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TORT LAW AND THE MORAL LAW: ANGLO-FRENCH DIVERGENCES

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ABSTRACT. *Tunc's inaugural lecture "Tort Law and the Moral Law" in 1972 aimed to set out the moral foundations of tort liability in common law and French law. It triggered exchanges in this Journal with Hamson who challenged Tunc's views. This article explores the context of the debate and then reviews the subsequent developments of English and French law. Both systems have continued on the same path as the protagonists set out in their debate with France deepening its grounding in social solidarity as a justification for tort liability while English law sees its place only in state action or private charity.*

KEYWORDS: *tort, tort theory, moral basis of tort, French delict, England, fault.*

I. INTRODUCTION

THE debate in this Journal between André Tunc and Jack Hamson over Tunc's inaugural Goodhart Lecture in 1972 illustrates the gulf between French ideas on extra-contractual liability (as it is now called) and English tort law. Although it is nearly 50 years since that lecture was given, the red lines between French and English law have not really changed. Indeed, they will be further entrenched if current proposed reforms to the French Code civil are enacted.[1] As the protagonists lucidly explain in a total of barely 25 pages, their debate was about the scope of tort law and whether principles of social solidarity have any place within them. That remains a relevant topic today.

* Emeritus Professor of Law, University of Cambridge. Address for Correspondence:. Email: jsb48@cam.ac.uk. The author had the good fortune to know both Tunc and Hamson at the time of the debate, since he too was a member of Trinity and a Roman Catholic. He was also present at the Inaugural Lecture on 27 October 1972. I am grateful for comments from Professor Simon Whittaker and Professor Paula Giliker on an earlier draft.

[1] The current official draft text for the reform of civil liability was produced by the French Ministry of Justice in 2017, but no legislation has been introduced so far to give effect to them. For a discussion of these reform proposals, see J.-S. Borghetti and S. Whittaker, *French Civil Liability in Comparative Perspective* (Oxford 2019). A private members' bill was introduced in 2020. Earlier proposals were made first by groups of academics and others under Pierre Catala in 2005 and then by François Terré in 2008.

This article seeks first to set the scene in 1972–73 in terms of the people involved and the debate on tort law at the time. Second, it presents the core of the debate between the two protagonists. Third, it seeks to assess the significance of the debate as an illustration of the divergent trajectories of English and French tort law.

II. Setting the Scene

A. The Protagonists

"Tort Law and the Moral Law"[2] was Tunc's inaugural lecture as the first Arthur Goodhart Visiting Professor of Legal Science at the University of Cambridge. Tunc was a prominent French professor in the field of civil liability based at the Université de Paris 1. He was the editor of one of the leading treatises of the day, Henri and Léon Mazeaud's *Traité théorique et pratique de la responsabilité civile*.[3] He was also rather unusually well versed in both American and English law. From 1947 to 1950, he was seconded as legal adviser to the International Monetary Fund in Washington DC. This stay had a formative influence over the rest of his career. Not merely did he and his wife, Suzanne, write an introduction to American law for a French audience.[4] He also developed a deep understanding of American company law, which would be a subject he researched and taught for the rest of his career. But equally importantly, he was exposed to the new ideas emerging in post-War US tort law – both product liability[5] and compensation for road accidents.[6] He continued his study of the US law for the rest of his life, especially through links with colleagues such as Arthur von Mehren at Harvard.[7] He travelled widely, including coming to England regularly from the early 1950s.

Jack Hamson retired as Professor of Comparative Law and as Editor of the *Cambridge Law Journal* in September 1973. He had been a teaching member of the Faculty of Law and Fellow of Trinity College since 1932. With a significant interruption for war service, he was a major influence on teaching in Cambridge and on comparative law for 40 years. He became professor in 1954, the same year as his Hamlyn Lectures on French

[2] [1972A] C.L.J. 247–59. Jack Hamson replied in "The Moral Law and Professor Tunc" [1973] C.L.J. 52, 52–55, to which Tunc responded in A. Tunc, "Accident Victim Compensation and the Moral Law" [1973] C.L.J. 241. Hamson then responded in C.J. Hamson, [1973] C.L.J. 244.

[3] 5th ed. (Paris 1957–60); 6th ed. (Paris 1965–83).

[4] A. Tunc and S. Tunc, *Le droit des États-Unis d'Amérique: sources et techniques* (Paris 1955), and A. Tunc and S. Tunc, *Le système constitutionnelle des États-Unis d'Amérique* (Paris 1954), 2 volumes.

[5] *Escola v Coca-Cola Bottling Co. of Fresno*, 150 P.2d. 436 (Cal. 1944).

[6] Columbia University Council for Research in The Social Sciences, *Report by the Committee to Study Compensation for Automobile Accidents* (Philadelphia 1932). See also F.P. Grad, "Recent Developments in Automobile Accident Compensation" (1950) 50 Colum.L.Rev. 300.

[7] See A.T. von Mehren, "André Tunc (1917–1999)" (2000) Revue internationale de droit comparé 13, 15–16. The mutual influence is seen by the scope given to French tort law in A.T. von Mehren, *The Civil Law System: Cases and Materials for the Comparative Study of Law* (Englewood Cliffs, NJ 1957).

administrative law,[8] a work which is perhaps his most enduring legacy. Although writing nothing substantial on tort law, Hamson was a regular case note writer on tort law in the *Cambridge Law Journal*, especially during his tenure as Editor. As Tony Jolowicz wrote:

> He wrote some memorable, even influential, pieces on both common law and comparative law topics, but the volume of his publications is relatively small. It was through his ability to convince others by the spoken word, at national and international gatherings as well as in the classroom, that he made his most important contributions to the law and its development.[9]

His contribution in this debate is slim in length but represents a depth of thinking based on careful study of over 40 years, and for a deep study of the French system as well as the English system.

The debate between the Anglophile Tunc and the Francophile Hamson was polite, but firm. They were both Fellows of Trinity, and both Roman Catholics, so they had much in common. They also had admiration for each other. So, this was a debate of principle conducted in a friendly fashion and in a genuine spirit of respect.

B. The Tort Law Context

The intellectual context in England made the inaugural lecture and the subsequent debate topical. The topic of accident compensation was very much current at the time of this lecture. Patrick Atiyah had published *Accidents, Compensation and the Law*[10] and Guido Calabresi published *The Cost of Accidents*[11] in 1970. Ison published *The Forensic Lottery* in 1967.[12] Through these works and others, the argument for a compensation scheme for road accidents was being loudly articulated. The New Zealand Accident Compensation Act was passed in 1972, replacing tort law with state-run compensation. That model accentuated the argument for reform of the compensation for accidents in other countries. The Pearson Commission[13] was set up in England in 1972 to look at the compensation for accidents, very much at the height of this debate. But it only reported in 1978 by which time the economic climate had changed for the worse. The rejection of its recommendations by the Conservative Government and the insurance industry reinforced the distinctive path on which the English law was

[8] C.J. Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (London 1954) with a French translation published by LGDJ in 1958.

[9] J.A. Jolowicz, "Charles John Hamson (1905–1987)" in *Dictionary of National Biography* (Oxford 2004).

[10] P.S. Atiyah, *Accidents, Compensation and the Law* (London 1970), 9th ed., by P. Cane and J. Goudkamp (Cambridge 2018).

[11] G. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven 1970).

[12] T.G. Ison, *The Forensic Lottery: A Critique of Tort Liability as a System of Personal Injury Compensation* (London 1967).

[13] Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd. 7504; D.K. Allen et al., *Accident Compensation After Pearson* (London 1978).

already set in comparison with France. The idea of a state-run compensation system never came back into prominence. The period of 1970–79 thus represented an unusual period of open debate about possible future directions of English tort law.

Cambridge at that time was replete with tort lawyers. Glanville Williams had already written on the foundational principles of the law of tort and was to publish a book on the subject a few years later with Bob Hepple.[14] Hepple published the first edition of his cases and materials on tort with Martin Matthews in 1974.[15] Within Trinity, there were the leading tort writers, Tony Weir[16] and Tony Jolowicz.[17] In 1968, Jolowicz had written an article in the *Cambridge Law Journal* on liability for accidents.[18] In it, he noted that English tort law was then pervaded with the principle "No Liability without Fault". But the principal explanation of this was, in his view, the dominance of the deterrence principle. This principle did not sit happily with the other current direction of tort law towards insisting that damages in tort should focus on compensation, not punishment. As a result, there was little attention given to the question of who paid damages (which was typically the insurance company), as long as the victim received compensation. Indeed, the law on exemplary damages had recently been limited in order to promote the compensation principle.[19] So, if liability based on fault tried to secure deterrence, the law on damages was pushing in a different direction. For Jolowicz, the solution lay in supplementing the fault principle with liability for risk. It was Utopian to think that there could be a system in which the state could secure compensation for all victims of accidents. But the law needed to go further than limit compensation to the victims of wrongs. Instead,

