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# Prevention and the Pillars of a Dynamic Theory of Civil Liability: A Comparative Study on Preventive Remedies

Alexandru-Daniel On

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**Prevention and the Pillars of a Dynamic Theory of  
Civil Liability**

**A Comparative Study on Preventive Remedies**

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## CHAPTER I\*

### Introduction

The Greek philosopher Heraclitus of Ephesus famously proposed the idea that change is the only constant in the world.<sup>1</sup> To a greater or smaller extent, everything in the physical world is subject to some degree of change in every moment. The French philosopher René Descartes imaginatively described this process as God re-creating the world at each successive instant.<sup>2</sup> The law of torts is subtly, yet strongly, linked to change in the world, particularly to change in human society. A natural consequence of this link is the inherent dynamism of this area of the law, which manifests itself twofold: first, the law of torts evolves in time; and second, the theory of tort law must be structurally dynamic: as a consequence of the fact that tort law is fact-dependent, tort theory is based on a process of characterizing and arranging facts, and finding their legal significance—a process which should be intuitively dynamic.

That being said, so far, the law of torts has been explained and theorized using a rather static approach. Traditional tort theory, in both the common law and the civil law, has been focused on placing facts into categories and enumerating elements.

There is great value in breaking down elements of torts, or in creating abstract categories. This is not an attempt to minimize the importance of the traditional approach on tort law,

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<sup>1</sup> See PLATO, CRATYLUS 19 (Benjamin Jowett trans., Project Gutenberg), available at <http://pinkmonkey.com/dl/library1/cratylus.pdf> (last visited Mar. 20, 2013).

<sup>2</sup> This perspective on change is linked to Descartes' image of time. Descartes believed that objects in the world do not have the capacity to endure in time, and believed that the nature of time is perpetual "re-creation". See RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY 33, 88 (John Cottingham ed. & trans., Cambridge University Press, 18th prtg. 2012; published as part of CAMBRIDGE TEXTS IN THE HISTORY OF PHILOSOPHY series).

especially since for the greater part of history it seemed to be enough for every practical purpose. The true problem, identified rather recently in legal doctrine, is the fact that tort theory has been oriented towards the past for most of its history,<sup>3</sup> instead of having a full spectrum on linear time, which would include the future.

The challenge of exploring the inherent dynamism of the law of torts goes far beyond the purposes of this paper. In a restricted and controlled manner, from the multiple areas of tort law that are in need of a dynamic approach, an emerging area—prevention—needs to be further explored.

The catalyst for the cogitations expressed herein and the topic around which everything revolves in this study is the proliferation of *preventive remedies*. This is an area of tort law which, if properly understood, is bound to change our whole perception on what civil liability is, what a tort action is supposed to do, and what the goals to be achieved by the law of torts are in general.

The purpose of this study is to draw the coordinates and identify the main vectors for the development of a comprehensive theory of prevention in the law of torts. In order to reach that goal, the study is divided into seven chapters (including the introduction).

Chapter II is focused on a set of definitions which were necessary in order to explain the choice of terminology used throughout this study. Unavoidably, this chapter is also a brief reflection on some of the fundamental concepts of tort law. The way we place preventive remedies within the general theory of civil liability will probably impact our conceptual

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<sup>3</sup> See Catherine Thibierge, *Avenir de la responsabilité, responsabilité de l'avenir*, D. 2004 Chron. 577, 580 (hereinafter Thibierge, *Avenir de la responsabilité*).

understanding of tort law more than anything else. Most importantly, the definition of liability needs to become broader than the traditional definitions focusing on compensation.<sup>4</sup>

In order to justify the expansive definition offered in Chapter II, Chapter III is tapping into the fundamental question of what moral responsibility is and how it can operate as a source for an expanded view on our understanding of civil liability. The recourse to notions of prospective and retrospective responsibility and their interplay opens up the possibility to analyze legal responsibility in a prospective way, thus revealing a philosophical foundation for preventive remedies.

Chapter IV focuses on what the law is today in the area of preventive torts. The focus is on jurisprudence (case law) from three major legal systems: the French, the English, and legal systems from the United States.

By no means should the role of courts be overlooked when discussing prevention because, so far, preventive remedies find support exclusively in jurisprudential development. Even in the future, the central role in the development of preventive remedies will be attributed to judges; the legislature will most likely regulate only specific matters. General and default rules for prevention can only be extracted from jurisprudence (case law), and, for the foreseeable future, the refinement of such rules and principles will most likely fall on the shoulders of judges, even if legislatures will consider codifying preventive remedies. A few attempts at codification have already been made, for example in the Principles of European Tort Law and the reform project for the law of obligations presented in 2005 by Professor Catala<sup>5</sup> or in the Reform project coordinated by François Terré.<sup>6</sup>

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<sup>4</sup> See *infra* Ch. II Part B.

<sup>5</sup> The European Group on Tort Law made a first step towards a diversification of functions in the law of torts, by combining prevention with compensation in Art. 2:104: “Expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred.” EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN



Chapter V deals with the evolution of tort theory in the area of prevention. Prevention as a scope of civil liability has been theorized only recently. A theory of “preventive civil liability” was proposed in the civilian literature,<sup>7</sup> whilst relying on ideas inherent to the precautionary principle,<sup>8</sup> while in the common law, there is abundant case law applying preventive measures,<sup>9</sup> but almost no effort of organizing the case law in a general theoretical framework.<sup>10</sup>

Although there are great dissimilarities between tort theory in civilian legal systems and common law systems, in such a novel field, the shared experience of the two legal families can open new horizons.

The study of the preventive function in the law of torts and preventive remedies is necessarily linked to the coherence of the fundamental framework of tort law. For this purpose, it

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TORT LAW, available at <http://civil.udg.edu/php/index.php?id=129>. The Catala Project for the reform of the law of obligations in France contains a similar provision. Article 1344 declares that: “The expenses incurred for the prevention of imminent damage or in order to avoid its aggravation, as well as for the reduction of its consequences, constitutes recoverable damage when reasonably incurred” (“Les dépenses exposées pour prévenir la réalisation imminente d'un dommage ou pour éviter son aggravation, ainsi que pour en réduire les conséquences, constituent un préjudice réparable, dès lors qu'elles ont été raisonnablement engagées”). Rapport à Monsieur Pascal Clément Garde des Sceaux, Ministre de la Justice, Avant-projet de réforme du droit des obligations (Articles 1101 à 1136 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil) at 154 (22 September 2005) available at [http://www.justice.gouv.fr/art\\_pix/RAPPORTCATALASEPTEMBRE2005.pdf](http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf)

<sup>6</sup> The Terré reform project, has a similar provision in Article 51 to those presented above, but goes a step further and, in Article 2, proclaims that “Independently from reparation of damage with might have been sustained, the court will prescribe reasonable measures, proper for preventing or stopping an illicit disturbance to which the plaintiff finds himself exposed to” (“Indépendamment de la réparation du dommage éventuellement subi, le juge prescrit les mesures raisonnables propres à prévenir ou faire cesser le trouble illicite auquel est exposé le demandeur”). *Proposition de textes. Chapitre des délits* in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 1-15 (François Terré coord., ed. Dalloz, 2011), available at [http://www.textes.justice.gouv.fr/art\\_pix/1\\_proposition\\_texte\\_responsabilite\\_civile\\_20111018.pdf](http://www.textes.justice.gouv.fr/art_pix/1_proposition_texte_responsabilite_civile_20111018.pdf)

<sup>7</sup> Catherine Thibierge, *Libres propos sur l'évolution du droit de la responsabilité*, REVUE TRIMESTRIELLE DE DROIT CIVIL (hereinafter RTD civ.) 561 (1999) (hereinafter Thibierge, *Libres propos*); Thibierge, *Avenir de la responsabilité*, *supra* note 3.

<sup>8</sup> See Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580-81. The emphasis the author puts on the protection of collective interests, the application for large scale damages, and the transversal domain of liability demonstrates that this “preventive liability” seems to draw its characteristics from the essential elements of the precautionary principle.

<sup>9</sup> See *infra* Ch. IV, Part C.

<sup>10</sup> By “general theoretical framework” I mean a set of guiding principles, accompanied by rules, standards, and element or factor-based tests which would be common to all preventive remedies, as default rules. So far, the common law has taken a pragmatic approach, having developed doctrines, standards and rules for every particular remedy, and found no need to bind them all under one theory.

is necessary to present a brief history of the evolution of tort law in the civil law and in the common law. The historical presentation is placed in relation with modern evolutions in philosophy and previous attempts in legal doctrine to introduce prevention into the above-mentioned general framework.

The comparison of the way the law of torts evolved in time will show how the dominant intellectual trend of the two legal traditions finds a correspondent in the emergence of preventive remedies. Individualism generated highly effective remedies for private individuals in small claims disputes that involve a very limited number of interests, whereas collectivism gave birth to the highly-controversial precautionary principle, a principle which applies for catastrophic damages, and serves to protect interests of entire collectivities. The result is of course a degree of imbalance within each legal system analyzed in this study. When the emphasis is on individualism, the precautionary principle is misunderstood. It is seen as unscientific, or paralyzing.<sup>11</sup> Though not the central object of this study, it is important to stress that the precautionary principle, when properly understood, is in fact incredibly flexible and apt to solve problems which involve large scale litigation and a great number of interests attached to a large variety of particular preventive measures (and not just judicial, also legislative). On the other hand, where the emphasis is on collectivism, the individual is often forgotten, and prevention is at times confused with the application of the precautionary principle. The need to have individual rights protected through preventive remedies is just as stringent as the need to protect collective interests. Assessing risks when the interest is individual will most often fall on courts, and not on other branches of the government. On the other hand, more often than not, it will be the administration, or the legislature, who will be in charge of taking preventive measures to safeguard the population or large communities from major risks, not courts.

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<sup>11</sup> See, e.g., Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003), at 1003.

There is however, a place for judge-made law and a theoretical and normative basis for the enforcement of general duties by way of preventive remedies within the law of torts. Chapter VI is aimed at promoting a dynamic analysis of the law in the area of preventive remedies, in order to explain the role of a default or gap-filling set of rules for prevention in the law of torts. Guidelines and standards are proposed, at least in embryonic form, in order to connect the dots and establish functional unity in this area of tort law. The key for understanding civil liability, and for the understanding of prevention in this area of the law, has been a reflection on *the nature and perception of time, events and human interaction*. Liability will be characterized as preventive because the decision-making process anticipates injury. The judge's position on a causation timeline is of immense importance in distinguishing preventive from compensatory remedies or sanctions. Not only does it dictate what kind of remedy will be made available (remedies are preventive only when the preventive effect is the direct consequence of an action in court that anticipates injury), it also mandates transformations in the way a judge has to perceive the facts and the evidence of a case. In cases of preventive remedies, judges must be made aware not only of facts which prove events from the past, but also facts and circumstances that will help them assess risk and anticipate events (through risk assessment techniques).

The shared jurisprudential experience from the common law and the civil law brings a fresh perspective as to how to assess the jurisprudence and how to adapt our theoretical models in order to provide real guidance for decision-makers.

The decision-making process of applying preventive remedies has many particularities which need to be explored. Perhaps the most essential characteristic of these remedies is their temporal application, since they are applied in order to anticipate damage. Theoretical models need to introduce time into the equation when discussing preventive remedies. The introduction

of time and the dichotomy between prospective and retrospective liability are the key pillars for a purposive and dynamic theory of prevention in the law of torts. A model focused on the citizen will reveal the basic architecture for a renewed theory of tort liability which is both prospective and retrospective, placing prevention and compensation on an equal footing as goals of civil liability. However, this study is only painting a rough picture of this model. It draws the basic lines, but leaves many gaps to be filled by a more detailed analysis of the case law.<sup>12</sup>

The two major western legal families, the civil law and the common law, are now slowly filling the gap of prevention, each one in a different way and in accordance with their own legal traditions. The pace, however, is very slow, and therefore there is still immense room for imagination and innovation in this field. The direction the law will take within each legal system is in large part unpredictable and can still be influenced (doctrinally, jurisprudentially, and even through legislative enactment).

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<sup>12</sup> The basic hope of every theoretician is that the details will fill the gaps rather than collapsing the structure altogether. Time and experience will be the test for the practical side of the model, and, unless it will remain completely ignored, doctrinal dialectic will refine or destroy its abstract foundations.

## CHAPTER II

### Redefining Liability

#### A. The preventive function of liability

In theoretical writings, prevention as a function of tort law and preventive remedies as its direct expressions have been overshadowed by compensation—a function so pervasive that it had been for a long time almost identified with tort law itself.

While tort law doctrine, both in the civil law and the common law, has always emphasized the function of compensation,<sup>13</sup> prevention has been mentioned only by a handful of authors,<sup>14</sup> but many times it was either cross-dressed as compensation (or reparation<sup>15</sup>), or

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<sup>13</sup> Older doctrine or more traditional contemporary authors, particularly French civilians, see compensation as essential in the law of torts. *See, e.g.*, MAZEAUD & CHABAS, *LEÇONS DE DROIT CIVIL. OBLIGATIONS. THÉORIE GÉNÉRALE* 349 (8th ed., François Chabas ed., Montchrestien 1991); MARCEL PLANIOL & GEORGES RIPERT, *6 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 639 (2nd ed., Paul Esmein ed., L.G.D.J. 1952). Common law authors, particularly in the U.S., always analyze compensation as the most important of the functions of liability, but generally add alongside compensation deterrence, punishment or vengeance, and economic efficiency. *See* WILLIAM L. PROSSER, *LAW OF TORTS* 6, 9, 23 (4<sup>th</sup> ed., West 1971); DAN B. DOBBS, *1 THE LAW OF TORTS* 17-21 (3rd reprt., West 2004); DOMINICK VETRI, LAWRENCE C. LEVINE, JOAN VOGEL & LUCINDA FINLEY, *TORT LAW AND PRACTICE* 12 (2nd ed., LexisNexis 2002); VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 7-9 (2nd ed., Carolina Academic Press 1999).

<sup>14</sup> *See, e.g.*, JOHN WILLIAM SALMOND & R. F. V. HEUSTON, *ON THE LAW OF TORTS* 28 (19th ed., R.F.V. Heuston & R.A. Buckley ed., Sweet & Maxwell 1987); MICHAEL A. JONES, *TEXTBOOK ON TORTS* 1 (3rd ed., Blackstone Press Limited, London 1986). GLANVILLE LEWELYN WILLIAMS & B. A. HEPPLER, *FOUNDATIONS OF THE LAW OF TORT* 23 (Butterworths 1976); PERCY HENRY WINFIELD & JOHN ANTHONY JOLOWICZ, *ON TORT* 3 (10th ed., W. V. H. Rogers ed., Sweet & Maxwell 1975); Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 579-580; Thibierge, *Libres propos*, *supra* note 7, at 583; MURIEL FABRE-MAGNAN, *2 DROIT DES OBLIGATIONS. RESPONSABILITÉ CIVILE ET QUASI-CONTRATS* 42-47 (2d ed., Thémis 2010); Philippe le Tourneau, *Responsabilité (en général)*, at no. 240 (Published as part of the *RÉPERTOIRE DE DROIT CIVIL*, Dalloz, last updated 2012); PHILIPPE LE TOURNEAU ET AL., *DROIT DE LA RESPONSABILITÉ ET DES CONTRATS. RÉGIMES D'INDEMNISATION* 879-880 (9th ed., Dalloz 2012-2013).

<sup>15</sup> For preventive remedies disguised as reparation *in natura*, *see infra* Ch. IV, Part B.2. “Reparation” is a term which has been used in Scottish law, and sometimes by English authors, and preferred to compensation. *See* WILLIAMS & HEPPLER, *supra* note 14, at 26; MAURICE ALFRED MILLNER, *NEGLIGENCE IN MODERN LAW* at 231 (Butterworths 1967). The Scottish “reparation” seems to be a synonym to the French *réparation*. In civilian language, the term is preferable to “compensation”. It is important to note that there is no perfect equivalence between the term “compensation” (spelled identically in French) and “reparation” (*réparation*). The French *réparation* is a broader concept. *Compensation* refers to situations where a sum of money is paid, whereas *reparation* includes both remedies *in natura* (for example, repairing a thing which has been damaged by an illegal act), and money compensation (*réparation par équivalent*). GÉRARD CORNU, *VOCABULAIRE JURIDIQUE* 803-804 (8th ed., Quadrigue/PUF, 2007). Also, within French law, the term “reparatory function” is definitely preferable to “compensatory function”, for the same reasons. However, in this study, especially in its comparative sections, or where the discourse applies for all the legal systems presented, the concepts of “compensation” and “compensatory function” are used interchangeably with “reparation” or the “reparative function”, both sets of terms being understood in their broadest meaning.

limited solely to the idea of deterrence, thus being reduced to a secondary or accessory function.<sup>16</sup> Influential names writing in the area of tort law have taken this conservative stance. Both the general idea of prevention and especially direct prevention,<sup>17</sup> as well as some of its more specific expressions, like the precautionary principle, have been either ignored (by the authors who see tort law as solely or mainly compensatory),<sup>18</sup> or treated as synonymous with deterrence.<sup>19</sup> It is not uncommon, particularly in French doctrine, for some authors to fear a potential pollution of the theoretical framework of civil liability (*responsabilité civile*) if the preventive function is given its own space in the theory of tort law.<sup>20</sup>

Although only a few scholars are leading the movement towards a more open, prevention oriented, general theory of tortious liability,<sup>21</sup> courts have been applying preventive remedies for

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<sup>16</sup> See PROSSER, *supra* note 13, at 23; GUIDO CALABRESI, THE COSTS OF ACCIDENTS. A LEGAL AND ECONOMIC ANALYSIS 26-27, 68-129 (Yale University Press 1970) (Deterrence is for Calabresi only a subgoal of the principal goal of reducing accident costs. Calabresi further divided deterrence into “specific prevention” and “general prevention”. The former is based on the assumption that individuals can make proper choices based on what the accidents costs or activities are and letting the market determine which activities are allowed and what are the degrees of precaution which are reasonable for each particular activity. *Id.* at 69. The latter is based on the antithetical assumption that individuals “do not know best”, and society will, at a collective level, make the decisions regarding which activities will be allowed or regulate some specific activities, based not only on market considerations, but also non-patrimonial interests and moral considerations. *Id.* at 96). ANDRÉ TUNC, LA RESPONSABILITÉ CIVILE 134-35 (Economica, 1981); GENEVIÈVE VINEY, INTRODUCTION À LA RESPONSABILITÉ 87-90 (3rd ed., L.G.D.J. 2008), part of the TRAITÉ DE DROIT CIVIL (Jacques Ghestin coord.). The latter author, however, does accept that a serious threat of injury can be assimilated to recoverable damage, and acknowledges that a duty of prevention is intrinsic to fault-based liability. *Id.* at 156-58.

<sup>17</sup> For the distinction between direct prevention and indirect prevention (deterrence) *see infra* p. 26.

<sup>18</sup> *See supra* note 13.

<sup>19</sup> *Supra* note 16.

<sup>20</sup> That is probably why the Catala project rejected at the outset prevention as a function of civil liability, whilst subordinating it to reparation, with a particular emphasis on reparation *in natura*. *Supra* note 5, at 148. Within the same project, article 1369-1 only allows a judge to take measures to stop an illicit act when damage has occurred, and threatens to become more serious, to repeat itself or to perpetuate. *Supra* note 5, at 161. *Per a contrario*, a judge cannot intervene in other cases, as, for example, when a future damage is only threatened. Even more progressive authors, who have been promoting a preventive action which does not require damage for a *prima facie* case, like Professor Thibierge, prefer to take a cautionary route when discussing the issue and place prevention somewhere outside the general theory of civil liability, in order not to disturb the long tradition of compensation-focused tort theory. Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580.

<sup>21</sup> *Supra* note 14.

a very long time; only, ever so often, the remedies were deemed procedural, meaning that they were treated outside substantial law, and definitely not a part of the general law of torts.<sup>22</sup>

More importantly, the minority of scholars who have been promoting the preventive use of remedies also seem to have been influential and seem to have impacted recent jurisprudence. A few lower French courts have started to implement these new doctrinal ideas, focused in particular on the precautionary principle, in a few recent cases.<sup>23</sup>

In the common law, concepts of “preventive liability” in the abstract, or the precautionary principle, are either rejected or not present in tort theory at all. However, the innovation and flexibility of equitable remedies have been pushing forward prevention in the case law without theorizing it as such, and with a great deal of success.<sup>24</sup>

There is, therefore, a discrepancy between the case law and the doctrinal discourse at the moment. That is why the conceptual framework of prevention in the law of torts needs to pay more attention to individual cases and preventive remedies which already exist, while reassessing fundamental notions about the essence of legal responsibility, civil liability and the application in time of civil remedies in the law of torts.

## **B. Terminology**

There is great merit to be found in the writings of the authors who are still in the minority,<sup>25</sup> and much to gain from elaborating some of the ideas from these recent doctrinal

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<sup>22</sup> See especially, *infra* Ch. IV, Part B.3.

<sup>23</sup> The most notorious cases cited in the literature as examples of such a preventive action have little support in reason and do not convince. I refer here to the “relay antennas” cases, discussed in Ch. IV, Part B.1.

<sup>24</sup> See Ch. IV, Part C.

<sup>25</sup> Thibierge, *supra* notes 3 & 7; MATHILDE BOUTONNET, LE PRINCIPE DE PRECAUTION EN DROIT DE LA RESPONSABILITÉ CIVILE (L.G.D.J. 2005); Cyril Sintez, *La sanction préventive en droit de la responsabilité civile. Contribution à la théorie de l'interprétation et de la mise en effet des normes* (Doctoral Thesis, December 2009, Université de Montréal); Except Cyril Sintez, the other authors focus on the precautionary principle when discussing direct prevention. If the precautionary principle operates as a behavioral norm, the question arose in French doctrine as to whether or not a “preventive action” can be introduced as an expression of this principle, in order to proactively intervene and safeguard the essential interests protected through the employment of the principle. This is the

writings. In civilian scholarship, a few French scholars are promoting a theory for preventive remedies focused on a concept which they have termed “preventive civil liability” (in French: *responsabilité civile preventive*). Professor Catherine Thibierge was the one to propose this terminology for the first time.<sup>26</sup> Inspired by this concept, other authors have later developed new theories focused on prevention, particularly Professor Mathilde Boutonnet in her doctoral thesis regarding the precautionary principle,<sup>27</sup> and Cyril Sintez in his doctoral thesis about preventive sanctions.<sup>28</sup>

While the substance of these scholarly works is extremely valuable, and has inspired much my own work,<sup>29</sup> I believe that such terminology should be avoided because it creates confusion, at least if preventive liability is understood as a *type* of liability, to be distinguished from liability in the traditional sense, which would be “compensatory” or “reparative”.<sup>30</sup> To term liability as “preventive”, or “compensatory”, means to add an adjective which does not describe liability, but the consequence of liability, which is the remedy.

It is ever more important to acknowledge the existence of remedies which are preventive in nature and analyze their place in civilian theoretical construction, since the mere existence of

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opinion sustained by Catherine Thibierge and Mathilde Boutonnet. Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 581. BOUTONNET, *supra*, at 305, 345 et seq. However, according to Geneviève Viney, the majority of contemporary French authors have an intermediate approach on the precautionary principle, which means that while they do accept the normative value of the precautionary principle, they reject its application in a preventive action, the scope of the principle being limited to fault based liability and the reparation of damage. Geneviève Viney, *Principe de précaution et responsabilité civile des personnes privées*, D. 2007 (Dossier: “Principe de précaution”, Christine Noiville coord.) at 1542, especially n.4.

<sup>26</sup> Thibierge, *Libres propos*, *supra* note 7, at 562. The concept seems to have been phrased as such within a workshop, by a student named Benoît, and Professor Thibierge kindly acknowledged the contribution. *Id.* at 562, n. 3.

<sup>27</sup> BOUTONNET, *supra* note 25.

<sup>28</sup> Sintez, *supra* note 25.

<sup>29</sup> My own scholarship and research for the past two years has been a reaction to Professor Thibierge’s cogitations on responsibility and civil liability, which I have found fascinating. I have been influenced by Professor Thibierge’s thinking, and have tried to expand on some of her ideas, but I have also substantially deviated from her vision, particularly with regards to the role of the precautionary principle in the area of direct prevention.

<sup>30</sup> Thibierge, *Libres propos*, *supra* note 7, at 562.



such remedies draws attention to a dysfunctional, although well established, definition of civil liability.

Professor Thibierge shaped this concept, “preventive liability”, in a manner that would not upset the traditional understanding of civil liability.<sup>31</sup> The vast majority of authors writing about the law of obligations in France have defined civil liability as “the obligation imposed by the law to repair the damage caused” (by a personal act, something or someone).<sup>32</sup> This definition is almost sacrosanct in civilian literature, and has a well-established place in the common law literature as well. Black’s Law Dictionary also defines “civil liability” as “the state of being legally obligated for civil damages.”<sup>33</sup>

It is not easy to contest this definition, not necessarily because of a lack of convincing arguments, but because of tradition. The extreme focus on the compensatory function of liability, and the fact that the usual remedy afforded by the law is in fact the reparation of damage caused (and usually through money compensation) have made this definition almost uncontested.

Curiously, “liability” in general is defined in quite different terms. Looking again in Black’s Law Dictionary, the definition of “liability” (in general) is “the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.”

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<sup>31</sup> Thibierge, *Avenir de la responsabilité*, supra note 3, at 580.

