note 4, at 10. BGB § 823 (1) states that "[a] person who, intentionally or negligently, injures unlawfully the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising therefrom." 1 COHN, *supra* note 46, at 155.

Traditionally, this provision has been interpreted to require a violation of an absolute right in order to receive compensation for damages. See W. KALLWASS, *PRIVATRECHT* 128 (1990); KUPISCH & KRÜGER, *DELIKTSRECHT* 20 (1987); DIETER MEDICUS, *GESETZLICHE SCHULDVERHÄLTNISSE* 46 (1985). However, the phrase "any other rights of another" does not necessarily require this interpretation. See Fritz Fabricius, *Zur Dogmatik des "sonstigen Rechts" gemäß § 823 Abs. 1 BGB*, 160 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 273 (1961); Wolfgang Mincke, *Forderungenrechte als "sonstige Rechte" im Sinne des § 823 Abs. 1 BGB*, *JURISTENZEITUNG [JZ]* 862 (1984). Recently, some commentators have raised doubts about this traditional interpretation, viewing the statute as a potential general clause. See, e.g., FERRARI, *supra* note 5, at 178, 183, 189, 193. See also 1 COHN, *supra* note 46, at 155 (referring to BGB § 823(1) as one of Germany's three general clauses).

49. BGB § 823(2): "A person who infringes a statutory provision intended for the protection of others incurs the same obligation. If, according to the purview of the statute, infringement is possible even without any fault on the part of the wrongdoer, the duty to make compensation arises only if some fault can be imputed to him." For discussion of *Schutzgesetze*, see generally BISTRIZKI, *VORAUSSETZUNGEN FÜR DIE QUALIFIKATION EINER NORM ALS SCHUTZGESETZ IM SINNE DES § 823 ABS. 2* (1981); Heinrich Dörner, *Zur Dogmatik der Schutzgesetzverletzung - BGH, NJW 1982, 1037 und NJW 1985, 134, 27 JURISTISCHE SCHULUNG [JUŠ]* 522 (1987); Ernst A. Kramer, *Schutzgesetze und adäquate Kausalität*, 31 *JZ* 338 (1976).

50. BGB § 826 establishes the rule that "[a] person who intentionally causes damage to another in a manner *contra bonos mores* is bound to compensate the other for this damage." 1 COHN, *supra*, note 46, at 158. See also H. Coing, *Allgemeine Rechtsgrundsätze in der Rechtsprechung des Reichsgerichts zum Begriff der "guten Sitten" (BGB §§ 138, 826)*, 1 *NEUE JURISTISCHE WOCHENSCHRIFT [NJW]* 213 (1947); REINHARD GRUNWALD, *SITTENWIDRIGKEIT*,

Germany, the surviving partner of a wrongfully killed person cannot claim damages.⁵¹ Thus, German law leaves considerable gaps that judges must fill by using powers similar to what the legislature of 1900 did not want to grant them.⁵²

Although other legal systems belonging to the Germanistic legal family follow the French single-rule system,⁵³ the German legal system does not. Germany is not the only system to reject the single-rule approach. Indeed, it is widely recognized that the law of tort is extremely diversified in the common law countries,⁵⁴ even more so than the German system with its three basic rules concerning civil liability.⁵⁵ Thus, some commentators characterize common law as a sys-

RECHTSWIDRIGKEIT UND DOLUS MALUS (1974); Manfred von Wolf, *Der Ersatzberechtigte bei Tatbeständen sittenwidriger Schädigung*, 20 NJW 709 (1967).

51. German scholars unanimously reject the possibility of allowing recovery of such damages. See, e.g., Claus Becker, *Schadenersatz wegen verletzungsbedingter Beeinträchtigung der Haushaltsführung auch für Unverheiratete*, 31 MONATSSCHRIFT FÜR DEUTSCHES RECHT 705 (1977); H.J. Becker, *Die nichteheliche Lebensgemeinschaft im Schadensrecht*, VERSICHERUNGSRECHT 201 (1985); Dunz, *Freie Lebensgemeinschaft der Unfallwitwe*, VERSICHERUNGSRECHT 509 (1985); Uwe Jagert, *Deliktsrechtliche Betrachtungen zur nichtehelichen Lebensgemeinschaft aus der Sicht des deutschen und italienischen Rechts*, 53 RABELS ZEITSCHRIFT [RABELSZ] 718 (1989).

52. Gaps in the German statutory law of torts include lack of protection for privacy rights. See 1 COHN, *supra* note 46, at 65. Judges consequently fill in these gaps. Hence, courts follow academic doctrine and accept the view that "there exists a general legal right to the free and undisturbed development of the personality of every individual being." *Id.* Courts now recognize this as one of the absolute rights protected by BGB § 823(1). *Id.* at 1550. Similarly, "[w]ithin very narrow limits the existence of an absolute right in the continued existence of an established business has been recognized." *Id.*

53. Although most other countries belonging to the Germanic legal family employ a terminology similar to that used by the German Civil Code, these countries "have nevertheless introduced texts in more general terms." Limpens et al., *supra* note 4, at 9.

For example, Austrian law states that

every person has the right to exact compensation from the wrongdoer for damage he has caused through his fault; the damage may be caused through breach of contractual duty or may be unrelated to any contract.

Similarly anyone who intentionally causes harm by improper conduct is liable for it, although if it is caused in the exercise of a right, he is only so liable if the exercise of the right obviously had the open purpose of causing damage to another.

Id. at 10 n.51 (quoting Austrian Civil Code § 1295 [hereinafter ABGB]).

Switzerland also embraces "the French concept of a general principle of liability." Limpens et al., *supra* note 4, at 10. See also FERRARI, *supra* note 5, at 12. "Anyone who causes damage to another in an unlawful manner, whether intentionally or negligently or carelessly, is bound to make it good." Limpens et al., *supra* note 4, at 9-10 n.47 (quoting Swiss C. Obligations art. 41(1)).

For further examples, see *id.* at 9-10.

54. Limpens et al., *supra* note 4, at 10.

55. At the beginning of the twentieth century, Sir John Salmond soundly rejected the possibility of any single principle underlying the various specific torts. "Just as criminal law consists of a body of rules establishing specific offences [sic], so the law of torts consists of a

tem based upon an "unrestricted pluralism,"⁵⁶ comprised of a virtually limitless number of different torts, such as battery, assault, nuisance, trespass to land, and trespass to chattel.

Despite this pluralism, both scholars⁵⁷ and judges⁵⁸ attempt to unify these torts under general liability principles. For instance, judges first introduced the tort of negligence, which is replacing gradually the different traditional unintentional torts⁵⁹ in both British⁶⁰ and United States law.⁶¹

II. THE POSITIVE ELEMENTS OF TORTIOUS LIABILITY

A. Act and Omission

The definitions of tort,⁶² *unerlaubte Handlung*, *délict*, and *fatto illecito*, seem to differ greatly from one another in different legal systems. Nonetheless, there are certain requirements in all legal systems without which no right to claim damages exists. Without (1) an intentional or negligent act (or omission) which (2) causes (3) damages, no tortious liability results, i.e., no obligation to compensate for damages arises.⁶³

The very first prerequisite of tortious liability is an objective element,⁶⁴ conduct. However, while all agree that an act can give rise to

body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability." 2 ZWEIGERT & KÖTZ, *supra* note 8, at 300 (quoting SIR JOHN SALMOND, *LAW OF TORTS* (2d ed. 1910)).

56. See Limpens et al., *supra* note 4, at 5, 10.

57. See *id.* at 11.

58. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

59. See Limpens et al., *supra* note 4, at 11.

60. See Gallo, *supra* note 34, at 154.

61. See, e.g., JAMES HENDERSON & RICHARD PEARSON, *THE TORTS PROCESS* 268 (1975) (stating that "[n]egligence is today, and has been for many years, the most important basis of tort liability in the United States").

62. Doubts exist concerning the possibility of defining "tort." See, e.g., W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 1, at 1 (5th ed. 1984). "Even though tort law is now recognized as a proper subject, a really satisfactory definition of a tort is yet to be found." *Id.* (footnote omitted). In fact, "no such definition of a tort can be offered. A tort, in English law, can only be defined in terms which really tell us nothing." 2 MILES, *DIGEST OF ENGLISH LAW XIV* (1910).

63. See, e.g., 2(2) FRANCESCO GALGANO, *DIRITTO CIVILE E COMMERCIALE* 282-83 (1990) (noting that these elements are required in Italy); MALAURIE & AYNÈS, *supra* note 22, at 35 (required in France); FERRARI, *supra* note 5, at 160 (these elements, along with unlawfulness, are required in Germany).

64. 4 JEAN CARBONNIER, *DROIT CIVIL* 93 (1969) (speaking of an act (or omission) of man as a *material* element).

liability,⁶⁵ in the past, some doubted whether an omission could be compared to an act and, therefore, result in civil liability. In nineteenth century France, for example, this was not at all possible.⁶⁶ Today, no doubt exists about the possibility of comparing these forms of conduct to each other.⁶⁷ Even though this is generally recognized in most legal systems, for example in the United States,⁶⁸ France,⁶⁹ Italy⁷⁰ and Germany,⁷¹ differences still exist. Hence, "as for the civil liability, the rule relating to the nonfeasance is opposite to the one relating to misfeasance. The latter is generally tortious The prejudicial nonfeasance, on the contrary, is permitted, except in the case where one is committed to help another person,"⁷² or, in more general terms, where one has the duty to act in order to avoid damages.⁷³

65. This principle has never been doubted, even in less recent periods; in fact, it has even been argued that "in the early common law one who injured another by a positive, affirmative act, was held liable without any great regard even for his fault." KEETON ET AL., *supra* note 62, § 56, at 373.

66. See MALAURIE & AYNÈS, *supra* note 22, at 36 (stating that the individualistic case-law of the nineteenth century denied that possibility; "a sole negative fact could not constitute a fault"). Even in those times, however, some voices favored allowing omissions to give rise to civil liability. See, e.g., Limpens et al., *supra* note 4, at 36, quoting LOYSEL, INSTITUTIONS COUTUMIÈRES (2d ed. 1783) ("He sins who can prevent and fails.").

67. See, e.g., ANDRÉ TUNC, *Introduction*, in 11 INT'L ENCYCLOPEDIA OF SOCIAL SCIENCES, *supra* note 4, at 38, where the authors proclaim that "nowadays, however, there is a noticeable move in favor of making the standard of reasonable man, exercising normal care and prudence, the test to apply in every case - cases of mere omission included. The distinction (between act and omission) thus appears to become redundant and ought to be abandoned." *Id.*

68. RESTATEMENT (SECOND) OF TORTS § 6 (comparing an omission to an act).

69. See, e.g., a very famous decision, the *arrêt Branly* on February 27, 1951, published in D., 1951, 329; see also the decision of the French *Cassation civile* of January 17, 1978, published in JURIS CLASSEUR PÉRIODIQUE, 1978, IV, 95.

70. Italian judges often point out the comparison between act and omission. See, e.g., the following decisions of the Italian *Cassazione civile*: December 12, 1988, n. 6739; February 24, 1987, n. 1943; March 18, 1982, n. 1785.

71. FERRARI, *supra* note 5, at 125.

72. 1 RENÉ SAVATIER, TRAITÉ DE LA RESPONSABILITÉ CIVILE EN DROIT FRANÇAIS CIVIL, ADMINISTRATIF, PROFESSIONNEL, PROCÉDURAL 56 (2d ed. 1951).