> It is submitted that a suitable criterion is to be found in the concept of risk and that a satisfactory body of legal rules could quite rapidly be developed by the courts if in every case they were to pose the question, "Whose risk was it that this damage might occur?" in place of the present "Whose fault was it that this damage did occur?" .... The starting points of the principle of risk are that in a complex modern society injury and damage are bound to occur from time to time and that it is possible to insure either against that injury or damage or against liability to pay compensation for it.[20]

In his view, there would still be need for litigation, because a state-run scheme of compensation also had its costs. In his view, disputes would be rarer than under the fault principle. In assessing risk, judges would be

[14] G. Williams and B.A. Hepple, *Foundations of the Law of Tort* (London 1976).
[15] B.A. Hepple and M.H. Matthews, *Tort: Cases and Materials* (London 1974).
[16] T. Weir, *A Casebook on Tort* (1st ed., London 1967; 2nd ed., London 1970; 3rd ed., London 1974).
[17] P.H. Winfield, *Tort*, 9th ed. by J.A. Jolowicz, T. Ellis Lewis and D.M. Harris (London 1971). From the 10th edition in 1975, the work is now known as *Winfield and Jolowicz on Tort*.
[18] J.A. Jolowicz, "Liability for Accidents" [1968] C.L.J. 50.
[19] *Rookes v Barnard* [1964] A.C. 1129; later also *Cassell & Co. Ltd. v Broome* [1972] A.C. 1027.
[20] [1968] C.L.J. 60.

directed to consider insurance among other factors. So Tunc's lecture spoke into a discussion already going on within Cambridge, indeed within Trinity College.

In France, Tunc himself was at the centre of a discussion about compensation for road traffic accidents. In 1930, the Cour de cassation had taken the bold step of turning the introductory phrase of Article 1384,[21] paragraph 1 of the Civil Code ("He is liable not only for the damage which he has caused by his own act, but also for that which is caused . . . by things which he has in his keeping") into a normative principle of liability.[22] A person was liable without proof of fault for the harm caused by things over which he exercised *garde*, defined as "use, direction and control", unless he were able to raise as a defence *cas fortuit*, *force majeure* or fault of the victim. France was late in adopting compulsory third-party insurance in 1958, whereas England introduced it in 1930.[23] Delictual liability under Article 1384 was the main route to compensation. But in 1966 Tunc argued for a system of no-fault compensation for road accidents which would not need litigation.[24] Tunc stated that there were about 120,000 road accident cases a year brought to the French courts, with 1000 of them reaching the Cour de cassation.[25] Analysing the practice of insurance companies, he argued:

a) French practice stands between a system of compensation based on the behaviour of the parties and a system of compensation disregarding behaviour;
b) French practice is moving from the first system toward the second one;
c) except in the case of damage suffered by a driver who has not collided with another vehicle, French practice is already much closer to the second system than to the first.[26]

Basically, pedestrians and cyclists were nearly always compensated, even if they were at fault. Driver-victims and passengers typically were compensated unless they injured themselves or were not injured in a collision. So, there was a divergence between the law in the books and practice. In addition, the legislative scheme of compensation for accidents at work was paid for people injured travelling to and work. So, he estimated something like 95 per cent of road accidents might be compensated from these social security funds.[27] In his view, French law needed to be brought into

[21] Since 2016, this is numbered Article 1242 of the Civil Code, but for the convenience of linking this article to the original articles, I will refer to it as "Article 1384" and the fault provision as "Article 1382" (now Article 1240).
[22] Cass., ch. réunies, 13 February 1930, *Jand'heur*, S. 1930.1.121 rapp. Le Marc'hadour, concl. Matter, note Esmein, D.P. 1930.1.57, note Ripert.
[23] Loi n° 58-208 of 27 February 1958 and Road Traffic Act 1930, s. 35.
[24] A. Tunc, *La sécurité routière: esquisse d'une loi sur les accidents de circulation* (Paris 1966), explained in English in A. Tunc, "Traffic Accident Compensation in France: The Present Law and a Controversial Proposal" (1966) 79 Harv.L.Rev. 1409.
[25] Tunc, "Traffic Accident Compensation in France", 1412.
[26] Ibid., at 1413.

line with best international practice. Tunc's proposal was similar to that of Picard in 1931[28] and of many proposals then circulating in the US.[29] For Tunc, the key principles were "Drivers apart, all victims of a traffic accident or their families should receive compensation, regardless of possible 'fault' on their part". Pain and suffering damages would not be compensated. Loss of earnings should be identified as concretely as possible and a person should be allowed to cover this "road security" payment with private insurance.[30] However, these proposals were challenged by insurers and members of the public as too costly. There were also attacks from those who preferred to keep the fault principle. So, Tunc's title of his English language explanation of his plan as "controversial" was accurate.

It is worth noting that the numbers of road accidents in France at the time were considerably higher than in England. From various sources, it appears that there were 6,675 deaths on the roads in England in 1970, but 16,928 in France, and both were more or less double the figures for 1950.[31]

More generally, there was a debate in France between those who favoured basing extra-contractual liability on individual responsibility (including fault) and those who favoured basing significant parts of it on the duty to guarantee the compensation of the victim.[32] The latter theme was triggered by the thesis of Tunc's colleague and friend, Boris Starck. Starck's theory was that the law ought to guarantee compensation for injuries to the person and fault should be restricted to other types of harm.[33] While having some misgivings about the application of the principle, Tunc broadly endorsed the basic principle "as a theory, perhaps even as a philosophy – a set of rules which, while not appropriate for embodiment in the statutory law of an industrialised nation can and should nevertheless inspire the development of the law of tort, even if the latter needs more refinement".[34] He supported even more the thesis of Geneviève Viney on the decline of individual responsibility as a principle within the French law of delict.[35] Her analysis showed how French law had moved away from genuine individual responsibility both in fault liability under Article

[27] Ibid., at 1416.
[28] M. Picard, "Pour une loi sur les Accidents d'Automobile" (1931) 2 Revue Générale des Assurances Terrestres 5, 489.
[29] See especially R.E. Keeton and J. O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (Boston 1965).
[30] Tunc, "Traffic Accident Compensation in France", 1426–29.
[31] See J. Bell and D. Ibbetson, *European Legal Development: The Case of Tort* (Cambridge 2012), 112.
[32] See J.-L. Halpérin, "French Doctrinal Writing" in N. Jansen (ed.), *The Making of Legal Doctrine* (Cambridge 2010), 73, 88–90.
[33] B. Starck, *Essai d'une théorie générale de la responsabilité en sa double fonction de garantie et peine privée* (Paris 1947). His major work was B. Starck, *Droit civil: La responsabilité civile*, vol. 1, (Paris 1973). For a short summary and commentary see A. Tunc, "A Little Noticed Theory in the Law of Tort: Boris Starck's Theory of Guaranty" (1973) 121 University of Pennsylvania Law Review 618.
[34] Tunc, "A Little Noticed Theory in the Law of Tort", 625.
[35] G. Viney, *Le déclin de la responsabilité individuelle* (Paris 1965), preface by A. Tunc. The preface is reprinted in A. Tunc, *Jalons: Dits et écrits d'André Tunc* (Paris 1991), 149.

1382 and under no-fault liability under Article 1384. It was Viney who became the major influence over the current Government proposals for the reform of extra-contractual liability in France.[36]

III. The Debate

Tunc's basic argument in his Goodhart lecture is that the moral justification for extra-contractual liability falls basically into two parts: (A) liability for (genuine) fault and (B) liability for accidents and inadvertence. The moral principles which govern the two are different. In the first, we are dealing with personal responsibility for moral wrongdoing. In the second, we are dealing with a form of social solidarity for the misfortunes of life. My presentation aims to present how these two themes fit into Tunc's thought and his assumptions about French law at the time of his Lecture. A third theme will look at the place of extra-contractual liability within the portfolio of French law's responses to accidents. This will lead us to understand the thrust of Hamson's criticism.