<sup>32</sup> In the “Vocabulaire Juridique”, coordinated by Gérard Cornu, civil liability (*responsabilité civile*) is defined as “the obligation to answer for damage caused to another person [...]” (*toute obligation de répondre civilement du dommage que l’on a causé à autrui*). CORNU, supra note 15, at 821. In the famous *Leçons de droit civil*, written by the Mazeaud brothers and François Chabas, the definition is phrased in the following terms: “A person is civilly liable when she is bound to repair a damage suffered by another” (*Une personne est civilement responsable quand elle est tenue de réparer un dommage subi par autrui*). MAZEAUD & CHABAS, supra note 13, at 349. Other authors also define civil liability as: “the obligation to repair the damage caused to another person” (*La responsabilité civile est l’obligation de réparer le dommage qu’une personne cause à un autre*) PHILIPPE MALAURIE, LAURENT AYNÈS, PHILIPPE STOFFEL-MUNCK, *LES OBLIGATIONS* 9 (Defrénois 2003). General dictionaries offer similar definitions for the legal usage of the term in the civil law. See, e.g., PETIT LAROUSSE EN COULEURS 802 (Librairie Larousse 1972): “Obligation to repair damage caused to another . . .” (“*Obligation de réparer le dommage causé à autrui . . .*”); 3 Dictionnaire Historique de la Langue Française (PR-Z) 3211 (Alain Rey coord., Dictionnaires Le Robert, 2006), providing the same definition.

<sup>33</sup> BLACK’S LAW DICTIONARY 933 (8th ed., Brian A. Garner ed. in chief, West 2004).

Looking at French civilian terminology, the discrepancy is even more staggering. The French term for civil liability is “*responsabilité civile*”. The word “*responsabilité*” evolved in time into a polysematic concept.<sup>34</sup> Yet, every sense of the word involves an actor who is “answerable” for something that is within his control.<sup>35</sup> That is why the most general employment of the word is ethical. In ethics, an actor is answerable for all his actions, irrespective of the positive or negative effects of said actions. Political responsibility and juridical responsibility are just subcategories of ethical responsibility, if ethical responsibility is understood in such a broad sense.<sup>36</sup> The English language also employs the term “responsibility” with the same etymology and similar ethical overtones.<sup>37</sup> The etymology of the word is roman, as in *re-spondere*, from the roman word *spondeo*, which means “to promise”.<sup>38</sup> *Respondere* means the answer given to a promise.<sup>39</sup> That is why a common dictionary definition of “*responsabilité*” is “an obligation or moral necessity to answer, to vouch for one’s own acts or the acts of others”.<sup>40</sup> In philosophical works, ethical responsibility (*responsabilité*) is described

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<sup>34</sup> The term responsibility does not have a generally accepted meaning in philosophical works. PAUL RICOEUR, *THE JUST 11* (David Pellauer trans., University of Chicago Press 2000). The original philosophical usage of “responsibility” was political. In modern European languages, “responsibility” comes into use toward the end of the eighteenth century, within debates about representative government (government which is responsible to the people). Garrath Williams, *Responsibility*, <http://www.iep.utm.edu/responsi/> (last visited Apr. 12, 2012). The *Oxford English Dictionary* cites the debates on the U.S. constitution in the *Federalist Papers* (1787), and the Anglo-Irish political thinker Edmund Burke (1796), when discussing the etymology of the word. 13 THE OXFORD ENGLISH DICTIONARY 742 (2d ed., J. A. Simpson, E.S.C. Weiner coords., Clarendon Press 1989). Other thinkers like Stuart Mill and Max Webber also discuss responsibility in political terms. Williams, *supra* note 34. The English term “responsibility” has been employed as early as 1733 and precedes its French equivalent. 3 Dictionnaire Historique de la Langue Française (PR-Z), *supra* note 32, at 3211. The word “*responsabilité*” entered into the French language in 1783 is derived from the older French word “*responsable*”, and influenced by the semantics of the English equivalent. *Id.* The word “*responsable*”, first used as a noun (1284), and then as an adjective (since as early as 1304) described the person that could be heard in a court of justice. *Id.* See also FABRE-MAGNAN, *supra* note 14, at 34-35. “*Responsabilité*”, because of this dual influence, became a term of art in political science, philosophy, and law, and the significance of the word varies according to the specifics of the subject matter.

<sup>35</sup> See *infra* Ch. III Part. A.

<sup>36</sup> *Id.*

<sup>37</sup> 13 THE OXFORD ENGLISH DICTIONARY, *supra* note 34, at 742; WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1005 (Merriam-Webster Inc. 1984).

<sup>38</sup> Thibierge, *Libres propos*, *supra* note 7, at 573. FABRE-MAGNAN, *supra* note 14, at 34.

<sup>39</sup> Thibierge, *Libres propos*, *supra* note 7, at 573.

<sup>40</sup> <http://www.larousse.com/en/dictionnaires/francais/responsabilit%C3%A9/68694> (Last visited Apr. 12, 2013)

either a reaction of conscience, which operates internally, or a reaction from the outside world (another person, or society in general), to a certain act.<sup>41</sup> The internal or external reaction helps characterize an act as being praiseworthy or blameworthy, and is always triggered by a choice made by the actor.<sup>42</sup>

Civil liability, or *responsabilité civile*, is nothing else but a part of legal responsibility, which is the legal expression of responsibility. We will see in a later chapter how moral responsibility and legal responsibility interplay.<sup>43</sup>

The English term “tort” also has strong ties to ethics. Tort is derived from the Latin *tortus* which means “twisted”, or “wrong”.<sup>44</sup> A tort is a civil “wrong”,<sup>45</sup> a behavioral deviation for which someone is legally responsible. In the common law, a “wrong” is a breach of a preexisting duty, on the one side (the active side), and an infringement of another person’s right on the other (the passive side).<sup>46</sup> Rights and duties precede torts, and a person commits a wrong only when its behavior deviates from a norm, thus breaching a preexisting duty.<sup>47</sup>

Going back to the traditional definition of “civil liability”, as defined above—“an obligation to repair damage”—such a definition creates confusion between the concept of responsibility and the consequences of responsibility (in the legal sense). To say that civil liability is the obligation to repair damage is to mistake civil liability with one of its remedies. Generally, a person is civilly responsible for her personal actions, acts of other persons (liability of employers for their employees, parents for their minor children), animals, or for the guard of

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<sup>41</sup> See *infra* Ch. III, Part A.

<sup>42</sup> *Id.*

<sup>43</sup> *Infra* Ch. III, Part B.

<sup>44</sup> PROSSER, *supra* note 13, at 2; ROBERT STEVENS, TORTS AND RIGHTS 2 (Oxford University Press 2007).

<sup>45</sup> FREDERICK POLLOCK, THE LAW OF TORTS 1 (13th ed., Stevens and Sons Ltd. 1929).

<sup>46</sup> ERIC DESCHEEMAEKER, THE DIVISION OF WRONGS. A HISTORICAL COMPARATIVE STUDY 2 (Oxford University Press 2009); STEVENS, *supra* note 44, at 2.

<sup>47</sup> *Id.* at 19.

one's things.<sup>48</sup> To say that one is responsible for damage is to say that one is responsible for the consequences of an action, and not for the action itself. We are responsible for what causes damage, and not for the effect (damage itself).

It is also important to observe how the traditional definition of liability influenced legal thinking in the law of torts, particularly in France.<sup>49</sup> There is more than just logical inconsistency in a definition that binds tort law to its compensatory remedies to the point where the two become identical. The flaw goes deeper into the perception French authors have about the fundamentals of civil liability. Not only does such a definition create confusion between responsibility and its effects, it goes to the heart of the most basic question of any tort regulation: any system of civil liability must solve “the conflict between the protection of legal interests and freedom of action.”<sup>50</sup> When discussing compensation only, the solution to this conflict is given by the interplay between the general rule, which must be that “losses lie where they fall,” and the exception, which is compensation. The general rule should be the starting point of tort analysis, even if its field of operation is severely reduced by the exception. Civil liability must be based on some convincing foundation, “a specific legal basis”,<sup>51</sup> be it fault, risk, *garantie*, or some other conceivable foundation. The existence of damage is never enough. It is true that this way of

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<sup>48</sup> At least one French author has identified this finesse in language. Professor Muriel Fabre-Magnan, in a volume on civil liability and quasi-contracts, begins Part I, dealing with tort liability, with this enlightening sentence: “to be liable (or civilly responsible) means to assume the consequences of one's act, one's choices, and account for such acts or choices” (*être responsable, c'est assumer les conséquences de ses actes, de ses choix, et en rendre compte*). FABRE-MAGNAN, *supra* note 14, at 5.

<sup>49</sup> This influence is almost non-existent in the common law. The common law of torts is much more actor-centered than the French *responsabilité civile*, and the focus on the compensatory function, where it exists, is driven by practical purposes (since most tort cases involve money compensation), and not by some theoretical inclination that favors compensation.

<sup>50</sup> K. LARENZ & C.W. CANARIS, *LEHRBUCH DES SCHULDRECHTS*, fragment *translated in* WALTER VAN GERVEN, JEREMY LEVER, PIERRE LAROUCHE, *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW* at 15 (Hart Publishing 2000).

<sup>51</sup> *Id.*

thinking is not common in the French literature,<sup>52</sup> but the principle underlies French law as well as any western legal system. The French do not ask for *reparation*, for instance, in cases of lawful competition, even though the actions of creating competition intentionally generate damage to the competitors.<sup>53</sup> There is also no compensation when, in case of a nuisance, the disturbance is not abnormal (is tolerable). There is no compensation to be had when a man marries a woman loved by another.<sup>54</sup> There is no foundation to ask for compensation in such cases, and therefore no liability, although there is damage (a loss).

Going back to the definition of liability, the most important point which needs to be emphasized is that the obligation to repair damage is the consequence of civil liability, and not liability itself. The obligation to repair damage is just one of the remedies created by the law for situations when a legally recognized interest is violated. Underlining the remedy, there is always another preexisting duty or a set of preexisting duties,<sup>55</sup> which are indeed central to the notion of liability. These duties are infinitely diverse, but there is a way of identifying them: they are always correlative to legally recognized interests and rights.

The law of torts is as much a law of rights, as it is a law of duties, and a law of wrongs, as it might be suggested by its terminology.<sup>56</sup> The “wrong” is necessarily a moral wrong, in the

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<sup>52</sup> Olivier Moréteau, *Basic Questions of Tort Law from a French Perspective*, Chapter I, at 1 (May 13, 2013) (unpublished manuscript) (on file with author).

<sup>53</sup> TUNC, *supra* note 16, at 24. In a capitalist economy, losses occurring as a result of lawful competition are actually desirable, and the law encourages lawful acts of competition. JONES, *supra* note 14, at 2.

<sup>54</sup> A very similar example is given by André Tunc. TUNC, *supra* note 16, at 24.

<sup>55</sup> I avoid using the term “obligations” in this context, since the preexisting duties which exist in the law of torts are general and there is no determinable active side, an obligee. However, there is at least one great French author that believed that liability in tort is premised in a preexisting “obligation”, and the breach of said obligation gives rise to a claim for the reparation of damage. PLANIOL & PIPERT, *supra* note 13, at 642.

<sup>56</sup> STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, 1 THE AMERICAN LAW OF TORTS 32-34 (The Lawyers Co-operative Publishing Co. 1983); DESCHEEMAER, *supra* note 46, at 2, 17. STEVENS, *supra* note 44, at 2. Another author has made the argument that the law of torts is becoming more of a law of rights, rather than a law of wrongs. WARREN A. SEAVEY, COGITATIONS ON TORTS 5 (University of Nebraska Press 1954). What the latter author is trying to emphasize is that rights are being protected with more vigor nowadays than in the past, and the conditions of liability are often relaxed. That does not mean however, that the law of torts is moving away from the concept of wrong (moral wrong). The unjustified infringement of a right is always a wrong. Moreover, a theoretical

deontological sense—a breach of a preexisting duty. Some common law authors embraced this way of thinking, by arguing that both negligence and strict liability cases are premised upon a breach of a preexisting duty.<sup>57</sup>

There is a great variety of rights and interests which are protected by the law of torts, and specific duties can be identified and attached to each one of these rights. These preexisting duties are not only identifiable on a case by case basis,<sup>58</sup> but the vast majority of them can also be generically united under one overarching duty: the duty to take precautions (which is the same as the duty of care, specific for negligence).<sup>59</sup> This duty can be found as the correlative of an indeterminate amount of recognized rights. It will be showed in a future chapter that modern philosophy is pointing out the fact that responsibility can no longer be limited to what man *has* influenced causally.<sup>60</sup> Society today must also hold persons responsible for what *can* be influenced causally. The duty to take precautions is deeply rooted in the concept of liability and has been part of fault based liability<sup>61</sup> and perhaps can play a part even in explaining strict liability schemes.<sup>62</sup>

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system where rights are opposed to duties (not wrongs), and a wrong is both a violation of a right and a breach of the correlative duty, seems to describe the common law of torts in a more logical and consistent manner.

<sup>57</sup> See, e.g., JONES, *supra* note 14, at 231; Professor Robert Keeton described strict liability in terms of “conditional fault”. Robert Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 418 (1959). Explaining this concept, he makes the argument that strict liability can be justified as a matter of social morality, that the common sense of morality would find activities generative of risk blameworthy if the person taking a profit from such activities would not compensate those who do suffer as a consequence of the risky activity. *Id.* at 419-20.

<sup>58</sup> An exercise which is not of much use in the law of torts, unless the duty has some specific content (like, for instance, the duty to inform patients about specific risks of a medical procedure).

<sup>59</sup> “To take care” and to “act with caution” are conceptually connected with the etymological root of the word “precaution”. The word is the English equivalent of the French word *précaution* (12 THE OXFORD ENGLISH DICTIONARY, *supra* note 34, at 309), which, in turn, has a Latin origin. The Latin word *precautio* means “measure of prudence”, and the earliest meaning of the French word *précaution* was “to act with prudence”. 2 DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (F-PR) 2898 (Alain Rey coord., Dictionnaires Le Robert 1998).

<sup>60</sup> *Infra* p. 36.

<sup>61</sup> Be it based on subjective fault, objective fault, traditional common law breach of duty analysis, or the Hand formula for negligence.

<sup>62</sup> The “best decider” doctrine formulated by then-Professor Guido Calabresi is quite a good example on how to base theories of strict liability on the duty to take precautions. According to his theory, the best decider is held strictly liable not only in cases where he could have taken reasonable precautions but didn’t, but also in cases where he could not have taken reasonable precautions or the required precautions were not feasible or economically

Most importantly, at least for the purposes of this study, the general duty to take precautions is essential for the imposition of preventive remedies; it is an *a priori* premise for a preventive remedy.

The term “precautions” needs to be understood in its broadest sense. In this broad sense it is overlapping substantially with the general duty of care and can be seen both as an affirmative and a negative duty. The duty to take precautions in its negative formulation is the correspondent of the roman principle *neminem laedere*, in the sense that one must refrain from conduct which might harm the legally protected interests of another. On the other side, the duty to take precautions in the affirmative mandates the actor to act in order to minimize a risk either created by him or a risk that is under his control.

Compensatory and preventive remedies come into play when a person is found in breach of this duty to take precautions. The obligation to take precautions can be found more or less intense depending on the factual circumstances, or depending on the legal system that is being analyzed. If under traditional tort analysis the breach of a preexisting obligation was remedied by way of imposing a new obligation (to repair the damage caused) the case law shows that the breach of a legally imposed duty to take precautions can be remedied even before damage occurs (*ex ante*). That is what must be understood by “preventive remedies”.

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advantageous. This would create an incentive on the “best decider” to develop an effective precautionary measure in the future. Guido Calabresi & Jon T. Hirschoff, *Toward A Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1071 (1972).

The content of the duty to take precautions is future-oriented and that allows such a theory to infer that one would have not only the obligation to take precautions in the present, but also to devise a more effective way of preventing harm in the future (a duty to come up with efficient precautions in the future). Taking Calabresi’s best decider rule, coupled with the duty to take precautions, to a more general level might explain the choice to move towards strict liability regimes in the French legal system in cases that involve accidents. Thus, liability for things under one’s guard, or the liability of employers for the acts of their employees, can be explained on the basis of an obligation to take precautions in the future, itself an expression of a sort of general “best decider rule” (the foundation being the power to control the risk in these examples).

Based on the considerations presented above, an alternative tentative definition for civil liability could be offered in order to encompass both preventive and compensatory remedies:<sup>63</sup>

*Civil liability can be defined as legal responsibility for the breach of a preexisting duty, imposed by the law and enforceable by way of civil remedies (sanctions).*

This definition encompasses under the term “civil remedy” compensation, reparation *in natura* of damage<sup>64</sup> and, in the legal systems where they exist, even punitive damages, and, of course, preventive remedies. It is a definition that promotes functional diversity; compensation, prevention and punishment are all encompassed in such a definition.

Of course, an objection that can be raised against such a definition is the fact that it does not encompass the whole area that is today described as “civil liability”, particularly in France. There are many situations in which the French legal system prescribes that compensation is to be granted even though no moral wrong can be identified, and the actor cannot be expected to take the required precautions in order to fulfill his legal duties (as it is in the case of responsibility of minors and interdicts for their own acts<sup>65</sup>) or in which compensation will be granted without looking into the illicit character of an act or by stretching the conditions of liability beyond the limits of individual responsibility (as it is in the case of liability for accidents caused by motor vehicles<sup>66</sup> or, more recently, when the Court of Cassation decided that the defect of a vaccine can

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<sup>63</sup> And in the common law, punitive remedies (punitive damages).

<sup>64</sup> At French law, the remedy is actually the creation of a credit-right in the patrimony of the victim the moment all elements of a tort action are present. The credit right is correlative to a new obligation, which replaces the preexisting obligation to take precautions—the obligation to repair the damage caused to the victim. The action in court is in fact recognizing the existence of the obligation to repair damage, which at the end of the trial becomes liquidated (when the judge evaluates and establishes the amount of damages), and can be enforced by ordinary means of execution. See GENEVIÈVE VINEY & PATRICE JOURDAIN, *LES EFFETS DE LA RESPONSABILITÉ* 140 (2nd ed., L.G.D.J. 2001), part of the *TRAITÉ DE DROIT CIVIL* (Jacques Ghestin coord.).

<sup>65</sup> CODE CIVIL [C. CIV.] art. 414-3 (Fr.) (former art. 489-2), as interpreted by the Court of Cassation in Cour de Cassation [Cass.][supreme court for judicial matters] ass. plén., May 9, 1984, D. 1984 Jurisp. 525 (note François Chabas); RTD. Civ. 1984, at 508 (obs. Jérôme Huet); JCP 1984, II, 20255 (note N. Dejean de la Bâtie); JCP 1984, II, 20256 (note Patrice Jourdain); JCP 1984, II, 20291 (rapport Fédou).

<sup>66</sup> Loi 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation [Law nr. 85-677 of July 5, 1985, aimed at improving the situations of



be inferred from presumptions, presumptions which at the same time serve to establish the causation element<sup>67</sup>). It should be clear that these situations no longer have anything to do with liability, or *responsabilité*. French jurists seem to have developed an “ideology of reparation”<sup>68</sup> (compensation), and the situations described above have gone so far from the concept of liability or civil responsibility, that now these circumstances give rise to a veritable obligation to repair damage, irrespective of responsibility. It is compensation without responsibility (*compensation sans responsabilité*).<sup>69</sup>

Having defined civil liability and having distinguished it from compensation, the next step is to define preventive remedies:

*Preventive remedies can be defined in the law of torts as coercive mechanisms designed to reduce or avoid future harm, created by the law for the protection of legally recognized interests and directed against a person who is civilly liable for failing to take the required precautions in order to safeguard legally recognized interests of another.*

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victims of traffic accidents and the acceleration of compensation procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 6, 1985, p. 7584.

<sup>67</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 1<sup>o</sup> civ., Sept. 26, 2012, D. 2012 Somm. 2853 (note Jean-Sébastien Borghetti); D. 2012 Actualités 2304 (obs. I. Gallmeister); *See also* Olivier Moréteau & Alexandru-Daniel On, *France* (report), in EUROPEAN TORT LAW 2013 (forthcoming, Ken Oliphant & Barbara C. Steininger eds., De Gruyter 2013). *See also* Christophe Radé, *Causalité juridique et causalité scientifique: de la distinction à la dialectique*, D. 2012 Chron. 112.

<sup>68</sup> FRANÇOIS TERRÉ, PHILIPPE SIMLER & YVES LEQUETTE, DROIT CIVIL. LES OBLIGATIONS 679 (9th ed., Dalloz 2005), part of the PRÉCIS Series, citing Louis Cadet and Denis Mazeaud for this phrase.

<sup>69</sup> There are even a few cases where the Court of Cassation went beyond the limits and conditions of civil liability in order to force the hand of the legislator to intervene and create a compensation scheme, usually based on national solidarity, a famous example being the Perruche case. Cour de Cassation [Cass.][supreme court for judicial matters], ass. plén., Nov. 17, 2000, D. 2001 Jurisp. 332 (note Denis Mazeaud & Patrice Jourdain); D. 2001 Somm. 2796 (obs. Fanny Vasseur-Lambry); *See also* D. 2001, at 316 (concl. orales Jerry Sainte-Rose); and subsequently, the Law of March 4, 2002 (Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law nr. 2002-303 of March 4, 2002, regarding the rights of patients and the quality of the healthcare system], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], March 5, 2002, p. 4118). Also, before the law of July 15, 1985 (*supra* note 66), the Court of Cassation forced the hand of the legislature for an intervention in the area of traffic accidents through its decision in the Desmares case. Cour de Cassation [Cass.][supreme court for judicial matters] 2<sup>o</sup> Civ., July 21, 1982, D. 1982 Jurisp. 449 (with conclusions by Jean Carbonnier & note by Christian Larroumet). *See also* Jean-Luc Aubert, *L'arrêt Desmares: une provocation... à quelles réformes?*, D. 1983 Chron. 1.

Preventive remedies are an expression of the preventive function of civil liability, but need not be confused with it. They are means of protecting legally recognized interests and, sometimes, appear as a form of coercion, preventive in nature, designed to eliminate or reduce the effects of an act which infringes upon those legally recognized interests.

The preventive function of liability is a more general and abstract notion. Preventive remedies are only one of many expressions of the preventive function of tort law. Compensatory liability (in the form of damages) can also function preventively, through its deterrent effect. The threat of liability inhibits tortfeasors from committing torts in the future. Generally, all actions in tort, including those aimed at compensation or punishment, have the purpose of preventing future harm, only most of the time this goal is achieved indirectly, through the fear of future liability. From this standpoint, what distinguishes preventive remedies from remedies which are compensatory in nature is the fact that the coercive apparatus of the state intervenes *a priori* to the occurrence of harm, and thus prevention is not mediated. This can be called *direct prevention*, as opposed to *deterrence (indirect prevention)*.<sup>70</sup>

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<sup>70</sup> Cyril Sintez uses similar terminology to express the same idea. He employs the terms “*mesures de prévention directe*” and “*mesures de prévention indirecte*”. Sintez, *supra* note 25, at 51-55. A good translation of this would be “measures of direct prevention” and “measures of indirect prevention”. What differentiates them, in the author’s view, is the fact that direct measures of prevention are directed against the fact which can potentially generate damage, whereas indirect measures of prevention operate on the situation that can generate the fact which can potentially generate damage. *Id.* at 51. Therefore “direct” and “indirect” describe how preventive measures operate on the facts which generate liability. Direct prevention measures can also be analyzed as mechanisms of enforcing the duty to take precautions in a more direct manner (the duty to take precautions becomes an obligation to take precautions, with a determined active and passive side, which becomes liquidated when the court makes its decision), as opposed to deterrence (where the sanction is aimed at correcting the effects of breaching the duty to take precautions, i.e., the breach of the duty to take precautions creates an obligation to repair the damage caused which is enforced by coercion, and not an obligation to take precautions; it is the fear of liability that creates a preventive effect, by providing an incentive to take preventive measures privately).

## CHAPTER III

### Responsibility,

#### Freedom and Human Power

##### A. Moral responsibility

Having previously seen how etymologically the civilian concept of “civil liability” and the common law term “tort” both have ethical overtones and are expressions of a more general concept—that of “responsibility”—it is worth exploring its potential for expansion, as well as its conceptual limitations.

The law of “torts” or “civil liability” deals with the *legal* responsibility of individuals, within the civil law (as opposed to criminal law).<sup>71</sup>

In order to justify the aforementioned proposition for a new definition of civil liability<sup>72</sup> and include preventive remedies in the realm of tort law, two things must be verified: first, whether the concept of liability has within itself the potential for such an extensive domain; and second, if preventive remedies exist, or could exist, in jurisprudence.

This chapter deals only with the first condition. The second condition is quite easily demonstrated since such remedies have existed in the jurisprudence for quite some time.<sup>73</sup>

Responsibility is a fundamental ethical concept. Moral responsibility is an incredibly complex issue and the philosophical questions which can arise have been exciting the minds of many thinkers throughout history. What is it to be responsible? What does responsibility mean?

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<sup>71</sup> Responsibility can be moral (ethical), political, or legal. When addressing the legal responsibility of individuals the term that is used is *liability*. BLACK’S LAW DICTIONARY, *supra* note 33, at 1338. In this third sense, of legal responsibility or liability, the concept is further divided into criminal and civil responsibility. MALAURIE, AYNÈS & STOFFEL-MUNCK, *supra* note 32, at 9. Civil liability deals with liability imposed under the civil law, as opposed to the criminal law. BLACK’S LAW DICTIONARY, *supra* note 33, at 933.

<sup>72</sup> *Supra* p. 23.

<sup>73</sup> For preventive remedies in jurisprudence *see infra* Ch. IV.

Who can be considered a responsible person?<sup>74</sup> What ought one be considered responsible for?  
To whom must one answer?