73. See André Tunc, *Introduction*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 4, at 38.

In Italy, tortious nonfeasance results from a violation of such duty to act "which can result from law, from a contract or from a previous conduct." PIETRO TRIMARCHI, ISTITUZIONI DI DIRITTO PRIVATO 137 (1986).

This remains true as well in the German legal systems. 1 COHN, *supra* note 46, at 56. See also HANS BROX, BESONDERES SCHULDRECHT 333 (1987) (noting that the duty to act can result from contract and "from a factual position into which the defendant has brought himself"). Furthermore, "[t]he German courts have established the principle that everybody who enters into relations with the public must pay due regard to the position of members of the public." 1 COHN, *supra* note 46, at 156. One must compensate the injured party for damages

B. Intent

Conduct is also closely linked to another condition of liability, the existence of intentional or at least negligent behavior,⁷⁴ i.e., fault.⁷⁵

In the French legal system, the existing link between conduct

resulting from the failure to do this, or from the failure to comply with the so-called *Verkehrssicherungspflicht*, i.e., the duty to take all precautions to avoid dangers and damages which could arise from entering into relations with third parties. For discussion of the *Verkehrssicherungspflichten*, see generally A. VON BAR, *VERKEHRSSICHERUNGSPFLICHTEN* (1980); Christian von Bar, *Entwicklungen und Entwicklungstendenzen im Recht der Verkehrssicherungspflichten*, 28 *JUS* 169 (1988); H. Mertens, *Verkehrspflichten und Deliktsrecht*, *VERSICHERUNGSRECHT* 307 (1980); HANS STOLL, *ZUM RECHTSFERTIGUNGSGRUND DES VERKEHRSSICHERUNGSPFLICHTEN VERHALTENS* 137 (1958).

In the French system, one must note that, while in earlier times one who failed to bring help to a person in danger was morally reprehensible, but not legally liable, "the new article 63 of the French Penal Code punishes a person who voluntarily abstains from bringing help to a person in peril when he may do so without risk to himself or to others." F.H. LAWSON ET AL., *AMOS & WALTON'S INTRODUCTION TO FRENCH LAW* 218 (3d ed. 1967) (citation omitted) [hereinafter *AMOS & WALTON*]. Belgium has introduced a similar statute as well. Limpens et al., *supra* note 4, at 37-38.

74. Although generally both intentional and negligent conduct are equivalent, i.e., both types of conduct can give rise to possible damage claims in all legal systems, some specific situations require the intention to perform a harmful act in order to be considered a tort and to oblige the wrongdoer to compensate for the damages caused. In Germany, for instance, while the violation of certain *Rechtsgüter* and the culpable breach of a *Schutzgesetz* can constitute a tort if caused either intentionally or negligently, certain damage caused by improper conduct need only be compensated if caused intentionally. See Limpens et al., *supra* note 4, at 26. Furthermore, while one may contract to exempt oneself from responsibility for unintentional harms, "a party may not exempt himself from future liability for intentional harms." BGB § 276(2). But see 2 O.C. GILES ET AL., *MANUAL OF GERMAN LAW* 45 (E.J. Cohn ed., 2d ed. 1971) (noting that *HANDELSGESETZBUCH [HGB]* § 458(2) prevents the exclusion of liability for negligence for damage caused by the Federal Railways).

In Italy as well, some harmful behaviors give rise to an obligation to compensate for damages only if intent exists. One such tort, called *illeciti di dolo*, is inducement of a third person to breach a contract. See, e.g., P. Marino, *La responsabilità da induzione all'inadempimento*, *RIV. CRIT. DIR. PRIV.* 849 (1987) (discussing this tort); C. Verde, *Note in tema di responsabilità del terzo per induzione all'inadempimento*, *RASS. DIR. CIV.* 421 (1985) (discussing this tort); F. ZICCARDI, *L'INDUZIONE ALL'INADEMPIMENTO* (1979) (discussing this tort). See generally PAOLO CENDON, *IL DOLO NELLA RESPONSABILITÀ EXTRACONTRATTUALE* (1974).

Some torts in Roman law required intent, or *malus animus*, such as the *furtum*, "otherwise it (theft) would attach in cases where the party was entirely innocent of any offense; as, for instance, in cases of error or *bona fides*." MAC COMBAICH DE COLQUHOUN, *supra* note 3, at 207.

75. This requirement for civil liability made its entrance into French law during the Middle Ages, when it "accorded well with the moral notions of the time. Liability without fault would be a social injustice: it would be 'the equivalent in civil law to the condemnation of an innocent person in criminal law.'" AMOS & WALTON, *supra* note 73, at 203 (footnote omitted).

and intent or negligence results from the concept of *faute*.⁷⁶ *Faute*⁷⁷ is one of the French conditions for liability.⁷⁸ It is composed of the objective element of conduct and a subjective element⁷⁹ of either intent or negligence.⁸⁰ Thus, conduct gives rise to possible damages claims only if the offender is blameworthy, i.e., if he acted intentionally or at least negligently.

Intent has replaced the earlier requirement of unlawfulness.⁸¹ Its

76. In spite of the importance of the concept of *faute* in French and Louisiana laws, neither the French nor the Louisiana legislature provides any definition of *faute*. STONE, *supra* note 1, at 84. Even though this may seem inappropriate, it is not, because

when one looks further, one can see that it is important that fault be not defined in the terms of any one age. It has been well said that 'fault is the mirror of our times: what we . . . decide fault to be, that is fault. As such, fault is a fluid term definable only with respect to its surrounding and thus, with the concept of fault, we can incorporate into our tort law a new situation without changing our definition of fault: fault remains the same; it is we, members of society who change.'

Id. (footnotes omitted).

77. Many definitions have been given of *faute*. Planiol, for example, has defined it as "a violation of an preexisting obligation," Planiol, *Du fondement de la responsabilité*, REV. CR. LEG. ET JUR. 80 (1905), and as "failure to do one's duty." Limpens et al., *supra* note 4, at 64. Starck, by contrast, defined *faute* as "the défaillance of man who does not fulfill his tasks." STARCK, *supra* note 25, at 31. De Cupis provided a similar definition to the one proposed in the text. 1 ADRIANO DE CUPIS, IL DANNO 116 (2d ed. 1966) (describing *faute* as a "state of mind which, with reference to a particular kind of damage, can be considered blameworthy").

78. "[T]he requirement of *faute* did not appear in all the projets of the *Code Civil*, e.g. Cambacères' second *projet* declared: *celui qui cause un dommage* (he who causes a damage is bound to repair it) which had it been adopted would have established a responsibility based on cause alone." STONE, *supra* note 1, at 81 n.40 (citation omitted).

79. Some authors speak of *faute* as the conjunction of three elements:

(1) a *material* element, an act of man as is referred to in Code Napoléon article 1382 and Louisiana Civil Code article 2315; (2) a *psychological* element: "*la volonté*" that could change the course of things; and (3) a *sociological* element: the reprobation directed by society with regard to the defendant's conduct which gives it character reprehensible and blameworthy

STONE, *supra* note 1, at 85 (citation omitted).

80. For classical jurists studying Roman law, the necessary presence of either *dolus* or *culpa*, i.e., blame or fault, was implied by the word *iniuria*, which "probably meant at first merely the absence of some lawful excuse for the act causing death or damage." 1 F.H. LAWSON & B.S. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 22 (1982).

81. For a discussion on the relationship between unlawfulness and intentional harm in Louisiana law, see STONE, *supra* note 1, at 85-89:

Whereas under the notion of *unlawfulness* the will of the *ruler* expressed in proscriptions became the measure of liability, under this touchstone the will of the *individual* expressed in his action causing damages becomes a subject source of liability. Society was now sufficiently developed to take a leap from the safe haven of formal proscriptions (*unlawfulness*) to a less predicate territory in which man's intention became the key to liability.

Id. at 85-86.

definition poses no substantial problems in civil law countries.⁸² Intent,⁸³ or as the French call it, *faute intentionnelle*,⁸⁴ occurs "when there is the intention to provoke a harmful event."⁸⁵ In some civil cases, however, "intention to cause the damage is not required."⁸⁶ For certain German statutes, "the acts in question are held to be intentional if the interference with the absolutely protected legal property (*Rechtsgut*) or the breach of public duty was intentional."⁸⁷

Although no uniform definition of intent exists at common law,⁸⁸ one well accepted definition states that "[t]he word 'intent' is used to . . . denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."⁸⁹ This definition is not very different from that which governs the civil law, even though the scope of the latter seems to be broader since it covers even those cases where "the actor *knew* that his act might involve harmful consequences for others . . ."⁹⁰ Civil law systems also recognize intentional fault, *dolus eventualis*, when there is "the conscience of the probability of the damage and its ac-

82. See, e.g., Limpens et al., *supra* note 4, at 30 ("The meaning of fault in intentional conduct (*faute intentionnelle*) has not been the subject of any important discussion" in France.).

83. For an Italian definition of intent, see, e.g., TRIMARCHI, *supra* note 73, at 142 ("[T]he intent consists in the awareness and willingness to cause the harmful event."). In Germany, intent as it relates to the law of torts has been defined as *Wissen und Wollen der Tat*, i.e., the awareness and willingness of the act.

84. See generally Brière de l'Isle, *La faute dolosive*, D. 1980, 180; R. Jambu-Merlin, *Dol et faute lourde*, D. 1955, 89; Geneviève Viney, *Remarques sur la distinction entre la faute intentionnelle, faute inexcusable et la faute lourde*, D. 1975, 263.

85. Cass. civ., 12 June 1974, D. 1975, 173. For similar definitions in both German and Italian laws, see HANS BROX, ALLGEMEINES SCHULDRECHT 127-33 (15th ed. 1987); FERRARI, *supra* note 5, at 69; Carlos A. Funaioli, *Dolo*, in 13 ENCICLOPEDIA DEL DIRITTO 738 (1964); GALGANO, *supra* note 63, at 303; KUPISCH & KRÜGER, *supra* note 48, at 72.

86. Limpens et al., *supra* note 4, at 30.

87. *Id.*

88. KEETON ET AL., *supra* note 62, § 8, at 33, state that even though "in a loose and general sense, the meaning of 'intent' is easy to grasp . . . 'intent' is also one of the most often misunderstood legal concepts."

89. RESTATEMENT (SECOND) OF TORTS § 8A (1965). This is not, however, the only definition of intent known in American law. In fact, the American Institute of Law itself defines the intent differently in the Model Penal Code. For a similar definition made prior to the *Restatement (Second) of Torts*, see WINFIELD AND JOLOWICZ ON TORTS 23 (W.V.H. Rogers ed., 1975) [hereinafter WINFIELD & JOLOWICZ] (stating that intention "signifies full advertence in the mind of the defendant to his conduct, which is in question, and to its consequences, together with a desire for those consequences").

90. Limpens et al., *supra* note 4, at 31-32. For a similar definition of intent, see the German Democratic Republic's Civil Code § 333(2) [ZGB], which states that "the citizen who causes the damage deliberately or deliberately tolerates that the damage can occur as a result of his behavior, acts intentionally."

ceptance without any justifiable reason. In this case, the *faute* consists in the acceptance of the risk to third parties rather than in a damage intentionally caused."⁹¹ Consequently, there is *dolus eventualis*⁹² when "the person imagines the possible harmful event, and accepts it in case of its realization."⁹³

C. Negligence

As mentioned previously, no fault liability⁹⁴ attaches unless harm has been caused by conduct which is at least negligent,⁹⁵ i.e., unless damages have been caused by "a person who does not exercise ordinary care."⁹⁶ Most civil law countries⁹⁷ accept this definition of negli-

91. M.L. RASSAT, *RESPONSABILITÉ CIVILE* 29 (1983).

92. The existence of the *dolus eventualis* in civil law systems should make it possible to compare the civil law and the common law concepts of intention. There are, however, different theories concerning the degree of intention required for fault.