A. Tunc on Fault Liability

The French Civil Code of 1804 is predicated on the importance of fault.[37] Articles 1382 and 1383 are a simplified version of Domat's principle:

> All the losses, and all the damages which may happen by the act of any person, whether out of imprudence, rashness, ignorance of what one ought to know, or other faults of the like nature, however trivial they may be, ought to be repaired by him whose imprudence, or other fault, has given occasion to it.[38]

In Domat's hands the humanist interpretation of Roman law was merged with the canonist concern for individual responsibility. Article 1382 was intended to cover deliberate acts: "Any human act whatever which causes damage to another obliges him by whose fault it occurred to make reparation." Article 1383 then supplemented this by mentioning: "Each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence." Fault was then focused on a failure to meet acceptable standards.[39] But the way this was interpreted in the nineteenth century tended to show an awareness, if not an indulgence, of human frailty and the standard was not too exacting, and in this English law was not much different.[40] But that changed over the course of the twentieth century.[41] The rise in the number and type of industrial accidents in

[36] J.-S. Borghetti, "The Culture of Tort Law in France" [2012] Journal of European Tort Law 158, 174.
[37] Bell and Ibbetson, *European Legal Development*, 60–62.
[38] Jean Domat, *Les loix civiles dans leur ordre naturel*, vol. I (Paris 1689), title 7.8. Domat was the first noteworthy author to use the term "fault".
[39] For example, see Bell and Ibbetson, *European Legal Development*, 86, on medical liability in the 1830s.
[40] Ibid., at 89–92.

the second half of the nineteenth century prompted both a reconsideration of what fault involved and whether liability could be based also on other principles.[42] At the end of the nineteenth century, fault was still understood as a personal failure. For Planiol in a very influential definition in 1905,[43] fault was the failure to conform to a pre-existing standard established by law, honesty or professional expectations. The Mazeaud brothers defined fault as conduct which a prudent man would not commit.[44] Fault as a failure of conduct went beyond an unlawful act in the sense of something prohibited by law and became increasingly objective.[45] But for the Mazeaud brothers, omissions would provide at least one boundary between morals and the law. Citing Bentham's example of failing to come to the aid of a drowning man, they thought the law would not find fault here, even though morals would.[46]

Tunc in his article picks up on this drift in the understanding of fault as an adequate moral basis of liability: "The fact remains that the fault principle, unrefined as it may be from a moral point of view, nevertheless gives society, in many fields of activity, as much morality as can be introduced by tort law."[47]

On the one hand, there are many imperfections of fault-based tort liability. Fault cannot judge the person's failure as a moral actor, merely the conduct. Tort law is imperfect as an instrument of justice because compensation is not proportionate to wrongdoing. It is also imperfect as an instrument of compensation because it does not reach many of the wrongs that are done each day. Tunc uses the illustration of the English case of *Bolton v Stone*[48] to make the point that undoubted harm to the person on the street outside the cricket ground was not compensated. Other instruments such as administrative regulations do a better job of protecting people from social evils. On the other hand, tort retains its place as one instrument among many, and the task he sets himself is to delineate the scope of tort-based fault liability.

On closer analysis, fault liability covers both deliberate and careless actions. Fraud or unfair competition are usually undertaken with deliberation and with at least recklessness about the harm they cause to another. They are morally reprehensible acts. But, he suggested, much of modern fault is not of that character. The standard of conduct is that of an abstract

[41] Ibid., at 95–98.
[42] See Halpérin, "French Doctrinal Writing", 85–90.
[43] M. Planiol, "Etudes sur la responsabilité civile" (1905) Revue critique de législation et de la jurisprudence, 277.
[44] H. Mazeaud and L. Mazeaud, *Traité théorique et pratique de la responsabilité civile, délictuelle et contractuelle*, 1st ed., vol. I (Paris 1931), 78.
[45] Halpérin, "French Doctrinal Writing", 90–92.
[46] Mazeaud and Mazeaud, *Traité théorique*, 408–17.
[47] Tunc, "Tort Law and the Moral Law", 252.
[48] [1951] A.C. 850.

(what was then called) a "good father of the family" (*le bon père de famille*)[49] or, in English, the reasonable person. Here fault abstracts from the characteristics of the wrongdoer – her age, her previous experience, her health. For Tunc, there was one standard and it appeared to be set at an unattainable level. This Tunc illustrates with one of his favourite cases of the period, known by the title of his case note, "The Child and the Ball".[50] Two boys aged nine and 11 were playing football on some waste ground. One of them, Michel, aimed a kick at the other, Bernard, missed the ball and sent a clod of earth which hit Bernard in the eye, injuring him. The Cour d'appel made two findings which the Cour de cassation upheld. First, on the basis of Articles 1382 and 1383 of the Civil Code, Michel was at fault in missing the ball: "the clumsiness committed had the character of a fault." Second, Michel's father was at fault for omitting to supervise his son adequately or, more accurately: "the father did not establish that he could not prevent the event giving rise to liability." The moral blame is not obvious here. The son is at fault because he does not show the ability of Lionel Messi. The father is at fault for omitting to stop his son's miss – an ability that escapes many a professional football manager! As Tunc remarked: "who by these standards could claim to be a good father of a family?"[51] The objective standard of fault, which contemporary scholarship and judicial practice supported, moved tort liability away from its moral base. He alluded to the (then) recent reform in France under which those lacking mental capacity would still be liable for the results of their actions.[52] The same was true of English law, where (in a then recent decision) a learner driver was at fault for not observing the standards of the normally proficient driver.[53] In Tunc's view, the law was in a mess as it tries to use fault in order to deal with accidents:

> From a technical point of view, it is a contradiction to define fault as a failure to behave as a good citizen, or to assert that negligence must be judged by the standard of the reasonable man, and yet to hold someone liable for errors which are statistically unavoidable, even by the most considerate and conscientious citizen …. As regards the moral law, to the extent to which we dare try to enforce it, it demands that we bear the responsibility for our decisions. But it certainly does not demand the liability of someone who has unfortunately been involved in an accident by reason of one of those errors that we all make more or less continually.[54]

[49] The term "bon père de famille" was replaced by "reasonable/reasonably" by loi n° 2014-873, art. 26.
[50] Cass. 2e civ., 1 December 1965, Juris-Classeur Periodique 1966.II.14567. See also Rodière, Rev.trim. dr.civ. 1966, 297–98; A. Tunc, "L'enfant et la balle: Réflexions sur la responsabilité civile et l'assurance", Juris-Classeur Periodique 1966.I.1893, reprinted in Tunc, *Jalons*, 169.
[51] Tunc, "Tort Law and the Moral Law", 254.
[52] Introduced by loi n° 68-5 of 3 January 1968, now found in Article 414-3 of the Civil Code: see Tunc, "Tort Law and the Moral Law", 251.
[53] *Nettleship v Weston* [1971] 2 Q.B. 691, which Tunc cites in Tunc, "Tort Law and the Moral Law", 251, note 12.
[54] Tunc, "Tort Law and the Moral Law", 255.

B. Tunc on the Law of Accidents

In Tunc's view, we need to separate the law of fault liability from the law of accidents. Accidents are the result of misfortune, not fault. But that is not the end of the matter:

> Nor, on the other hand, does moral law allow the victim of an accident to be abandoned to his misfortune. Human brotherhood will not permit it. And since the fate of the victim cannot be entrusted to Good Samaritans, society itself must play the role of the Good Samaritan and take care of the injured: this is the task of public health authorities and social security.[55]

That said, we have to recognise the limitations of the contemporary social security, and its inability to provide full compensation to the victim. Insurance-based systems supplement the actions of the state:

> Moral law therefore requires either the establishment of a general fund for injuries and diseases coupled with a continued effort to increase the amount of compensation it can pay or at least the enforcement by statute of non-fault insurance for patently dangerous activities (driving for instance) and, in addition, promotion of individual insurance and expansion of social security …. So it appears that, where accidents are concerned, moral law requires compensation from collective sources to be substituted for liability based on fault.[56]

Tunc is talking here mainly about social security and insurance-based funding for accidents and he says, rightly, that these are "collective sources". So why does tort still matter? Tort (and the insurance that lies behind defendants) is the vehicle through which private insurance provides the compensation which the state-run social security system cannot. If we remember that, by this time, France already had no-fault liability for road accidents through Article 1384, paragraph 1, and that this had been established in 1930 as a "presumption of liability" not a "presumption of fault",[57] then the argument is not at all strange to a French lawyer. It essentially summarised what they already did in tort, though less effectively and with higher costs than Tunc's *Projet* was proposing.

In Tunc's view, there was thus a clear difference in the moral foundation between the law of fault and the law of accidents:

> when it comes to accidents, the jurist loses all his normal points of reference. To tell a driver that he should not commit errors is meaningless. Morality does not require us to bear the burden of the consequences of our unavoidable errors: it does demand that we organise a system of compensation which will indemnify in principle all victims, even the victims of their own errors.[58]

[55] Ibid.
[56] Ibid., at 255–56.
[57] Cass., ch. réunies, 13 February 1930, *Jand'heur*, rapp. Le Marc'hadour, concl. Matter, S. 1930.1.121 note Esmein, D.P. 1930.1.57 note Ripert; A. Guégin-Lécuyer, "The Development of Traffic Liability in France" in W. Ernst (ed.), *The Development of Traffic Liability* (Cambridge 2010), 50, 51.
[58] Tunc, "Tort Law and the Moral Law", 256.

Fault is not totally excluded, but is confined to egregious cases, where a person knowingly causes an accident or is reckless.[59] Tunc is not driving fault away but pointing out where it does not fit. He recognised that the boundaries were not easy to draw, but he argued that the principles were clear:

> Although it is difficult to establish with precision the borderline between the respective fields of a tort law mainly founded on fault and of an accident law, two principles at least seem to emerge with sufficient clarity from the preceding discussion. On the one hand, when someone has taken a deliberate decision, the moral law demands that he bear the responsibility for what he has done: I must answer for what I write, as a businessman must answer for the means of competition he chooses. On the other hand, when an accident has occurred, the moral law demands as a matter of priority that the victim be indemnified.[60]

If we explore more fully Tunc's moral position here, it is basically an argument from human solidarity – that we cannot abandon those who are injured as a result of misfortune. The implications of this appeal to solidarity will be covered below in Section II(D).