It is important to note that some of the answers provided by moral philosophers have been extremely influential on legal doctrine, especially when the central topic was prevention and preventive remedies.<sup>75</sup>

First and foremost, in order to understand the connection between prevention and responsibility, the questions which need an answer are “what is responsibility?” and “what is one responsible (answerable) for?”

Even though the term “responsibility” is relatively and surprisingly modern,<sup>76</sup> philosophers have been concerned with issues of responsibility throughout history. The concept of responsibility is so closely connected to the issues of human condition, right and wrong, consciousness, and individual freedom. Therefore, invariably, philosophers discussing these issues, either directly or indirectly, struggle with questions of responsibility, perhaps even without defining the issue as such.

It is also quite difficult to find common ground in philosophical thinking for a generally accepted definition of moral responsibility since this concept is influenced so much by the

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<sup>74</sup> Commonly described as the issue of “moral agency”; Williams, *supra* note 34.

<sup>75</sup> For instance, Catherine Thibierge relies on the writings of Paul Ricoeur, Friederich Nietzsche and Hans Jonas. These philosophers are cited in Catherine Thibierge’s leading articles on preventive tort liability, alongside other books and articles analyzing the moral concept of responsibility. Thibierge, *Libres propos...*, *supra* note 7, at 563, footnote 5; Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 577-78. Professor Thibierge connected these philosophical ideas to the need of reforming tort theory and expanding it in order to encompass prevention. It is worth mentioning that for Professor Thibierge, the intellectual source for preventive tort liability is the concept of *liability* itself. Because the French language uses the same word to denote the moral concept of responsibility and the legal counterpart (liability): *responsabilité*, a deeper understanding of this concept is considered by Professor Thibierge (rightfully so) as key to the development of preventive liability (*responsabilité préventive*). Her analysis goes through the etymology of the word *responsabilité* and the historical evolution of different functions served by tort law. See Thibierge, *Libres propos*, *supra* note 7, at 572-74, 578-81. Other authors also mention Hans Jonas’ philosophy as the root-source for the emergence of the precautionary principle. Christine Noiville, *La lente maturation jurisprudentielle du principe de précaution*, D. 2007 (Dossier: “Principe de précaution”, Christine Noiville coord.) at 1515. Cyril Sintez’s thesis on the preventive sanction also relies on the modern philosophical writings of Paul Ricoeur, Emmanuel Levinas, and Jaques Derrida. Sintez, *supra* note 25, at 323-28.

<sup>76</sup> The word itself came into use only in the 18th century. See *supra* note 34.

subjective views taken by philosophers over the subject of morality as a whole. However, this does not render the concept of responsibility completely elusive. One can identify a common architecture and the coordinates for what moral responsibility is. In accordance with its etymology, a person is considered responsible when he or she has to answer for his or her actions.<sup>77</sup> In order to answer for an act, a person must first assume the act as his own, which means that an *a priori* condition of responsibility is *freedom*, or the possibility to make a choice between different courses of action.<sup>78</sup>

What is perhaps less obvious is the fact that *freedom*, defined this way, is synonymous with *power*. The possibility to make a choice implies the power to causally influence events. Freedom and power are thus the *a priori* coordinates of responsibility. Modern philosophy tends to emphasize the element of power, while freedom was at the center of classical works and the philosophy of the enlightenment. That does not mean that this would create a dissociative approach, because the two concepts can be used interchangeably and differ only based on the perspective used to look upon the problem. Freedom is an internal element, it is actor-based. Power is external and relational—it puts the actor in relation with the rest of the world.

On the second question (“what are we responsible for?”), a classification regarding the concept of responsibility is also essential to the understanding of its potential scope: the

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<sup>77</sup> *Supra* p. 17.

<sup>78</sup> Freedom can be used in terms of practical freedom (i.e., the possibility to make day to day choices) or transcendental freedom (which means the possibility to act irrespective of any pre-existing factors, like education, social position, moral instruction, disease, health, natural ability, intelligence, etc.). John R. Silber, *The Ethical Significance of Kant's Religion*, in IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE lxxxix, footnote 28 (Theodore M. Greene & Hoyt H. Hudson trans., Harper One 2008); Williams, *supra* note 34. “Freedom of will” is sometimes used in a metaphysical sense. Immanuel Kant probably offered the most consistent line of arguments supporting the idea that responsibility can only be justified if a person’s will is free in a transcendental sense, i.e., he can choose the object of his will for every action without influence from pre-existing factors which are alien or antecedent. *Id.* at lxxxviii. However, when it comes to the extent of one’s accountability (not to its foundation), Kant recognizes that there are limitations on the expression of freedom (the freedom of choice), and draws the conclusion that there is a direct proportion between accountability and practical (non-transcendental) freedom. *Id.* at lxxxix, n. 28.

dichotomy between “retrospective responsibility” and “prospective responsibility.”<sup>79</sup> Retrospective responsibility describes ex-post assumption or assignment of responsibility.<sup>80</sup> Human actions are analyzed retrospectively in order to determine their qualities as “good” or “bad”, “praiseworthy” or “blameworthy”.<sup>81</sup> Prospective responsibility, on the other hand, precedes the act under analysis, or operates *ex ante*. It deals not with what should have been done, but what has to be done.<sup>82</sup> Retrospective responsibility operates *uno ictu*, in the sense that it is analyzed on a case by case basis, whereas prospective responsibility is generic, describing a “sphere of responsibility,”<sup>83</sup> or the set of duties which rest upon the shoulders of the actor. Again, these two notions seem to be two sides of the same coin, or different perspectives of the same reality, since they converge at the moment when an act is performed. If the act is in accordance to the preexisting duties, it will be praised as good, but if it is found in breach of a preexisting duty, blame will be assigned. One recognizes the retrospective outlook on responsibility when actions are described as good or bad, blameworthy or praiseworthy, and the foundation for responsibility is described in terms of freedom. Prospective responsibility tends to emphasize the sphere of duties, what people ought to do, and, most often, philosophical discourse on prospective responsibility emphasizes power as its foundation.

A few words regarding some of the most influential thinkers speculating on the nature and scope of moral responsibility and the systems which they have proposed is necessary. Unfortunately, a truly elaborate discussion that would do justice to the great philosophers writing about moral responsibility would not be feasible for the purposes of this study. A limited number

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<sup>79</sup> Williams, *supra* note 34.

<sup>80</sup> For a discussion on retrospective responsibility, both moral and legal, see JOEL FEINBERG, *Problematic Responsibility in Law and Morals* in JOEL FEINBERG, *DOING AND DESERVING. ESSAYS IN THE THEORY OF RESPONSIBILITY* 25-37 (Princeton University Press 1970).

<sup>81</sup> In other words, it is an *ex post* judgment on the morality of an action. See Williams, *supra* note 34.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

of conclusions and reference to just a few of the great minds which have shone light on these problems hopefully will suffice. All the authors mentioned below (Aristotle, Immanuel Kant, David Hume, Friedrich Nietzsche, Hans Jonas and Paul Ricoeur) have a key feature in common which justifies the choice of presenting the traits of their moral philosophy: they have been immensely influential philosophers, but they have also influenced legal science.<sup>84</sup> Also, within their philosophical systems one can trace the fundamental doctrines of retrospective and prospective responsibility.

Aristotle's philosophical inquiries regarding the human condition and ethical behavior from the *Nicomachean Ethics* have been both enduring and influential over the course of time. Although the term responsibility was unknown at the time when he was writing, Aristotle was trying to find answers to the questions "what makes a man good or bad?" and "what makes an action good?" He believed the former question to be more fundamental since that "which makes a man good"<sup>85</sup> will also make him "do his own work well."<sup>86</sup> He believed a man becomes good or bad according to certain *states of character* which are *virtues* (the good) and *vices* (the bad).<sup>87</sup> It is within the very subtle connections between the *states of character*, on the one side, and *actions* and *passions*, on the other, that one can trace a discussion on the nature and conditions of responsibility in the works of Aristotle. The subject's possibility and capacity to make *choices* as to the passions he indulges in and the actions he performs is considered essential.<sup>88</sup> After a

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<sup>84</sup> To give just a few examples: is it not notorious that legal scholars distinguish between commutative justice and distributive justice, a division created and explained by Aristotle? Is it not common, particularly in the civil law, to discuss about "imputability" in the law of torts, or to identify the will as a source of norms in the context of contracts, ideas which are Kantian in origin?

<sup>85</sup> Aristotle, *Nicomachean Ethics* in THE BASIC WORKS OF ARISTOTLE 957 (Richard McKeon ed., The Modern Library 2001).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> "Virtue, then is a state of character concerned with choice." *Id.* at 959.

choice is made by the actor, an action will be considered either blameworthy or praiseworthy.<sup>89</sup> This is precisely “retrospective responsibility”, as defined before.<sup>90</sup> Aristotle built the foundations of the theory of retrospective responsibility without ever naming it as such. And there is more: notions of prospective responsibility are not absent from his analysis either. Aristotle also states in the *Nicomachean Ethics* that “choice involves a rational principle and thought,”<sup>91</sup> or a “previous deliberation,”<sup>92</sup> and the object of such deliberation are the “things that are in our *power* and can be done” (*emphasis added*).<sup>93</sup>

With the risk of skipping more than two thousand years of philosophical thinking, within the 18th century two brilliant philosophers, David Hume and Immanuel Kant, in very different ways, and based on apparently contradictory systems of ethics, offered new insight into the fundamentals of responsibility. Their theories marked a scission in the theory of action and responsibility, because of the different outlook they had on responsibility: Hume—a naturalistic and external perspective, whereas Kant—a rationalistic and internal perspective.<sup>94</sup>

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<sup>89</sup> Better yet—“only after a choice is made.” Aristotle makes a few fine distinctions between voluntary actions and actions which are chosen, and finally arrives at the conclusion that what is subject to choice defines character better than voluntary actions do. *Id.* at 967. He observes, for instance, that children and lower animals act voluntarily (are not influenced by external forces when they act), but not in choice. *Id.* at 967-68. However, he linked blameworthiness and praiseworthiness only to the causal distinction voluntary/involuntary:

“Since virtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes pity, to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for legislators with a view to the assigning both of honours and of punishments.” *Id.* at 964.

<sup>90</sup> *Supra* p. 29.

<sup>91</sup> Aristotle, *supra* note 85, at 967.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> For a mark of this scission into the 20th century, one would just have to contrast for example, Hart’s theory of ascription, with Paul Ricoeur’s essay on the meaning of responsibility. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, NEW SERIES 171 (1948-1949), available at <http://www.jstor.org/stable/pdfplus/4544455.pdf?acceptTC=true> (last visited, August 27, 2013); and compare with Paul Ricoeur, *The Concept of Responsibility. An Essay in Semantic Analysis*, in THE JUST 11 (David Pellauer trans., University of Chicago Press 2000).



For David Hume, to hold a person responsible for an action is equated with what he describes as the feelings of approving or blaming that person for performing a particular action.<sup>95</sup> The nature of approval or blame is a very important point in Hume's system of ethical responsibility. In his words, "approbation or blame . . . is nothing but a fainter and more imperceptible love or hatred."<sup>96</sup> To be responsible is therefore a matter of how *another* person feels about the actions of the actor; it is a judgment from the exterior.<sup>97</sup> However, Hume considers that an act alone is not enough to trigger passions such as love or hatred, and therefore there is something more which needs to be read into these actions, and that is *intent*, which demonstrates a durable quality in a person—a trait of character:

“[It] is not enough, that the action arise from the person, and have him for its immediate cause and author. This relation alone is too feeble and inconstant to be a foundation for these passions. It reaches not the sensible and thinking part, and neither proceeds from anything durable in him, nor leaves any thing behind it; but passes in a moment, and as if it had never been. On the other hand, an intention shews certain qualities, which, remaining after the action is perform'd, connect it with the person, and facilitate the transition of ideas from one to the other.”<sup>98</sup>

Hume dismissed reason as a source for the human conscience and as a basis for morality, through his famous phrase “Reason is wholly inactive, and can never be the source of so active a principle as conscience, or a sense of morals.”<sup>99</sup> He also recognized that duty is an element of morality which cannot be disregarded, as men often act according to what they consider to be

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<sup>95</sup> Lloyd Fields, *Hume on Responsibility* in HUME STUDIES 161 (Volume XIV, Number 1, 1988), available at <http://www.humesociety.org/hs/issues/v14n1/fields/fields-v14n1.pdf>.

<sup>96</sup> DAVID HUME, A TREATISE OF HUMAN NATURE 400 (CreateSpace Independent Publishing Platform 2012).

<sup>97</sup> Williams, *supra* note 34.

<sup>98</sup> HUME, *supra* note 96, at 231. The fragment also quoted in Fields, *supra* note 95, at 163.

<sup>99</sup> HUME, *supra* note 96, at 299.

their duty,<sup>100</sup> but did not give any real importance to it. For him, duty was not an imperative, nor was it eternal,<sup>101</sup> and he considered it too feeble to withstand the passions of a human being.<sup>102</sup>

Immanuel Kant, on the other hand, built a theory of morality which had completely opposite starting points from Hume's. For Kant, a morally responsible person is first and foremost a human being equipped with reason, although, as he developed his theory over the course of time, he accepted a place in his system for the sentient side of human beings.<sup>103</sup> The rational being, with an autonomous free will,<sup>104</sup> he considered equipped to discover *the moral law*, a set of principles of action which are abstract, identical for all human beings, and discoverable by way of reason.<sup>105</sup> He expresses this idea in a beautiful metaphor: "two things fill the mind with ever new and increasing admiration and awe . . . the starry heavens above and the moral law within."<sup>106</sup>

As opposed to Aristotle and Hume, Kant's theory of morality is centered on actions in themselves, and not on human character, thus finding the question "when is an action good or bad?" more fundamental than "when a person is good or bad?" Once again, his general principle of action, called "the categorical imperative,"<sup>107</sup> is masterfully phrased: ". . . act as if the maxim of your action were to become by your will a universal law of nature."<sup>108</sup>

Therefore the two pylons of Kant's theory of morality are the individual, on the one side, in the sense that it is focused on the person committing an act, as a rational and sentient being,

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<sup>100</sup> *Id.* at 298.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 276.

<sup>103</sup> Silber, *supra* note 83, at lxxxii.

<sup>104</sup> THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 465 (2d ed., Robert Audi gen. ed., Cambridge University Press 1999).

<sup>105</sup> Theodore M. Greene, *The Historical Context and Religious Significance of Kant's Religion* in KANT, *supra* note 78, at liii-liv.

<sup>106</sup> IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 95 (Thomas Kingsmill Abbott trans. 1898), available as an e-book from the *Literary Reference Center*, EBSCOhost (accessed May 3, 2013).

<sup>107</sup> THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 104, 465.

<sup>108</sup> IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 34 (Mary Gregor & Jens Timmermann eds. and trans., Cambridge University Press 2012). The same principle is phrased in the first person at page 17.

and the action itself, which can be judged as good or bad. That is why Kant's theory of morality is apt to answer a fundamental question of responsibility with great implications for legal responsibility as well: when is a *person* responsible for a particular *action*? In retrospective form, Kant's theory of morality reveals a responsibility which is centered on the subjective state of mind of the individual performing an action. Kant believes that an action is not supposed to be judged according to the consequences of the act, but according to the internal state of mind of the person performing it.<sup>109</sup> Kant thus develops the concept of (moral) imputability,<sup>110</sup> which in the legal domain would find an equivalent in the concept of fault. However, Kant's theory has much to do with the prospective side of responsibility, perhaps even more than his retrospective analysis. He considers an action good or bad based on its relationship with the moral law. Moral law establishes a set of absolute duties, and for that reason Kant's entire theory is centered on *duty*, on what a person ought to do.<sup>111</sup> His views on retrospective responsibility must be read in close connection with his deontological views. Kant considers that any state of mind and any other purpose for an action other than the sense of duty (the awareness that a duty needs to be respected and performed simply because it is a duty) will devoid the act of any moral worth.<sup>112</sup>

Kant was also preoccupied with the relationship of his deontological theory with the law. He distinguished between moral duties and legal duties based on the source that imposes the duty to an actor. Moral duties are self-imposed, are imposed by every rational and autonomous human being to himself through reason, whereas legal duties are imposed from the outside by a

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<sup>109</sup> The good or the evil is a condition which necessarily comes as an effect of the freedom of choice the actor has (*Willkür*), which is an expression of his free will, and therefore internal. Silber, *supra* note 78, at cxi.

<sup>110</sup> Silber, *supra* note 78, at lxxxvii.

<sup>111</sup> That is also why Kant's moral theory is said to be "deontological" [The word "deontology" is derived from the Greek words for duty (*deon*) and science (or study) of (*logos*)]. Larry Alexander & Michael Moore, *Deontological Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/> (last visited May 3, 2013).

<sup>112</sup> An action will be considered good only when it is done for the sole purpose of obeying the moral law. As one commentator puts it, Kant was a champion for the maxim "duty for duty's sake." Greene, *supra* note 105, at lvi.

legislator.<sup>113</sup> But it is important to note that Kant saw law as coercive *order*, and for that reason, the duties the legislator will proscribe and enforce externally are also in essence moral duties or categorical imperatives, only they take legal form. Kant believed that all laws must find their justification in reason.<sup>114</sup> Kant's moral law, just like natural law, is absolute and discoverable by reason.<sup>115</sup>

Modern philosophers have been putting a stronger emphasis on the power element as an *a priori* condition of responsibility.<sup>116</sup> This allowed for the relational analysis of responsibility, which is reflected in the philosophy of Hans Jonas and Paul Ricoeur. Both philosophers maintain deontological and rationalistic views on responsibility, but detach themselves from Kant's individualism by adding solidarity and cooperation into the equation of responsibility.

Hans Jonas defined responsibility as "solicitude, accepted as a duty,"<sup>117</sup> the object of which is something that, because of its vulnerability, becomes worrisome for a human being. He

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<sup>113</sup> John Ladd, *Introduction to IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE* xiii (John Ladd trans., The Bobbs-Merrill Co. 1965). Also, for Kant, the law must deal only with duties of a particular nature, the "duties of justice." *Id.* at xv.

<sup>114</sup> Kant defines the law (*Recht*) as a set of *a priori* principles of practical reason. *Id.* at xvii.

<sup>115</sup> For Kant, the moral laws are "engraved upon [man's] heart" (in the sense that human beings have, within them, the capacity to know the predicates of the moral law). KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE, *supra* note 78, at 169.

<sup>116</sup> Of particular importance in this regard is the German philosopher Friedrich Nietzsche, who focused his ethical thoughts on placing the analysis of responsibility in relation to human power. For Nietzsche the whole of life on Earth is driven by a *will to power* and "all happening in the organic world is an *over-powering*, a *becoming-lord-over*." FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 50-51 (Maudemarie Clark & Alan J. Swensen trans., Hackett Publishing Co. 1998). As opposed to the popular maxim "with great power comes great responsibility," responsibility for Nietzsche is not the price one must pay to society for some extra accumulated power. Responsibility is a premise for causal thinking, and a way for human beings to accumulate even more power, by conquering the future, by having *control* over the future:

"In order to have this kind of command over the future in advance, man must first have learned to separate the necessary from the accidental occurrence, to think causally, to see and anticipate what is distant as if it were present, to fix with certainty what is end, what it means thereto, in general to be able to reckon, to calculate,—for this, man himself must first of all have become *calculable*, *regular*, *necessary*, in his own image of himself as well, in order to be able to vouch himself *as future*, as one who promises does!" *Id.* at 36.

<sup>117</sup> HANS JONAS, LE PRINCIPE RESPONSABILITÉ. UNE ÉTHIQUE POUR LA CIVILISATION TECHNOLOGIQUE 301 (Jean Greisch trans., Les Éditions du Cerf 1990).

believed that responsibility arises out of man's capacity to casually influence events.<sup>118</sup> Also, his theory is focused on the catastrophic occurrence, particularly if it is caused by human intervention. He emphasized that under the pressure of the irreversibility of some processes and the unprecedented speed of technological advancement, the essence of the human response to this reality must also change,<sup>119</sup> and he believed that a new science is needed in order to study all the interdependencies of the modern world, based on a morality that focuses on *prudence* as a value.<sup>120</sup> Man's capacity to influence the world around him has reached a point where he must be responsible not only towards present persons, but also towards future generations and our planet as a whole.<sup>121</sup> Under such a theory, man is made responsible not only for his behavior, for what he *has influenced* casually, but equally responsible for what requires his action,<sup>122</sup> what he *can influence* causally.

Paul Ricoeur goes further, and explicitly argues for a substitution of the retrospective view on responsibility with one that is deliberately prospective, with the effect in the legal realm of adding the idea of prevention for future harm to that of reparation for harm already done.<sup>123</sup> Ricoeur noticed that the Kantian concept of responsibility, based on imputation of acts to their authors comes under heavy attack in the modern age, both in the law and in ethics.<sup>124</sup> Moreover, the concept of imputation has been displaced, according to Ricoeur, through a process which began with the Critique of Practical Reason, with retribution (for fault).<sup>125</sup> This allowed for the proposition in legal doctrine that one is responsible for the effects of the action, not the action

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<sup>118</sup> *Id.* at 141.

<sup>119</sup> *Id.* at 17.

<sup>120</sup> *Id.* at 257.

<sup>121</sup> *Id.* at 14.

<sup>122</sup> *Id.* at 132-33.

<sup>123</sup> Ricoeur, *supra* note 34, at 31.

<sup>124</sup> *Id.* at 19.

<sup>125</sup> *Id.* at 18-19.

itself (for instance, in the much used phrase “responsibility for the damage caused”).<sup>126</sup> Other developments in the law of civil liability, like theories of strict liability, eroded the idea of imputation, although they further an important moral value—that of solidarity.<sup>127</sup> But the most important displacement took place in philosophical theory, where theories like the one advanced by Hans Jonas promote a responsibility *for others*, not a responsibility *for actions*.<sup>128</sup> Under this view, an actor is responsible for “what is fragile”, something that is handed over to the “care” of the agent.<sup>129</sup> This extends the object of responsibility, but also its scope, since everything that is in the agent’s power is subject to his duty of care, and once he acts, all the effects of the act could be imputed to him (even if they stretch over future generations).<sup>130</sup> True enough, if, as Ricoeur hypothesizes, the phenomenology of *initiative* and *intervention* is based on “interweaving” free causality with natural causality,<sup>131</sup> every action can be imputed to its author. However, to impute every effect of the action, both in time and space, to the same, “would make action impossible.”<sup>132</sup> That is why he proposes a middle-of-the-road ethical responsibility: “human action is possible only on the condition of a concrete arbitration between the short-term vision of a responsibility limited to foreseeable and controllable effects of an action to the long-term vision of an unlimited responsibility.”<sup>133</sup>

The ideas reflective of retrospective and prospective responsibility, as they arise out of the thinking of the abovementioned philosophers, ought not to be read out of the context from which they arose (in the eyes of each philosopher they are parts of a complex ethical system, each one distinguishable from the other). However, the fact that responsibility can be discussed

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<sup>126</sup> See *supra* note 32.

<sup>127</sup> Ricoeur, *supra* note 34, at 25.

<sup>128</sup> *Id.* at 28.

<sup>129</sup> *Id.* at 29.

<sup>130</sup> *Id.* at 29-30.

<sup>131</sup> *Id.* at 23.

<sup>132</sup> *Id.* at 33.

<sup>133</sup> *Id.*

both in retrospective and in prospective terms is a common occurrence which must not be ignored. Finding that this dichotomy can be traced in philosophical writings all the way back to the ancient Greeks (and Aristotle was a perfect example for this), then in the writings of the enlightenment (Kant and Hume), and finally in modern philosophy (Nietzsche, Jonas and Ricoeur), shows that the domain of ethics never lacked a forward-looking approach on responsibility. That opens up the prospective avenue for those who find legal responsibility an object for reflection. There is tremendous potential for an expansive and forward-looking theory in the law of torts.

### **B. The relationship between moral responsibility and civil liability**

That being said, in order to transition to the second condition, and in order to place preventive remedies within the ambit of tort law, as expressions of legal responsibility, it is important to first see how moral responsibility and legal responsibility interplay, and how they differ.

The interplay between law and morality in general, and between tort law and morality in particular, is one that has divided doctrine for quite some time.<sup>134</sup> The views shared throughout this paper are that the law of civil liability is deeply rooted into moral law, which acts as a primordial source, feeding the law of torts with its most valuable nutrients: the rules of right conduct. Moreover, the body of knowledge developed within rational ethics can serve as an epistemological source for a deeper understanding of the law of torts.<sup>135</sup>

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<sup>134</sup> For an overview, see HENRI BATIFFOL, *LA PHILOSOPHIE DU DROIT* (5th ed., PUF 1975).

<sup>135</sup> Such an epistemological relationship between tort law and moral philosophy has been advanced, for instance, by Catherine Thibierge. See Thibierge, *Libres propos, supra* note 7, at 575. In the English-speaking world, a famous proponent of a relationship between law (in general) and morality, whereby morality and philosophical inquiry are seen as epistemological sources for the law is Ronald Dworkin. See RONALD DWORKIN, *LAW'S EMPIRE* 96-98, 101 (The Belknap Press of Harvard University Press 1986).

Although connected, law and morality need not occupy the same space. If responsibility as an ethical concept deals with how a person is answerable for his/her actions in general—that is, for all actions based on a choice—legal responsibility has a much narrower scope. First, legal responsibility deals only with how a person is answerable in the eyes of the law. A person can be morally responsible as a matter of internal conscience, in the eyes of society, or of God.<sup>136</sup> Second, legal responsibility deals with wrongful behavior, as a rule,<sup>137</sup> whereas in ethics one is responsible for every action based on choice, whether good or bad.