The first is the theory generally accepted in France that fault in intentional behavior presupposes an *intention to harm (dolus)*. The same approach is followed in German CC § 226 and 826

According to the second theory, which is current in Germany, in the Socialist countries and in the countries of the Common Law, there is fault in intentional behavior when the actor *knew* that his act might involve harmful consequences for others' *dolus eventualis*.

Limpens et al., *supra* note 4, at 31-32. The authors, by making this distinction, seem not to consider the existence of the so-called *faute inexcusable*, the French equivalent of the *dolus eventualis*. See, e.g., FERRARI, *supra* note 5, at 70.

93. BROX, *supra* note 85, at 127. For a similar definition, see also 1 DIETER MEDICUS, *SCHULDRECHT* 142 (1988); GALGANO, *supra* note 63, at 303.

94. "Fault as the criterion of liability has a powerful logical attraction." Tunc, *supra* note 73, at 64. Nonetheless, it is not the only criterion:

Towards the end of the nineteenth century it began to be asked whether the social function of the law of torts was really that of punishing fault and not that of securing individuals against harms This question was precipitated by the rapid increase of mechanization in industry and in transport, by the political emergence of the working classes, and by the development of insurance.

AMOS & WALTON, *supra* note 73, at 203-04. Consequently, new theories for civil liability were introduced in France. STONE, *supra* note 1, at 83. However, at least as far as the liability of one's own act is concerned, fault remains the most important criterion.

95. As for the distinction between intent and negligence, "[i]n general, legal writers do not attach much importance to this distinction." Limpens et al., *supra* note 4, at 25. This distinction is, however, relevant in some cases. See, e.g., FERRARI, *supra* note 5, at 72; 2 JACQUES FLOUR & JEAN-LUC AUBERT, *LES OBLIGATIONS* 108 (1988); Limpens et al., *supra* note 4, at 25. See also CENDON, *supra* note 74, at 21.

96. BGB § 276(1). While the BGB defines negligence, it does not define intent; in contrast, the Civil Code of the former German Democratic Republic (ZGB) defines intent. See ZGB DDR § 333(2).

97. For a French definition of negligence, i.e., *faute non intentionnelle*, which gives rise to the so-called *quasi-délits*, see FLOUR & AUBERT, *supra* note 95, at 108 (proclaiming that fault in unintentional behavior "consists either in not having foreseen the eventuality of damages or, if it has been foreseen, in not having adopted the measures necessary to prevent its realiza-

gence,⁹⁸ as do the common law countries, such as England⁹⁹ and the United States.¹⁰⁰ Although no bright line rule exists to determine what conduct amounts to negligence,¹⁰¹ the cited definition fails even to provide any guideline for establishing whether negligence exists in a particular situation. Nevertheless, the aforementioned definition is helpful to the extent it implies that "[t]he notion of negligent conduct presupposes a standard of non-negligent or prudent conduct."¹⁰² Once this has been determined, it becomes possible to decide whether there is negligence.¹⁰³

In some situations, statutes, ordinances or other regulations set the standard; violation thereof amounts to *negligence per se*.¹⁰⁴

In cases where no regulations exist, however, the judge or jury determines the standard of care. Courts often refer to the standard of "reasonable man,"¹⁰⁵ the French *bon père de famille*,¹⁰⁶ or the *buon padre di famiglia*. This standard is "independent of the idiosyncracies

tion"). For a discussion of the meaning of negligence in Louisiana law, see STONE, *supra* note 1, at 372.

98. Some insist that negligence includes a psychological element. See *supra* note 79. Others insist that "[n]egligence is the contrary of diligence, and no one describes diligence as a state of mind." LAWSON & MARKESINIS, *supra* note 80, at 26 (citation omitted).

99. Certain scholars have proclaimed that:

Negligence usually signifies total or partial inadvertence of the defendant to his conduct and/or its consequences. In exceptional cases there may be full advertence to both the conduct and its consequences. But, in any event, there is no desire for the consequences, and this is the touchstone for distinguishing negligence from intention.

WINFIELD & JOLOWICZ, *supra* note 89, at 24.

100. See Limpens et al., *supra* note 4, at 29-30.

101. In one case, Judge Reagan proclaimed:

In determining what constitutes negligent conduct there is no fixed rule; the facts and environmental characteristics of each case must be considered and treated individually in conformity with the true Civil Law concept. Judicially, we are tending more and more to an appreciation of the truth that, in the last analysis, there are few rules; there are principally standards and degrees of negligence for the reason that no one is so gifted with foresight that he or she could anticipate the variation of facts present in every accident and prescribe the proper rules for each.

Johnson v. Price, 183 So. 2d 364, 366 (La. Ct. App. 1966) (footnote omitted).

102. STONE, *supra* note 1, at 87.

103. Fixing a standard is necessary, otherwise the liability for negligence would be "co-extensive with the judgement of each individual, which would be as variable as the length of the foot of each individual, (therefor) we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Vaughan v. Menlove, 132 Eng. Rep. 490 (1837) (Lord Tindal).

104. STONE, *supra* note 1, at 87.

105. This "fictitious person has never existed on land or sea." KEETON ET AL., *supra* note 62, § 32, at 174. Further, this standard was probably first established as the applicable standard to ordinary negligence cases by *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

106. STONE, *supra* note 1, at 87.

of the particular person whose conduct is in question."¹⁰⁷ This "excellent but odious character"¹⁰⁸ is not, however, a man¹⁰⁹ who is "constantly preoccupied with the idea that danger may be lurking in every direction about him at any time,"¹¹⁰ nor does he¹¹¹ represent a merely objective standard. In fact, because juries must take circumstances into account when determining liability,¹¹² some argue that "the reasonable person standard may, in fact, combine in varying measure both objective and subjective ingredients,"¹¹³ and even that "the standard is too strict and should give way to a more subjective approach."¹¹⁴

D. The Tort of Negligence

Negligence does not only constitute an element of fault. In common law, "it also has the further meaning of an independent tort, with the specific name of 'negligence'."¹¹⁵ Its history¹¹⁶ is generally considered linked to the industrial revolution¹¹⁷ in both England¹¹⁸ and the

107. *Glasgow Corp. v. Muir*, [1943] App. Cas. 448, 457 (Eng.) (Lord MacMillan). See also *Commonwealth v. Pierce*, 138 Mass. 165, 176 (1884).

108. A.P. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 12 (1930), cited in KEETON ET AL., *supra* note 62, at 174 n.9. For a discussion of the use of the cited expression, see Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the 'Odious Creature'*, 23 OKLA. L. REV. 410 (1970).

109. Instead of speaking of the "reasonable man," most recent decisions speak of the "reasonable person." See, e.g., *Vassos v. Roussalis*, 625 P.2d 768, 772 (Wyo. 1981).

110. *Whitman v. W.T. Grant Co.*, 395 P.2d 918, 920 (Utah 1964).

111. Even though one normally refers to the reasonable "man," some argue that women are also reasonable, and urge courts to recognize a reasonable woman standard. See, e.g., Stuart L. Bass, *The "Reasonable Woman" Standard: The Ninth Circuit Decrees Sexes Perceive Differently*, 43 LAB. L.J. 449 (1992); Howard A. Simon, *Ellison v. Brady: A "Reasonable Woman" Standard for Sexual Harassment*, 17 EMPLOYEE REL. L.J. 71 (1991). In order to avoid any gender bias, some argue that the standard for liability should be gender-free. See, e.g., Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311 (1976-77); KEETON ET AL., *supra* note 62, § 32, at 175 n.9. See generally Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

112. For a list of the circumstances that can affect the standard to be applied, see, e.g., KEETON ET AL., *supra* note 62, § 32, at 175; STONE, *supra* note 1, at 382-94.

113. KEETON ET AL., *supra* note 62, § 32, at 175.

114. Randy T. Austin, *Better Off with the Reasonable Man Dead or the Reasonable Man did the Darndest Things*, 1992 B.Y.U. L. REV. 479, 479.

115. WINFIELD & JOLOWICZ, *supra* note 89, at 25. For a comparison of negligence as an element of tortious liability and negligence as an independent tort, see also GLANVILLE WILLIAMS & B.A. HEPPLER, *FOUNDATIONS OF THE LAW OF TORT* 88 (1976) (stating that "negligence is both a way of committing various torts and a tort on its own").

116. For the history of the tort of negligence, see Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 LAW Q. REV. 184 (1926).

117. Of course, instances of an action referring to negligence can be found even in earlier

United States.¹¹⁹ This explains why in the United States “[t]he acceptance of the negligence standard . . . has often been viewed as a subsidy for the protection of infant industries,”¹²⁰ even though the United States’ leading case of *Brown v. Kendall*¹²¹ “involved not industry, but instead the actions of private persons engaged in separating two fighting dogs.”¹²² Examining the development of the tort of negligence in England further weakens this theory. Until *Brown v. Kendall*,¹²³ the development of negligence as a tort paralleled that of the United States. Yet, its leading case, *Donoghue v. Stevenson*,¹²⁴

times. “There is an instance in 1676, where the action was held to lie when the defendant negligently sent his servant to break in some unruly horses in Lincoln’s Inn Fields, among a large concourse of His Majesty’s lieges, whereby the plaintiff was kicked.” WILLIAMS & HEPPLER, *supra* note 115, at 89 (footnote omitted). *But see* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 154 (1949) (noting that in “that time the word had been used in a very general sense to describe a breach of any legal obligation”).

118. “It was perhaps in England that the industrial revolution had its first impact on the law of tort. A first adjustment occurred merely through expansion of liability for negligence.” Tunc, *supra* note 73, at 42.

119. *See, e.g.*, KEETON ET AL., *supra* note 62, § 28, at 161.

120. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 84 (5th ed. 1990). For a similar explanation of the introduction of the tort of negligence, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 99 (1977) (“One of the most striking aspects of legal change during the antebellum period is the extent to which common law doctrines were transformed to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development.”).

121. 60 Mass. 292 (1850). The authors of HENDERSON & PEARSON, *supra* note 61, at 270, consider this the leading case for establishing the necessity of proving negligence in order to impose liability for accident injury. Even though *Brown v. Kendall* is deemed to be the leading case, it was not “a total revolution: rather it tidied up the law of torts, removing the eccentric allocation of the burden of proving due care.” E.F. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 204 (1964-65).

122. Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 229 (footnote omitted). Others also challenge the idea that the birth of the tort of negligence came from the need to protect infant industries. *See, e.g.*, Roberts, *supra* note 121, at 205 (“Rather than simply promoting ‘General Motors,’ is it not more accurate to say that Chief Judge Shaw saw the change in moral terms as well, as a sound policy not only for business but for every man? Taken at its own face value in its own period, was not the rule almost inevitable?”); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 365 (1951) discussing the concern lest the uneven application of civil liability for harm resulting from negligent conduct “become a factor tending to discourage them from enterprise and investment!

This very consideration began to worry American judges during half of the nineteenth century. They disliked the imposition of liability without fault and reacted against any manifestation of this notion.”

123. “In 1850, however, the two systems [in England and the United States] split asunder after Chief Justice Shaw’s leading opinion in *Brown v. Kendall*.” Roberts, *supra* note 121, at 201 (footnote omitted).