C. Tunc's View of Tort within the Portfolio of Responses to Accidents

Tunc's picture of tort law provides us with the following array: (a) fault liability within tort, (b) no-fault liability backed by insurance within tort, (c) no-fault compensation from an insurance fund outside tort and (d) state-provided social security, again outside tort. At the end of the nineteenth century, industrial accidents moved first from fault to no-fault with decisions in administrative law and then in civil law under Article 1384, paragraph 1.[61] Then they moved swiftly into social security. When road accidents came along, they were first handled under fault. But then in 1924, they moved to no-fault under Article 1384, paragraph 1.[62] It is also worth noting that accidents caused during paid carriage by road would be governed not by tort, but by contract. Since 1911, the carrier of persons was deemed to have undertaken an obligation of result to transport the passenger safe and sound to destination.[63] Social security law was interpreted to move many cases of work-related accidents into social security. The *Projet Tunc* would remove most of the remaining motor vehicle

[59] Ibid., at 257.
[60] Ibid., at 259.
[61] CE 21 June 1895, *Cames,* n° 82490, S. 1897.3.33 note Hauriou; Cass. civ. 16 June 1896, *Oriolle, Guissez et Cousin c Teffaine*, D.P.1897.1.433 note Saleilles; Y. Salmon, "Technological Change and the Development of Liability for Fault in France" in M. Martín-Casals (ed.), *The Development of Liability for Technological Change* (Cambridge 2010), 89, 108–13.
[62] Cass. civ. 29 July 1924, S. 1924.1.321 note P. Esmein.
[63] Cass.civ. 21 November 1911, *Cie générale transatlantique c Zbidi Hamida ben Mahmoud*, D.P. 1913.1.249. Cf. in England where the passenger has to show negligence and certainly cannot count on being carried safe or sound or to destination: *Easson v L.N.E.R.* [1944] 2 K.B. 421.

accidents into his category (c) – claims against an insurance fund without the need for litigation. So what would remain in tort? In brief, it would be accidents that were neither work accidents nor motor vehicle accidents, and these would not be fully compensated by social security. Social security does not deal with pain and suffering, nor as much cover for loss of earnings or impairment as can be obtained in tort.

D. Hamson's Reply

The core of Hamson's criticism is that Tunc makes too simplistic a dichotomy between the law of fault on the one hand and the law of accidents on the other. Tunc's scope for fault is greatly diminished because he excludes from it ordinary errors which we all typically commit: "whether or not 'fault' is the appropriate word, a total exclusion of all such accidents from the category of acts entailing a moral obligation to make full reparation seems to me over-restrictive."[64]

With echoes of the arguments of his Trinity colleague Jolowicz five years earlier, he suggests that Tunc has missed out a third possible moral principle, liability for risk:

> It is a salutary rule of law, and a good moral principle, that a person who for his own purposes puts in hand a dangerous operation should be liable to make good the damage resulting therefrom without proof of further fault, especially if he has foresight of the kind of damage which is likely to result. Indeed the law of France is more reasonable than the Common law on this point as it firmly puts the motor car in the class of things for which the "custodian" has strict liability.[65]

This invocation of risk is evocative of liability under *Rylands v Fletcher*, as it was then understood, though the issue of whether it was possible to use this to provide compensation for personal injuries was controversial.[66] In discussing risk, Hamson drew not only on his knowledge of French private law, but also French administrative law, where liability for dangerous things had been established in 1919.[67]

In his riposte to this criticism, Tunc replies in a manner which would be typical of a French lawyer of his time, and even today. First, French law dropped the idea of risk in relation to Article 1384, paragraph 1, in 1930. The liability under *Jand'heur* was not based on the dangerousness or defectiveness of a thing, but simply on the fact that the defendant had it in his keeping, that is to say, he has use, direction and control of it. Furthermore, the literature raised a host of objections to the idea of liability

[64] Hamson, "The Moral Law and Professor Tunc", 54.
[65] Ibid.
[66] *Rylands v Fletcher* (1866) L.R. 1 Ex. 265 and (1868) L.R. 3 H.L. 330. *Read v J. Lyons & Co. Ltd.* [1947] A.C. 156. For a contemporary analysis, see R. Chambers, "The Law of Nuisance and the Rule in *Rylands v Fletcher*" (1978) D.Phil. Oxford.
[67] CE 28 March 1919, *Regnault-Deroziers*, n° 62273, Leb. 329; S. 1918-1919.3.25 note Hauriou.

for risk. In what way should ordinary everyday things be seen as a risk. Motor vehicles might be an easy object to treat as risk-creating. But outside that, how do you decide what is a risk? If you limit it to dangerousness, what counts as a danger? Does social benefit offset potential harm? Tunc argued that the apparent attractiveness of risk as a justification for liability dissolves when you look at the difficulties of putting the idea into practice.[68] Tunc noted that Hamson was aware of this literature but seemed not to be giving it sufficient weight. He might also have made the point that Hamson was equally aware that French administrative law had moved away from risk as the basis of liability to the principle of equality before public burdens, which is akin to the principle of solidarity.[69] Second, risk is not adequate to deal with the full range of accidents, including accidents in the home. In his view, the Preamble to the French Constitution of 1946 demonstrates that the duty to provide support to the victims of misfortune is not only a moral principle, but a legal one.

Hamson's other line of criticism was that compensation for accidents, however laudable, was not the function of tort law. For him: "There is an important difference, both morally and legally, in the nature and extent of the obligation (a) to repair an injury which we have inflicted and (b) to succour a person (as did the Good Samaritan) who has been injured by another."[70]

The first is a duty in justice, the second is a duty of charity: "It seemed to me that Professor Tunc was anxious, particularly in the case of damage caused by motor vehicles, with which he was particularly concerned, to substitute a duty to be owed in charity (whether individual or collective) for the duty which is owed in justice.

This substitution in my opinion tends to lower the moral principles of the law and not to enhance them."[71]

It is here that both French legal and French Catholic moral principles diverge from Hamson's English legal and English Catholic moral principles.

To an English audience, it may seem strange to dwell on the political and religious beliefs of a leading academic. But I believe that is important and I am comforted by the analysis of a leading contemporary French tort scholar, Jean-Sebastien Borghetti, who traces a trend back to the end of the nineteenth century when "the political convictions of left-wing lawyers appeared to merge with the Christian concern for the poor and the

[68] Tunc, "Accident Victim Compensation and the Moral Law", 242–43.

[69] Compare TC 29 February 1908, *Feutry* n° 00624,D. 1908.3.349 concl. Teissier (fault in supervision of an inmate of a psychiatric hospital) and CE Sect. 3 February 1956, *Thouzellier*, Leb. 49 (no-fault equality before public burdens where borstal boys escaped and burgled the claimant's house): see C.J. Hamson, "Escaping Borstal Boys" [1969] C.L.J. 273.

[70] [1973] C.L.J. 244, 244.

[71] Ibid. See also Hamson, "The Moral Law and Professor Tunc", 53.

afflicted".[72] He suggests this combination of views is avowedly reflected in the current major influence on French tort law, Geneviève Viney, and in André Tunc, who was a major influence on her along with her supervisor Boris Starck.[73] French lawyers may be positivists, but they have never adopted the fetish of the ideological neutrality of legal reasoning in the same way as the Germans and the English. This is clear from the work of the leading French scholar on legal reasoning at the end of the nineteenth century who lived on until 1959 and who shaped much of French thinking in the twentieth century. François Gény argued that simple syllogistic reasoning from the texts of legal rules was not enough. The judge or interpreter of the law has often to make value judgments about how the rule is best understood. Since the rule does not dictate the answer, the interpreter makes such value judgments according to his or her conscience.[74] So legal interpretations are offered typically from perspectives in which the author believes. Christian Socialists like Saleilles, Josserand, Starck, Tunc and Viney form what Borghetti describes as the dominant ideology of French tort law, the victim-oriented *idéologie de la reparation*.[75] There was and is a minority of conservative, free-market scholars like Planiol and Ripert (or today Terré) who pushed for a focus on moral fault and a narrower scope for tort law. This ideological trend was reflected just before the inaugural lecture in 1972 when the law faculty of the University of Paris was split more or less ideologically between the socialist University of Paris 1 and the more conservative University of Paris 2. The more socialist tort lawyers like Tunc and Viney joined Paris 1 and the more conservatives Paris 2. It is also normal to accept that French judges belong to ideologically distinct professional associations and may pursue political careers at some time in their professional lives before returning to judicial practice.[76]

That the ideological perspective for interpreting the law includes religious beliefs does not offend the French value of secularism (*laïcité*). The interpreter is not imposing a religious belief but interpreting the law as consistently as possible with his or her own philosophical position. It is natural to try to ensure that what one does as a lawyer is compatible with personal beliefs within the confines of the law. This was the ambition of other scholars in the post-War period such as Georges Ripert,[77] René Savatier[78] and Jean Carbonnier. Tunc was not unusual in this regard.