A further distinction comes into play when from the more general notion of legal responsibility one moves to the particular subject of civil liability. Civil liability is opposed to criminal liability, where the wrongful behavior, the offense, is directed against a social value of great interest, and consequently the state itself.<sup>138</sup> Civil liability deals only with a wrong directed against other persons, against a value which pertains to the private sphere, be it individual or collective. Therefore, civil liability is relational; it is based on a relation between persons. Ethical responsibility can be non-relational; an action which is without consequence to state or particular interests can be morally judged, but not legally.

Since the law of torts deals with relations between persons, both retrospective responsibility and prospective responsibility need to be analyzed by way of relational language and relational conditions. This has always been the case in the area of retrospective-reparative

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<sup>136</sup> See H.A. SCHWARZ-LIEBERMANN VON WAHLENDORF, *ELÉMENTS D'UNE INTRODUCTION À LA PHILOSOPHIE DU DROIT* 81-82 (L.G.D.J 1976).

<sup>137</sup> Quite exceptionally, the law provides for honors or rights to be attributed to a person for righteous behavior, like, for instance, when a person is offered an official medal for extraordinary deeds. See, e.g., 10 U.S.C.A. § 3741 (West): “The President may award, and present in the name of Congress, a medal of honor of appropriate design, with ribbons and appurtenances, to a person who, while a member of the Army, distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty.”

<sup>138</sup> In criminal law doctrine the violation of such social values is classified as “public harm” (as opposed to private harm, which is dealt with by the civil law) and that is why criminal prosecution is conducted by the state, and not by private individuals. CHARLES W. THOMAS & DONNA M. BISHOP, *CRIMINAL LAW. UNDERSTANDING BASIC PRINCIPLES* (Sage Publications 1987).



liability. The basic elements for a tort, as a general rule, both in the common law and in the civil law, are a wrongful act, causation and damage.<sup>139</sup> The cause is to be found in the act of the tortfeasor, whereas the effect is suffered by the victim. Tort analysis is thus based on the relation between the tortfeasor and the victim. On the other hand, in the area of prospective responsibility, its relational character is not as obvious because it is only potential. If prospective responsibility deals with the sphere of duties of an individual,<sup>140</sup> the sphere of legal duties would have to correlate with a sphere of rights. The problem is that the person holding the sphere of rights is not determinable until the moment the tortious act occurs. One can, at best, determine a set of potential victims, whose rights are under threat.

The size of the sphere of duties is determined by the *power* of the actor. We have seen that the sphere of duties of a person in ethics is dependent upon the freedom and power of the actor.<sup>141</sup> Tort *liability*, just like *responsibility* in ethics, can be characterized as being in an ontological relationship of direct proportionality with *human power*.<sup>142</sup> As the power of a certain person or category of persons grows, its sphere of duties grows as well, either by taking on new duties (a matter of quantity), or by having previous duties become more strict (a matter of quality). There may be a need to re-emphasize that *power* in this context means the capability to causally influence events based on a rational choice, and in this sense it is synonymous with *freedom of choice*.

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<sup>139</sup> Negligence, or fault based liability, have the greatest level of generality, in both the common law and the civil law. For the French civil law *see, e.g.*, FABRE-MAGNAN, *supra* note 14, at 85 et seq.; For a presentation of negligence in the common law *see, e.g.*, PROSSER, *supra* note 13, at 139 et seq.

<sup>140</sup> *Supra* p. 29.

<sup>141</sup> *Supra* Ch. III, Part A.

<sup>142</sup> The latter is much broader and serves as a fundamental source for the former. *See* Thibierge, *Libres propos*, *supra* note 7, at 575.

Understanding that the engine fueling the permanent expansion of liability is the ontological direct proportionality relationship between human power and responsibility,<sup>143</sup> both ethical and juridical, brings about this very important realization: preventive remedies are not a worthless sophistication in the law; their existence is a real necessity in today's society. The decisions taken by man (his rational choices), in today's world, influence the lives of others in an unprecedented manner. Many human actions today can have far-reaching effects, influencing the life or health of many others, as well as the environment and our planet as a whole, and even future generations.<sup>144</sup>

Power unfettered by responsibility would create within the legal system a severe imbalance (between persons). In the law, ascribing responsibility to match the power of each actor is, on the one side, equivalent to recognizing each person's freedom, since true freedom implies responsibility,<sup>145</sup> and on the other hand, an expression of equality between men, as each man's duties must be proportional with his own power. If all men are unequal in power from the moment of birth until their last breath, responsibility brings balance and acts as an egalitarian counterforce. Responsibility is, even etymologically, a "response".<sup>146</sup> For every morally relevant action, there must be an equal moral reaction.

The necessity to match responsibility with power already triggered a reaction, not only in philosophy and legal doctrine, but also in the way the law evolved. Thus, the relationship

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<sup>143</sup> RICOEUR, *supra* note 34, at 29: "Stated in terms of its scope, responsibility extends as far as our powers do in space and time." This relationship goes even further than the scope of responsibility. The mere existence of responsibility is also dependent on the existence of power. If one were to accept the Kantian maxim (which, by the way, is in consonance with Aristotle's views on ethical behavior, at least as far as the requirement for freedom of choice is concerned) that only a person endowed with a free will which expresses itself through its choices can be made answerable for his/her acts, and if power is the capacity to causally influence events based on rational choice, and responsibility can be assigned only to those who have freedom of choice, then responsibility will follow *every* free choice.

<sup>144</sup> Thibierge, *Libres propos*, *supra* note 7, at 566-68.

<sup>145</sup> As one author said: "Under conditions of a total lack of responsibility, there is no other limit than the law of the jungle" ("*Il n'y aura . . . dans une condition d'irresponsabilité, d'autre limite que celle de la loi de la jungle*"). SCHWARZ-LIEBERMANN VON WAHLENDORF, *supra* note 136, at 82.

<sup>146</sup> *See supra* Ch. II, Part B.

between human power and responsibility can be proven empirically, or at least can be inferred from solid facts. Tort liability went through periods of rapid expansion after the industrial revolution of the 19th century and the technological revolution of the 20th, in the sense that the number of tort actions and actionable wrongs grew significantly. For instance, shifts from fault-based liability to strict liability in the French legal system considerably enhanced the domain of actionable torts.<sup>147</sup> In the common law the domain of strict liability remained rather narrow<sup>148</sup> in comparison to the French system, but the domain of actionable wrongs grew in other ways, by recognizing new causes of action, like intentional infliction of emotional distress,<sup>149</sup> or by broadening the scope of existing causes of action.<sup>150</sup> The reaction of course was not only jurisprudential, but also legislative, with numerous statutes being adopted. In the U.S., such examples of legislation adopted to respond to increased power include workers compensation statutes, as well as numerous products liability statutes, or the Tort Claims Act and the Civil Rights Act.<sup>151</sup> In France—and other European states have done the same—many special laws have been passed in order to cover the particularities of aeronautical accidents,<sup>152</sup> nuclear accidents,<sup>153</sup> traffic accidents,<sup>154</sup> products liability,<sup>155</sup> etc. Also, the precautionary principle

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<sup>147</sup> Strict liability torts require no proof of fault, which means that recovery becomes easier for the victim by comparison with fault based liability. For an *in extenso* presentation of the movement replacing fault with strict liability in various areas of tort law in France see VINEY, *supra* note 16, at 33-42. For strict liability in U.S. law see PROSSER, *supra* note 13, at 492 et seq. For English law, see JONES, *supra* note 14, at 231 et seq.

<sup>148</sup> And with considerable differences between the United States and England. In England, the case law applying strict liability rules is much more narrow, as it is the case, for instance, with abnormally dangerous activities, where the courts have been very careful not to expand the ruling from *Rylands v. Fletcher*, as opposed to the United States, where strict liability rules for abnormally dangerous activities are more general. Donal Nolan, *Rylands v. Fletcher and Fire* in THE LAW OF TORT 979-80 (Andrew Grubb ed., Butterworths 2002).

<sup>149</sup> MARSHAL A. SHAPO, AN INJURY LAW CONSTITUTION 29 (Oxford University Press 2012)

<sup>150</sup> One good example is the evolution of products liability in the state of New York. See EDGAR BODENHEIMER, JOHN B. OAKLEY & JEAN C. LOVE, AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM. READINGS AND CASES 124-139 (4th ed., West 2004).

<sup>151</sup> See SHAPO, *supra* note 149, at 25-35. Professor Shapo makes a more detailed presentation on how increased power of certain actors has influenced the development of tort law.

<sup>152</sup> Art. L. 321-3 and L. 322-3 of the French Code of Civil Aviation (*Code de l'aviation civile*).

<sup>153</sup> Nuclear accidents law in France is extremely complex and a series of legislative acts regulate the matter. For an enumeration of these special laws see Viney, *supra* note 16, at 36, n. 50.

<sup>154</sup> Loi 85-677 du 5 juillet 1985, *supra* note 66.

received normative value in all the European Union member states after its implementation in the Maastricht Treaty,<sup>156</sup> and even constitutional value in France.<sup>157</sup> These movements in the law are all reactions to the need for the law to adapt to increased *power*.

### C. Finding a domain for preventive remedies

If indeed civil liability can be seen both as retrospective (as it has been traditionally viewed) and prospective, and if a general duty to take precautions can be seen as a general preexisting duty imposed by the law to all persons capable of legal responsibility, then preventive remedies would be mechanisms which are put in place in order to enforce this duty to take precautions. They are coercive mechanisms and for that reason can be qualified as *civil sanctions*.<sup>158</sup> But, since even prospective liability is relational,<sup>159</sup> whenever the duty to take precautions is breached, a correlative right becomes determinable, and for that reason the above mentioned sanctions can also be characterized as *civil remedies*.

A new question thus would arise. What are the consequences of this qualification? If preventive remedies are coercive in nature that means that their application can only proceed after the imperative of prevention is put in balance with the imperative of preserving the individual freedom of the actor subject to sanction. The actor's freedom of choice gives rise to his responsibility, but his own personal freedom will also justify limits being put on the effects of his responsibility. In other words, the law must find a right measure for the effects of

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<sup>155</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. (L 210 , 07 August 1985); implemented in France through Loi 98-389 du 19 mai 1998 relative à la responsabilité du fait des produits défectueux [Law nr. 98-389 of May 19, 1998, regarding liability for defective products], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], May 21, 1998, p. 7744.

<sup>156</sup> Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, O. J. (C 325/5; 24 December 2002).

<sup>157</sup> Loi constitutionnelle 2005-205 du 1 mars 2005 Loi constitutionnelle relative à la Charte de l'environnement [Constitutional Law nr. 2005-205 of March 1, 2005, Constitutional law regarding the Environmental Charter], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], March 2, 2005, p. 3697.

<sup>158</sup> See also Sintez, *supra* note 25, at 237-46.

<sup>159</sup> *Supra* p. 39.

responsibility. Precaution for the sake of precaution simply will not do in the world we live in. A risk-free world is an illusion, and a very paralyzing one. That is why a nuance is necessary when discussing the duty to take precautions. One's duty to take precautions is not a duty to take all possible precautions, but only to take *reasonable* precautions. There is unity and a connection with reparative liability when looking at things from this perspective: the duty of care, as it is presented by Lord Atkin in *Donoghue v. Stevenson*,<sup>160</sup> as well as the duty to act like a *bonus pater familias* (essential, in French law, to the notion of fault<sup>161</sup>), is fundamentally the same with the duty to take reasonable precautions.<sup>162</sup>

This is, true enough, a return to fault based liability,<sup>163</sup> only this time stripped of the damage element, or at least redefined so as to correspond to the purpose of anticipating damage and reducing risks of damage. Liability based on the duty to take precautions would be triggered, as a rule, whenever an actor fails to take reasonable precautions, thus generating an unreasonable risk to somebody else's rights, even if such a risk did not yet materialize into actual damages. The scope of the preventive remedy sought would be to anticipate damage, and find the best

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<sup>160</sup> *Donoghue v. Stevenson*, [1932] All ER Rep 1, 11, 18, 19; [1932] AC 562, 579, 580, 596 (per Lord Atkin);

<sup>161</sup> HENRI MAZEAUD, LÉON MAZEAUD & ANDRÉ TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE* 494-495 (6th ed., Montchrestien 1965). The *bonus pater familias* standard is, by its own language, more forward-looking than that of "a reasonable man", as it projects a relationship between generations. See Olivier Moréteau, *Post Scriptum to Law making in a Global World: From Human Rights to a Law of Mankind*, 67 LA. L. REV. 1223, 1228 (2007).

<sup>162</sup> Moreover, the duty of care and the standards of the reasonable man and the *bonus pater familias* are inherently forward looking (perspective). The existence of the duty and/or its breach is determined by mentally transposing into the actor's shoes, so as to judge the reasonableness of his action and the foreseeability of said action's effects. This sort of judgment can only be made through an effort of imagination and empathy, an effort to gaze into the future, the same way the actor should have, in the circumstances with which he was faced.

<sup>163</sup> *Contra*, see Sintez, *supra* note 25, at 454. Sintez believes that preventive sanctions can be applied irrespective of fault, but one must be mindful that the sum of cases he analyses and which he considers examples of the application of preventive sanctions, by including compensatory sanctions or punitive damages which act as a deterrent (indirect prevention), go far beyond what I have qualified as a preventive remedy in this paper. Sintez, *supra* note 25, at 89-137. If, as I believe is necessary, preventive remedies (sanctions) are narrowed down to those remedies which have primarily a preventive purpose and do not operate indirectly, then there is no proof in the jurisprudence that liability in these cases would ever be devoid of fault (or moral imputability, for that manner).

means to avoid it by reducing the risk of harm back within reasonable limits or at least reduce the amount of damages, when they cannot be prevented altogether.

The question that would remain is how can strict liability be explained if the general duty in the law of torts is one to take *reasonable* precautions? In strict liability torts, since fault is not an element, a person will be liable no matter how diligent such a person has been at the time when the act causing damage occurred. The traditional justification was to base strict liability torts on a presumption of fault, and thus reverse the burden of proof for fault.<sup>164</sup> Despite its appeal, this explanation cannot stand if courts will not allow the plaintiff to prove that he has taken all reasonable precautions (which would defeat the presumption).<sup>165</sup> Strict liability theories can have, however, a solid justification based on notions of prospective liability, and that is how legal theory eventually evolved. Theories like professional risk, developed by Salleilles,<sup>166</sup> risk of activity, developed by Josserand,<sup>167</sup> or more modern theories based on control<sup>168</sup> or “conditional fault”<sup>169</sup> take the emphasis away from the act which generates damage and puts it on the activity creating the risk of damage as a whole.

What all the cases of strict liability have in common is the fact that the actor has power over a complex activity which generates risks and *assumes* responsibility for these risks *a priori*—when he initiates the activity. The actor is not responsible for the act which produces damage individually, but for the activity as a whole, because he has assumed such a responsibility as a condition for running the activity (the policy of the law being that the costs of

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<sup>164</sup> See, e.g., PLANIOL & PIPERT, *supra* note 13, at 644-46; MAZEAUD ET AL., *supra* note 161, at 95-96 (André Tunc later developed another view on this issue. VINEY, *supra* note 16, at 117-19).

<sup>165</sup> As it is the case, for example, in France for liability for things after the Jand'heur case. FABRE-MAGNAN, *supra* note 14, at 207-208.

<sup>166</sup> VINEY, *supra* note 16, at 110-11.

<sup>167</sup> *Id.* at 111.

<sup>168</sup> “Control” in the sense used by French doctrine under “*l'idée de maîtrise*.” LE TOURNEAU ET AL., *supra* note 14, at 1809.

<sup>169</sup> Keeton, *supra* note 57.

liability will be internalized by him, and perhaps redistributed). Now, just because liability for damages caused is assumed *a priori*, does not mean that in this case, the actor does not still have a duty to take precautions. His obligation to repair damage which results from the created risks does not exclude the general duty to take precautions; the two obligations coexist! The risk generated by the activity must be kept at a reasonable level, and that is why preventive remedies can be applied even in cases where strict liability reigns.<sup>170</sup> Quite exceptionally, the law allows unreasonably risky activities to run their course when, socially and economically, they produce more benefit than harm.<sup>171</sup> In those situations, the duty to take precautions has a very limited scope, the prevailing duty being the duty to make compensation to every person injured as a result of the activity.<sup>172</sup> Strict liability schemes are essentially schemes of compensation, based on an *a priori* assumption of a duty to compensate persons harmed by an activity. The duty to take precautions is inherent to fault-based liability, but a person can cumulate the duty to repair damage, assumed with the inception of the activity, with the general duty to take precautions, although the latter is not as intensively enforced when a strict liability scheme is applicable.<sup>173</sup>

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<sup>170</sup> WINFIELD & JOLOWICZ, *supra* note 14, at 586; *Contra see* Ken Oliphant, *The Nature of Tortious Liability* in THE LAW OF TORT 23 (Andrew Grubb ed., Butterworths 2002); Ken Oliphant, *Injunctions and Other Remedies* in THE LAW OF TORT 302 (Andrew Grubb ed., Butterworths 2002). Ken Oliphant is making the argument that when liability is premised not on a wrong done, but on the actor's wholly legitimate pursuit of a socially-desirable activity, injunctions should not be imposed. While this is true for a prohibitory injunction that forbids the defendant to continue the activity or severely impairs his capacity to operate or to continue the activity, or a mandatory injunction with the same effect, the statement should not be generalized. A duty to take precautions subsists even if the activity is one which is subject to a strict liability regime based on considerations of burden and benefit. While courts cannot forbid the activity or severely impair its operation, they can use injunctions which would have the purpose of bringing the risk created by the activity within reasonable limits. While it is true that a smart agent will take all reasonable precautions in order to minimize the risk, thus reducing his operational costs, the hypothesis of an unreasonable agent is not unfathomable, and in that case, coercion can be used in order to bring the activity within the proper risk levels. Therefore, direct prevention and compensation are not wholly incompatible in strict liability cases.

<sup>171</sup> That is why in such cases the key question is "not whether it was lawful or proper to engage in blasting but who should bear the cost of any resulting damage . . ." Spano v. Perini Corp., 250 N.E. 2d 31, 34 (N.Y. 1969).

<sup>172</sup> PROSSER, *supra* note 13, at 517.

<sup>173</sup> The duty to take reasonable precautions is normally in alignment with the economic interest of the actor, who is, in such a scenario, internalizing all the damages caused by the activity. A reasonable actor will normally reduce risks to a normal level without coercion, because it is in his interest to do so—reducing risk will also reduce his cost

## Chapter IV

### Preventive Remedies

#### A. Introduction

Preventive remedies<sup>174</sup> can be found in the law today in a series of seemingly disparate cases. Most of them have been used by courts for quite some time, without drawing much attention from legal doctrine in the law of torts. Being employed more often and in many new areas as we move further into the 21<sup>st</sup> century, preventive remedies are drawing increased attention from legal scholarship, and the reasoning employed by courts when applying such remedies is becoming more and more sophisticated.

Mapping the remedies and drawing a few parallels is a necessary step in order to see the state of preventive jurisprudence in the law of torts today.

This chapter is organized in such a manner so as to reflect the categories and partial generalizations which already exist in the common law. The risk that springs with the employment of common law categories throughout this chapter is that the presentation of preventive remedies from the French legal system might seem rather bizarre for the continental reader. However, because the re-arrangement of the French cases is reflective of classifications made within the common law, the present chapter partially satisfies<sup>175</sup> the requirements of a modern comparative approach based on functional equivalence.<sup>176</sup>

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of doing business, provided, of course, that the cost of precautions is lower than the cost associated with the risk of harm.

<sup>174</sup> Defined *supra* (Ch. II Part B) as: “coercive mechanisms designed to reduce or avoid future harm, created by the law for the protection of legally recognized interests and directed against a person who is civilly liable for failing to take the required precautions in order to safeguard legally recognized interests of another.”

<sup>175</sup> Partially, because at no point was this chapter intended to present all the preventive remedies from within the three legal systems which have been selected. Some preventive remedies are not presented in this chapter at all, like estoppel, which can work preventively when a court estops one of the parties from doing something that would be damaging to the other. Also, there might be other remedies which might fit into some of the categories presented in



Within the headings of “preventive action” and “reparation *in natura* of damage” are included cases where a preventive measure is taken after a full trial and a complete record, thus analyzing functional equivalents to permanent injunctions. What distinguishes the “preventive action” from traditional reparation of damage in this respect is the fact that in the case of preventive actions, there is no damage to be repaired, whereas in the case of reparation *in natura*, the judgment aims both at repairing past damage and preventing future harm.

The procedure of *référé* is a functional equivalent of interim injunctions.

*L’action déclaratoire* is the functional equivalent of declaratory judgments (declarations of right).

Under the heading of “private preventive expenses” the functional equivalents for self-help are analyzed, whenever self-help is used in order to avoid future damage.

What distinguishes injunctions and their equivalents on the one hand, and declaratory judgments and self-help and their functional equivalents on the other, is the fact that in applying

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this chapter and might have been overlooked—from property law, successions, civil procedure, or other areas of private law. There are also many preventive remedies to be found in administrative decisions or in decisions taken by administrative courts in France, which would be equivalent to some decisions taken as a matter of tort law in the English or American common law. Since the purpose of this chapter is only to map the most important preventive remedies in the law of torts and extract rules and standards from some of the most important cases, which will serve as the basis for a theoretical a model for prevention (proposed in a future chapter), I hope the reader will excuse this somewhat lack of thoroughness. On the other hand, the exposition of preventive remedies in this chapter might also be seen as too broad, because later it will be demonstrated (*Infra* pp. 122-123) that only some of the preventive remedies presented herein are mechanisms of *direct prevention*. Declarations of right are mechanisms of indirect prevention, and self-help is, strictly speaking, not a preventive remedy at all. That being said, it does not follow that these remedies ought to be, from the outset, removed from the practical analysis, since the way declarations of right and self-help operate will give substantial insight as to who should be the default decision-maker, as well as the methods used for the enforcement of the duty to take precautions, or as to the use of retrospective and prospective notions regarding liability, and provides examples for the key distinction between preventive remedies and compensatory remedies.

<sup>176</sup> On equivalence functionalism see Konrad Zweigert, *Des solutions identiques par des voies différentes (Quelques observations en matière de droit comparé)*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ [hereinafter R.I.D.C.] 5 (1966); Béatrice Jaluzot, *Méthodologie du droit comparé. Bilan et perspective*, 57 R.I.D.C. 29, 39-41 (2005); John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 622-23 (1998); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L. J. 411, 428-29, 434-40 (1985); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 679 (2002); James Gordley, *The Functional Method* in METHODS OF COMPARATIVE LAW (Pier Giuseppe Monateri ed., Edward Elgar 2012). See also Olivier Moréteau, *Premiers pas dans la comparaison des droits* in JURILINGUISTIQUE: ENTRE LANGUES ET DROITS 419 (Jean-Claude Gémard & Nicholas Kasirer eds., Thémis 2005).

injunctions the court order creates an obligation for the defendant if the plaintiff wins, but in cases of declaratory judgments and self-help, court intervention is only declarative.

In France, as well as in England and the United States, many of the remedies presented herein are well established in the law, only they have not been traditionally analyzed as part of the bigger picture, as part of a cohesive theory on direct prevention in the law of torts. The choice of selecting the common law as a model for the structure and organization of this chapter was influenced by the inherent pragmatism which permeated this domain in English and American legal thinking. The common law seems to have expended much more effort in regard to categorizing preventive remedies, and trying to find unified standards within the categories created. In France, the process of categorizing the law of torts has always been focused on substance, on abstract concepts, such as subjective<sup>177</sup> and objective liability,<sup>178</sup> or on the nature of the rights which are being protected, and the division between substantive law and procedure seems to be more strict, at least when it comes to theoretical endeavors. Also, the doctrinal focus on the precautionary principle, which is a rather specialized area of prevention, might have hindered the search for general rules and common standards.

The categories created around preventive remedies may look like puzzle pieces for a theory of prevention in the law of torts. Going through these cases presented herein, one would only get a sneak peek into the general picture of prevention in the law of torts. However, there is much to learn about the application of preventive remedies when going through the particularities of each category of preventive remedies, as well as from the differences which exist between the three legal systems under scrutiny.

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<sup>177</sup> Subjective liability (*responsabilité subjective*) is a synonym for fault-based liability.

<sup>178</sup> *Responsabilité objective*, commonly translated as strict liability.

That being said, an exhaustive presentation of all the cases would be both impossible and counter-productive. As much as possible, I have indicated other jurisprudential rulings and have tried to offer a few words on the general directions taken in the law with regard to preventive remedies. Nevertheless, within each subheading, from the multitude of cases, some have been singled out, but not necessarily because they give a feel of the legal system as a whole, but rather because a valuable lesson can be extracted from each particular case selected. The important differences between France, England and the United States, in this particular field, do not necessarily regard the substantial rules or the pragmatic results, but the institutions, techniques and specific ideologies.<sup>179</sup> For example, the relay antenna cases must be seen as exceptions, even within the French legal system. In France, in the bigger picture and most of the time, “preventive actions” produce the same results as permanent injunctions. Singling out those cases was not intended to be presented as a feature of how the French judiciary analyzes permanent preventive measures in general. Valuable lessons can be learned from the relay antenna cases and the jurisprudential evolution regarding those cases. Also, they are reflective of a certain mindset and a philosophical approach on prevention which is peculiar when compared to what is happening in U.S. or English law.

The case presentations were needed in order to discover the best way to bind preventive remedies under common standards, with a common mathematics, and with common principles. The scope of this chapter is not merely to catalog the remedies according to existent patterns and categories (created or revealed already by legal doctrine or jurisprudence),<sup>180</sup> but also place a

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<sup>179</sup> Professor Reimann pointed out that this is actually a general feature, and that comparativists generally are aware that “the most fundamental differences (between legal systems—A/N) do not exist between substantive rules but between institutions, procedures, and techniques.” Reimann, *supra* note 176, at 677.