124. [1932] A.C. 562. Even though the case is known as *Donoghue v. Stevenson*, its full

“which revolutionized the law of negligence,”¹²⁵ arose *after* the industrial revolution. In England at this time, there was no reason to believe “that the development . . . under a system of private enterprise would be hindered and delayed as long as the element of chance exposed enterprisers to liability for the consequences of pure accident, without fault of some sort.”¹²⁶

Despite the fact that their leading cases arose in different eras, both British and United States tort law define the tort of negligence in substantially the same way, as “the breach of a legal duty to take care which results in (consequential) damage, undesired by the defendant, to the plaintiff.”¹²⁷ The tort of negligence therefore requires: (1) the existence of the frequently discussed,¹²⁸ and sometimes criticized,¹²⁹

title reads “*M’Alister (or Donoghue) (Pauper) v. Stevenson.*” Heuston, *Donoghue v. Stevenson in Retrospect*, 20 MOD. L. REV. 1 (1957).

This decision has been the subject of various articles in recent years. See, e.g., Harold Evans, *A certain lawyer stood up - Donoghue v. Stevenson 50 yrs on*, 1982 NEW ZEALAND L.J. 159; DONOGHUE V. STEVENSON AND THE MODERN LAW OF NEGLIGENCE - THE PAISLEY PAPERS (Peter Burns ed., 1991); Florence O’Donoghue, *A Half-Century of Neighbourliness: Donoghue v. Stevenson Reconsidered*, LAW & JUST. 4 (1984); J.C. Smith & Peter Burns, *Donoghue v. Stevenson - The Not So Golden Anniversary*, 46 MOD. L. REV. 147 (1983); Joycey Tooher, *Still Silvery on Its Diamond Jubilee? On the Trial of That Elusive Snail*, 66 LAW INST. J. 379 (1992); Alan Rodger, *Lord Macmillan’s Speech in Donoghue v. Stevenson*, 108 LAW Q. REV. 236 (1992). See also Alan Rodger, *Mrs. Donoghue and Alfenus Varus*, 41 CURRENT LEGAL PROBS 1 (1988) (examining certain interesting details concerning the pursuer).

125. Rina Harber, *Snails, snails and more snails*, 66 LAW INSTITUTE J. 201 (1992) (reviewing DONOGHUE V. STEVENSON AND THE MODERN LAW OF NEGLIGENCE - THE PAISLEY PAPERS (PETER BURNS ed., 1991)).

Of course, even before the cited decision, negligence could give rise to liability, but “prior to 1932, negligent conduct only gave rise to liability in limited, specific circumstances.” Tooher, *supra* note 124, at 379. The decision’s importance lay in “its insistence upon the expansible nature of the action of negligence.” WILLIAMS & HEPPLER, *supra* note 115, at 90.

126. Gregory, *supra* note 122, at 365 (referring to concerns facing industry in the United States regarding the imposition of liability for merely negligent conduct).

127. WINFIELD & JOLOWICZ, *supra* note 89, at 45.

128. “An obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct towards another.” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 331 (3d ed. 1964). The duty of care has been discussed in many articles. See, e.g., R.W.M. Dias, *The Duty Problem in Negligence*, 13 CAMBRIDGE L.J. 198 (1955); Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); W.L. Morison, *A Re-Examination of the Duty of Care*, 11 MOD. L. REV. 9 (1948); F.H. Lawson, *The Duty of Care in Negligence: A Comparative Study*, 22 TUL. L. REV. 111 (1947-48); Catherine Brown, *Duty of Care*, 65 LAW INST. J. 943 (1991); J.F. Keeler, *The Proximity of Past and Future: Australian and British Approaches to Analyzing the Duty of Care*, 12 ADELAIDE L. REV. 93 (1989); Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 LAW Q. REV. 249 (1991).

129. See, e.g., W.W. Buckland, *The Duty to Take Care*, 51 LAW Q. REV. 637 (1935); Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934); Brown, *supra* note 128.

duty of care; (2) the breach of such duty; (3) damages; and (4) a causal connection between the actor's conduct and the damage.

However, even though civil law also requires some of the aforementioned elements, such as fault in conduct, causation, and damages, and even though the tort of negligence seems comparable to the *quasi-délits*¹³⁰ of French law, or to the unintentional torts of the other civil law countries,¹³¹ the tort of negligence is not the same as the unintentional tort of the civil law countries, for its scope of application is much broader.¹³²

E. Damages

In tort law, unlike in criminal law, no liability arises without damages.¹³³ In fact, "if there be no damage, the law of tort has noth-

130. French law distinguishes between *délits*, i.e., intentional torts, and *quasi-délits*, or unintentional torts. Limpens et al., *supra* 4, at 25. These expressions derive from the Roman distinction between obligations *ex delicto* and obligations *quasi ex delicto* "which arose because one had caused damage to another by conduct and was required to repair it even though such conduct was not strictly a delict." STONE, *supra* note 1, at 2-3. For a treatment of the Roman *obligationes quasi ex delicto*, see MAC COMBAICH DE COLQUHOUN, *supra* note 3, at 269; STONE, *supra* note 1, at 3-4.

A similar distinction can be found in Louisiana law. STONE, *supra* note 1, at 19. "[O]ffences are those illegal acts which are done wickedly and with the intent to injure, while quasi-offences are those which cause injury to another, but which proceed only from error, neglect, or imprudence." *Edwards v. Turner*, 6 Rob. 382, 384 (1884).

131. Several authors recognize the possible danger of comparing the common law's tort of negligence with the civil law's unintentional tort. See, e.g., Limpens et al., *supra* note 4, at 54 ("At first sight, we may be tempted to say that the tort of negligence comes extremely close to the concept of *faute* as elaborated in the French-based legal systems, and by the Civil Code art. 1382 in particular.").

132. Of course, the civil law concept of unintentional tort and common law concept of tort of negligence are comparable for those authors who hold that "the tort of negligence lays the foundation for a principle of general tortious liability." See Limpens et al., *supra* note 4, at 54. See also FREDERICK POLLOCK, *THE LAW OF TORTS* 21-23 (12th ed. 1923). This theory has also been sustained in Europe. See Gallo, *supra* note 34, at 154.

For those scholars, however, who consider the law of torts as consisting of a body of rules establishing specific injuries, the tort of negligence is not comparable to the unintentional civil law tort, i.e., there is no general principle of liability. See, e.g., JOHN SALMOND, *LAW OF TORTS* 3 (6th ed. 1924).

For discussion of the merits of each view, see generally Glanville L. Williams, *The Foundation of Tortious Liability*, 7 *CAMBRIDGE L. J.* 111 (1941); Percy H. Winfield, *The Foundations of Liability in Tort*, 27 *COLUM. L. REV.* 1 (1927); PERCY H. WINFIELD, *THE PROVINCE OF THE LAW OF TORT* 32-39 (1931).

133. See Pierre Catala & John Antony Weir, *Delict and Torts: A Study in Parallel*, 38 *TUL. L. REV.* 663, 663 (1963-64); PIERRE LE TOURNEAU, *LA RESPONSABILITÉ CIVILE* 31 (2d ed. 1976) (stating that a crime entails criminal liability even when there is no damage). See also FERRARI, *supra* note 5, at 13; PAOLO FORCHIELLI, *RESPONSABILITÀ CIVILE* 11 (1983).

French Civil Code art. 1382, for example, states expressly that only an act "which causes

ing to repair and the plaintiff's claim is to be dismissed."¹³⁴ Even though this general principle exists both in civil law and in common law, each has a quite different law of damages. In England and the United States, for example, the law of damages includes the possibility of awarding punitive or exemplary damages.¹³⁵ In civil law countries,¹³⁶ where punishment, the basic function of punitive damages,¹³⁷ no longer¹³⁸ constitutes the function of tortious liability,¹³⁹ punitive damages can never be awarded.¹⁴⁰

Various legal systems within the same legal family¹⁴¹ differ regarding the form of reparation allowed. German law, for example, has a relatively simple law relating to damages for all types of recovery.¹⁴² The law is characterized by "compensation . . . in principle to be effected in kind and not by payment of money . . ." ¹⁴³ In contrast,

damage to another" results in liability. AMOS & WALTON, *supra* note 73, at 207. That is why, for instance, it was generally agreed that no claim for damages existed where flying over a property caused no actual damage. *Id.*

134. STONE, *supra* note 1, at 22.

135. Punitive damages are seldom assessed in England. See Catala & Weir, *supra* note 133, at 666 n.9. In the United States, however, "punitive damages are awarded rather freely." *Id.*

136. See, e.g., ALBERTO TRABUCCHI, ISTITUZIONI DI DIRITTO CIVILE 185-86 (1990) ("[A]ny penal evaluation is extraneous to tortious liability.").

137. The institution of punitive damages "cannot be exclusively reduced to one legal purpose. Several functions blend together to some extent." Hans Stoll, *Consequences of Liability: Remedies*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 4, at 101. In fact, punitive damages afford satisfaction and they are also used to draw off the profits obtained by the commission of harm.

138. In Roman law, "ideas of punishment and reparation were often mixed." STONE, *supra* note 1, at 22.

139. In civil law, the main functions of tortious liability are compensation and reparation. See FERRARI, *supra* note 5, at 11; Cesare Salvi, *Responsabilità contrattuale*, 39 ENC. DEL DIR. 1187 (1988); TRABUCCHI, *supra* note 136, at 185-86.

140. In France, however, some legal writers contend that tortious liability can have the function of a punishment. See, e.g., STONE, *supra* note 1, at 23 n.24.

141. For a brief treatment of the law of damages in France, Italy and Germany, see, e.g., FERRARI, *supra* note 5, at 23-29, 76-78.

142. While German rules relating to damages apply to both contract law and tort law, French and Italians employ different rules for recovery of damages in contract and tort cases. See, e.g., FERRARI, *supra* note 5, at 24.

143. 1 COHN, *supra* note 46, at 105. The principle at issue - called *Prinzip der Naturalrestitution*, is laid down in German Civil Code § 249:

A person who is obliged to make compensation shall restore the situation which would have existed if the circumstances rendering him liable to make compensation had not occurred. If compensation is required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary for such restitution.

See, e.g., Kremer, *Vertrauensschaden, Naturalrestitution und Erfüllungsinteresse*, JURISTISCHE ARBEITSBLÄTTER 485 (1978); Dieter Medicus, *Naturalrestitution und Geldersatz*, 9 JUS 449

most countries, such as the Scandinavian countries,¹⁴⁴ the common law countries (including South Africa), as well as some civil law countries,¹⁴⁵ require compensation for the damage caused by tortious conduct in the form of money payments.¹⁴⁶

Other differences between the various legal systems exist. While the systems based upon a "restricted" or "unrestricted pluralism" generally make distinctions between different kinds of *iniuria*¹⁴⁷ (such as harm to property, to a person's health, freedom,¹⁴⁸ and right to an established and operative business), those systems following the single-rule approach make no such distinctions before imposing liability. This presupposes, however, that the latter systems have other devices for imposing the necessary limits on liability. In fact, for a harm to be compensable in these countries, it must not be caused by a specific *iniuria*, but it "must normally be existing and certain,"¹⁴⁹ and a direct consequence of the defendant's conduct.¹⁵⁰ The possibility of invoking these formulas results in great judicial discretion¹⁵¹ and allows judges to award damages even in cases where never previously awarded, such as in wrongful death cases of cohabitating partners.¹⁵² In contrast, "pluralistic" systems may not merely invoke magic for-

(1969). *But see* 1 COHN, *supra* note 46, at 104 (noting that compensation in the form of money may be demanded for damage to property-related interests and in certain other cases).