[72] Borghetti, "The Culture of Tort Law in France", 174. Borghetti identifies, appropriately, the work of Saleilles and Josserand as reflecting this trend. These were the two major founders of French no-fault liability under Article 1384, paragraph 1, of the Civil Code.
[73] Ibid., especially note 51.
[74] F. Gény, *Méthode de l'interprétation*, 2nd ed., vol. 1 (Paris 1919), 207–22. The first edition was in 1899: J. Bell, *Policy Arguments in Judicial Decisions* (Oxford 1983), 226–27.
[75] Borghetti, "The Culture of Tort Law in France", 173–74.
[76] J. Bell, *Judiciaries in Europe* (Cambridge 2005), 62–63.
[77] G. Ripert, *La règle morale dans les obligations civiles*, 4th ed. (Paris 1949).

The substantive moral debate between Tunc and Hamson had been well identified by Louis De Naurois, professor of canon law at the Institut Catholique of Toulouse.[79] In his article on Boris Starck,[80] published almost simultaneously with the lecture, Tunc acknowledged that the separation between the moral principles on compensation for fault and compensation for accidents is influenced by Starck and is supported by articles written by the Catholic moral theologian and lawyer, Louis De Naurois:

> [De Naurois] contends that commutative justice obliges anyone who has infringed another's right, whether by fault or not, to compensate the harm done to him. The mere interests resulting from freedoms (for instance, the interest of a trader in keeping his customers) also deserve protection. The protection of mere interests, however, is necessarily weaker than that accorded to rights, because everyone's freedom competes with the freedom of the others. Thus, De Naurois, like Professor Starck, considers that a certain field, defined from the point of view of the victim, is governed by a guaranty principle, while another one is governed by the fault principle. Even the delimitations of the respective fields of guaranty and fault are approximately the same [in these two authors].[81]

In his writing, De Naurois started by pointing out the apparent conflict between the moralists who considered that there was only responsibility in the case of fault, and the lawyers who had a much broader concept of responsibility. He argued against narrowing the scope of responsibility to the domain of fault. For him, there is a moral imperative for someone to guarantee his victim against harms which result from his actions or those of the things he controls which do not perform as others reasonably expect. Here he specifically refers both to Article 1382 of the French Civil Code and Article 1384, paragraph 1. His moral imperative relies on the notion of personal autonomy linked to personal responsibility. One is responsible for the harm caused by the acts which you freely undertake, even without fault. Equally, one's own freedom should not be hampered by the acts of others, even without fault. This applies both to actions of people and of the things they use.[82] Using as a starting point the French legal provisions which criminalised failure to help a person in danger, De Naurois also takes the view that failing to help someone in need may a breach of a moral duty of justice towards that other and not merely a failing in charity.[83] De Naurois argued that moralists had traditionally seen duties of solidarity as mediated through institutions of the state or the community. The state

[78] R. Savatier, *Comment repenser la conception actuelle de la responsabilité civile* (Paris 1966).
[79] L. de Naurois, "Juristes et Moralistes en Présence des Obligations Interpersonnelles de Justice" (1963) Nouvelle Revue Théologique 598. Tunc was, to my knowledge, a regular frequenter of events at the Institut Catholique in Paris, as was his wife.
[80] A. Tunc, "A Little-Known Theory" (1973) 121 University of Pennsylvania Law Review 618.
[81] Ibid., at 622, note 16.
[82] Naurois, "Juristes et Moralistes", 604–05.
[83] Ibid., at 611–12.

owes duties of solidarity to those in need, and we have a moral duty to pay taxes to support it. But in the view of De Naurois, there are both institutional and inter-personal duties of solidarity. Inter-personal duties of solidarity arise when the solidarity organised by the state is insufficient or breaks down. The volunteers who fill the gap are not just performing an act of charity, an act of supererogation. They are responding to a claim of justice from the person in need which is normally fulfilled by the state, but which is owed by those able to help. Solidarity is a duty of everyone. It is just that it is normally well satisfied by the mechanisms developed by the state.[84] Not all help belongs to the moral domain of justice. Other help is a matter of courtesy or helpfulness, acts of spontaneous goodwill but not claims of right. But when fundamental interests are affected that is where the claims of solidarity come in.[85]

The article by De Naurois illuminates the moralist positions adopted by Tunc and Hamson. They are not just typical of their own legal systems; they are also typical of their different national Catholic traditions. Hamson represents the traditional Catholic moralist position. It looks to moralists like St. Alphonsus Liguori (1696–1787), founder of the Redemptorist order, whose writings were popular within Catholic piety in England. For him, "if our neighbour is in extreme want, we are bound to assist him with what is not absolutely necessary for our own sustenance. If his necessity is not extreme, but very great, we must help him with what we ourselves do not need".[86] Although a very famous and diligent confessor, St. Alphonsus was less concerned with denouncing sin and more with promoting the way of perfection, of which charity was part. Hamson's distinction in morality between the claims of justice and the role of charity springs from this tradition. It is also what De Naurois sees as traditional moral philosophy. Tunc, on the other hand, was part of the more progressive wing of the French Catholic Church, given impetus as a reaction to Vichy's traditional Catholicism. The place of solidarity as a requirement of interpersonal justice fits with the more progressive social teaching expounded by De Naurois and Pope Paul VI[87] and with Tunc's socialist politics.

Tunc appeals to the importance of solidarity in French post-War political culture. Although the French Revolution promoted "fraternity" as one of its core values, there were no specific provisions related to it. It was the Preamble to the Constitution of the Fourth Republic in 1946 that gave structure to the concept of solidarity and it is this that Tunc quotes in his reply to

[84] Ibid., at 614.
[85] Ibid., at 615.
[86] St. Alphonsus de Liguori and C.J. Warren (translator), "The School of Christian Perfection", available at https://archive.org/details/TheSchoolOfChristianPerfectionBySaintAlphonsusDeLiguori/page/n1/mode/2up (last accessed 11 June 2021).
[87] See *Populorum Progressio* (Vatican 1967), paragraphs 47, 48. M.P. Hornsby-Smith, *An Introduction to Catholic Social Thought* (Cambridge 2006), 81–83.

Hamson.[88] Interestingly, he quotes paragraphs 11 and 13, but not paragraph 12: "The Nation proclaims the solidarity and equality of all the French in the face of national disasters."[89] But it is clear that this concept of solidarity as a legal principle was widely accepted, even by the most conservative Catholic jurists such as Ripert.[90] So Tunc is writing not only out of a strong continental European Catholic tradition, but also out of a currently strong French legal viewpoint when he emphasises solidarity as a moral imperative of justice.

Hamson clearly thought that solidarity is a feature of collective action, rather than an individual responsibility, and so it has nothing to do with tort. Tunc's view disagrees with this. The political and legal use of the concept of solidarity arose in France. The sociologist Durkheim was responsible for drawing attention to the need for societies to recognise the importance of individual autonomy and the fact of human interdependence. The socialist legal scholar, Duguit, transformed this into a legal principle – if we as members of society are interdependent, then it is the role of the state to ensure that the conditions for human interdependence exist and flourish. This imperative found its way into Duguit's concept of law[91] and into the Preamble of the 1946 Constitution. But the underlying idea of social solidarity as not merely a fact, but as a moral imperative is not confined to the duties of the state. Indeed, Duguit's starting point was that people have duties towards each other as part of being in society which the state then has to facilitate and guarantee. This "social norm" arises from the nature of human interdependence without relying on a higher metaphysical norm. This provides the basis for the criticism of individual actions, as well as justifying the state in organising activity to support the social system as a whole.[92] The awareness of social independence pre-exists the legal rule. The law gives concrete expression to it.[93] It is here that the theological tradition and the socialist tradition join. Individual duties of solidarity provide the rationale for state-organised activities and duties. The state is the vehicle for realising effectively the mutual duties of solidarity which members of society owe to each other.[94]

Tunc and Hamson also saw different aspects of the parable of the Good Samaritan. Tunc focused on the help offered by the Samaritan and on Jesus's criticism of the priest and the Levite who did not help him.[95]

[88] Tunc, "Accident Victim Compensation and the Moral Law", 243–44.
[89] This principle was not formally recognised as legally binding until 1991: CC decision 91-291 DC of 6 May 1991, *Dotation de solidarité urbaine*, Rec. 40.
[90] G. Ripert, *Les forces créatrices du droit* (Paris 1955), 164–65.
[91] L. Duguit, *Traité de droit constitutionnel*, 1st ed., vol. 1 (Paris 1921).
[92] Ibid., at 20–24.
[93] Ibid., at 46–48
[94] Private conversations with Tunc confirmed that he was concerned about the duties of individuals arising out of solidarity with each other.
[95] Tunc, "Tort Law and the Moral Law", 255; Tunc, "Accident Victim Compensation and the Moral Law", 243.

Hamson focused on the primary duty of the robbers to provide full compensation to the victim and the praiseworthy, but limited support offered by the Samaritan.[96]

The debate between Hamson and Tunc shows not just the difference in legal traditions between France and England at the time of Tunc's inaugural lecture. It also reveals different currents of moral opinion. Both of them happen to be Catholics, and I hope to have shown how their views represent two contemporary traditions of Catholic thought. But the divergence on morality was not limited to the Catholic traditions of each country. Their views represented wider trends within their societies. It is this combination of legal and moral divergence which led to the ever-widening gap between the two legal systems in the subsequent years.