<sup>180</sup> For a more extensive presentation on the jurisprudence regarding prevention in the civil law *see* especially Sintez, *supra* note 25. For English law *see* Oliphant, *Injunctions and Other Remedies*, *supra* note 170. For U.S. law, the Second Restatement of the Law of Torts offers a good overview on the case law applying injunctive relief. AMERICAN LAW INSTITUTE, 4 RESTATEMENT OF THE LAW. TORTS 2d, at 556-628 (§ 933- 951).

critical eye on some of the most important issues which come up in cases where preventive remedies are sought.

## **B. Preventive remedies at French law**

### 1. The preventive action (*l'action préventive*)

In France, the practical implementation of a philosophy of prevention in the law of torts finds a peculiar expression in a series of highly controversial decisions based on the precautionary principle. Again, that does not mean that preventive actions are founded solely on the precautionary principle in the French legal system. There are many examples of preventive measures being taken by courts in various areas, like nuisance,<sup>181</sup> defamation<sup>182</sup> and privacy torts,<sup>183</sup> protection of image rights,<sup>184,185</sup> or unfair competition.<sup>186</sup> Other preventive measures can

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<sup>181</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2e civ., February 24, 2005, nr. 04-10362, JurisData 2005-027086; JCP 2005. II. 10100, (note François-Guy Trébulle).

<sup>182</sup> Cour d'appel [CA][regional court of appeal] Paris, January 5, 1972, D. 1972 Jur. 445 (note Jacques Dutertre); RTD. Civ. 1973, at 358 (G. Durry). In this case, the court ordered that a scene from a movie created by the defendant be eliminated, and the title be modified, because it was defamatory and an infringement of the right to respect the honor (*droit à l'honneur*) of some of the soldiers who fought during the second world war, due to a confusion which likely would have been created between said soldiers and some of the characters portrayed in the movie.

<sup>183</sup> A very interesting example is Tribunal de Grande Instance [TGI][ordinary court of original jurisdiction] Paris, May 14, 1985, D. 1986 I.R. 52—where the court ordered the suppression of certain passages from a book which were infringing upon the right to privacy of a former President of the French Republic. Generally, French law seems to be more protective of personality rights when in conflict with the freedom of expression than other western countries, particularly the United States. For a more detailed presentation of the case law and the clash between the freedom of expression and the right to privacy in France, see Jean-Pierre Gridel, *Liberté de la presse et protection civile des droits modernes de la personnalité en droit positif français*, D. 2005 Chron. 391; Christophe Bigot, *Protection des droits de la personnalité et liberté de l'information*, D. 1998 Chron. 235; Pierre Kayser, *Les pouvoirs du juge des référés civil à l'égard de la liberté de communication et d'expression*, D. 1989 Chron. 11.

<sup>184</sup> Cour d'appel [CA][regional court of appeal] Paris, June 14, 1983, D. 1984 Jur. 75 (note Raymond Lindon)—ordering the destruction of posters with the image of Jhonny Halliday, Alain Delon, Romy Schneider, Julien Clerc, Michel Sardou, Maxime le Forestier and Gérard Depardieu; Tribunal de Grande Instance [TGI][ordinary court of original jurisdiction] Paris, 1e ch., October 2, 1996, in ANDRÉ BERTRAND, *DROIT À LA VIE PRIVÉE ET DROIT À L'IMAGE* 154 (Litec 1999)—enjoining the plaintiffs from selling a lighter imprinted with the image of a famous comedian; Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., July 16, 1998, D. 1998 I.R. 210—creating an interdiction on the sale of floppy disks with a video game because it infringed upon the image rights of the plaintiff.

<sup>185</sup> Article 9 of the French Civil Code expressly recognizes the possibility for courts to intervene by any measure deemed appropriate in order to stop an infringement on the right to privacy and image rights, even by way of *référé* (equivalent to the English interim injunction).

<sup>186</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., March 5, 1991, nr. 88-19745, JurisData 1991-000308—enjoining a television station from broadcasting a movie the same day it premiered in the cinema.

be obtained through the use of the possessory action.<sup>187</sup> Taken as a whole, these cases seem to be decided in a similar manner with cases that fall under the heading of permanent injunctions in the common law. However, the common law does not have any jurisprudence applying the precautionary principle, and for that reason it is worth exploring some of these cases *in extenso*.

It was a group of some lower French courts who have made the bold step of applying the precautionary principle in order to impose preventive measures, within the ambit of traditional tort actions. This was done particularly under the guise of nuisance law in cases where the plaintiffs were seeking to have relay antennas removed from their neighborhood for fear that the electro-magnetic emissions of the antennas would have a negative impact on the health of the community.

The factual pattern in these decisions is almost identical. One of the first decisions applying the precautionary principle and employing a preventive remedy on this foundation in a tort action was given by a lower court from the city of Grasse<sup>188</sup> (and later approved by the Court of Appeals of Aix-En-Provence).<sup>189</sup> The parties to the dispute were the municipality of the city and a mobile phone company.<sup>190</sup> The mobile phone company installed a relay antenna at a short distance from a school, 36 meters from the actual classrooms.<sup>191</sup> The fear that damage caused by exposure to radiation emitted by these relay antennas would harm the children influenced a

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<sup>187</sup> Of particular interest are the possessory actions which are placed in the category of *denunciation de la nouvelle oeuvre*, which recognizes to the possessor of immovable property the possibility to ask for a suspension of a work done on a different property which creates a probable future disturbance. Jamel Djoudi, *Action possessoire*, at nos. 52-54 (Published as part of the RÉPERTOIRE DE DROIT CIVIL, Dalloz, last updated 2012). This sort of possessory action is described as a “preventive action” (*action préventive*). *Id.* at nr. 54. The more general possessory action (*complainte*) can be used in similar situations, but only if the work on the neighboring land is finished, in which case the court can proceed to more drastic measures, like demolition. *Id.*

<sup>188</sup> Tribunal de Grande Instance [TGI][ordinary court of original jurisdiction] Grasse, June 17, 2003, JurisData 2003-221748.

<sup>189</sup> Cour d’appel [CA][regional court of appeal] Aix-en-Provence, June 8, 2004, D. 2004 Jur. 2678 (note Mathilde Boutonnet); D. 2005 Panorama 186 (obs. Denis Mazeaud); Michel Cannarsa et al., *France*, report published in *European Tort Law 2004*, at 297 (Helmut Koziol & Barbara C. Steininger eds., Springer 2005).

<sup>190</sup> Michel Cannarsa et al., *supra* note 189, at 297.

<sup>191</sup> *Id.*

number of parents to take action. They decided to transfer their children to other schools and, as a consequence, the municipality sued the company for nuisance in order to have the relay antennas removed.<sup>192</sup> The lower court ordered the removal of the antenna, and based its decision on the precautionary principle.<sup>193</sup> The Aix-en-Provence Court of Appeals upheld the judgment, but based its decision on the law of nuisance, omitting to mention the precautionary principle.<sup>194</sup>

Just a few years later, a similar case arose under the jurisdiction of the Court of Appeals of Versailles.<sup>195</sup> In 2005, a telecommunications company installed a relay antenna in a town named Tassin La Demi-Lune, in order to provide mobile phone reception to its customers in the surrounding areas.<sup>196</sup> The residents living in the vicinity of the antenna sued the company, complaining that the presence of the antenna constitutes a private nuisance generating risk for the health of the community, and that it depreciated the value of their property.<sup>197</sup> The *Tribunal de Grande Instance* of Nanterre, in a judgment made on the 18th of September 2008, ordered the removal of the relay antenna by the mobile phone company, under the pressure of a penalty of 100 Euros for every day of delay.<sup>198</sup> The court also decided to compensate the plaintiffs with 3000 Euros each for their damages resulting from exposure to health risks.<sup>199</sup> The court based its decision both on the precautionary principle and the French theory of private nuisance (*trouble anormal de voisinage*). The Versailles Court of Appeal affirmed the lower court's decision, and even increased the daily penalty to 500 Euros and the compensation for each plaintiff to 7000

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 298.

<sup>194</sup> *Id.*

<sup>195</sup> Cour d'appel [CA][regional court of appeal] Versailles, February 4, 2009, D. 2009 A.J. 499; D. 2009 Somm. 819 (note Mathilde Boutonnet); J-Ph. Feldman, *Le trouble voisinage du principe de precaution*, D. 2009 Chron. 1369; Olivier Moréteau, *France*, report published in *European Tort Law 2009*, at 199 (Helmut Koziol & Barbara C. Steininger eds., De Gruyter 2010). For the decision of the lower court *see* Tribunal de Grande Instance [TGI][ordinary court of original jurisdiction] Nanterre, September 18, 2008, D. 2008, at 2916 (note Mathilde Boutonnet).

<sup>196</sup> Moréteau, *supra* note 195, at 199.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

Euros.<sup>200</sup> The Court of Appeals did not mention the precautionary principle in the decision, and relied solely on principles of nuisance law in its motivation of the decision.<sup>201</sup>

Mobile phone companies have not taken the chance of appealing these judgments to the Court of Cassation, fearing that a decision from the Court of Cassation upholding such decisions would disrupt their operations of providing coverage to their customers, and preferred to have some antennas dismantled here and there,<sup>202</sup> especially since other lower courts have gone the other way, and refused to grant orders obliging telephone companies to dismantle their antennas.<sup>203</sup>

The great benefit brought by the decisions discussed above is the incredible attention they received in the legal literature.<sup>204</sup> But, although these decisions made a lot of noise and definitely attracted attention, in the jurisprudence they served no other purpose than to bring confusion into an area which is in need of direction and a solid foundation. Through the feeble arguments presented, I believe these decisions have put the anathema of irrationality on the precautionary principle. Not without merit, these decisions have been criticized for the “circuitous”,<sup>205</sup> “poor and incoherent”<sup>206</sup> reasoning used, which challenges common sense and logic.<sup>207</sup> Particularly the second decision, rendered by the Court of Appeals of Versailles, has been highly criticized, and for good reason. The court refused to quantify the risk created by the telephone companies or weigh in any way the evidence presented. After taking into consideration the fact that the installation of the relay antennas was done with the authorization of administrative authorities

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<sup>200</sup> *Id.* at 200.

<sup>201</sup> *Id.* at 201.

<sup>202</sup> *Id.*

<sup>203</sup> *See, e.g.*, Tribunal de Grande Instance [TGI][ordinary court of original jurisdiction] Lyon, September 15, 2009, JurisData 2009-010741.

<sup>204</sup> *See* notes 189 & 195.

<sup>205</sup> Moréteau, *supra* note 195, at 200.

<sup>206</sup> Feldman, *supra* note 195, at 1370.

<sup>207</sup> Moréteau, *supra* note 195, at 200.

and the emissions of radiation are well below the threshold established by the administration, the court of appeals qualified the risk as hypothetical,<sup>208</sup> as opposed to the lower court which concluded that “the risk is certain.”<sup>209</sup> Saying that a risk is certain is a contradiction in terms (contradiction *in adjecto*). Risk (*risque* in French) is defined as “a potential danger, more or less predictable.”<sup>210</sup> The concept of risk is therefore inseparable from *uncertainty*, and a risk, while quantifiable (higher risk, lower risk), can be said to exist or not to exist, but it is never certain. Also, the court did not analyze the existence of a risk, but only the *proof* of risk. The only argument brought for the existence of health risks was the diversity of scientific opinions, and the court, by reversing the burden of proof, required from the defendant proof of non-existence of any risk. Since on the record some studies indicated that relay antennas are dangerous, while others suggested the contrary, the court found that the uncertainty as to whether or not it is safe to be exposed to the magnetic field of the antennas is enough in order to order the removal of the antennas.

In cases such as this one, the parties are bound to bring contradictory studies, and the mere existence of studies indicating that a risk exists is not enough, they must also be reliable and backed by scientific data. Asking for the defendant to prove that there is no risk, and quantify the existence of the risk not by the substance of the scientific data, but merely by acknowledging that one or more studies exist which posit that the risk is real and substantial, is simply absurd. Moreover, asking the defendant to prove a “zero risk” to an activity is virtually impossible. Any human activity implies a certain amount of risk.

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<sup>208</sup> Boutonnet, *note* to Cour d’appel [CA][regional court of appeal] Versailles, *supra* note 195, at 819.

<sup>209</sup> Tribunal de Grande Instance [TGI][ordinary court of original jurisdiction] Nanterre, *supra* note 195, at 2916.

<sup>210</sup> PAUL ROBERT, DICTIONNAIRE ALPHABÉTIQUE ET ANALOGIQUE DE LA LANGUE FRANÇAISE [LE PETIT ROBERT 1] 1720 (A. Rey & J. Rey-Debove coords.). The Oxford English Dictionary indicates that the etymology of the English word “risk” is the French *risque* or the Italian *risco* or *rischio*, and defines risk as a “hazard, danger, exposure to mischance or peril”, or as a “chance”. 13 THE OXFORD ENGLISH DICTIONARY, *supra* note 34, at 987.



The court's reliance on the theory of private nuisance in this case can also be questioned, since nuisance presupposes that the disturbance created not only exist, but also must reach a certain level so as to become more than a mere inconvenience; or, in one word, it must be *abnormal*.<sup>211</sup> In general, a preventive approach and the precautionary principle can be used in conjunction with the theory of private nuisance,<sup>212</sup> but only if the court actually engages in a decent level or risk assessment.<sup>213</sup> The court must identify the risk and move the procedure so as to have sufficient facts to quantify the risk, either by approximation,<sup>214</sup> or by way of maxmin intervals<sup>215</sup> (the interval created between the best case and the worst case scenario), and if the approximation or the interval falls within the ambit of what could be described as an "abnormal" disturbance, a preventive remedy can be imposed. A correct application of the precautionary principle implies its application only after every effort to scientifically identify and quantify the risk is exhausted.<sup>216</sup>

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<sup>211</sup> GENEVIÈVE VINEY, PATRICE JOURDAIN, LES CONDITIONS DE LA RESPONSABILITÉ 1218 (3<sup>e</sup> ed., L.G.D.J 2006), part of the TRAITÉ DE DROIT CIVIL (Jacques Ghestin coord.).

<sup>212</sup> Nuisance theory might be flexible enough to adapt to such a change. However, generalizing this jurisprudence in nuisance law would create serious problems. The French judiciary is not that adverse to floodgate arguments, but abolishing the requirement of abnormality of the nuisance would open the way for a good variety of unjustified litigation. That is why Mathilde Boutonnet argued that it would have been simpler just to invoke the precautionary principle and apply it in this case, because it is much harder to defend this decision based on nuisance law. Boutonnet, *note* to Cour d'appel [CA][regional court of appeal] Versailles, *supra* note 195, at 420.

<sup>213</sup> On risk assessment and prevention *see infra* Ch. VI, Part C.

<sup>214</sup> The approximation of the risk, in this case, could have been approximated at least, by way of comparing the emissions of relay antennas with other electronic devices, the emissions of which the public generally accepts as reasonable. The French National Academy of Medicine published a study quantifying the effects of GSM antennas to human health, by comparing the risks with those generated by the use of mobile phones. The impact of a GSM antenna situated in the proximity of the subject in one day is identical to the effects of a 30 seconds use of a mobile phone. Académie Nationale de Médecine, *Les risques des antennes de téléphonie mobile*, *Bull. Acad. Nat'le Méd.*, Tome 193, Nr. 3, at 781-785 (2009), available at <http://www.academie-medecine.fr/detailPublication.cfm?idRub=27&idLigne=1542> (Last visited May 11, 2013).

<sup>215</sup> On maxmin models and the precautionary principle *see* Daniel A. Farber, *Uncertainty*, 99 *Geo. L.J.* 901, 930-932 (2011). At a basic level, the maxmin model means calculating the best case scenario and the worst case scenario, in order to balance the probability for a best case scenario with the probability of a worst case scenario. *Id.* at 931-932. This virtually creates an interval within which there is uncertainty, but one could still anticipate the most probable outcomes.

<sup>216</sup> Communication from the Commission, *on the precautionary principle*, at 4 (Brussels, 2 Feb. 2000, COM(2000) 1), available at [http://ec.europa.eu/dgs/health\\_consumer/library/pub/pub07\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf) (Last visited May 11, 2013).

Another question that should be addressed is the applicability of the precautionary principle in such cases.<sup>217</sup> Civil courts should not only apply the precautionary principle after a correct assessment of risk, but must also do so with the awareness that jurisdictional bodies have considerably reduced resources and manpower to conduct risk assessment in very delicate matters. The exact same problem was brought in front of administrative courts, and administrative judges, particularly from the *Conseil D'Etat*, have been wise enough to trust the regulatory bodies that had the resources to conduct risk assessment and establish procedures and conditions to be satisfied by mobile phone companies when installing relay antennas, while acknowledging that the precautionary principle could be applied in these types of cases.<sup>218</sup> A number of lower courts have also recognized that the judiciary cannot intervene in such cases because the administration has taken the charge to assess the risks implied by the installation of such devices, created norms and standards to be applied, and therefore it would not be appropriate for courts to second guess the administration when it comes to such matters.<sup>219</sup>

Considering this state of affairs, a conflict of jurisdiction was generated between the courts charged with civil matters and administrative courts. In France, administrative courts are the sole venue for cases involving acts and facts of the administration, and these courts are not under the supervision of the Court of Cassation, the highest administrative court being the *Conseil d'Etat*. When conflicts between different jurisdictions appear these jurisdiction disputes are sent to the *Tribunal des Conflits*. The *Tribunal des Conflits* recently had to decide whether the issue regarding the relay antennas installed in proximity of residential areas can be decided by civil courts or administrative courts. In its decision, rendered in the 14th of May of 2012, the

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<sup>217</sup> Idea proposed by one scholar commenting on these decisions. Boutonnet, *note* to Cour d'appel [CA][regional court of appeal] Versailles, *supra* note 195, at 420.

<sup>218</sup> Conseil d'État [CE] [highest administrative court], July 19, 2010, nr. 328687, JurisData 2010-012229.

<sup>219</sup> See LE TOURNEAU ET AL., *supra* note 14, at 1790, n.1 (citing various cases where courts followed this line of argument).

*Tribunal des Conflits* decided that ordinary judges cannot decide claims which have “the effect of interrupting the emission, forbidding the installation, ordering the removal or the relocation of a relay antenna regularly authorized by the administration.”<sup>220</sup> The basis for this decision was the principle of separation of powers, the intervention of the judiciary in these matters being considered in breach of this principle. Administrative courts can verify the legality of the administrative acts authorizing the installment of the relay antennas and certifying the level of emissions, but the executive power is given a great amount of deference when it comes to the means of implementing certain national policies. This is perhaps why the *Conseil d’Etat* does not sanction the way in which the administration is making use of the precautionary principle in cases of relay antennas. The decision of the *Tribunal des Conflits* does not strip the judiciary of all power in regards to the matter of relay antennas. Civil courts now have jurisdiction in cases involving relay antennas only if:

“(1) the claim is for damages and stems from the lawful installation or operation of the relay antenna, provided it is not a public work (*ouvrage public*), subject to the possibility of a preliminary ruling on jurisdiction; or (2) the claim is to order the cessation of nuisance (*trouble anormal de voisinage*) caused (i) by installation or operation which does not comply with administrative regulations, or (ii) by regular installation or operation, but where the interest harmed is not related to public health or interference of the radio-waves.”<sup>221</sup>

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<sup>220</sup> Tribunal des conflits [TC] [deciding on conflicts of jurisdiction between the Cour de Cassation and the Conseil d’État] May 14, 2012, 6 decisions, JurisData 2012-010164, 2012-010165, 2012-010166, 2012-010169, 2012-010170, 2012-010172; D. 2012 Jur. 1930 (notes G.J. Martin & J.-C. Msellati); Olivier Moréteau & Alexandru-Daniel On, *France* (report) in EUROPEAN TORT LAW 2013 (forthcoming, Ken Oliphant & Barbara C. Steininger eds., De Gruyter 2013). See also Sophie Moreil, *Antennes relais: que reste-t-il au juge judiciaire?*, D. 2012 Chron. 2978.

<sup>221</sup> Moréteau & On, *supra* note 220.

Most importantly, the *Tribunal des Conflits* is saying that courts can still apply general civilian doctrines as long as they don't second guess decisions made in administrative acts which are not illegal.

Soon after the decision of the *Tribunal des Conflits* was made public, in a series of three decisions, the Court of Cassation followed the directives laid down by the *Tribunal des Conflits*, and declined competence in relay antenna cases.<sup>222</sup>

Based on this recent jurisprudence, it seems as though the jurisprudence we have criticized from these appellate courts is coming to an end. The truly unsettling problem which sprang out of these decisions, however, remains unsolved. How are we supposed to understand and apply the precautionary principle in the context of preventive remedies? The Court of Appeals of Versailles gave no reasons as to why the court felt that the protection offered through administrative regulation was insufficient, or why the studies presented as evidence were unsatisfactory or unreliable. This court applied the precautionary principle blindly and discarded the problem with no real analysis. The simple fact of contradictory evidence was considered enough to find uncertainty, and therefore no effort of quantifying the risk was made. The law of nuisance was used as a tool to mask a certain level of ignorance on the issue and solve the problem without getting into the substance of the matter.

The precautionary principle should be applied more like a tie-breaker in cases of uncertainty. The decision-maker must expend all efforts in order to minimize the level of uncertainty through scientific discovery and evidence, and only when risk assessment calculations do not point towards a more likely result, should the precautionary principle be

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<sup>222</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., October 17, 2012, 3 decisions, D. 2012 A.J. 2523.

used.<sup>223</sup> When these conditions are met, and only then, the decision-maker must “err on the side of caution,”<sup>224</sup> and must give more weight to interests that are essential to humanity, like a clean environment and human health.

## 2. Preventive remedies disguised as reparation in kind.

The concept of reparation (*réparation*) in the civil law implies the existence of harm or damage.<sup>225</sup> As a rule, in French law, when repairing damage a court first looks at methods of compensation in kind or reparation *in natura* (*réparation en nature*). It is seen as the best method for repairing harm, and whenever it is possible the victim can request it and the court will be inclined to grant it.<sup>226</sup> If compensation in kind is not possible, the victim will have to contend herself with methods of compensation by equivalent.<sup>227</sup> The reason for this rule is that the victim must be brought as close as possible to her situation before the injury occurred. Many of the methods of *reparation* are, however, not compensatory in nature, but preventive. The examples are more numerous than one would expect, and include those particular situations where the mere infringement of a right is considered sufficient in order to render a decision without analyzing the damage element. The vast majority of these cases fall under what Cyril Bloch described as manifestations of the function of “cessation of illicit acts”.<sup>228</sup> This qualification emphasizes the retrospective and actor-based outlook on liability. From this point of view, the remedies are repressive (they repress illicit acts).<sup>229</sup> At the same time, from a prospective and

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<sup>223</sup> See Communication from the Commission, *on the precautionary principle*, *supra* note 216, at 4.

<sup>224</sup> Interdepartmental Liaison Group on Risk Assessment, *The Precautionary Principle: Policy and Application*, <http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.pdf> (Last visited May 11, 2013), at 9.

<sup>225</sup> The obligation to repair damage is born when a person is declared liable for damages. FABRE-MAGNAN, *supra* note 14, at 372.

<sup>226</sup> MAZEAUD & CHABAS, *supra* note 13, at 734-735.

<sup>227</sup> *Id.* at 735.

<sup>228</sup> See CYRIL BLOCH, LA CESSATION DE L'ILLICITE. RECHERCHE SUR UNE FONCTION MÉCONNUE DE LA RESPONSABILITÉ CIVILE EXTRA CONTRACTUELLE (Daloz 2008). See also, *Proposition de textes. Chapitre des délits in POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE*, *supra* note 6, art. 2.

<sup>229</sup> *Id.* at 881.

victim oriented point of view, the same remedies can be described as preventive, because the suppression of the illicit act also prevents damage directly.

It is not unusual for courts to combine preventive remedies with compensatory ones. For instance, in a case decided in 2003, the Court of Cassation upheld a decision where the plaintiffs were awarded, besides damages, the negative of some photographs which were taken without their agreement and in violation of their image rights.<sup>230</sup>

The fact that many cases involve some form of damage is probably why these remedies have been traditionally categorized as reparative. However, since in many cases where a right is infringed, the courts do not actually look into the damage element (actual damage does not need to be proved), and every once in a while, situations come up when the damage is merely potential (*virtuel*).<sup>231</sup>

Some remedies can even be cataloged as having a dual nature, in the sense that they can be simultaneously compensatory and preventive. For instance, when a court offers the plaintiff a right to respond to an allegation published in the defendant's paper (which the court considers defamatory), or decides that the defendant must publish the decision of condemnation,<sup>232</sup> the order at the same time repairs the damage created, at least in part, and prevents the perpetuation of the inaccurate and defamatory information. Such a response prevents the spread of false defamatory information in the future, thus preventing future harm.

Combining compensatory remedies with preventive remedies is a great example of harmony in the application of compensation and prevention in the law of torts. These kinds of cases are set in situations where decision-makers have to look both ways, in the past and in the

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<sup>230</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2e civ., December 18, 2003, Gaz. Pal. 2005, Somm. 1398.

<sup>231</sup> Professor Philippe Brun described it as "*prejudice virtuel*". Philippe Brun, *note* to Cour de Cassation [Cass.][supreme court for judicial matters] 3e civ., September 9, 2010, D. 2010 Pan. 49, at 50.

<sup>232</sup> See LE TOURNEAU ET AL., *supra* note 14, at 886 (and the decisions cited by the authors).

future, and act to correct wrongful consequences of torts with this holistic vision in mind. It is not unusual for damage to have been generated in the past, and yet for the consequences to be felt for a long time after the generating facts.