144. *See* Stoll, *supra* note 137, at 64.

145. *See* FERRARI, *supra* note 5, at 126-27.

146. However, even in those countries the possibility of receiving compensation in kind exists. *See, e.g.,* CODICE CIVILE [C.C.] art. 2056 (Italy).

147. In regard to English law, commentators note that

[t]he concept [of damage] is absent from the digests and indices, and it has never been a central topic of discussion. The common lawyer would never ask himself the question 'What damage is redressible in an action of tort?' - the system concentrates on iniuria, not damnum - so it is not surprising that it is difficult to answer.

Catala & Weir, *supra* note 133, at 665 (italics in original) (footnotes omitted).

148. German law considers the violation of the aforementioned rights as a tort because its statutes expressly required it. *See* BGB § 823(1): "A person who, intentionally or negligently, unlawfully injures the life, the body, the health, the freedom, the property or other right of another is bound to compensate him for any damage arising therefrom."

In English law, violations of the foregoing rights constitute different specific torts, such as trespass to chattel, trespass to land, and battery.

149. *See* AMOS & WALTON, *supra* note 73, at 207 (referring to the French requirement).

150. Where, however, damages have not yet been suffered, yet "appear to be certain and direct consequences of an actual situation," the defendant must compensate for the damages even before actually occurring. FERRARI, *supra* note 5, at 77. Where "loss is merely problematical," however, no damages will be awarded. AMOS & WALTON, *supra* note 73, at 207.

151. *See* 2 ZWEIGERT & KÖTZ, *supra* note 8, at 311.

152. For decisions relating to such wrongful death cases in countries which utilize the single-rule approach, *see supra* notes 27-29, 36-39. *See also* 2 ZWEIGERT & KÖTZ, *supra* note 8, at 311-12.

mulas in order to achieve the same result, but must make new law.¹⁵³

F. Causation

In order to give rise to tortious liability, the intentional or negligent conduct must *cause*¹⁵⁴ the damage, i.e., it must be shown "that a relation of cause and effect exists between the wrongful act and the damage."¹⁵⁵ Establishing this relation is necessary to avoid the "infinite liability for all wrongful acts"¹⁵⁶ which would "set society on edge . . . and fill the courts with endless litigation."¹⁵⁷

Despite numerous efforts to identify a general principle applicable to all causation problems,¹⁵⁸ no generally accepted theory yet exists.¹⁵⁹

One possible theory¹⁶⁰ is the so-called "equivalence theory,"¹⁶¹

153. In England, no damages for the wrongful death of a cohabiting partner were compensable until the revision in 1982 of the Fatal Accidents Act of 1976.

154. Sometimes, instead of requiring the harm to be *caused* by the wrongdoer's conduct, statutes require the harm to *result from, arise from, occur through, be brought about by, be the consequence of, be produced by, or happen by reason of* that conduct. A.M. Honoré, *Causation and Remoteness of Damage*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 4, at 11-12. Modern courts and writers generally treat these expressions as synonymous. *Id.* at 12.

At times, however, the expressions *causing harm* and *occasioning harm* are distinguishable. "[T]he cause is the factor which is certain to produce the consequence sooner or later, in one way or another, whilst the occasion merely determines the timing, place or manner of the upshot." *Id.*

155. AMOS & WALTON, *supra* note 73, at 211 (footnote omitted). See also FERRARI, *supra* note 5, at 78; Pierre Gueux, *La relation de cause à effet dans les obligations extracontractuelle*, D. CHR. 205 (1964); STONE, *supra* note 1, at 34.

156. KEETON ET AL., *supra* note 62, § 41, at 264. See Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 64 (stating that the question of causation "enables us to eliminate irrelevant elements").

157. North v. Johnson, 59 N.W. 1012, 1012 (Minn. 1894).

158. For recent discussion of that question in common law, see generally William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); Michael A. Pope, *Statistical Evidence as Proof of Causation*, 55 DEF. COUNS. J. 135 (1988); David T. Price, *Causation - the Lords' Lost Chance?*, 38 INT'L & COMP. L.Q. 735 (1989); Robert Roth, *Causation and the Burden of Proof - An Age Old Dilemma and a New Age Approach*, 14 ADVOC. Q. 70 (1992); Steven Shavell, *Uncertainty Over Causation and the Determination of Civil Liability*, 28 J.L. & ECON. 587 (1985); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985). Honoré, *supra* note 154, at 23, (noting that there are "some writers who have taken the view that there is no need for a theory of causation").

159. "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach." KEETON ET AL., *supra* note 62, § 41, at 263.

160. "The fundamental distinction recognized by Continental theorists is between those

which considers "every *conditio sine qua non* [as] a cause of the harm which would not have occurred without it."¹⁶² After governing several countries' torts, such as those of France¹⁶³ and Germany,¹⁶⁴ this theory was abandoned¹⁶⁵ because "the courts . . . have felt that it would lead to an undue extension of civil liability."¹⁶⁶

Instead, the civil law courts turned attention to the "adequacy theory," or "theory of adequate cause."¹⁶⁷ According to this theory—based on an evaluation *ex ante*¹⁶⁸ and referred to in France as *prognostic rétrospectif*¹⁶⁹—only those events which in the normal course of things are likely to produce the damage may be deemed its cause.¹⁷⁰ Most civil law countries, including France¹⁷¹ and Italy,¹⁷² have adopted this theory. However, in Germany, this theory is com-

theories which recognize that every particular causal statement is implicitly general, in the sense that its truth is dependent on the truth of some general statement of regularities, and those theories which do not recognize this." H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 433 (2d ed. 1985). However, "[b]etween the individualizing and generalizing theories we must place the Continental variant of the doctrine of the equivalence of conditions, the 'theory of conditions'." *Id.* at 434.

161. The Austrian writer Glaser first expounded the modern version of this theory:

If one attempts wholly to eliminate in thoughts the alleged author [of the act] from the sum of the events in question and it then appears that nevertheless the sequence of intermediate causes remains the same, it is clear that the act and its consequence cannot be referred to him . . . but if it appears that, once the person in question is eliminated in thought from the scene, the consequences cannot come about, or that they can come about only in a completely different way, then one is fully justified in attributing the consequence to him and explaining it as the effect of his activity.

HART & HONORÉ, *supra* note 160, at 442-43 (footnotes omitted).

162. Honoré, *supra* note 154, at 34.

163. See FLOUR & AUBERT, *supra* note 95, at 155. See also AMOS & WALTON, *supra* note 73, at 211-12.

164. See Honoré, *supra* note 154, at 31.

165. In Germany, this theory "fell out of favour for civil law after the enactment of the GERMAN Civil Code." Honoré, *supra* note 154, at 31. See also ALBERT A. EHRENZWEIG, *DIE SCHULDHAFTUNG IM SCHADENSERSATZRECHT* 88 (1936).

166. HART & HONORÉ, *supra* note 160, at 465. For a similar criticism of the *conditio sine qua non* theory, see MALAURIE & AYNÈS, *supra* note 22, at 47 ("[T]his theory has been rejected because . . . it attributes an unlimited number of causes to a damage. It tends to hold every man liable for all the misfortunes inflicting mankind; this is neither true, nor possible . . . one must limit the causal connection.").

167. HART & HONORÉ, *supra* note 160, at 465. Note that "[t]he choice of term[s] is sometimes significant, since "adequacy" is preferred to "adequate cause" by those who see the theory as wholly or partly concerned to set non-causal limits to civil responsibility rather than to elucidate the meaning of causal connection in civil law." *Id.* This theory is attributed to the German psychologist von Kries who first advanced it in the 1880s. *Id.* at 467.

168. Recently, this method has been suggested in Italy. GALGANO, *supra* note 63, at 301.

169. See FERRARI, *supra* note 5, at 80; FLOUR & AUBERT, *supra* note 95, at 155.

170. AMOS & WALTON, *supra* note 73, at 212.

171. *Id.*; FERRARI, *supra* note 5, at 80; STONE, *supra* note 1, at 37.

172. See GALGANO, *supra* note 63, at 301.

bined with the "scope of the rule" theory¹⁷³ which "asserts that damages for harm are recoverable only if the harm is within the scope of the rule violated."¹⁷⁴ Thus, "[i]t has been held that even a damage adequately caused may not have to be compensated for, if the legal rule under which the compensation is payable was not intended to offer protection against the type of damage in question."¹⁷⁵

England, as well as the United States, have adopted the theory of proximate cause in order to solve the problem of causation.¹⁷⁶ This theory, however, based upon Lord Chancellor Bacon's maxim *in iure non remota causa sed proxima spectatur*,¹⁷⁷ is poorly defined and has therefore even been spoken of as a chameleon.¹⁷⁸ Several attempts have been made to establish a universal rule which would resolve all issues of causation. For example, the "nearest cause" rule attributes damage only to the event which is nearest in time and space.¹⁷⁹ Similarly, according to the "last human wrongdoer" rule, liability would be placed upon the last human wrongdoer in time.¹⁸⁰ Finally, the

173. "[T]his theory was developed independently in the 1920s and 1930s by *Rabel* in Germany and by *Green* in the USA." Honoré, *supra* note 154, at 60 (footnotes deleted).

174. *Id.* (footnote deleted). See 1 COHN, *supra* note 46, at 105.

175. 1 COHN, *supra* note 46, at 105.

176. Sometimes this expression is substituted by the expression "legal cause." See, e.g., Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 212 (1924); Clarence Morris, *On the Teaching of Legal Cause*, 39 COLUM. L. REV. 1087 *passim* (1939); KEETON ET AL., *supra* note 62, § 42, at 273. See also RESTATEMENT (SECOND) OF TORTS § 430 ("[T]he negligence of the actor [must] be a legal cause of the other's harm.").

177. See FRANCIS BACON, *A Collection of some Principal Rules and Maxims of the Common Laws of England*, in THE ELEMENTS OF THE COMMON LAWS 1 (1630): "In *iure non remota causa sed proxima spectatur*. It were infinite for the law to judge the cause of causes, and their impulsion of one another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

178. Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471 (1950) ("Having no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult.").

179. In regard to the aforementioned interpretation of the quoted maxim, it has been stated that "whether Bacon really meant anything of the sort is at least doubtful." KEETON ET AL., *supra* note 62, § 42, at 276. For an early criticism of the maxim at issue, see J.H. Beale, Jr., *Recovery for Consequences of an Act*, 9 HARV. L. REV. 80, 81 (1895-1896) (stating that "[i]f the maxim means anything, it is this: that in looking for the cause of a loss, in order to affix liability for it, one cannot go behind the last cause").

Nevertheless, the "nearest cause" rule plays a role even nowadays. In fact, in *Fennessey v. Pacific Gas & Electric Co.*, 10 Cal. 2d 538 (1938), the court held that errors in the instructions as to proximate cause (defined as the *nearest cause* by the judge) constituted errors in law and therefore a ground for new trial. In this case, in fact, the "court instructed the jury, 'proximate . . . means the closest cause, the nearest cause that you can find, the cause, if we may say it that way, in closest proximity.'" *Id.* at 544.