IV. The Growing Divergence After this Debate

But the trajectories of the two systems diverged after that. England stayed with fault-based tort and French tort law moved in a different direction, marked not least by the partial adoption of the *Projet Tunc* by legislation on road traffic accidents in 1985.

A. France

The divergence in the path of French law is particularly in the second decade after Tunc's article was published. In 1982, the Cour de cassation decided *Desmares*.[97] The case concerned an elderly couple, Mr. and Mrs. Charles, who were knocked down as they crossed the road some distance away from a pedestrian crossing in the middle of a town. They sued under Article 1384, paragraph 1, for injuries caused 'by the act of a thing', the car. The driver, Desmares, claimed that they had been at fault in crossing the road and so he was partially exonerated. But the Cour de cassation decided that the fault of the victim did not exonerate the keeper of a thing unless the act amounted to force majeure. In other words, the fault of the victim had to be a totally unforeseeable event. Jay-walking pedestrians in a town centre are not unforeseeable. The no-fault liability of the keeper of a car became even stricter, since the defence of fault of the victim was effectively merged with that of force majeure. The Cour de cassation expanded this to cover non-motoring cases in 1984.[98] This case law was designed to influence the review of compensation for motor vehicle accidents which the Ministry of Justice was conducting at the time. In 1981,

[96] Hamson, "The Moral Law and Professor Tunc", 53–54, 244.
[97] Cass. 2 civ. 21 July 1982, n° 81-12850, D. 1982, 449 concl. Charbonnier, note Larroumet; J. Bell, S. Boyron and S. Whittaker, *Principles of French Law*, 2nd ed. (Oxford 2008), 392–93. See also J.-L. Aubert, "L'arrêt Desmares, une provocation … à d'autres réformes" (1983) Recueil Dalloz, chron. 1.
[98] Cass. 2 civ. 15 November 1984, n° 83-15081, D. 1985, 20 concl. Charbonnier.

Tunc's colleague at Paris 1, Robert Badinter, was appointed Minister of Justice and he set up a new review of compensation for motor vehicle accidents. Unlike the review in 1964, the new review's proposals supporting ideas similar to those outlined in the *Projet Tunc* were considered broadly acceptable.[99] To make the proposals acceptable, a number of compromises were made, such as excluding contributory fault of the victim who was a child or who was over 70 unless they deliberately sought their own harm. The resulting law was adopted by Parliament in 1985 with very little fuss. No-fault liability was established for the victims of motor accidents who were able to claim against the insurer of the keeper of the vehicle.[100] The mechanism of compensation was a letter from the victim to the insurance company. But significant litigation has remained when insurance companies reject claims and the law on the matter remains complex. The system of first-party insurance established a guarantee system of liability alongside tort law. That did enable the Cour de cassation to reverse the approach to fault of the victim in the *Desmares* case and to return to permitting fault to be alleged against the victim as a defence to a claim for no-fault liability under Article 1384, paragraph 1.[101] Thus fault is not totally banished from the realm of even no-fault liability. The acceptance of this scheme as part of extra-contractual liability is shown by the proposal in the *Projet de réforme* of 2017 to incorporate the 1985 law within the Civil Code within a chapter on "Principal Special Schemes of Liability"[102] (proposed arts. 1285–1288). It is part of tort liability, not a special scheme of charity or social solidarity, as Hamson would have seen it.

The second movement in the direction of guarantee of compensation came in 1984 in a set of leading cases on the liability of and for children. The *Child and the Ball* case in 1965 has already been discussed.[103] The liability of the boy was based on Article 1382. As was seen in that case, the standard for fault was objective and set at quite a high level, if missing a kick at a ball counted as fault, rather than accidental clumsiness. The law on fault liability took an even stricter turn in a set of decisions by the highest formation of the Cour de cassation, the Assemblée Plénière.[104] In *Derguini*,[105] a child of five was held to have committed fault under

[99] See A. Tunc, "'It Is Wise Not to Take the Civil Codes Too Seriously': Traffic Accident Compensation in France" in P. Wallington and R.M. Merkin, (eds.) *Essays in Memory of Professor F.H. Lawson* (London 1986), 71, 79.

[100] Guégin-Lécuyer, "The Development of Traffic Liability in France", 67–69; Bell, Boyron and Whittaker, *Principles of French Law*, 400–03. Also R. Redmond-Cooper, "The Relevance of Fault in Determining Liability for Road Accidents: The French Experience" (1989) 38 I.C.L.Q. 502. One of the major reasons why the insurance companies were more amenable to the *Projet Tunc* in 1985 was that road accident numbers had declined significantly since hitting a peak in 1970: see Bell and Ibbetson, *European Legal Development*, 112–13, especially note 5.

[101] See Bell, Boyron and Whittaker, *Principles of French Law*, 394.

[102] See Borghetti and Whittaker, *French Civil Liability in Comparative Perspective*, Appendix, 608ff.

[103] Above note 50 and associated text.

[104] Ass.plén., 9 May 1984, n^{os} 79-16612, 80-93081, 80-93481, 80-14994, D. 1984, 525 concl. Cabannes, note Chabas.

Article 1382 by crossing the road without looking and then, when she saw the car, doubling back on her tracks into the path of the car which was trying to swerve to avoid her. Her parents appealed on the ground that she could not have been at fault because she lacked discernment. But the Cour de cassation upheld the finding of fault on the ground that the lower court "was not bound to verify whether the minor was capable of discerning the consequence of these actions". As the avocat général Cabannes explained in the case, such an interpretation brought the liability of children without mental capacity into line with the reform on the law of adults without mental capacity. In 1968, the Civil Code was amended to make adults without mental capacity liable to pay compensation for the harm they caused.[106] That had already admitted that fault could occur without discernment, and so the application of the same idea to the liability of children below the age of reason was no great departure from principle. Another of the set of decisions held that a child could have the custody of a thing and would be liable under Article 1384, paragraph 1, without proof of any discernment.[107] So a three-year-old child picking up a stick and accidentally poking it into a friend's eye was liable under Article 1384, paragraph 1.[108] On such interpretations of the provisions on delictual liability, fault could have no deterrent effect and it was effectively a way of channelling compensation to victims, especially as the liability of the child triggered the liability of parents.

The liability of the father in the *Child and the Ball* case was based on Article 1384, paragraph 4. This provided: "The father and mother, to the extent that they exercise the right of custody, are jointly liable for damage caused by their minor children living with them." The original understanding was that the parents were liable for their failures in the education or the supervision of their child. That was the understanding still when Tunc wrote in protest at the decision in this case. He asked in what way the father was at fault in his supervision, a point he made also in the inaugural lecture. But the decision in *Bertrand*[109] in 1997 changed this. In that case, a 12-year-old boy was riding his bike when a moped rider crashed into him. The moped rider sued the boy's parents under Article 1384, paragraph 4, and succeeded. The parents appealed to the Cour de cassation on the ground that no fault of supervision had been found against them. But the appeal was rejected. In a rather audacious interpretation of the Code, the Cour de cassation ruled that the strict liability (*responsabilité de plein droit*) of parents can only be discharged by a finding that the harm was caused by a force majeure or by fault of the victim. The approach was

[105] Ibid., case 4, n° 80-93481.
[106] Then Article 489-2 of the Civil Code, now Article 414-3.
[107] Ibid., case 2 n° 79-16612 and case 3.
[108] Ibid., case 3, *Gabillet*, n° 80-14994.
[109] Cass. 2 civ., 19 February 1997, n° 94-21111, D. 1997, 265 note Jourdain.

confirmed by the Assemblée plénière in 2002.[110] But the court also added that for the liability of parents to arise "it is sufficient that the harm invoked by the victim has been directly caused by the act of the minor, even without fault". So in this case, the claimant Vincent sued the parents of Maxime and Jérôme for injuries he received in an improvised rugby game. He was getting up when Maxime, who was holding the ball, was tackled by Jérôme and fell on him. No fault was shown, but the two sets of parents were held liable for the harm caused, even without any fault in their supervision of their children. The parents are simply liable as effective guarantors of compensation of any victim of their children's act of exuberance. The rationale is clear in the conclusions of the avocat général in the 1984 children cases. There avocat général Cabannes explicitly says: "in any case, isn't it a problem of insuring the parents? Car insurance is certainly compulsory; school insurance in reality is also and the amount of the premium is infinitesimal!"[111]

The movement towards the law on extra-contractual liability being a guarantee of compensation perhaps reached its apogee in the *Blieck* decision of 1991 on the interpretation of Article 1384, paragraph 1. In *Blieck*,[112] a young man in the care of a private association wandered off and set fire to a forest belonging to the Blieck couple. The Association was held liable under Article 1384, paragraph 1, on the basis that "the association had accepted the duty of organising and controlling on a permanent basis, the way of life of the handicapped person". This adds to the range of people actually specified in Article 1242 as liable for the acts of another. Article 1384, paragraph 1, provided: "He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible." Now paragraph 1 had always been treated as an introductory summary for the subsequent paragraphs which list specific people who are responsible for the acts of specified other people. But this decision established that people other than those listed specifically in Article 1384 could be liable for the acts of others. Although the decision set out a number of facts making liability appropriate, it did not actually articulate a principle, though commentators were quick to treat it as such. Subsequent decisions have established that an association can be liable even if it only looks after a person's way of life for part of a

[110] Ass. plén. 13 Dec. 2002, n° 00-13787, D. 2003.231 note Jourdain.