Intervention to stop the occurrence of future damage, while compensating for the past, can have numerous advantages, including mitigation of damages or avoidance of future litigation and, therefore, lower judicial and social costs.

### 3. Le référé and l'action déclaratoire

There is an intensive focus on preventive actions applying the precautionary principle in the legal literature,<sup>233</sup> and this needs to be contrasted with the reality and the dynamics of the French judicial system, which had to respond to needs of everyday life, and has done so with quite a great deal of ingenuity. A good place to look for preventive remedies at French law is also in areas dealt with more often than not within the subject of civil procedure. French judges aptly made use of injunctions,<sup>234</sup> either in the context of ordinary actions, or in preliminary proceedings (*le référé*), with the purpose of preventing future damage.

The procedure of *référé* is not a modern creation, having been developed prior to the French Revolution.<sup>235</sup> From the beginning this procedure had a preventive character having been designed to prevent irreparable loss.<sup>236</sup> According to article 484 from the French civil code of procedure, the *référé* is meant to provide only interlocutory relief, pending a decision on the merits of the case.<sup>237</sup> This provisional character might have been the reason why the imposition of an injunction through the *référé* was never analyzed as part of the substantial law of torts, as a

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<sup>233</sup> See *infra* Ch. V. Part B.

<sup>234</sup> The term *injunction* has a very general meaning in French law: “order, formal decision, or command given by the authorities”. CORNU, *supra* note 15, at 492.

<sup>235</sup> Olivier Moréteau, *The French Procédure de référé: basic rules and recent evolution*, at 2 (1994) (unpublished manuscript) (on file with author).

<sup>236</sup> *Id.* at 2-3.

<sup>237</sup> NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 484 (Fr.).

preventive remedy. It is seen as a rather exceptional remedy, because it is deviating from the traditional procedural rules.<sup>238</sup> It is a simple and rapid procedure, intended only for those situations when time is really pressing and a judgment is needed urgently. There is even a variety of *référé* called *référé d'heure à heure*,<sup>239</sup> which besides being exceptionally expedient, allows the judge to give a remedy even on days that are public holidays or outside of the regular work days.<sup>240</sup>

During the 20th century, the procedure of *référé* expanded considerably.<sup>241</sup> The requirement of urgency was interpreted less strictly,<sup>242</sup> first by presuming the existence of urgency in some cases,<sup>243</sup> and later by eliminating the requirement for some limited hypothesis.<sup>244</sup> Also, a great number of disputes are solved definitively by courts by using this procedure, despite the provisional character attached to its foundation. There are many cases in which the parties never go through with the definitive action after the court pronounced a decision in *référé*, either because the damage was avoided or because the party requesting it does not follow up with an action because she feel that she can't win at trial. There are also a few situations in which the plaintiff has an interest only in the preventive and expedient remedy.<sup>245</sup>

Having lost some its urgent and provisional nature, even though theoretically only in cases of exception, the procedure of *référé* has become a promising area where prevention might blossom further within the French legal system. Over the past few decades, the jurisprudence

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<sup>238</sup> Xavier Vuitton, *Référés. Instance. Procédure*, in JURISCLASSEUR. PROCÉDURE CIVILE, Fasc. 472, at nr. 1.

<sup>239</sup> *Id.* at nr. 45.

<sup>240</sup> NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 485 (2) (Fr.).

<sup>241</sup> Initially only the *Tribunal de Grande Instance* had jurisdiction for decisions made in *référé*, but the procedure was later made available to all courts. Moréteau, *supra* note 235, at 4.

<sup>242</sup> *Id.* at 10-11.

<sup>243</sup> NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 809 (1) (Fr.).

<sup>244</sup> NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 809 (2) (Fr.).

<sup>245</sup> One could imagine, for instance, that a celebrity who did not want some photographs to be published might not want to take the case to trial after the publication is made, because it would attract even more attention to the publication in question.



demonstrated the efficiency of this remedy. Prevention can be obtained through this mechanism in various areas, like protection of privacy,<sup>246</sup> image rights,<sup>247</sup> unfair competition,<sup>248</sup> or defamation,<sup>249</sup> etc.

Another procedural mechanism used for preventive purposes is the declaratory action (*l'action déclaratoire*). Actions are declaratory when their purpose is to obtain a judicial declaration of the existence or non-existence of facts which produce juridical effects, or the legality or illegality of an act, without having the benefit of enforcing justice through any coercive mechanism.<sup>250</sup>

Declaratory judgments have been created by jurisprudence. There is no article in the Code of Civil Procedure regulating this type of action in general, but some articles describe particular applications of declaratory judgments [for example art. 285 (2) and 296 of the French Code of Civil Procedure, and article L. 615-9 from the Code of Intellectual Property].<sup>251</sup>

A person seeking declaratory judgment in a French court must prove, like in all other actions in justice, that her claim is based on a legitimate and serious interest. French courts have made it very clear that a plaintiff cannot demand a declaratory judgment every time he is unsure whether or not an act or fact is illegal.<sup>252</sup> However, it would be hard to argue that a plaintiff does not have an interest in cases where actual harm did not yet occur, but it would be very probable to happen, unless the defendant is made aware of the illegality of his actions or the legality of the

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<sup>246</sup> Cour d'appel [CA][regional court of appeal] Toulouse, January 15, 1991, D. 1991 Jur. 600 (note Jacques Ravanas).

<sup>247</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2e civ., July 12, 1966, D. 1967 Jur. 181 (note Pierre Mimin).

<sup>248</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2e civ., March 9, 1978, JCP 1978, IV, 152.

<sup>249</sup> Cour d'appel [CA][regional court of appeal] Paris, October 24, 1991, D. 1992 Jur. 244 (note Charles Debbasch).

<sup>250</sup> HENRY SOLUS & ROGER PERROT, 1 DROIT JUDICIAIRE PRIVÉ 209-10 (Sirey 1961).

<sup>251</sup> Yvon Desdevises, *Action en justice. Recevabilité. Conditions subjectives. Intérêt*, in JURISCLASSEUR. PROCÉDURE CIVILE, Fasc. 126-2, at nr. 61 (last updated February 2012).

<sup>252</sup> Cour d'appel [CA][regional court of appeal] Grenoble, November 16, 1949, RTD civ. 1950, at 221, 222 (obs. Pierre Hebraud & Pierre Raynaud); Cour de Cassation [Cass.][supreme court for judicial matters] soc., August 4, 1952, RTD civ. 1953, at 370, 371 (obs. Pierre Hebraud & Pierre Raynaud).

plaintiff's actions. Ex-ante declaratory judgments are not favored in French law. The fear is that declaratory judgments operating ex-ante will create situations where the judge is asked for a decision even though there is no actual controversy, the petitioner seeking legal advice or trying to obtain the judicial stamp in order to legitimize an activity and avoid future liability.<sup>253</sup>

#### 4. The problem of private preventive expenses

In French law, preventive remedies are generally dependent upon an exercise of authority, and the consequence of such exercise of authority is the *imposition* of preventive measures. As a rule, courts have the central role in the administration of preventive measures.

French law does not generally recognize self-help as a remedy,<sup>254</sup> and that is why preventive remedies cannot be either private, or recognitive.<sup>255</sup>

That being said, this does not mean that private persons are just supposed to stay idle in the face of danger and only act with the approval of the state. Every person is entitled to a proportional defense when facing threats of danger, and this translates into doctrines like self-defense or necessity. Although recognized as valid private means of protecting oneself from injury, self-defense and necessity are not seen as *remedies*. They are merely defenses (*causes de justification*) in tort actions.<sup>256</sup> As a rule, an actor will not be held liable in tort in case of a

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<sup>253</sup> SOLLUS & PERROT, *supra* note 250, at 210. Hebraud & Raynaud, *supra* note 252, at 371.

<sup>254</sup> This is based on the idea that a private person cannot take justice into his own hands. There are, however, cases when private remedies are recognized, but these cases must be seen as very exceptional. Probably one of the most notorious civilian examples is the *exceptio non adimpleti contractus* (the exception of non-performance), by virtue of which one party in a synallagmatic contract can withhold performance of an obligation if the other party does not perform its own obligation which is due.

<sup>255</sup> This means that the mere fact that a court recognizes the legality of a private act which is preventive by nature, does not make that act a preventive remedy.

<sup>256</sup> For a presentation *in extenso* of their legal regime see VINEY & JOURDAIN, *supra* note 64, at 570-82.

necessary and proportional exercise of self-defense,<sup>257</sup> or in cases where he acts out of necessity.<sup>258</sup>

A strong argument can be made for going even further. Not only can an actor defend himself in the face of immediate danger and avoid liability for doing so, through the defenses of self-help and necessity; in cases where no other reasonable alternative exists he may also protect his interests by taking on his own initiative preventive steps, and, as a consequence, have an action in order to be compensated for the expenses incurred by taking these preventive measures.

French jurisprudence is starting to recognize this possibility, but the cases are confusing and contradictory. The two chambers of the Court of Cassation seem to be divided on this issue.

The First Chamber of the Court of Cassation was first to decide the problem of compensating preventive expenses in 2006.<sup>259</sup> The case was brought by a heart patient who had decided to remove at his own cost a pacemaker which ran the risk of being defective.<sup>260</sup> The model he had implanted proved to cause problems in the past, patients having died or suffered severe heart injury because a wire connecting an articular probe to the peacemaker broke.<sup>261</sup> Because of these problems, the company decided to stop marketing the model and recommended that heart patients be subject to more frequent check-ups.<sup>262</sup> A number of patients, including the plaintiff, could not live with the constant fear of such an accident and decided to remove, at their own cost, the pacemaker, and subsequently filed claims in order to recover their costs.<sup>263</sup> Some judges from the Appellate Court in Lyon had ruled that compensation should be granted, while

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<sup>257</sup> Also the aggression must be imminent and unjust. *Id.* at 571-572.

<sup>258</sup> *Id.* at 580. However, the victim can in such cases obtain compensation if she can rely on a cause of action which is not based on fault, or through the mechanism of unjustified enrichment. *Id.* at 581.

<sup>259</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., December 19, 2006, RTD civ. 2007, at 352 (Obs. Patrice Jourdain); JCP 2007, II, 10052 (Note Sophie Hocquet-Berg); Olivier Moréteau, *France* (report) in EUROPEAN TORT LAW 2007, at 282 (Helmut Koziol & Barbara C. Steininger eds., Springer 2008).

<sup>260</sup> Moréteau, *supra* note 259, at 282.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Jourdain, *supra* note 259, at 352.

others have dismissed such claims.<sup>264</sup> The case that reached the Court of Cassation was one of those where compensation was not allowed by the Court of Appeals.<sup>265</sup> The Court of Cassation, on the one side, upheld the judgment on the issue of compensating the expenses incurred as a consequence of removing the pacemakers, but remanded the decision because the appellate court did not offer compensation for the non-pecuniary damage suffered by the plaintiff, caused by the anxiety of having the defective probe implanted.<sup>266</sup> The reactions to this decision within French legal doctrine were critical. Some authors argued that the decision could not stand because there was no illicit act (there was no *fait générateur*),<sup>267</sup> while others have been critical because the court should have analyzed the issue as one of causation and not as one pertaining to the damage element.<sup>268</sup> The second line of arguments criticizing this opinion seems to be more compelling.<sup>269</sup> The Court of Cassation refused to compensate the plaintiff because the damage he invoked was merely hypothetical, and not a damage which was certain. The Court of Cassation lost sight of the facts of the case and confused one set of damages with another. To some extent, this case did involve at one point damages which were hypothetical, not materialized, and not certain to occur in the future. The risk of such damages existed prior to the second medical intervention, when the pacemakers were taken out. However, no one could possibly argue that such damage did not exist at the time of the trial. The damages sought by the plaintiff were neither future, nor hypothetical, and definitely not uncertain. In order to remove the pacemakers,

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<sup>264</sup> *Id.*

<sup>265</sup> The decision of the Court of Appeals reversed the decision reached by the court of first instance (Le Tribunal de Grande Instance), where the plaintiff had won. Moréteau, *supra* note 259, at 282.

<sup>266</sup> Jourdain, *supra* note 259, at 353.

<sup>267</sup> Sophie Hocquet-Berg, *supra* note 259, at 29-30.

<sup>268</sup> Jourdain, *supra* note 259; Moréteau, *supra* note 259.

<sup>269</sup> In this author's opinion, the arguments made for the idea that there was no *fait générateur* do not convince. See Sophie Hocquet-Berg, *supra* note 259, at 29-30. The *ex post* determination that the pace-makers were intact at extraction does not change the fact that at the moment of extraction they were unreasonably dangerous because of defective design and the company producing them was pulling them off the market for that reason. An interpretation going the other way would require the patients implanted with the pace-maker to wait until the pace-maker stops functioning (at which point they would almost certainly die) in order to prove the defect.

the plaintiffs suffered actual harm with the subsequent surgery and had to pay for the procedure. Saying that such damage is hypothetical and uncertain is tantamount to denying the facts and is insulting to the victims. Surgery is both costly and painful. The legal problem in this case has nothing to do with the characteristics of the damage element. The real problem is one of causation.<sup>270</sup> French law analyzes causation as a straight line, which connects the *fait générateur* (generating act) with the damage, and the intervention of the victim (the victim's own acts) may break the chain of causation, or at least lead to partial exoneration.<sup>271</sup> The key to solving this case was therefore not the characteristics of the damage, but the existence or non-existence of causation. An act of the victim which is arbitrary, capricious, or abnormal, in the sense that it is not a normal consequence of the *fait générateur*, would break the chain of causation, whereas if the victim acted reasonably under the circumstances, the causation link is not affected.<sup>272</sup> Commenting on the reasonableness of the heart patients when confronted with the risk of having their pacemakers fail, Patrice Jourdain stated that “common sense would dictate not to make the victims wait until they are dead in order to invoke a damage which is certain”.<sup>273</sup>

The consequence of this first decision was that it did not allow the victim to recover the preventive expenses incurred.

Just two years later, the Court of Cassation, this time through the second chamber, reached the exact opposite conclusion.<sup>274</sup> In this case, the plaintiff asked for compensation after incurring expenses to prevent the risk of landslide, after the defendant had done works on his

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<sup>270</sup> Jourdain, *supra* note 259, at 353.

<sup>271</sup> VINEY, *supra* note 211, at 269, 280-82, 325 et seq.

<sup>272</sup> Jourdain, *supra* note 259, at 353.

<sup>273</sup> *Id.* at 354.

<sup>274</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2e Civ., 15 May 2008, RTD civ. 2008, at 679 (obs. Patrice Jourdain); JCP 2008, I, 186 (obs. Philippe Stoffel-Munck); D. 2008 Panorama 2900 (obs. Philippe Brun); Olivier Moréteau, *France* (report) in EUROPEAN TORT LAW 2008, at 280 (Helmut Koziol & Barbara C. Steininger eds., Springer 2009).

property which endangered plaintiff's property.<sup>275</sup> Both the Court of Appeals and the Court of Cassation decided in this case that the plaintiff could recover his expenses.<sup>276</sup>

The latter decision brings much promise for the future, and might mark a point from which the Court of Cassation began recognizing preventive expenses as compensable damage.<sup>277</sup> For our purposes, the issues described in this chapter are functionally equivalent to the common law remedy of self-help, which is indeed seen as a remedy.<sup>278</sup> However, it should be emphasized that the cases presented above, while promoting the preventive *function* of tort law, are not cases of preventive remedies, because the victims in this case did not seek to prevent future loss. The purpose of the victims' actions in court was to obtain compensation for past expenses, and not a preventive remedy. The idea of prevention or the preventive function of tort law is not, however, out of place in such cases, because one of the effects of satisfying the victims' claim for compensation is to indirectly recognize the reasonability of their preventive intervention. Preventive intervention is, in such cases, in the hands of a private person, other than the one generating the risk, and not in the hand of courts of justice. The above-mentioned private person engages both in risk-assessment and the decision-making process. The court analyzes ex-post the decision reached, and either will recognize it as reasonable, thus allowing compensation, or sanction it for being arbitrary, or wrongful, and refuse compensation.

Besides these cases which have clearly been analyzed as part of the law of torts in the French literature and in jurisprudence, cases applying measures that would qualify as self-help in the common law can be found within the ambit of property law. The French civil code allows, for instance, the owner of a parcel of land to cut the roots, brambles and brushwood sticking out

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<sup>275</sup> Moréteau, *supra* note 274, at 280.

<sup>276</sup> *Id.* at 281.

<sup>277</sup> Both the Catala and the Terré projects for reform, as well as the Principles of European Tort Law, contain provisions which would codify this solution. *See supra* notes 5 & 6.

<sup>278</sup> *See infra* Part C.3.

from an adjacent lot onto his property.<sup>279</sup> In the French tradition, however, this is not seen as self-help. The cited text is situated in the code in a chapter discussing “legal servitudes”. The law explicitly recognizes this right for the owner, and when such authorization from the law is lacking, the recourse can only be judicial in order to obtain satisfaction.<sup>280</sup>

### **C. Preventive remedies in English and American Law**

#### 1. A general overview

The arrangement of the remedies provided in the previous chapter might seem odd to the French civilian, yet very familiar to a common law lawyer. French scholars dealing with substantive law tend to focus on rights, causes of action and the general elements of civil liability. That is why many of the remedies are not discussed in the law of torts. *Référé* for instance, one of the most important preventive remedies, is left to the realm of civil procedure. Common law scholarship, on the other hand, attentive to the needs of practitioners and abhorrent of classificatory rigidity, has a broader way of looking at remedies in the law of torts. Although, as we have already seen, compensation plays a central role, just like in the civil law, the common law is not oblivious to other remedies and their functions.

There is a long history of express recognition of preventive remedies in the common law. Both courts of equity and courts of common law have been applying preventive remedies from early on. There are accounts of preventive measures ordered through the writs *Quia Timet, De Minis*, or writs of prohibition, which date to as early as the 13th century.<sup>281</sup>

This tradition of prevention was later transplanted and continued in the United States. In the 19th century, Christopher Columbus Langdell described equitable relief as primarily

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<sup>279</sup> CODE CIVIL [C. civ.] art. 673 (Fr.).

<sup>280</sup> For instance, in order to cut overhanging branches of trees from the adjacent lot, the owner must introduce an action in court. *Id.* Contrast with *infra* note 418.

<sup>281</sup> THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 680-81 (Liberty Fund 2010).

preventive in American law.<sup>282</sup> The law of equitable remedies is highly developed in the common law family, and although the law of torts has been traditionally a common law subject (where the only remedies at law were in the form of damages or self-help), through the use of injunctions, a substantial part of the law developed by equity found its way into the field of torts.<sup>283</sup>

Because of the attention received in legal scholarship and court opinions, and because of the effectiveness of these remedies in their actual application to daily disputes, the preventive remedies of the common law form an invaluable repository for the study of prevention in the law of torts. Whether equitable, or legal, common law remedies have been tested by time, and have proven to be highly effective means of protecting legal rights. From this point of view, it can be said that remedies from common law systems are more developed and more effective than their civilian counterparts. As proof for this assertion, the most staggering display of effectiveness is noticeable in the area of *enforcement* of injunctions in common law jurisdictions. The party refusing to obey to the court order will be held in contempt, and can be imprisoned for this reason.<sup>284</sup> In the civil law, the injunctive order can be put into execution only through ordinary means of enforcement, and when such enforcement proceedings fail, the non-performing party is usually not liable for any criminal offense.<sup>285</sup>

However, the solutions and the methodology employed by courts of equity, particularly in regard to injunctive relief, grew out of a way of thinking that has many points of contact with the civilian tradition.

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<sup>282</sup> Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction*, 1 Harv. L. Rev. 111, 111 (1887).

<sup>283</sup> WARREN A. SAVEY, *COGITATIONS ON TORTS* 22 (University of Nebraska Press 1954).

<sup>284</sup> DAN B. DOBBS, *REMEDIES. DAMAGES-EQUITY-RESTITUTION* 101 (West 1973); Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 305. Also, *see* Magistrates' Courts Act 1980 § 63 (1) (b) (Eng.), available at <http://www.legislation.gov.uk/ukpga/1980/43> (last visited May 16, 2013); Contempt of Court Act 1981 § 14 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1981/49> (last visited May 16, 2013).

<sup>285</sup> The exceptions to this rule are very limited in number and narrow in scope. *See* CODE PÉNAL [C. PÉN] art. 434-25 (Fr.) (*discrédit sur une décision juridictionnelle*).



First, the case-by-case approach and the discretionary nature of injunctions in the common law hide a very intricate classificatory system where injunctions are classified in a civilian manner according to their object (prohibitory or mandatory), their function (preventive or reparative) or the nature of the court order (permanent or interlocutory). The legal effects given to an injunction and the requirements for its application depend on the category where it fits.

In addition, doctrines which seem to have much in common with the civilian concepts of good faith<sup>286</sup> or *nemo auditur propriam suam turpitudinem allegans*,<sup>287</sup> balancing rights or balancing the equities, or proportionality tests, permeate the body of law and the doctrines created by equitable remedies.

Laches, for instance, is a reason to refuse an injunction,<sup>288</sup> or at least a factor to be taken under consideration, which can be used by the defendant when the plaintiff brings the action for injunctive relief with unreasonable delay, and the delay has operated to the prejudice of the defendant or has weakened the court's facility of administration.<sup>289</sup> This defense shows that the common law encourages taking preventive steps, through judicial proceedings, at an early stage,<sup>290</sup> and sanctions plaintiffs who act unreasonably or in bad faith. The good faith element is central to laches, as shown not only by the situations when this defense is applicable (or when this factor weighs the balance in favor of dismissing the claim), but also when it is not. English

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<sup>286</sup> For a general overview on the concept of good faith and its applications in the French civil law, see Philippe le Tourneau & Matthieu Poumarède, *Bonne foi* (Published as part of the RÉPERTOIRE DE DROIT CIVIL, Dalloz, last updated 2012).

<sup>287</sup> On good faith and anti-opportunism in relation to preventive remedies, particularly injunctions, see Mark P. Gergen et. al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203, 233, 237-49 (2012).

<sup>288</sup> Oliphant, *Injunctions and Other Remedies*, supra note 170, at 308.

<sup>289</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 576 (§ 939, comment a.).

<sup>290</sup> Not taking preventive measures early on might be prejudicial to the defendant or might make the administration of justice more difficult (documents might be lost, witnesses might forget their original impressions, etc.). *Id* at 576-77.

courts have decided that a claimant will not be penalized when the delay was caused by negotiations which were continued in order to settle the case, or where the plaintiff did not initially have sufficient information in order to demonstrate that the defendant was responsible for his injury.<sup>291</sup>

The defense of unclean hands, or “the doctrine of clean hands”, also has overtones of a “good faith principle”, or another more obscure, yet very old civilian principle: *nemo auditur propriam turpitudinem allegans*. This doctrine, of “unclean hands”, will bar the defendant from obtaining his remedy when misconduct on his part makes the issuance of the injunction inappropriate in the eyes of the court.<sup>292</sup> Cases where this doctrine was used involved plaintiffs who deliberately misled the defendant or the court, orchestrated fraud, or used deplorable means to protect their interests.<sup>293</sup>

In addition, the whole body of law regarding preventive remedies, which is not limited to injunctions, works in accordance with an overriding general principle, which can be named “the principle of proportionality”. The cases where preventive measures are sought are usually decided on the basis of a proportionality calculation which operates on at least three levels.

First of all, the court must determine if preventive measures are at all required, and this means that the court measures the interests of both parties and the result of this balancing test determines if the coercive apparatus of the state should intervene preventively. It is not possible to prevent all harm, and not all risks of harm are unacceptable for society. Some acts are so unpredictable that any preventive measure is futile. Not everything can be anticipated. A large number of negligence cases fall into this category: where the sole cause of an accident is the inadvertent act of a person, there is not much to be done by way of prevention. Unless the

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<sup>291</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 308.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 309. *See also* 4 RESTATEMENT OF THE LAW. TORTS 2d, at 576 (§ 940, comment b.).

underlying case of the accident is constant, like some company policy, the mere accidental occurrence is hard to anticipate. Also, torts which have a short temporal span, most of the time, cannot be prevented (there might not be any time between the introduction of the risk and the occurrence of damage to take a preventive measure because damage occurred immediately after the risk was generated). Other preventive remedies will not be issued because of their paralyzing effects. This is particularly true in cases where the acts complained of by the plaintiff produce benefits which clearly outweigh the losses. A large number of cases of strict liability fall into this category. If an act or activity is valuable to society as a whole, policy considerations demand that it be allowed to run its course and prevention will be allowed only exceptionally.<sup>294</sup> However, when damages have already been caused, the one making profits out of the respective act or activity is usually liable for damages. The intervention in such cases is only ex-post.

Second, the selection of the remedy, and the intensity of the preventive action required by the court is also dependent on proportionality. The more serious the consequences and the more probable the occurrence of harm in the future, the more intense the remedy will be. Some activities need to be banned for good (for instance a trespass), others just limited to acceptable limits (especially applicable in cases of nuisance). For some, the court can only order provisional,<sup>295</sup> partial,<sup>296</sup> conditional,<sup>297</sup> or experimental relief,<sup>298</sup> or delay a permanent remedy and simply order new evidence to be produced (especially scientific studies).<sup>299</sup> Also, preventive remedies might be suspended.<sup>300</sup> Finally, in some cases a simple declaration from the court will

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<sup>294</sup> See *supra* p. 45 and note 170.

<sup>295</sup> Interim (interlocutory) injunctions. 4 RESTATEMENT OF THE LAW. TORTS 2d, at 597 (§ 943, comment h.).

<sup>296</sup> *Id.* at 593 (§ 943, comment c.).