180. This rule, not unlike the "nearest cause" rule, has been criticized and consequently

"cause and causation" rule renders the defendant not liable if he has only created a passive condition upon which the active cause operated.¹⁸¹ Despite all the theories relating to causation,¹⁸² "no definite principle can be laid down by which to determine this question."¹⁸³ This is why in the United States, for example, the solution of the problem at issue is said to "depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."¹⁸⁴

III. CAUSE ÉTRANGÈRE AND GROUNDS OF JUSTIFICATION

A. *Cause étrangère*

In spite of the existence of the aforementioned conditions, a defendant may not be held liable if he proves either the existence of an extraneous cause¹⁸⁵—the French *cause étrangère*¹⁸⁶—or some specific defence.¹⁸⁷

Even though these defenses produce the same effects, i.e., the failure of the plaintiff's action to be held as tortious conduct,¹⁸⁸ they must be distinguished. While the existence of an extraneous cause interrupts the chain of causation,¹⁸⁹ defense on grounds of justifica-

abandoned because "it has the effect of cutting off plaintiff's remedies against negligent actors who should be responsible." JAMES B. MALONE, THEORIES OF CAUSATION IN THE LAW OF NEGLIGENCE 353, 354.

181. Although this theory has been rejected, nevertheless one can still find the mentioned expressions in the decisions because "it is quite impossible to distinguish between active forces and passive situations." KEETON ET AL., *supra* note 62, § 42, at 277-78.

182. For an overview of further theories and their criticism, including the "natural and probable consequences" rule, the "substantial factor" rule, the "justly attachable cause" rule, and the "but for" rule, see MALONE, *supra* note 180, at 353, 354-57.

183. 1 THOMAS A. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 110 (1906). See also Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 50 (1991); KEETON ET AL., *supra* note 62, § 42, at 279 (referring to the "fruitless quest for a universal formula"). See also Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1737, 1737 (1985) (stating that "the causation requirement has resisted all efforts to reduce it to a useful, comprehensive formula . . .").

184. KEETON ET AL., *supra* note 62, § 42, at 273. For a comparison of this view with other authors' views, see generally Kelley, *supra* note 183.

185. AMOS & WALTON, *supra* note 73, at 214. "The defendant may negative the existence of a causal relationship between his action and the damage by proving that the damage was occasioned by an extraneous event for which he was not responsible." *Id.*

186. The expression *cause étrangère* is borrowed from article 1147 of the French Civil Code. AMOS & WALTON, *supra* note 73, at 214.

187. WINFIELD & JOLOWICZ, *supra* note 89, at 614.

188. See Limpens et al., *supra* note 4, at 81 (proclaiming that "it is true that these two types of defence very often produce the same result, i.e., the dismissal of the tortious claim").

189. Honoré, *supra* note 154, at 91. "'Extraneous cause' is a synonym for a cause which is

tion acknowledges this relationship, but relieves the conduct of its blameworthy character.¹⁹⁰

The extraneous cause concept encompasses different *causes étrangères*, such as superior force (*force majeure*), chance (*cas fortuit*),¹⁹¹ action of the third party, and fault of the victim.¹⁹² However, in order to break the chain of causation, the extraneous cause must, at least in France, present certain characteristics: "the event must be *unforeseeable* and *irresistible* (or *inevitable*)."¹⁹³ As far as the "foreseeability" and the "unavoidability" (or "irresistibility") are concerned,¹⁹⁴ some argue that nothing is really unforeseeable and unavoidable. Thus, the courts have stated that an event is considered an extraneous cause if it is "normally"¹⁹⁵ unavoidable and unforeseeable,¹⁹⁶ i.e., if a reasonable man could not have avoided or foreseen it.¹⁹⁷

An interesting problem concerning the extraneous cause con-

counted as the sole cause of the harm, interrupts the chain of causation, prevents the existence of an adequate relationship between the tortfeasor's conduct and the harm or otherwise renders the damage too remote. . . ." *Id.* See also AMOS & WALTON, *supra* note 73, at 214; Limpens et al., *supra* note 4, at 81.

190. Limpens et al., *supra* note 4, at 81. Where there is justification, the defendant has not been sued wrongly or by mistake, [unlike in the case of *cause étrangère*]; it was he who caused the damage, and his behaviour suggests he is at fault. But really, when we take a closer look, we see that the fault is only apparent, and that the certain factors excuse or justify his behaviour.

Id.

191. French courts use the expressions *cas fortuit* and *force majeure* synonymously. AMOS & WALTON, *supra* note 73, at 214. See also FERRARI, *supra* note 5, at 107; STARCK, *supra* note 25, at 278.

In the rare instances where possible distinctions have been suggested we find the following attempts. *Cas fortuit* is a *natural* happening which occasions damage such as a flood or earthquake, while *force majeure* refers to a *non-natural* happening, proceeding from the will of the person other than the one sued. . . .

STONE, *supra* note 1, at 59.

192. AMOS & WALTON, *supra* note 73, at 214.

193. Pierre Catala & Anthony Weir, *Delict and Torts: A Study in Parallel*, 39 TUL. L. REV. 701, 759 (1964-1965). See also FERRARI, *supra* note 5, at 107; STONE, *supra* note 1, at 59.

194. These conditions were also required in Roman law in order to lead to the dismissal of the tortious claim. See STONE, *supra* note 1, at 59. "Ulpian defined *vis major* as all force to which resistance was not possible . . . thus stressing its *irresistibility*, and *casus fortuitus* as events which human deliberation . . . is able to foresee thus stressing its *unforeseeability* *Id.*

195. The introduction of this adverb into court decisions derived from the work of the Mazeaud brothers and "succeeded in introducing a little flexibility into an area disfigured by the abuses of logical abstractions." Catala & Weir, *supra* note 193, at 761 n.181.

196. FERRARI, *supra* note 5, at 107.

197. The reference to the "reasonable man" has led to the statement that "the unforeseeability and the unavoidability are evaluated *in abstracto*." STARCK, *supra* note 25, at 282.

cerns the value of the victim's fault,¹⁹⁸ the *faute de la victime*,¹⁹⁹ which finds its origin in Roman law. In Roman law, an injured party whose own fault led to his harm could only recover if the tortfeasor's fault was intentional.²⁰⁰

In France, the victim's fault, if it concurred with the plaintiff's fault, usually led to the reduction of damages,²⁰¹ at least until a decision on July 21, 1982.²⁰² After this decision,²⁰³ the plaintiff's fault would entail the apportionment of damages only if the *faute de la victime* was unforeseeable and unavoidable.²⁰⁴ This rule, however, has been mitigated in 1987 when the *Cour de Cassation*²⁰⁵ established that there will be reduction of the damages "if the defendant proves that the victim's fault has contributed to the harmful event,"²⁰⁶ even if the fault was not unforeseeable or unavoidable.

In the United States, there is no uniform solution to contributory

198. In civil law countries, the expression usually referred to is "the victim's fault" or "the fault of the injured party." See, e.g., Honoré, *supra* note 154, at 94. This expression has been criticized; some argue that it would be more proper to speak of the victim's *act*. Catala & Weir, *supra* note 193, at 762. "This is perfectly logical A fault often plays a causal role, but an act or circumstance in which there is no element of fault can perfectly well be causal" *Id.* This is the case, for example, when a child too young to be morally responsible or a lunatic person suffers harm as a result of his own act. In such cases, "when the incapable person is himself plaintiff his material contribution to the accident is taken into account and the defendant will be exonerated to the extent that the plaintiff's actions caused the damage." AMOS & WALTON, *supra* note 73, at 216 (footnote omitted).

199. In France, this problem is identified by the expression *faute de la victime*; in Germany, it is called *eigenes Verschulden des Geschädigten*. Honoré, *supra* note 154, at 94. In English, no "expression of art" corresponds to the aforementioned phrases, although a similar concept can also be found in common law. Even in common law there is no uniform solution. Indeed, in order to solve the problem at issue, two concepts are applied: "contributory negligence" and "comparative negligence." However, none of these expressions corresponds directly to the French one. Some conclude that contributory negligence has a more restricted meaning than the French expression, since "[it] excludes that conduct of the injured party which is not merely contributory to the harm but its sole cause, . . . or which is intentional rather than merely negligent, or which occurs after the tortfeasor's conduct has affected the injured part." *Id.* (footnote omitted).

200. *Id.* "[I]f anyone suffers damage through his own fault he is not regarded as suffering damage." *Id.*

201. See STONE, *supra* note 1, at 69.

202. See Civ., July 21, 1982, GAZ. PAL. II 391 (1982).

203. The rule that the plaintiff's fault lead to the reduction of the compensable damages to be compensated was first applied in the 1930s. See, e.g., Civ., Dec. 13, 1936, GAZ. PAL. I 157 (1937).

204. See FERRARI, *supra* note 5, at 108.

205. See Civ., April 6, 1987, BULL. CIV. II 86 (1987).

206. Judgment of April 6, 1987, *supra* note 205, cited in FERRARI, *supra* note 5, at 109. This rule also applies to the fault of the third party. See, e.g., STARCK, *supra* note 25, at 284.

fault. In fact, some jurisdictions²⁰⁷ have adopted the contributory negligence²⁰⁸ rule, based on English law.²⁰⁹ Under contributory negligence, the plaintiff's fault completely bars any recovery against the defendant. Most jurisdictions, however, avoid this harsh result by application of the comparative negligence rule. There are three distinct versions of this rule.²¹⁰ First, under "pure" comparative negligence, the plaintiff's damages are reduced in proportion to his fault.²¹¹ Second, under the "fifty percent" rule, recovery is barred completely only if the plaintiff's negligence is greater than the defendant's.²¹² Finally, under the "forty-nine" percent rule, the action is dismissed if the

207. "As of October, 1989, only six United States jurisdictions continue to apply the common-law rule that contributory negligence completely bars an injured person's recovery . . . these are Alabama, the District of Columbia, Maryland, North Carolina, South Carolina, and Virginia." Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Liability*, 41 ALA. L. REV. 13 (1989). However, "South Carolina . . . adopted comparative fault in a recent judicial opinion." William F. Horsley, *The Argument for Comparative Fault*, 38 N. C. B. Q. 18, 19 (1991).

208. For a critical approach to contributory negligence, see, e.g., Leon Green, *Illinois Negligence Law II*, 39 ILL. L. REV. 36, 116 (1944); Frank E. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958). For a more recent attack on contributory negligence, see Horsley, *supra* note 207; Wex S. Malone, *Some Ruminations on Contributory Negligence*, 65 UTAH L. REV. 91 (1981).

209. The idea of contributory negligence "first appeared at the beginning of the nineteenth century, though the general idea is traceable much earlier." WINFIELD & JOLOWICZ, *supra* note 89, at 106. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (1809), appears to be the earliest English case; as for this affirmation, see, e.g., Horsley, *supra* note 207, at 19; KEETON ET AL., *supra* note 62, § 65, at 451 n.1; WINFIELD & JOLOWICZ, *supra* note 89, at 106.

In England, the problem of extraneous causation was solved in 1945 by the Law Reform (Contributory Negligence) Act. Section 1(1) states that:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, Ch. 28, § 1(1) (Eng.).

210. For a recent, complete survey on the different versions of comparative negligence, as well as for the jurisdictions which adopt them, see Little, *supra* note 207, at 27-33. However, there are more variations on the rules relating to comparative negligence than the three mentioned. "Nebraska, South Dakota, and Tennessee employ a so-called "slight-gross" rule . . . the basic requirement is that the plaintiff's negligence must be slight and the defendant's gross to avoid barring the action." *Id.* at 29.