[111] My translation. D. 1984, 525 concl. Cabannes. On insurance costs, see B. Häcker, "Fait d'autrui in Comparative Perspective" in Borghetti and Whittaker (eds.), *French Civil Liability*.

[112] Ass. plén. 29 March 1991, *Association des Centres Éducatifs du Limousin c Blieck*, n° 89-15231, D. 1991, 324 note Larroumet, J.C.P. 1991.II.21673 concl. Dottenville; Bell, Boyron and Whittaker, *Principles of French Law*, 397. Previously, the state had been liable without proof of fault for the acts of adults without mental capacity: CE Sect. 3 February 1956, *Thouzellier*, D. 1956.596 note Auby. The policy on "care in the community" meant that mentally handicapped persons were no longer kept in state institutions, but they were to be cared for in the wider community often by private associations, as in the *Blieck* case.

day.[113] The range of people has been expanded to include legal guardians of children who themselves were the child's parents.[114] More controversially, liability has been extended to sporting clubs which control specific activities of their members. As stated by the Cour de cassation in a later case, "sporting associations whose mission is to organise, to direct and to supervise the activity of their members are liable for the harm which they cause at such events, provided that a fault which is characterised by the breach of the rules of the game can be attributed to one or more of their members, even if not identified".[115]

The potential cost of insurance was recognised by the avocat général Duplat in the case, but sporting clubs do have an insurance obligation in any case to cover for the harm caused by their players.[116] This expansion of strict liability for the acts of others marks a further expansion of the guarantee function of tort law. The *Blieck* decision, while limited in its specific effect, signalled an emphasis which was taken up in the *Bertrand* decision and the cases on sporting clubs.

If we look at the proposed reforms of the Civil Code in the *Projet de réforme* of 2017,[117] then they basically entrench the solutions coming from case law since 1982. In relation to *Blieck*, the decision itself is entrenched in proposed Article 1247 of the Civil Code as is the liability of legal guardians of adults, but the liability of associations, care homes and sporting clubs is altered by allowing them to escape liability by proving they were not at fault. Furthermore, it is made clear that there should not be further expansion in the future, because this is a rule not a principle.[118] The development of the liability for children is also entrenched.[119]

In relation to the question of what counts as "fault", although there is some greater precision in the proposed definition of fault in proposed

[113] Cass. 2 civ. 25 February 1998, *Eicher c Thierry*, n° 97-50002, D. 1998, 315 note Kessous.
[114] Cass. crim. 28 March 2000, n° 99-84075.
[115] Ass.plén, 29 June 2007, n° 06-18141, D. 2007, 2408 note François.
[116] See the comments of Jourdain in the *Revue trimestrielle de droit civil* 2007, 782. But note loi n° 84-610 of 16 July 1984 imposed on sporting clubs the obligation to insure for harm caused to or by their players (now art. L321-1 of the Sporting Code).
[117] See Borghetti and Whittaker, *French Civil Liability in Comparative Perspective*, Appendix.
[118] Proposed Article 1247: "A physical or legal person charged by judicial or administrative decision with organising and controlling an adult's way of life on a permanent basis is liable strictly for the action of such an adult placed under their supervision." Proposed Article 1248: "Other persons who take on by contract, and by way of their business or profession, a task of supervision of another person or the organisation and control of the activity of another person, is liable for the action of the physical person supervised unless they show that they did not commit any fault." Article 1245 para. 1 sets out that liability for others occurs "in the cases and on the terms laid down in articles 1246 to 1249", thus restricting their scope to being a set of rules.
[119] Proposed Article 1246: "The following are liable strictly for the action of a minor:
- his parents, to the extent to which they exercise parental authority;
- his guardian or guardians, to the extent to which they are charged with care of the minor's person;
- a physical or legal person charged by judicial or administrative decision with organising and controlling the minor's way of life on a permanent basis. In these circumstances, the parents' liability of such a minor cannot be engaged."

Article 1242, there is no attempt to say anything about whether fault is conceived subjectively or objectively or whether it requires discernment.[120]

The final area of development was the creation in 2002 of provisions for hospital-acquired infections.[121] Like the law on road traffic accidents, this was enacted outside the Civil Code (but it is part of the Public Health Code) and this made it unnecessary to have recourse to the general provisions of the Civil Code, such as those on delict. This law established that doctors and other medical practitioners are only liable for fault in treatment, but they are required to take out liability insurance. But, as an exception, the Law created a scheme of no-fault compensation for nosocomial infections. In all cases of harm resulting from treatment, the hospital has to provide an explanation of how a patient died or was injured. Claims are made to ONIAM (*Office national d'indemnisation des accidents médicaux*). It then adjudicates whether the harm is the result of fault or a nosocomial infection and therefore which insurer is required to pay. This then can be contested by the hospital or professional's insurer or the victim may consider the insurer's offer is insufficient. Any dispute goes to a conciliation panel. It has the effect of reducing, but not eliminating litigation. In the case of sufficiently serious harm resulting from medical treatment (and not from the underlying condition of the patient) and where the fault of a medical practitioner or hospital is not established, then the victim has a no-fault compensation claim against a special fund established on the basis of national solidarity. So medical liability is basically based on fault, but compensation may also be obtained from state-funded schemes.

B. England

The continuation of English law on its dependent path of fault liability was most obviously seen by the fate of the Pearson Report on *Compensation for Personal Injuries*.[122] Set up at the end of 1972, the Commission reported in 1978. Apart from no-fault compensation for road accidents funded by a tax on petrol, most of its recommendations were about procedural improvements in litigation.[123] Different categories of harm received different solutions. There were not many proposed departures from the fault principle within tort law as the core basis of liability. The economic climate had

[120] See M. Durgué, "The Definition of Civil Fault" in Borghetti and Whittaker (eds.), *French Civil Liability in Comparative Perspective*, ch. 5; J.-S. Borghetti, "The Definition of *la faute* in the *Avant-projet de réforme*', in J. Cartwright, S. Vogenauer and S. Whittaker (eds.), *Reforming the French Law of Obligations* (Oxford 2009), 271.

[121] The laws of 4 March 2002 and 30 December 2002, now Title IV of Book 1 of the legislative part of the Code de la santé publique. For explanation see S. Taylor, "The Development of Medical Liability and Accident Compensation in France" in E. Hondius, *The Development of Medical Liability* (Cambridge 2010), 70, 73, 93–101; Bell, Boyron and Whittaker, *French Private Law*, 408–10.

[122] Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd. 7504; Allen et al., *Accident Compensation After Pearson*. See P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9th ed. (Cambridge 2018), 14–15, 437ff.

[123] Cane and Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 439–41.

changed by the end of the 1970s and the Pearson proposals, especially on road accidents, were not adopted by government. As Cane and Goudkamp remark, the result is that "Pressure to replace the tort system is now all but non-existent".[124]

English law does not use "fault" in a generic sense as a criterion for liability. Individual torts will use "intention", "malice", "negligence" among other concepts. These are the concepts which are defined and articulated in cases and scholarly writings. This does not mean that English law fails to recognise that fault in tort does not always equate to moral fault – a point Hamson was quick to make in his reply to Tunc. The picture is mixed. Tunc was right that an objective standard of the competent driver applies to the learner driver,[125] but the standard applied to children may be technically "objective", and it is related to what is typical for the age of the child. As a result, it is rare to find instances of children being held liable in tort.[126] In contrast to French law, there is no clear rule on the liability of those with a mental incapacity. In some cases, they will be liable for failing to fulfil a duty of care, but it is not clear that this covers all situations.[127] These points illustrate that sometimes a moral element of fault is significant in English law. All the same, Cane and Goudkamp accept that there may be good practical reasons why fault may be found in law where there is no moral basis for it. Like Tunc, they resort to the argument based on the desirability of compensation:

> [I]f we think that the main purpose of the law is to compensate injured persons, there is no reason why moral fault should be the criterion of liability to pay compensation. Indeed, if this is our aim, the criterion of whether a person is entitled to compensation ought to be whether they have been injured, regardless of how they were injured. From this point of view, the chief shortcoming of the tort system is not that it sometimes compensates people whose injuries were not the result of moral fault, but that it fails to compensate very many other people who have suffered injuries in circumstances that do not fall within the tort system at all.[128]

For them, it would be reasonable to take account of insurance and conclude that the issue is really about who should insure for a particular risk, even if they are not at fault in creating it.[129] This may well explain the expansion of liability for others beyond the employment relationship.[130] But fault

[124] Ibid., at 438.
[125] Tunc, "Tort Law and the Moral Law", 251.
[126] C. McIvor, *Third Party Liability in Tort* (Oxford 2006), 24–35.
[127] See *Dunnage v Randall* [2016] Q.B. 639. Goudkamp has argued in favour of a defence of insanity in tort for those who are mentally incapable: J. Goudkamp, "Insanity as a Tort Defence" (2011) 31 O.J.L.S. 727.
[128] Cane and Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 171.
[129] Ibid., at 175.
[130] See especially *Catholic Child Welfare Society v Various Claimants* ("*Christian Brothers*") [2012] UKSC 56, [2013] 2 A.C. 1; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] A.C. 355. The limited extent of this liability was shown in *Barclays Bank plc v Various Claimants*

continues to remain a significant element in the set of events for which one person is liable for the acts of another.