<sup>297</sup> *Id.* at 594-95 (§ 943, comments d. & e.).

<sup>298</sup> *Id.* at 585 (§ 941, comment e.), 592 (§ 943, comment b.).

<sup>299</sup> This might prove to be a safe step in situations where there is a high degree of uncertainty as to the facts and their future effects. In such cases, courts will have to balance the scope of reducing uncertainty with that of protecting the rights or interests in question, and avoid either being over-cautious or being too hasty in making the decision.

<sup>300</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 304.

suffice to end a conflict before any harm ensues (this is the typical case for a declaration of right proceeding).

Finally, there is a proportion to be found in the application of preventive remedies in time. Preventive remedies which are far removed from the moment when the damage is likely to occur tend to be less energetic, experimental, or provisional, whereas proximity to the moment when negative consequences occur (or urgency) empowers the court to take more energetic measures.

The next section opens the discussion with the most effective preventive remedies—injunctions. Subsequent sections address alternative, less energetic measures, like self-help and declaratory judgments. The many similarities between the English and American legal systems permit the use of the English model as a default, and emphasize, where necessary, the solutions where the American states have departed from the English common law.

The outline of common law remedies from this chapter is intended to be in approximate symmetry with the former, which analyzes similar mechanisms from the perspective of French law.

## 2. Injunctions

### a. Injunctions in general

Injunctions are defined as court orders “prohibiting a person from doing something or requiring a person to do something.”<sup>301</sup>

Injunctions are commonly referred to as equitable remedies, because they have been developed by the chancellor in equity proceedings. In fact, for a long time, these remedies were

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<sup>301</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 297. Professor Dobbs defined injunctions as *in personam* orders “directing the defendant to act, or to refrain from acting in a specified way”. DOBBS, *supra* note 284, at 105. Black’s Law Dictionary also defines injunctions along the same lines as court orders “commanding or preventing an action.” BLACK’S LAW DICTIONARY, *supra* note 33, at 800.

allowed only in equitable proceedings, and courts of common law did not have the power to grant equitable relief until 1854.<sup>302</sup> Nowadays, the power of the High Court of England to grant injunctive relief is encapsulated in section 37 (1) of the Supreme Court Act of 1981, which offers this remedy to the High Court without any restraint (“in all cases in which it appears to the court to be just and convenient to do so”).<sup>303</sup> However, a county court can only issue an injunction if it is subordinate to a claim for damages.<sup>304</sup> In the United States, most states have merged common law and equity courts, and therefore ordinary courts can grant the full range of remedies available either from equity or common law.<sup>305</sup> A few states have kept the division between common law courts and equity courts until today, and in such jurisdictions, many of the distinctions and requirements imposed before the merger of common law and equity in England still apply.<sup>306</sup>

Although the procedural distinction between common law and equity is now history, much of the substantial law that governs injunctions still has the equitable imprint. This is noticeable when we analyze the requirements of injunctions; the discretionary nature of the remedy and its subsidiary application in relation to other remedies available, especially common

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<sup>302</sup> The Common Law Procedure Act of 1854 gave the common law courts limited power to grant injunctions, besides the usual remedy, which was in the form of damages; but after the merger of common law and equity courts in 1875, all divisions of the High Court were allowed to grant injunctive relief. Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 297.

<sup>303</sup> *Id.*

<sup>304</sup> *The King v. Cheshire County Court Judge and United Society of Boilermakers*, [1921] 2 K.B. 694 (Eng.).

<sup>305</sup> That does not mean that courts are free to select the remedy in every case based on their whim. The merger between law and equity did not change the fact that remedies at law are still preferred by courts and that, as a rule, most equitable remedies will only be available if the remedy at law is inadequate. DOBBS, *supra* note 284, at 27, 66-67. However, according to the Second Restatement of Torts, in jurisdictions where law and equity have merged, the court “is enabled, if pleading and practice requirements have been met, to award to the plaintiff in one action all the various forms of relief to which the facts entitle him.” 4 RESTATEMENT OF THE LAW. TORTS 2d, at 598 (Introductory Note to Ch. 48).

<sup>306</sup> The states of Delaware, Mississippi and Tennessee still preserve the division between equity courts and courts deciding matters at law. Russell Fowler, *A History of Chancery and Its Equity from Medieval England to Today's Tennessee*, Tenn. B.J., February 2012, at 20. *See also* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819 (1993); Frederick P. Santarelli, *Preliminary Injunctions in Delaware: The Need for A Clearer Standard*, 13 DEL. J. CORP. L. 107 (1988).

law remedies, are not mere ghosts from the past, and they still characterize injunctive relief in almost all common law jurisdictions. While English law is still very close to the traditional approach, American law has been making a strong effort to move the law of remedies away from rigid old tests, and the requirements have been largely reshaped in order to meet the requirements of justice in a unified court system.<sup>307</sup>

It must be noted that injunctions are applied not only in matters regarding tort law. They are issued in a variety of situations, covering all areas of the law. Injunctions have been used, for instance, in constitutional law in order to enjoin public officers to enforce an unconstitutional statute; in the law of property in order to solve questions regarding waste or easements; or in disputes regarding wrongful trade practices, infringement of patents, copyrights, trademarks, labor disputes, etc.<sup>308</sup>

Injunctions are remedies of general applicability in the law of torts.<sup>309</sup> That means that, as a rule, a remedy in the form of injunction is available for every category of torts,<sup>310</sup> especially when there is a threat of repetition or continuation of the tort.<sup>311</sup> Injunctions are available when a legal right has been violated, even in the absence of any proof of damage.<sup>312</sup> Moreover, in *Quia Timet* form, injunctions are available even when there is a mere threat of harm and a right has not been violated *stricto sensu*, but there is a high probability that it will be in the future.<sup>313</sup> Looking at how injunctions operate, the general applicability of injunctive relief is tied to the

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<sup>307</sup> See 4 RESTATEMENT OF THE LAW. TORTS 2d, at 573-575 (§938, comments b. & c.).

<sup>308</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 557 (Scope note).

<sup>309</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 299.

<sup>310</sup> Torts such as trespass to land, impairment or loss of the support of land, pollution and diversion of waters, nuisance, wrongful interference with a business, and interference with personality rights, are very often subject of suit for injunctive relief. Other torts, however, are less frequently subject to suit for injunctive relief, like assault, battery, false imprisonment, negligence, misrepresentation, nondisclosure, malicious prosecution, or abuse of process. 4 RESTATEMENT OF THE LAW. TORTS 2d, at 557 (Scope note).

<sup>311</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 299.

<sup>312</sup> *Sevenoaks District Council v. Pattullo & Vinson Ltd.*, [1984] Ch. 211 (Eng.).

<sup>313</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 318.

infringement of rights and not the commission of a category or another of designated torts. This is proof that injunctive relief goes far beyond the scope of redressing wrongs and compensating victims when a wrong was committed. It is an indicator that the starting point in the law of torts is no longer the identification of a predetermined actionable category of wrongs. The law of torts begins with the more general goal of protecting rights and assuring the respect of legal duties.<sup>314</sup>

Traditionally, injunctions have been considered discretionary remedies.<sup>315</sup> This does not mean however that injunctions are left to the whim of judges,<sup>316</sup> and the administration of justice is arbitrary. Courts of equity have always been very careful in their decisions regarding injunctive relief, and have shown throughout history incredible self-restraint. Traditionally, this remedy was considered harsh and extraordinary, and could have only been issued when legal remedies were considered inadequate.<sup>317</sup> Today, even though the applicability of injunctions is much enlarged in scope, the conditions are still relatively restrictive and based on very solid principles. It is rather fascinating how common law jurisdictions managed to balance this cautious approach with the increasing demand in practice for injunctions, and have kept the remedy flexible enough in order to apply injunctions whenever the need arose.

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<sup>314</sup> See *supra* p. 19 and note 46. Also, see Langdell, *supra* note 282, at 111: “It is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights.”

<sup>315</sup> WINFIELD & JOLOWICZ, *supra* note 14, at 586; JONES, *supra* note 14, at 430; MARGARET BRAZIER, *THE LAW OF TORTS* 517 (9th ed., Butterworths 1993).

<sup>316</sup> The case law shows that the discretionary power did not lead to any type of severe abuse. The idea itself of discretionary power, as applied to equity, was criticized by John Selden in an often-cited and humorous paragraph: “Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. ‘Tis all one as if they should make the Standard for the measure we call a Foot, a Chancellor’s Foot; what an uncertain Measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: ‘Tis the same thing in the Chancellor’s Conscience.” JOHN SELDEN, *TABLE TALK. BEING THE DISCOURSES OF JOHN SELDEN* 43-44 (Israel Gollancz ed., J.M. Dent and Co. 1689), available as an e-book at [http://books.google.com/books?id=pB9IML8cKtkC&printsec=frontcover&hl=ro&source=gsb\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=pB9IML8cKtkC&printsec=frontcover&hl=ro&source=gsb_ge_summary_r&cad=0#v=onepage&q&f=false) (Last visited May 18, 2013).

<sup>317</sup> In the United States, in the 19th century, their domain was practically limited to infringement of property rights. 4 RESTATEMENT OF THE LAW. TORTS 2d, at 571(§ 937, comment a.).

The ingenuity behind keeping the law of injunctions flexible can be attributed to the rejection, by courts, of a check-list test for injunctive relief. The English have preferred to create flexible standards applicable to various categories of injunctions, and keep on analyzing the details on a case by case basis (for instance, the standard for a interlocutory and mandatory injunction is a lot higher than the standard for permanent and prohibitory injunction, but the final determination of the court might rest on just one or several factors which the court finds compelling either for granting the injunction or refusing it).<sup>318</sup>

American courts seem to favor a list of factors which ought to be taken into consideration *as a whole* in order to make a case for injunctive relief compelling, and on which the court decisions will be based, as opposed to English courts who tend to focus on the factor or factors with special incidence in the case which needs to be decided.<sup>319</sup>

The Second Restatement of Torts enumerates a list of factors which should be analyzed, as a whole, by courts when granting injunctions. These factors are:

- a) The nature of the interest to be protected;
- b) The relative adequacy to the plaintiff of injunction and of other remedies;
- c) Any unreasonable delay by the plaintiff in bringing suit;
- d) Any related misconduct on the part of the plaintiff;
- e) The relative hardship likely to result to defendant if an injunction is granted and to the plaintiff if it is denied;
- f) The interests of third persons and of the public; and

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<sup>318</sup> The key determination will vary from case to case. In some cases the most important facts relate to public policy (*e.g.*, *Parker v. Camden London Borough Council*, [1986] Ch. 162), in others the probability of harm might be crucial (*e.g.*, *Redland Bricks Ltd. V. Morris*, [1970] A.C. 652, at 665 (Lord Upjohn) (Eng.); *Att’y-Gen. v. Corp. of Manchester*, [1893] 2 Ch. 87, at 92 (Chitty J.)(Eng.)), or the imminence of harm (*Fletcher v. Bealey*, (1885) 28 Ch. D. 688, at 698 (Pearson J.)), etc.

<sup>319</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 565-566 (§ 936).



g) The practicability of framing and enforcing the order or judgment;<sup>320</sup>

A very interesting case applying both the general principles of equity and the factors test detailed by the Restatement is *Village of Wilsonville v. SCA Services, Inc.*, decided by the Supreme Court of Illinois.<sup>321</sup> In this case, the village of Wilsonville, joined later by Macoupin County and Macoupin County Farm Bureau, sought injunctive relief against SCA Services, a company operating a chemical waste disposal site neighboring the village.<sup>322</sup> The plaintiffs argued that the site constituted a public nuisance and a hazard to the health of the citizens of the village, the county, and the state.<sup>323</sup> The defendant brought the waste in from different clients and, after delivery in Wilsonville, tested the chemical waste and then deposited it in trenches.<sup>324</sup> 95% of all the waste was being kept in 55 gallon steel drums, while 5% was kept in double-wall paper bags.<sup>325</sup> Amongst the dangerous substances, the court enumerated solid cyanide, paint sludge, asbestos, pesticides, mercury, arsenic, and PCBs.<sup>326</sup> The record showed that the containers were in a poor shape and some were leaking during transport and on the site. The plaintiffs complained about the existing odors and the dust coming from the plant, as well as the danger of future harm due to infiltrations of toxic waste in the water supply and in the soil, because of high permeability of the soil<sup>327</sup> and because the site was located above an abandoned coal mine, which created a risk of pillar failure of the mine due to readjustment of stress.<sup>328</sup> The defendant took precautions against potential underground infiltrations by using 14 monitoring wells around the site in order to detect infiltrations, and tested the samples quarterly at a private

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<sup>320</sup> *Id.*

<sup>321</sup> *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824 (1981).

<sup>322</sup> *Id.* at 826-27.

<sup>323</sup> *Id.* at 827.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 828.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 827.

laboratory.<sup>329</sup> The Illinois Environmental Protection Agency (IEPA) conducted an inspection on the site, and granted an operational permit to the defendant.<sup>330</sup> Also, each transport of waste needed to be accompanied by a permit from the IEPA. In total, the IEPA granted 185 permits to the defendant before the trial commenced.<sup>331</sup>

The trial court decided in this case to grant both a mandatory and a prohibitory injunction, enjoining the defendant from operating the hazardous-waste landfill in the vicinity of the village and ordered the defendant to remove all the waste buried there and transport it to a different location, and then restore and reclaim the site.<sup>332</sup> The decision was upheld on appeal unanimously.<sup>333</sup>

The Illinois Supreme Court also affirmed in a lengthy and well-motivated decision. The court focused its arguments on a few of the factors from the restatement, but clearly had the whole factors test in mind, having cited both the Restatement Second of Torts and Prosser on multiple occasions.<sup>334</sup> The court focused its arguments on the existence of a nuisance, not only at present, but also prospectively,<sup>335</sup> making the remedy in this case both reparative and preventive. What makes this case very special is the fact that the preventive scope proved to be essential. The court noted that the present damages would not have warranted the issuance of such a drastic remedy, but the threat of future damage, added to the existing disturbance, made it permissible to order the complete removal of the waste site.<sup>336</sup> The standard used by the court in determining that a prospective nuisance existed was based only on a probability assessment—“a dangerous

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<sup>329</sup> *Id.* at 827-28.

<sup>330</sup> *Id.* at 828.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 827.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 834, 836, 842.

<sup>335</sup> *Id.* at 831.

<sup>336</sup> *Id.* at 833-34.

probability”.<sup>337</sup> The court also reviewed the balancing of equities factor which was emphasized by the trial court, and concluded that in this case the rights of the citizens who live nearby outweigh the interests of the defendant.<sup>338</sup> The court found that banning all waste activity in the area was reasonable under the circumstances, particularly because of the high probability of serious damage occurring.<sup>339</sup>

Finally, a very interesting issue discussed by the court in this case is the relevance of the inspection and the permits issued by the IEPA. In the American legal system, courts tend to defer to the administration when it comes to the establishment of standards for environmental pollution or health hazards. Whenever the United States Environmental Protection Agency (EPA) or state agencies like the IEPA issue an order which regulates the manner in which an activity is to be performed, or intervenes in order to prevent or repair the effects of an activity, injunctions which are incompatible with the administrative regulation will not be issued,<sup>340</sup> or the remedy will be tailored in order to assure both deference to the administration and protection of individual rights and interests.<sup>341</sup> In this case, the Supreme Court of Illinois argued very convincingly against

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<sup>337</sup> *Id.* at 836. “If a court can prevent any damage from occurring, it should do so”. *Id.* at 837. The concurring judge assigned his reasons in order to offer an alternative approach, which would take into consideration both the probability of future injury and the magnitude of the damage:

“ . . . I believe that there are situations where the harm that is potential is so devastating that equity should afford relief even though the possibility of the harmful result occurring is uncertain and contingent. . . . If the harm that may result is severe, a lesser possibility of it occurring should be required to support injunctive relief. Conversely, if the potential harm is less severe, a greater possibility that it will happen should be required .” *Id.* at 842 (Ryan, J., concurring).

<sup>338</sup> *Id.* at 835.

<sup>339</sup> *Id.* at 838.

<sup>340</sup> At the federal level, this is actually a problem of federal preemption, and not just based on the general deference which is due to the administration because it is in a better decision-making position. *See Feikema v. Texaco Inc.*, 16 F.3d 1408, 1416 (“we hold that when the EPA, acting within valid statutory authority of the RCRA and not arbitrarily, enters into a consent order, that order will also preempt conflicting state regulation, including a federal court order based on state common law”).

<sup>341</sup> This was the case in *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 1975). The court refused to grant an injunction in this nuisance case, because the activity (shredding junked automobiles) respected all the requirements imposed by the administration, and there was no overarching public policy argument for granting the injunction:

“the problem of zoning is a local one, governed by local law; it must be solved in local perspective. The appropriate local authority has zoned the property specifically for shredder use;

deferring to the IEPA in this case based on the particular facts of this case. The IEPA relied on studies conducted by the defendant when issuing the permits,<sup>342</sup> and studies presented at trial, even by the expert from the defendant showed that the permeability of the soil was greater than the minimum standard imposed the IEPA.<sup>343</sup> The plaintiffs in this case were able to effectively prove that the IEPA was in error when issuing these permits, and that the actual scientific data shows a higher risk to the environment than what the IEPA relied on when issuing the permits. The total record consisted of more than 13,000 pages,<sup>344</sup> which proves just how difficult it is to build a case in court in order to prove that a state agency's determination was erroneous. This decision is a wonderful example of efficient administration of justice, culminating with a well written opinion. Continental lawyers most probably would be in awe in reading that the duration of the trial, considering the lengthy record, was only 104 days.<sup>345</sup>

The days of flexible remedies might, however, come to an end soon. A recent Supreme Court decision in the area of patent law might well challenge for the future settled law both at Federal and State level,<sup>346</sup> with the undesirable effect of replacing the very flexible test from the Restatement with an apparently more restrictive check-lists or elements test.

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and appellant has been issued a permit to so use the property. After careful and continued tests by reputable experts as well as public officials, appellant's operation has met all the required standards. Under these circumstances . . . the appellant cannot be prevented from continuing to engage in the operation of its shredding." *Id.* at 1125.

The court however pointed out that if some irregularities are found in the way the activity is run, a reasonable period should be given for the company to redress all the defects which do not generate imminent or substantial harm, and also damages may be awarded if the activity caused any damage to property. *Id.*

<sup>342</sup> 426 N.E.2d at 828.

<sup>343</sup> *Id.* at 829-830, 832.

<sup>344</sup> *Id.* at 827.

<sup>345</sup> *Id.* at 841.

<sup>346</sup> Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012).

In *eBay Inc. v. MercExchange*,<sup>347</sup> the Supreme Court of the United States, while affirming that it is upholding “traditional principles”,<sup>348</sup> created a “four-prong”<sup>349</sup> test, according to which the movant in an injunction case must show:

- a) That he has suffered irreparable injury;
- b) That remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- c) That, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and
- d) That the public interest would not be disserved by a permanent injunction.<sup>350</sup>

This Supreme Court decision has been criticized elsewhere for (1) the redundant mention of both irreparable injury and inadequacy of damages, (2) the elimination or at least the reduction of other factors to second-class status, and (3) for the substitution of a factor-based test with a check-list test.<sup>351</sup> The danger is not just that of sweeping aside settled law, in the name of tradition.<sup>352</sup> This proves to actually be a case of innovation which threatens to bring the law of injunctions back to medieval times, when the key determination in such cases was whether or not the remedy at law (damages) was available and adequate. Irreparable injury, as well as availability and adequacy of remedies at law are terms of art which were replaced by the Second Restatement of Torts with a flexible test, coupled with a determination of “the relative adequacy”<sup>353</sup> of the injunction. This shift was based on strong arguments and backed up by both

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<sup>347</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>348</sup> *Id.* at 392-94.

<sup>349</sup> Gergen et al., *supra* note 346, at 214. The court calls it a “four-factor test”. *eBay*, 547 U.S. at 391. However, the way this test is phrased makes it seem more like an element-based test, where the conditions are cumulative: “A plaintiff *must demonstrate* . . . .” *Id.* (emphasis added).

<sup>350</sup> *Id.*

<sup>351</sup> Gergen et al., *supra* note 346, at 207-08.

<sup>352</sup> *Id.*

<sup>353</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, §§ 944-950.

older and modern case law.<sup>354</sup> The older formulas were restraining courts from issuing injunctions in cases where injunctions were needed and adequate in relation to all other remedies (not just damages), for no other reason than the respect of tradition.<sup>355</sup> After the merger of law and equity, the lack of tension between common law and equity jurisdiction disappeared. Because the same court has the power to impose any remedy, a medium was created where the law could rationally reconcile any conflict between the multiple remedies (which previously existed separately) in order to best serve the citizens and protect their rights and interests.

Curiously, the Court itself did not believe it made any change in the law and has explicitly said that equitable remedies are still left at the discretion of district courts.<sup>356</sup> However, a great number of lower federal courts have applied the test in order to operate changes in other areas of the law, like government regulation, constitutional law, state contract law, and expanded it for other cases of intellectual property, and even state tort law.<sup>357</sup>

#### b. Taxonomy of injunctions

Besides general principles, the taxonomy of injunctions also influences the applicable legal regime. Courts generally distinguish between permanent and interim injunctions (a), and also mandatory and prohibitory injunctions (b). Aside from these general classifications, there is also a particular type of injunction which is exclusively preventive in nature: the *Quia Timet* injunction (c).

#### a) Permanent and interim injunctions<sup>358</sup>

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<sup>354</sup> *Id.* at 560-61 (§933, comment a.), 573-76 (§938, comments b. & c.).

<sup>355</sup> *Id.* at 575 (§938, comment c.).

<sup>356</sup> “We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity. . . .” *eBay*, 547 U.S. at 394 (2006).

<sup>357</sup> Gergen et al., *supra* note 346, at 205.

<sup>358</sup> Some authors add temporary restraining orders to this category. *See* DOBBS, *supra* note 284, at 106. We will not put any emphasis on this category, which is very similar to interim injunctions, only it is *ex parte* (the defendant does not have notice of the proceedings), and has the same general requirements as interim injunctions, only the

Injunctions are named permanent when they are issued at the conclusion of a trial upon the merits.<sup>359</sup> This type of injunction is named permanent because the decision of the court is definitive, as opposed to interim (also called preliminary, interlocutory or temporary) injunctions which are temporary in the sense that they will be revised by the court after a full hearing.<sup>360</sup> It is said that permanent injunctions usually have a perpetual effect.<sup>361</sup> While this is generally true, it is not the factor that characterizes the injunction as permanent. In some situations, a permanent injunction can be limited in time, or conditional,<sup>362</sup> and even a potentially perpetual injunction may be subject to an application by the person bound by it to modify its terms or discharge it.<sup>363</sup> Permanent injunctions are simply intended to be a final solution to the dispute.<sup>364</sup> Their effects can be temporary, and need not operate *ad infinitum*.

Since permanent injunctions are decided after a full hearing, the court can weigh all the factors according to the totality of evidence and make an informed decision after careful consideration. The factors taken into consideration are all intended to help the court answer an adequacy question: is the injunction sought an adequate remedy to the case at hand? This adequacy determination is today basically identical to the three manifestations of the principle of proportionality, described above,<sup>365</sup> at least in England<sup>366</sup> and American jurisdictions following

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plaintiff must also prove that his need for relief is so urgent that notice to the defendant and an adversary hearing are impracticable. *Id.* at 107.

<sup>359</sup> WINFIELD & JOLOWICZ, *supra* note 14, at 587.

<sup>360</sup> Interim injunctions can also be revised at any time the court considers it necessary before the final decision is reached. Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 319.

<sup>361</sup> *Id.*

<sup>362</sup> *Supra* notes 295, 296, 297 & 298.

<sup>363</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 319.

<sup>364</sup> DOBBS, *supra* note 284, at 106.

<sup>365</sup> *Supra* pp. 73-75.

<sup>366</sup> Although in English law the proportionality analysis is not obvious looking at cases individually, it can be extracted from the whole body of law developed in equity. The Chancellor and then the courts have always tried to give the best response to the facts that were presented in front of them, and the discretion allowed in equity allowed for great flexibility in adapting the remedy to the requirements of practical justice, even though the test in England is still the “adequacy” test. See Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 306-07.

the Restatement.<sup>367</sup> Hopefully, the future of injunctions will lie in the refinement of this adequacy or proportionality test, and not in the implementation of a check-list of elements, as introduced by the Supreme Court, in the name of tradition.<sup>368</sup>

Like all preventive remedies, in case of perpetual injunctions, the judges' decision is made in a climate of uncertainty, but permanent injunctions are instruments of lesser danger, at least in comparison to interim injunctions, temporary restraining orders, or *Quia Timet* injunctions, because the judge has both time and a complete record on which to rely in making a decision.

Injunctions are called interim (interlocutory, preliminary, or temporary) when they are ordered before the conclusion of the trial, and have, in principle, provisional effects, pending a final decision.<sup>369</sup> These injunctions are issued based on an incomplete record and after a limited hearing.<sup>370</sup> In England, interim injunctions are usually conditional upon the claimant's undertaking to pay if he loses at trial.<sup>371</sup> In the U.S., the issuance of an injunction can sometimes be made conditional upon the posting of a bond.<sup>372</sup>

The interim injunction can sometimes be sufficient to resolve a dispute, just like the *référé* is in France.<sup>373</sup> Questions of law can be decided definitively (like a final trial) at interim stage, but questions of fact cannot, due to the fact that the record is incomplete.<sup>374</sup> A pronouncement of the law and an early assessment of the interests at hand can prove sufficient to convince the parties not to continue the dispute. Time might work to the same effect. Sometimes

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<sup>367</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 559-64 (§§ 933-934).

<sup>368</sup> *Supra* note 347.