211. In 1989, thirteen states employed pure comparative negligence. While seven states operate under judicially made rules (Alaska, California, Florida, Kentucky, Michigan, Missouri, and New Mexico), six operate under statutes (Arizona, Louisiana, Mississippi, New York, Rhode Island, and Washington).

212. In 1989, twenty states employed the "fifty percent" rule; for a list of these states, see Little, *supra* note 207, at 29.

plaintiff's fault is equal to or greater than the defendant's.²¹³

B. Self-Defense and Necessity

The liability of the defendant may also be affected by the defense of justification,²¹⁴ or "factors justifying the defendant's action."²¹⁵ *One fait justificatif*²¹⁶ is self-defense. Today, self-defense is "a ground of justification in every legal system."²¹⁷ It "negatives any liability in tort,"²¹⁸ even in those countries where tortious liability is not based upon the concept of fault.²¹⁹ Self-defense is defined²²⁰ as conduct that causes damage, but does not constitute a tort because it is done in order to repel an aggression.²²¹ In all legal systems, this conduct must satisfy several conditions²²² in order to negate liability. Generally, to

213. In 1989, nine states employed the "forty-nine percent" rule: Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, and West Virginia.

214. The grounds of justification have sometimes been defined as "negative elements" or "negative characteristics" of fault; see, e.g., AMOS & WALTON, *supra* note 73, at 220; FER-RARI, *supra* note 5, at 83. However, it has even been said that "there is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed." Joseph H. Beale, *Justification for Injury*, 41 HARV. L. REV. 553 (1928).

215. AMOS & WALTON, *supra* note 73, at 220.

216. As to a recent treatment of the grounds of justification in France, see DINGOME, *LE FAIT JUSTIFICATIF EN MATIÈRE DE RESPONSABILITÉ CIVILE* (1986).

217. Limpens et al., *supra* note 4, at 81. In civil law, self-defense (defined sometimes as "necessary defense;" see, e.g., Limpens et al., *supra* note 4, at 81) always existed as a justification (even in SOPHOCLES, OEDIPUS AT COLONUS, one can find some references to self-defense), but "early English law, with its view of strict liability, did not recognize such a privilege." KEETON ET AL., *supra* note 62, § 19, at 124. It was not until the year 1400 that the common law recognized self defense as a justification for a crime. Y.B. 2 Hen. 4, pl. 40 (1400). In fact, it has been stated that "in 1294 and in 1319 the defendant was obliged to respond; but in 1400 and ever since, the plea is accepted as a complete defence." John H. Wigmore, *Responsibility for Tortious Acts: Its History III*, 7 HARV. L. REV. 446 (1894).

218. WINFIELD & JOLOWICZ, *supra* note 89, at 631.

219. It has been stated that "in classical Mohammedan law, for example, in principle an act is of itself sufficient to impose liability, and the state of mind of the person concerned is irrelevant. This might suggest that no grounds of justification would be recognized. Nevertheless, classical Mohammedan law accepts necessary defense as a ground of justification." Limpens et al., *supra* note 4, at 82.

220. In several legal systems, the legislature expressly provides a definition. See, e.g., BGB § 227; CODE CIVIL [C. CIV.] art. 284 (Greece); C.C. art. 2044 (Italy); MINPŌ art. 720(1) (Japan); CODE CIVIL [C. CIV.] art. 52(1) (Switz.); CODE CIVIL [C. CIV.] art. 149 (Taiwan).

Other legal systems have no express definition offered by the civil codes. The judges and legal scholars have developed this justification based on general principles of tortious liability and on criminal law principles. In France, for example, while the *Code Civil* does not provide any definition of self-defense, Penal Code art. 328 does.

221. For a similar definition, see STONE, *supra* note 1, at 191.

222. Limpens et al., *supra* note 4, at 82-83, lists six conditions: (1) an attack which must be (2) immediate or imminent and (3) unlawful and an (4) intentional, (5) proportional conduct (6) directed towards the author of the attack. *Id.* Some summarize these conditions and list

constitute self-defense, the action must be taken to avoid *unlawful*²²³ and *actual*²²⁴ aggression. Consequently, when the defensive action occurs after the threat of aggression has subsided,²²⁵ or "where there is no right to defend oneself against an opponent who is authorized . . . or who, as a servant of the state, is acting within his authority,"²²⁶ the attacked person becomes the aggressor and is subject to liability for his conduct. Furthermore, in order to constitute self-defense, the conduct must be *proportional*²²⁷ to the aggression; it must not exceed the limits of necessity.²²⁸ Where the attacked person's conduct "goes beyond the real or apparent necessities of his or her defense,"²²⁹ "there would be abuse of self-defense"²³⁰ generally resulting in tortious liability.²³¹

If the act of self-defense harms not the original aggressor, but a third party, the claim of self-defense is vitiated.²³² In such a case, the

only two conditions: an unlawful attack and a proportional conduct. MALAURIE & AYNÈS, *supra* note 22, at 57.

223. Unlawful aggression is expressly required in German Civil Code § 227: "An act done in defense is not unlawful. Defense is any defensive action necessary in order to repel an immediate and unlawful attack upon oneself or another." *Id.*

224. As for actual aggression, see German Civil Code § 227, *supra* note 223. In German law, an aggression is actual up until the moment where the danger has ceased. *See, e.g.*, FER-RARI, *supra* note 5, at 82 n.115.

225. "It is clear that once the defendant has repelled the aggression, any additional force applied is in the nature of vengeance and constitutes an aggression itself." STONE, *supra* note 1, at 194. For a similar statement, see KEETON ET AL., *supra* note 62, § 19, at 127, where the authors proclaim that "revenge is not a defense." For court decisions, see *Germolus v. Sausser*, 85 N.W. 946 (Minn. 1901); *Monize v. Begaso*, 76 N.E. 460 (Mass. 1906); *Tezeno v. Maryland Cas. Co.*, 166 So. 2d 351 (La. Ct. App. 1964).

226. Limpens et al., *supra* note 4, at 83.

227. *See, e.g.*, CODE CIVIL [C. CIV.] art. 169 (Libya); CODE CIVIL [C. CIV.] art. 149 (Taiwan).

228. "No compensation need be paid for harm caused by necessary defense unless the limits of necessity are exceeded." GRAZHDANSKII KODEKS RSFSR [GK RSFSR] art. 448 (1964) (Russia), *quoted in* Limpens et al., *supra* note 4, at 82.

229. KEETON ET AL., *supra* note 62, § 19, at 126. The problem of unproportional, or unreasonable or excessive force has been treated also in Roman law. Ulpian stated:

Where, however, anyone kills another who is attacking him with a weapon, he is not held to have killed him unlawfully; and where anyone kills a thief through fear of death, there is no doubt that he is not liable under the *Lex Aquilia*. But if he is able to seize him, and prefers to kill him, the better opinion is that he commits an unlawful act, and therefore he will be liable under the *Lex Cornelia*.

STONE, *supra* note 1, at 193, *quoted in* DIG. 9.2.5.pr. (Ulpian, *Ad Edictum* 18).

230. MALAURIE & AYNÈS, *supra* note 22, at 57.

231. However, there are legal systems, such as those in Taiwan and Libya, whose "statutory provisions lay down that a person guilty of excessive defense must merely pay an equitable indemnity." Limpens et al., *supra* note 4, at 83.

232. *See, e.g.*, STONE, *supra* note 1, at 194-95; WINFIELD & JOLOWICZ, *supra* note 89, at 633.

person is said to be acting under necessity,²³³ *état de nécessité*, *Notstand*, *stato di necessità*.²³⁴ Necessity requires conditions similar to those of self-defense in order to negate liability, i.e., "an actual or threatened illegal wrong"²³⁵ and no available alternative to avoid the harm. However, the defense of necessity, rarely used in common law,²³⁶ has additional requirements; the occasion of the necessity may not arise from the defendant's own negligence.²³⁷ Furthermore, in some countries, such as Italy, the actual or threatened wrong must be grave;²³⁸ in other countries, such as France, the interest sacrificed must be less than the one saved.²³⁹ As far as the consequences of conduct under necessity are concerned, while some legal systems (France, Germany, Poland, and common law countries, as far as intentional torts are concerned)²⁴⁰ consider necessity as being a justification negating all liability,²⁴¹ other systems (mainly Mohammedan systems)²⁴² do not relieve a person from liability. A third group of

233. It has been said that the only difference between necessity and self-defense is that "in necessity the damage is done to a third party, and not to the author of an unlawful and immediate attack." Limpens et al., *supra* note 4, at 83.

234. As for a treatment of necessity in French law, see, e.g., PAUL PALLARD, *L'EXCEPTION DE NÉCESSITÉ EN DROIT CIVIL* (1949); RENÉ SAVATIER, *L'ÉTAT DE NÉCESSITÉ ET LA RESPONSABILITÉ CIVILE EXTRA-CONTRACTUELLE*, in *ÉTUDES CAPITANT* 729 (1956). As for German law, see Ortrun Lampe, *Defensiver und aggressiver übergesetzlicher Notstand*, 21 NJW 88 (1968); Wilhelm Weimar, *Die zivilrechtliche Haftung bei strafrechtlichem Notstand*, 15 NJW 2093 (1962). In Italy, too, this problem has been addressed by several scholarly works. See MAURO BRIGUGLIO, *LO STATO DI NECESSITÀ NEL DIRITTO CIVILE* (1963); Bruno Inzitari, *Necessità*, in 27 ENC. DEL DIR. 852 (1979).

235. WINFIELD & JOLOWICZ, *supra* note 89, at 635.

236. Winfield and Jolowicz state that "the authority on it is scanty." *Id.*

237. This condition is expressly required: "[w]here a person causes damage through the necessity of protecting himself or another from immediate harm and grave personal danger, and the danger was not caused voluntarily by that person and could be avoided in no other way . . ." C.C. art. 2045 (Italy).

238. See *id.*

239. As a result, in France, one cannot consider the sacrifice of a human life instead of one's own life a necessity. See AMOS & WALTON, *supra* note 73, at 223. "French law would not admit that one was entitled to sacrifice another's life for one's own safety." *Id.* See also FERRARI, *supra* note 5, at 83; MALAURIE & AYNÈS, *supra* note 22, at 53. In Italy, however, it is possible to consider the sacrifice of another person's life to save one's own life a necessity. See, e.g., GALGANO, *supra* note 63, at 300.

240. For a more complete list of countries, see Limpens et al., *supra* note 4, at 84-87.

241. However, in these systems both case law and legal theory tend to favor some indemnity for the victim. In Germany, for example, while the necessity governed by Germany Civil Code § 228 (*Notstandsverteidigung*) relieves the defendant of all liability, unless the defendant "caused the danger through his own fault," Germany Civil Code § 904 (*Notstandsangriff*) provides that the victim has the right to claim damages. For a more complete treatment of necessity in Germany, see, e.g., FERRARI, *supra* note 5, at 122.

242. See Limpens et al., *supra* note 4, at 86.

systems (including Italy,²⁴³ Libya,²⁴⁴ Switzerland, Turkey,²⁴⁵ Austria,²⁴⁶ and Greece²⁴⁷) utilize an intermediate approach under which the person claiming necessity is bound to pay an indemnity to be determined by the judge on the basis of equitable principles.