The situation of medical liability was the subject of a report by the Chief Medical Officer, *Making Amends* in 2003.[131] He proposed that there should be a comprehensive no-fault scheme for medical accidents. But the Government reaction was simply to improve the procedure for obtaining redress in a way that is not dissimilar to the French procedure under the 2002 Law. The NHS Redress Act 2006 is firm in section 1(2) that liability for medical harm lies in tort and thus in fault. The rest of the Act is about how to avoid litigation, but it required secondary legislation to make it effective, which was slow in coming. This saga and that of the Pearson report shows that little in England had changed from the position which Hamson adopted. Not even his risk-based liability suggestion came to pass. The decisions of the House of Lords rejecting recovery for personal injuries in nuisance had the effect of restricting risk liability to property relations between neighbours.[132]

In terms of tort theory, contemporary scholarly writing is more plentiful, more sophisticated and more reflective than current French writing. The sophisticated French writing was produced particularly from the end of the War until the 1970s, so the English had some catching up to do. All the same, the quality of current writing is extensive and impressive. In the 1970s in England, there was lively discussion of the New Zealand compensation system and of Pearson. But these days, the focus is primarily on understanding the place of fault and other sources of moral responsibility.

Within scholarly writing on English law, many theorists suggest that tort law is about reparation for wrongs, and some define wrongs simply as breaches of rights.[133] Others, like Gardner, have accepted moral responsibility extends further. It includes a responsibility for the results of a person's actions, even if no rights are breached. Obligations to compensate can arise from both violation of rights and the occurrence of events for which a person is responsible.[134] Much of Gardner's discussion is about what he called "obligations to succeed" or, to use the French term that Demogue coined three-quarters of a century earlier, *obligations de résultat*.[135] In his view, the reasons why individuals have responsibility for outcomes are essentially political. We assign responsibility for a variety

[2020] UKSC 13, where an employer was not held liable for the acts of an independent doctor to whom its employees were sent for medical examinations.

[131] Chief Medical Officer, *Making Amends: A Consultation Paper Setting Out Proposals for Reforming the Approach to Clinical Negligence in the NHS* (London 2003); see W. Swain, "The Development of Medical Liability in England and Wales" in Hondius (ed.), *The Development of Medical Liability*, 51–52.

[132] The House of Lords held that personal injuries cannot be recovered in a nuisance action: Hunter v Canary Wharf Ltd. [1997] A.C. 655, but they are still recoverable in public nuisance: *Corby Group Litigation Claimants v Corby B.C.* [2009] Q.B. 335.

[133] R. Stevens, *Tort and Rights* (Oxford 2007), ch. 2.

[134] J. Gardner, *Tort and Wrongs* (Oxford 2019), 156–57.

of reasons – fairness, efficiency or, more generally, reasonableness. These assigned responsibilities need not be based on any metaphysical moral grounds of responsibility.[136]

Gardner and others have been influenced by Honoré's discussion of "outcome responsibility": "Outcome-responsibility means being responsible for the good and the harm we bring about by what we do. By allocating credit for the good outcomes of actions and discredit for bad ones, society imposes outcome-responsibility."[137]

Unlike the 1984 French children cases, Honoré thought liability for outcomes depended on a capacity for decision and action. His purpose was to show that objective conceptions of fault and strict liability were compatible with a moral conception of responsibility and can be seen as fair.

Honoré and Gardner, like Hamson and Jolowicz before them, discuss strict liability and outcome responsibility mainly in terms of responsibility for risk.[138] Perry usefully discusses one version of outcome responsibility that attracts many scholars, liability for risk. Although not fault in itself, responsibility for risk-creation involves foreseeability of harm:

> Outcome-responsibility affects reasons for action in a more diffuse fashion: in a given situation it may require the agent to apologize, for example, or to obtain assistance. It also constitutes the *basis* for a moral obligation to compensate, but in order actually to establish such an obligation further argument is necessary.[139]

But much of this discussion, as in the work of Gardner, is much more on risk-creation and the ability to take avoiding action, which is not the focus of Tunc or of French law. Indeed, as Tunc's reply to Hamson suggests, French doctrinal writing sees this as an outmoded debate.[140] For the French, certainly the liability of children, of parents for children and of those with responsibility for mentally handicapped adults are not a matter of risk. Rather, they are a form of situational responsibility – responsibility that arises because a person occupies a particular position, not necessarily out of choice. It is that emphasis on obligations arising out of a situation that can explain best the link between the justification of liability based on solidarity and the use of tort law to channel that liability to contribute to the well-being of another.

A typical English law approach is to give up on a universally applicable theory of tort liability, but rather to look for a pluralist approach to the

[135] Ibid., at 166–68; R. Demogue, *Traité des obligations en général* (Paris 1925), vol. 5, n° 1237 and vol. 6, 1932, n° 599.
[136] Gardner, *Tort and Wrongs*, esp. 223–25.
[137] T. Honoré, "Responsibility and Luck: the Moral Basis of Strict Liability" (1988) 103 L.Q.R. 530.
[138] E.g. ibid., at 544–45.
[139] S.R. Perry, "Risk, Harm and Responsibility" in D.G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1995), 321, 345, emphasis.
[140] See Tunc, "Accident Victim Compensation and the Moral Law", 242–43.

justification of tort law.[141] Gardner's political approach (or others would call it pragmatism) seems to dominate the justifications for tort liability. But it is interesting to observe that the concept of solidarity is not used in the English literature,[142] unlike in the French, as Tunc's work shows.

V. Conclusion

Looking at the positive English tort law of today, Cane and Goudkamp remark:

> public policy in this area is focused on attempting to make the tort system more efficient and less expensive to administer rather than on getting rid of it with the result that the tort system remains firmly in place as a major source of compensation for victims of personal injury on the roads, at work, in hospitals and in public places. Most other accidents and most diseases remain, in practice, outside the tort system. Thus, although much has changed in the past forty years, the situation the Pearson Commission uncovered in the 1970s remains, in its essentials, the same.[143]

It would be fair to say that French law is significantly different than in 1972, but it retains the broad lines of principle which Tunc set out in his inaugural lecture.

If we ask why, then much can be attributed to path dependency.[144] Legal systems which start down a particular path will often continue on it not only out of inertia, but also because public and private arrangements, as well as systems for litigation and dispute resolution have been built in response to a particular pattern of legal liability. Birke Häcker, in an insightful commentary on this area, points to the differences in insurance practices and in legal culture that have an interplay with the legal rules of different legal systems:

> A corollary of insurance being so widespread in France is . . . that it has emboldened courts to expand parental liability – but at the same time it also takes the sting out of a finding of liability. There is therefore nothing particularly awkward about friends, colleagues or neighbours claiming compensation from each another, as might be the case in England.

Just as the substantive framework of accountability for *fait d'autrui* differs between the systems, so do insurance products and cultures of claiming. Ultimately, loss allocation and distribution mechanisms vary between French, English and German law.[145]

[141] See J. Goudkamp and J. Murphy, "The Failure of Universal Theories of Tort Law" (2015) 21 Legal Theory 47.
[142] I am grateful to Paula Giliker for pointing out an exception in H. J. Laski, "The Basis of Vicarious Liability" (1916) 26 Yale Law Journal 105, 121. His words echo Durkheim, and he relies heavily on French literature in the article.
[143] Cane and Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 440.
[144] See Bell and Ibbetson, *European Legal Development*, 179–83.
[145] Häcker, "Fait d'autrui in Comparative Perspective", 221.

It is not worth speculating which is the chicken and which is the egg in the relationship of tort and insurance. The two systems mutually adapt. The English worries about the high costs associated with no-fault tort liability as proposed by Pearson have not materialised in France. The strict liability of parents for children in France only leads to a €14 a year difference in legal liability insurance between households with children and those without – less than the cost of one espresso a month![146] Of course, in many cases, it is the same insurance companies that produce the liability insurance policies in England and France, and make a profit in both countries.

The debate between Tunc and Hamson in 1972–73 reveals significant differences between French and English tort law which have persisted, if not widened. In many ways, Tunc not only expressed clearly ideas which were less clearly articulated in the French literature and made them available to an English-reading public. He also pushed some of the English scholars of his time to reflect on and articulate their own deepest understandings of their system. Rather than seeing comparative law as inevitably aiming to achieve harmonisation, we can see in this dialogue as an example of comparative law helping each system to understand both itself and its differences. It is an important reason why comparative law is an activity which is worth undertaking and to which both Tunc and Hamson devoted their very long lives.

[146] Personal research on French insurance websites.

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