C. Consent, Assumption of Risk, and Other Grounds of Justification

In several common law systems²⁴⁸ and civil law systems, not unlike in Roman law (*volenti non fit iniuria*),²⁴⁹ consent negates the existence of liability. Under common law, consent negates liability by not recognizing a tort where the absence of consent is a definitional part of a specific tort, such as assault.²⁵⁰ In civil law, consent negates the unlawfulness of the conduct.²⁵¹ Of course, in order for the consent to be valid, several conditions must be met. The consent must be manifest, though it need not be express.²⁵² It may be implied from circumstances²⁵³ or, in an exceptional case, through necessity.²⁵⁴ For

243. Where a person causes damage through the necessity of protecting himself or another from immediate and grave personal danger, and the danger was not caused voluntarily by that person and could be avoided in no other way, the victim has a right to an indemnity, the extent of which is left to the judge's equitable discretion.

C.c. art. 2045 (Italy).

244. See C. Civ. art. 171 (Libya).

245. "The judge shall equitably determine the sum payable in compensation by a person who injures the property of another in order to protect himself or a third party from damage or imminent danger." CODE OBLIGATIONS [C. OBLIG.] art. 52(2) (Switz.).

246. See ABGB § 1306a (Austria).

247. See C. Civ. art. 286(1) (Greece).

248. The principle of consent as justification can be found in English law in Bracton's *De Legibus Angliae* (1250-1258). This principle (worded as it is now, *volenti non fit iniuria*) first appeared in a case of 1305, 33-5 Edw. 1 (Rolls 90b Series). WINFIELD & JOLOWICZ, *supra* note 89, at 614.

249. It has been said that the idea "underlying [consent] has been traced as far back as Aristotle, and it was also recognized in the works of the classical Roman jurists." *Id.*

250. Holmes states that "the absence of lawful consent is part of the definition of assault." *Ford v. Ford*, 10 N.E. 474, 475 (Mass. 1887). The same is true of conversion (*Tousley v. Board of Educ.*, 40 N.W. 509 (Minn. 1888)), false imprisonment (*Ellis v. Cleveland*, 54 Vt. 437 (1882)), and trespass (*Bennett v. McIntire*, 23 N.E. 78 (Ind. 1889)). For further cases, see KEETON ET AL., *supra* note 62, § 18, at 112 nn.5-8.

251. "[T]he consent of the victim is considered to be a justification, in view of which an act is not unlawful." *Limpens et al.*, *supra* note 4, at 89. "[T]he consent of the victim causes in principle the illicit character of the conduct to disappear." CARBONNIER, *supra* note 64, at 95.

252. For an example of express consent, see STONE, *supra* note 1, at 181.

253. A classic example of implied consent is participation in a football game. "[F]ootball players are considered to give implied consent to any future injuries suffered in the normal course of the game." *Limpens et al.*, *supra* note 4, at 89. Another example to which legal writers often refer relates to the situation wherein a person lines up with others and holds out his arm for a vaccination. *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266 (Mass. 1891).

example, consent is implied for surgery where a patient is unable to consent due to lack of consciousness, provided that the operation would prevent serious harm and a reasonable person would give consent.²⁵⁵ Even if consent is given, however, the defendant may still be held liable under certain circumstances. In Italy, for example, consent negates liability only if it is given by the person having authority to do so²⁵⁶ and if it relates to alienable rights.²⁵⁷ In other countries, not only must the consent be freely given,²⁵⁸ but it also cannot be procured by fraud.²⁵⁹

Under common law, the principle *volenti non fit iniuria* does not only appear as a defense under the heading of consent, but also under assumption of risk.²⁶⁰ Assumption of risk²⁶¹ constitutes a much criti-

254. Some authors refer to this situation as the emergency rule rather than as implied consent. See, e.g., EPSTEIN, *supra* note 120, at 19. Others prefer to speak of the emergency "privilege." They argue that it is not consent which negates the doctors' liability, "but such lawful action [the doctors' conduct] is more satisfactorily explained as a privilege." KEETON ET AL., *supra* note 62, § 18, at 117.

255. For some cases, see, e.g., McGuire v. Rix, 225 N.W. 120 (Neb. 1929); Jackovach v. Yocom, 237 N.W. 444 (Iowa 1931); Preston v. Hubbell, 196 P.2d. 113 (Cal. Dist. Ct. App. 1948).

256. See TRIMARCHI, *supra* note 73, at 140. In the United States it has also been pointed out that consent must be given by the person having the authority to do so. Generally, in the case of a minor, the consent must be given by his parents or legal custodian. In some cases, however, jurisdictions such as Illinois and New Jersey "have taken the child from the parents [or person having the legal custody] and made it temporarily the ward of the court or state for the purpose of giving the requisite consent." STONE, *supra* note 1, at 184. See, e.g., People v. Labrenz, 104 N.E.2d 769 (Ill. 1952); State v. Perricone, 181 A.2d 751 (N.J. 1962).

257. See CODICE PENALE [C.P.] art. 50 (1932)(Italy). See also FERRARI, *supra* note 5, at 85.

258. A man cannot said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will.

WINFIELD & JOLOWICZ, *supra* note 89, at 618 (citing Bowater v. Rowley Regis Corp., K.B. 476, 479 (1944)).

259. Cases relating to consent procured by fraud generally deal with sexual or intimate bodily contact. See, e.g., Blossom v. Barrett, 37 N.Y. 434 (1868); Bartell v. State, 82 N.W. 142 (Wis. 1900); Crowell v. Crowell, 105 S.E. 206 (N.C. 1920); People v. Steinberg, 73 N.Y.S.2d 475; Bowman v. Home Life Ins. Co., 243 F.2d 331 (3d Cir. 1957).

260. See Limpens et al., *supra* note 4, at 89. For a history of this defense, see Charles Warren, *Volenti Non fit Iniuria in Actions of Negligence*, 8 HARV. L. REV. 457 (1895).

261. Those critical of assumption of risk as a defense have stated that it should be abolished. "Except for express assumption of risk . . . the term and the concept should be abolished." Fleming James, *Assumption of Risk*, 61 YALE L.J. 141, 169 (1952). For a more recent criticism, see 4 F. HARPER ET AL., LAW OF TORTS § 21.8, at 259 (2d ed. 1986). "[The] concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence." *Id.* But see Kenneth W. Simons, *Assumption of*

cized affirmative defense with the burden of proof on the defendant.²⁶² Assumption of risk follows the same rationale as consent²⁶³ and has the same results, i.e., it bars the plaintiff's recovery (provided that it can be defined as "primary" assumption of risk).²⁶⁴ In civil law, assumption of risk is also a recognized defense.²⁶⁵ However, it does not always have the same consequences. In France, for example, the *acceptation des risques* does not negate the defendant's fault, but merely results in a reduced liability.²⁶⁶

Apart from the aforementioned justifications, the various legal systems recognize other grounds of justification. Where, for example, an individual causes damage by complying with a superior's orders, both civil law²⁶⁷ and common law²⁶⁸ provide for a privilege that bars the plaintiff's recovery, provided the order was lawful.²⁶⁹

The defendant can also negate liability by proving to have acted under lawful authority.²⁷⁰ For example,²⁷¹ if a policeman arrests an individual in the course of his duty and with proper warrant, there is

Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. REV. 213 (1987). Despite the criticism, the doctrine of assumption of risk has not lost its appeal; it has been recently treated in several scholarly works. See, e.g., Ann K. Bradley, *Reasonable Implied Assumption of Risk as a Complete Defense in Sports Injury*, 28 SAN DIEGO L. REV. 393 (1988); John L. Diamond, *Assumption of Risk after Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717 (1991); Jeffrey J. Gearhart, *Assumption of Risk Rides Again*, 41 ARK. L. REV. 657 (1988); James C. Glassford, *Rini v. Oaklawn Jockey Club: Assumption of Risk on Trial: To the Dismay of the Plaintiff's Bar, This one Discredited Defense Being Revived*, 11 CAL. LAW. 57 (1991).

262. *McInnis v. Fireman's Fund Ins. Co.*, 322 So. 2d 155 (La. 1975).

263. For the rationale of assumption of risk, see *Settoon v. Texas & Pacific Ry. Co.*, 48 La. Ann. 807 (1896).

264. For the distinction between primary and secondary assumption of risk, see EPSTEIN, *supra* note 120, at 318.

265. See FERRARI, *supra* note 5, at 85.

266. See, e.g., STARCK, *supra* note 25, at 158.

267. This defense is known in French and in Italian law. See, e.g., FERRARI, *supra* note 5, at 84; MALAURIE & AYNÈS, *supra* note 22, at 53; STARCK, *supra* note 25, at 156.

268. See, e.g., HENDERSON & PEARSON, *supra* note 61, at 119.

269. AMOS & WALTON, *supra* note 73, at 223. In French law, "the plea of superior orders raises problems of principle analogous to those of the plea of necessity. A subordinate is not bound to execute passively orders which he knows, or ought to know, to be wrongful." *Id.* French legal writers have pointed out that the order is lawful when (1) it is issued by a source who is legally empowered to do so, see *Judgement of March 31, 1933*, G.P. I 973 (1933), and (2) when the order does not contrast with any provision, see *Judgement of March 18, 1955*, D. 573 (1955).

For the requirement of similar conditions in Italian law, see ANTOLISEI, *DIRITTO PENALE* 238 (1983); FERRARI, *supra* note 5, at 84 n.124. Similar conditions must also be met under German law. See, e.g., BGH, May 25, 1955, BGHZ 17, 327.

270. It has been said this defense is "most frequently invoked in the realm of public law, - as where a civil servant, acting in his official capacity and within the limits of his authority,

no liability²⁷² unless the policeman abused his authority.²⁷³

However, in common law, as well as in some civil law countries, the right of "arrest without warrant" authorizes police to make arrests without first obtaining a warrant. The rationale is to prevent crimes and to protect the arresting officer from liability.

There are, of course, other grounds of justification which vary from country to country. However, in spite of this diversity, one can conclude that they all seem to have one common denominator: "they are invariably based upon pressure being brought to bear on the tortfeasor which restricts his freedom of action or counteracts his scale of value."²⁷⁴

IV. CONCLUSION

The purpose of this Article is to outline the laws of torts as it varies with each country's legal system in order to illustrate that the actual differences between the systems are not too relevant. Indeed, generally, "where a plaintiff would recover in France, he would recover, too, in England."²⁷⁵ Apart from some unique rules, for example punitive damages in common law, compensation for wrongful death of a cohabitating partner in some French based systems, and compensation in kind in some German based systems, the tort law of the various countries tends to produce the same consequences. This affirmation presupposes common aims and common conditions. However, since the conditions for tortious liability are basically the same, there is no doubt that the different law of torts will continue to achieve the very same results.

interferes with a person's property . . . or where he infringes someone's personal rights." Limpens et al., *supra* note 4, at 88.

271. Other cases relate to the parents' power to physically discipline their children or to judicial orders. However, there are tendencies to "abolish" this absolute power. In Germany, for example, the parents' power to discipline their children has been severely criticized. See, e.g., Horst Petri, *Abschaffung des elterlichen Züchtigungsrechts*, 9 ZEITSCHRIFT FÜR RECHTSPOLITIK 64 (1974). In Italy in 1988, a law on judges' liability was enacted under which judicial officials can currently be held liable for causing damages either intentionally or *cum culpa lata*.

272. For an application of this principle, see, e.g., Logan v. Swift, 327 So. 2d 168 (La. Ct. App. 1976).

273. For example, where an officer strikes a prisoner without cause. E.g., Dufrene v. Rodrigue, 38 So. 2d 511 (La. Ct. App. 1949). See also Polizzi v. Trist, 154 So. 2d 84 (La. Ct. App. 1963).

274. Limpens et al., *supra* note 4, at 92.

275. Catala & Weir, *supra* note 193, at 780.