<sup>369</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 319.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 321.

<sup>372</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 569 (§ 936, comment e.).

<sup>373</sup> *See supra* p. 63.

<sup>374</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 319.



redress is needed urgently and only the interim order can be efficient, a final trial becoming moot after the issuance (or not) of the injunction.

The interim injunction is a powerful tool, but also a very dangerous one, due to the risk of making wrong choices based on a limited record. That is why a great deal of effort has been expended in order to develop mechanisms and standards aiming to strike a balance between allowing interim injunctions to be used with flexibility and minimizing the risk of error in awarding or refusing such a remedy.

For that reason there are at least four approaches on interim injunctions within the two great legal systems of the common law (the English and the American).

In England, interim injunctions are traditionally considered discretionary, and a court can award such an injunction whenever it considers it “just and convenient.”<sup>375</sup> However, courts generally follow a test which has been proposed by Lord Diplock in the House of Lords decision *American Cyanamid Co. v. Ethicon Ltd.*<sup>376</sup> The test consists of a set of four questions, each of which should be addressed only if the answer to the previous question is favorable to the plaintiff. These questions are:

- 1) Does the plaintiff have a serious question to be tried?
- 2) Would the plaintiff be adequately compensated by an award of damages at the conclusion of the trial?
- 3) If the plaintiff would be awarded the injunction, but at trial this would prove to have been wrong, would the defendant be adequately compensated under the plaintiffs undertaking to pay damages?

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<sup>375</sup> “The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.” Supreme Court Act 1981 § 37 (1) (Eng.), available at <http://www.legislation.gov.uk/ukpga/1981/54> (last visited May 18, 2013).

<sup>376</sup> *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, 408 (Lord Diplock).

4) Does the balance of convenience favor the award of an injunction?<sup>377</sup>

Although this test is considered the default test in England today,<sup>378</sup> it is not followed religiously, and English courts distinguish new cases from *American Cyanamid* whenever they feel that the test might not produce an equitable result. For example, in *De Falco v. Crawley Borough Council*, Lord Denning distinguished *American Cyanamid* because in that case the plaintiffs could not give any worthwhile undertaking in damages because of inability to pay, and therefore allowed a showing of a very strong arguable case, which would compensate for failing the third element of the *American Cyanamid* test.<sup>379</sup>

In the United States, the Restatement of Torts subjects interlocutory injunctions to the same general analysis based on factors, the same as with permanent injunctions. All the factors which are taken under consideration for permanent injunction remain relevant for interlocutory injunctions. The comments to the Restatement, however, clarify the standard by adding and emphasizing four special factors which are essential in cases of interlocutory relief:

- 1) The character and the extent of the threat of irreparable harm to the plaintiff's interests as they are at the time of the application;
- 2) The seriousness of the consequences that temporary restraint will impose on the defendant;
- 3) The probabilities then discernible as to the ultimate outcome of the trial; and
- 4) Diverse policy considerations.<sup>380</sup>

The list of factors listed in Section 936 and the comments to the Restatement is not limitative, and other factors may be analyzed by courts in addition to the ones presented above.

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<sup>377</sup> *Id.*

<sup>378</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 322.

<sup>379</sup> *De Falco v. Crawley Borough Council*, [1980] 1 All ER 913, at 922 (Lord Denning).

<sup>380</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 570 (§ 936, comment e.)

The Restatement once more favored flexibility over strict rules like the British *American Cyanamid* in-cascade test.

Another approach which is becoming more and more popular is the “Leubsdorf-Posner formulation”.<sup>381</sup> Professor John Leubsdorf laid down the fundamentals of this approach in a study published in 1978.<sup>382</sup> For Leubsdorf, the most important goal of a test for preliminary injunctions is minimizing errors, by predicting the final outcome of the trial.<sup>383</sup> This prediction is based on comparing the probability of each party to prevail at trial.

“The court, in theory, should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of the irreparable loss that the defendant would suffer if enjoined from exercising what turns out to be his legal right. It should then make a similar calculation of the probable irreparable loss of rights to the plaintiff from denying the injunction. Whichever course promises the smaller probable loss should be adopted.”<sup>384</sup>

Judge Posner later translated this formulation into mathematical form in *American Hospital Supply Corporation v. Hospital Products Limited*.<sup>385</sup>

$$P \times H_p > (1 - P) \times H_d,$$

where P is the probability that the plaintiff will win at trial, H<sub>p</sub> is the harm suffered by the plaintiff if the injunction is denied, and H<sub>d</sub> is the harm suffered by the defendant if the injunction is granted to the plaintiff.<sup>386</sup>

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<sup>381</sup> The name “Leubsdorf-Posner” comes from two authors who actually proposed a different approach on preliminary injunctions. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 390 (2005). Leubsdorf himself endorsed the name “Posner-Leubsdorf formula” in a recent article which defends it and criticized the alternative proposed by Brooks and Schwartz. See John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 34 (2007).

<sup>382</sup> John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

<sup>383</sup> *Id.* at 541.

<sup>384</sup> *Id.* at 542.

<sup>385</sup> *Am. Hosp. Supply Corp. v. Hosp. Products Ltd.*, 780 F.2d 589 (7th Cir. 1986).

<sup>386</sup> *Id.* at 593.

Finally, a fourth method, developed by Professors Richard Brooks and Warren Schwartz emphasizes a different goal: promoting efficient behavior.<sup>387</sup> Under their formulation, courts would grant interlocutory relief to any plaintiff willing to incur liability for defendant's compliance costs (preferably ex-ante, through a bond), or alternatively would grant relief only if that would be the most efficient allocation of the resources in dispute.<sup>388</sup> The emphasis is on the liability rule, which is considered preferable because it obliges the parties to select the behavior which is most efficient during litigation: a plaintiff knowing his claim is weak will not pursue an injunction because it will prove more costly to him, whereas a defendant who knows his actions are wrongful will try to minimize his compliance costs (and the reverse is true when the parties are confident of their chances).<sup>389</sup>

b) Mandatory and prohibitory injunctions

More common in practice, prohibitory injunctions are orders which are negative in form, and named as such because, when granted, their effect is to prohibit a certain act or activity. The prohibition can be absolute or total, or it can be only partial.<sup>390</sup> The legal regime of prohibitory injunctions is practically the general regime discussed above.

Mandatory injunctions, on the other hand, are subject to special rules, at least in England, and in American jurisdictions still faithful to the old rules developed in equity. They are orders to carry out positive works.<sup>391</sup> In comparison to prohibitory injunctions, these orders seem more drastic, and therefore, all things being equal, it is more difficult to obtain a mandatory injunction

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<sup>387</sup> Brooks & Schwartz, *supra* note 381, at 393, 409.

<sup>388</sup> *Id.* at 403-07.

<sup>389</sup> *Id.* at 405.

<sup>390</sup> A partial restraint can come in the form of limitations on the duration or the intensity of an activity, or other limitations of the defendant's liberty which do not go as far as prohibiting some particular act entirely. See *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 1 W.L.R. 683, 703 (Veale J.) (defendants ordered to cease their activity only between 10 PM and 6 AM); *See also* 4 RESTATEMENT OF THE LAW. TORTS 2d, at 593 (§ 943, comment c.).

<sup>391</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 312.

than it is to obtain one in prohibitory form.<sup>392</sup> In England today, while in theory mandatory injunctions remain discretionary, the courts tend to follow the test laid down by Lord Upjohn in *Redland Bricks Ltd. v. Morris*.<sup>393</sup> The test is a four-element test, all four of which need to be met in order for the injunction to be issued. These elements are:

- 1) A very strong probability that grave damage will accrue to the plaintiff in the future if the injunction is not issued;
- 2) Damages would not be a sufficient or adequate remedy;
- 3) The cost of compliance to the order by the defendant must be balanced with the probable damage to the plaintiff; and
- 4) The injunction must be able to be phrased in clear terms, in order for the defendant to be aware of precisely what is requested of him; an injunction which is phrased in too general terms and without any guidelines for the defendant would not be issued in mandatory form.<sup>394</sup>

In the U.S., under the Restatement, there is no real distinction drawn between mandatory and prohibitory injunctions. One of the comments to the restatement says that “all injunctions are mandatory in the sense of requiring compliance with the orders contained in the decree.”<sup>395</sup> And indeed, the flexibility of the factors enumerated in section 936 allows for a common legal regime. The fact that mandatory injunctions are more harsh in effects can be taken into consideration when analyzing the relative hardship factor [§936 (1) e].<sup>396</sup>

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<sup>392</sup> *Id.*

<sup>393</sup> *Redland Bricks Ltd. v. Morris* [1970] AC 652, at 665-66.

<sup>394</sup> *Id.*

<sup>395</sup> 4 RESTATEMENT OF THE LAW. TORTS 2d, at 559 (note on terminology).

<sup>396</sup> Courts are, in fact, reluctant to decree burdensome relief. Leubsdorf, *supra* note 382, at 535, 546.

c. *Quia Timet* injunctions

Injunctions are named *Quia Timet* when the party asking for relief does not meet the requirements of an actionable tort and seeks an injunction in order to prevent the occurrence of a legal wrong.<sup>397</sup> Usually, injunctions are issued when a tort has already been committed and, in case of torts where damage is an element, this means that before the occurrence of damage, as a rule, there is no cause of action.<sup>398</sup> Injunctions in *Quia Timet* form are the exception to this rule. *Quia Timet* injunctions are exclusively preventive by design. Both the etymology and the history of this category of injunctions points to its exclusive preventive application. Black's Law Dictionary translates "Quia Timet" as meaning literally "because he fears"<sup>399</sup> and, according to Joseph Story, *Quia Timet* was a generic term used in the old common law for six writs called *brevia anticipatia*, or writs of prevention (the Writ of Mesne, Warrantia Chartae, Monstraverunt, Audita Querea, Curia Claudenda, a Ne injuste Vexes).<sup>400</sup> Today the old writs are obsolete, but the generic term for injunctions issued in order to prevent the occurrence of future torts survived.

In the law of torts, injunctions issued in *Quia Timet* form are rather rare, both in England<sup>401</sup> and in the U.S.<sup>402</sup> The reason for this is the fact that traditionally courts requested either a probability "almost amounting to moral certainty" that the wrong will occur,<sup>403</sup> irreparable harm,<sup>404</sup> or the existence of imminent danger of substantial damage to the plaintiff,<sup>405</sup>

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<sup>397</sup> WINFIELD & JOLOWICZ, *supra* note 14, at 588.

<sup>398</sup> *Id.*

<sup>399</sup> BLACK'S LAW DICTIONARY, *supra* note 33, at 1281.

<sup>400</sup> JOSEPH STORY & W.H. LYON, 2 COMMENTARIES ON EQUITY AS ADMINISTERED IN ENGLAND AND AMERICA 525 (14th ed., Little Brown & Co. 1918).

<sup>401</sup> WINFIELD & JOLOWICZ, *supra* note 14, at 589.

<sup>402</sup> However, in the U.S, cases which are commonly cited are pretty diverse, and involve insurance or suretyship disputes, family matters, cancelation of execution upon judgment, the determination of shares of stock, suits to remove cloud on title, suits to determine liability insurer's duty to defend, the establishment of easements upon real property, suits to quiet title, patent infringement, etc. Jay M. Mann & Curtis A. Jennings, *Quia timet: A remedy for the fearful Surety*, 20 FORUM 685, 686 (1984-1985).

<sup>403</sup> Att'y.-Gen. v. Corp. of Nottingham, (1904) 1 Ch. 673, 677 (Farwell J.), citing FitzGibbon, L.J., in Att'y. -Gen. v. Rathmines and Pembroke Joint Hosp. Board (unreported).

<sup>404</sup> Fletcher v. Bealey, (1885) 28 Ch. D. 688, at 698 (Pearson J.).

or “a strong probability that injury will result”<sup>406</sup> in order to grant injunctions in *Quia Timet* form.

English cases also show a certain degree of reticence to apply injunctive relief in *Quia Timet* form even when the conditions are met. *Hooper v. Rogers*, a case decided by the English Court of Appeal in 1975,<sup>407</sup> is a great example in this regard. The plaintiff and the defendant in this case were adjacent landowners. The defendant bulldozed a substantial quantity of soil below the plaintiff’s house, exposing it to soil erosion which might lead to the eventual collapse of the plaintiff’s house. Although in this case, Justice Russell apparently relaxed the requirements of *Quia Timet* injunctions by explaining the term “imminent damage” as referring to circumstances when the remedy sought is not premature,<sup>408</sup> the court went on affirm the decision of the lower court where specific relief was substituted with damages (damages in lieu of injunction).<sup>409</sup>

U.S courts use standards which are similarly stringent to the ones developed by English courts for *Quia Timet* injunctions, but it seems that they are less likely to replace injunctive relief with an award of damages when there is a high probability of harm. The case of *Village of Wilsonville v. SCA Services, Inc.*, discussed at length above,<sup>410</sup> is a great example of a more modern and flexible approach on *Quia Timet* relief, though one explanation for the court’s more careful consideration of the requirements of *Quia Timet* injunctions in this case might be the fact

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<sup>405</sup> “There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage substantial.” *Id.*

<sup>406</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 318.

<sup>407</sup> *Hooper v. Rogers*, (1975) Ch 43.

<sup>408</sup> *Id.* at 49-50 (Russell L.J.).

<sup>409</sup> *Id.* at 50. “Damages in lieu of injunction” is an exceptional remedy which is employed only when the prima facie case for an injunction is established by the plaintiff, but the court, in its discretion, decides that a monetary compensation is a more suitable remedy. Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 337. This remedy amounts to a “forced sale of the claimant’s rights (to have issued an injunction—A/N) at a fixed price by the court”. *Id.* at 339. Normally, the circumstances must be such that the following conditions are met: (1) the injury to the plaintiff’s legal rights is small; (2) the injury can be estimated in money; (3) the injury can be adequately compensated by a small sum of money; and (4) it would be oppressive to the defendant to grant an injunction. *Id.* at 340, citing *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch 287, at 322-3 (A.L. Smith L.J.).

<sup>410</sup> *Supra* p. 80-83.

that the threatened harm was environmental and could have potentially affected a great number of citizens. The standard used by this court was apparently based on a very high probability (“a dangerous probability”<sup>411</sup>), yet the whole argument of the court seemed to be centered not on this standard, but on weighing the interests of all the persons involved in that case (the balancing of equities).

Considering the heightened standards for *Quia Timet* injunctions, one thing is certain: fear alone is not enough in order to obtain injunctive relief!<sup>412</sup> The defendant must prove the existence of a risk and make an effort to quantify that risk, because only a high risk of future harm will open the door for *Quia Timet* relief.

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<sup>411</sup> Vill. of Wilsonville, 426 N.E.2d at 836.

<sup>412</sup> There have been, however, a few cases in the 19th century where some courts have ordered injunctions in cases where the fear of future harm was not supported by a showing of a high risk of harm. The following paragraph from *Baltimore v. Fairfield Import Co.*, involving a case where a leper was enjoined to enter into a contract with a laborer, in order to live with and be cared for by that laborer in a residential neighborhood, is most troubling in this regard:

“Leprosy is, and has always been, universally regarded with horror and loathing, and it is conceded to be an incurable disease. In past ages its unfortunate victims, shunned and avoided by their fellow men, viewed by all with superstitious dread, wandered about the open country, naked and starving. Hospitals for the relief of those smitten with the terrible malady seem to have been unknown in antiquity. The sufferers were eventually isolated in villages occupied by them exclusively. With the tide of emigration westward during the decline of the Roman empire, leprosy was spread over Europe, and in the Middle Ages it prevailed to an alarming extent; its principal ravages dating from the first crusades. The influence of Christianity tempered the rigor of the affliction, and as early as 583 the third council of Lyons directed the bishops of each city to feed and support the lepers at the expense of the church. In the thirteenth and fourteenth centuries, hospitals and asylums were numbered by hundreds in almost every country. But, whether isolated in villages in the East, or segregated in hospitals in the West, the leper was completely and forever an outcast, being considered both legally and politically dead. The advance of civilization, while in a measure ameliorating his condition, and checking the spread of the pestilence, stripped the disease of none of the dread with which it had always been regarded by the great majority of mankind. The horror of its contagion is as deep-seated to-day as it was more than 2,000 years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote, and by no means dangerous; *but the popular belief of its perils, founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages, and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot, in this day, be shaken or dispelled by mere scientific asseveration or conjecture.*” (emphasis added).

*City of Baltimore v. Fairfield Imp. Co.*, 39 A. 1081, 1084 (1898). For more details on this period when fear alone was considered sufficient by some courts to order injunctive relief, see Larry D. Silver, *The Common Law of Environmental Risk and Some Recent Applications*, 10 HARV. ENVTL. L. REV. 61, at 81-84.



### 3. Self-help

As opposed to the French civil law, which does not recognize self-help as a remedy, the common law formally recognizes it as such, and has done so for a very long time.<sup>413</sup> In most situations, self-help is exercised in the form of private action which amounts to self-defense or private measures which can be defended under necessity.<sup>414</sup> Measures taken under the cover of self-defense or necessity might be preventive, when the commission of a tort is threatened and the apprehension of harm is immediate. They usually involve drastic measures taken in cases of grave danger and in close temporal proximity to the harm. These situations can rarely be analyzed as preventive measures because they are so extreme as to usually constitute a prima facie case for a tort on their own, only the commission of such a tort is tolerated by the law, given that it was the only reasonable escape from the apprehended harm.<sup>415</sup>

It is more adequate to characterize self-help as a preventive remedy in cases of nuisance or trespass by encroachment. In some situations the law recognizes a right to the plaintiff to take steps in order to eliminate the nuisance or the trespass by doing works on his own land, and exceptionally—and only if it can be done peacefully—eliminate the cause of the nuisance or trespass even from his neighbor's land.<sup>416</sup> This is called a right of abatement.<sup>417</sup>

There are quite a few practical examples of cases of abatement of nuisance, and they vary from the very trivial, like trimming the overhanging branches of trees,<sup>418</sup> to very extreme, like demolition of residential premises because they are causing a serious nuisance.<sup>419</sup>

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<sup>413</sup> See WINFIELD & JOLOWICZ, *supra* note 14, at 585.

<sup>414</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 346.

<sup>415</sup> For that reason it is also described as a “privilege” of self-defense. PROSSER, *supra* note 13, at 108.

<sup>416</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 346.

<sup>417</sup> Abatement means in this context “to remove”. WINFIELD & JOLOWICZ, *supra* note 14, at 585.

<sup>418</sup> *Lemmon v. Webb*, (1895) AC 1.

<sup>419</sup> *Davies v. Williams* (1851) 16 QB 546.

#### 4. Declarations of right

Similarly to the functional equivalent from the French Civil Law,<sup>420</sup> declarations of right (UK) or declaratory judgments (U.S.) can be obtained at common law, in order to establish the existence of a right, or to demonstrate the lawful or unlawful nature of an activity.

The preventive effect of this remedy is obvious,<sup>421</sup> since the remedy is usually used in order to obtain an adjudication which would extinguish the conflict between the parties before a tortious activity or actual harm would ensue.<sup>422</sup>

It is important to note that declarations of right are sometimes used in situations where the court does not feel that an energetic remedy like an injunction should be issued, but wants to affirm the claimant's right.<sup>423</sup>

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<sup>420</sup> *Supra* Ch. IV, Part B.3.

<sup>421</sup> This effect, however, is indirect, and not the result of a legal sanction. *See infra* p. 122-123.

<sup>422</sup> *See, e.g.*, Marsh v. Wells Fargo Bank, N.A., 760 F. Supp. 2d 701, 709 (N.D. Tex. 2011): “[d]eclaratory judgment actions are intended to determine the rights of parties when a controversy has arisen, before any wrong has actually been committed, and are preventative in nature”.

<sup>423</sup> Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 345.

## CHAPTER V

### The Perception of Direct Prevention

#### In Legal Literature

##### A. Introduction

Inroads into the legal culture of France, England and the United States are very useful for explaining how core concepts like “preventive remedies”, “the preventive function” or “the precautionary principle” came to life, and why they have a place in the law of torts. Looking into the evolution of tort law in the French legal system and the perception scholars have about tort liability can explain the jurisprudence applying preventive remedies in its cultural medium. The same reasoning applies for common law systems. Common law doctrine might not have theorized the metaphysics and the foundations of the practical remedies created, but the evolution of the law shows that within the common law systems there is a very intense preoccupation to systematically arrange preventive remedies and explain their application in the case law. Because of their practical importance, common law doctrine has done much towards the purpose of categorizing, documenting and finding the best standards and rules for the application of preventive remedies.

This chapter contains a description of important theoretical attempts to place the theory of prevention within the law of torts and of the progress made within legal literature in France, England and the United States on this issue. It then tries to place these attempts into perspective, by showing how the structure of each legal system and its culture influenced these theoretical endeavors.

## B. France

### 1. Theoretical systems proposed for prevention by French doctrine

It is a feature of the civil law in general, and of French law in particular, for doctrine to be at the origin of major evolutions in the law of torts. Throughout the past two centuries, French scholars have been dedicated to the adaptation of the wonderfully simple tort system laid down by the *Code Civil* of 1804 to the growing needs of an ever-changing society.

Civilian scholars always had an eye out for changes in society, as well as scientific, philosophical and anthropological developments. Major theoretical advancements in the law of torts have been "reactionary", meaning that they were a response to some growing need in human society.<sup>424</sup> Preventive tort liability exhibits this feature: it is a reaction to fundamental changes in society and it springs out of necessity: the rapid technological development of the 20th and 21st centuries provided the necessary incentive to intensify the debate on prevention within French doctrine.

There are two main lines of thought regarding the issue of prevention, one which can be characterized as traditional, and another more progressive.

The first line of thought, for which Professor Geneviève Viney can be seen as a principal exponent,<sup>425</sup> is conservative, in the sense that the arguments which are presented are aimed at preserving the French retrospective theoretical system. The duty to take precautions is seen as inherent to fault based liability<sup>426</sup> and any change to the traditional fault-based analysis is looked upon with suspicion. The notion that liability could exist in the absence of damage is found to be

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<sup>424</sup> There has been a strong response in French doctrine to the societal changes following the industrial revolution (theories of risk, developed by Saleilles and Josserand), as well as after the second world war (when the protection of individual rights, particularly human rights and human dignity became a special concern). VINEY, *supra* note 16, at 109-27.

<sup>425</sup> A good majority of French authors support this line of argument or have similar views. See Viney, *supra* note 25, at 1542, n.4.

<sup>426</sup> VINEY, *supra* note 16, at 122, 156; Viney, *supra* note 25, at 1542.

particularly troubling.<sup>427</sup> The precautionary principle is not ignored, but the focus is placed on retrospective liability (compensation), and the effects the precautionary principle has on traditional negligence law.<sup>428</sup>

Toward the more progressive line, Cyril Bloch's thesis about the "cessation of illicit acts"<sup>429</sup> marks an important step toward theorizing prevention. The author opened the door for functional diversity by proving in his study that there are cases where courts intervene by way of sanctions which are not retrospective (reparatory), but rather prospective in nature.<sup>430</sup> He concluded that courts apply these sanctions or remedies in order to stop activities which are illicit in nature, based on an autonomous function of civil liability, that of cessation of illicit activities, which complements the function of compensation.<sup>431</sup>

More along the progressive line of argument, with Professors Catherine Thibierge, Mathilde Boutonnet, and Cyril Sintez as principal proponents, the main argument is directed towards a substantial reassessment of what one ought to understand by "civil liability", in light of the philosophical movement of the 20th century and the practical demand for new legal solutions aimed at avoiding catastrophic and irreversible harm. The precautionary principle is set forth by these authors as a foundation for "preventive liability"<sup>432</sup> and as the normative support for a "preventive action" (an action which would have the exclusive scope of preventing damage before it occurs, autonomous from the usual compensatory action).<sup>433</sup>

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<sup>427</sup> Viney, *supra* note 25, at 1542; Rapport à Monsieur Pascal Clément Garde des Sceaux, *supra* note 5, at 146.

<sup>428</sup> In order to have a veritable preventive action in French law which can be applied generally (and not just for the protection of particular rights), the intervention of the legislature is considered necessary. VINEY & JOURDAIN, *supra* note 64, at 21.

<sup>429</sup> CYRIL BLOCH, *supra* note 228.

<sup>430</sup> *Id.* at 132-40.

<sup>431</sup> *Id.* at 265, 613.

<sup>432</sup> Thibierge, *supra* note 3, at 580;

<sup>433</sup> BOUTONNET, *supra* note 25, at 341-45.

Cyril Sintez's thesis is probably the most recent on this issue, and he takes this line of argument to the next level, by showing that, in the jurisprudence, preventive mechanisms have been employed by courts, and most of the time not on the basis of the precautionary principle, but in more mundane cases where the principle does not apply.<sup>434</sup> The author reunites all the preventive mechanisms in the law of torts under the concept of "preventive sanction", which operates in judicial actions where the court order issued aims either at avoiding damage, reducing the consequences of damage, or deterring future harmful behavior.<sup>435</sup> Therefore, the jurisprudence he presents proves that the existence of damage is not a necessary condition for an action in tort.<sup>436</sup> Cyril Sintez's thesis is very broad in scope and thus very original. He is analyzing all the preventive effects of tort actions, including the ones which fall under the concept of deterrence, like private penalties and punitive damages.<sup>437</sup> His expansive views and the rejection of fault as an element in or a foundation for a preventive tort action<sup>438</sup> clearly differentiate his thesis from the traditional line of thought. However, the same broad scope led the author to go further than the other authors mentioned above, by expanding the domain of preventive actions beyond that of the precautionary principle, through the concept of *preventive sanction*.

A short outline of the evolution of the French law of torts and an introduction to the precautionary principle, as it appears in the French legal system, can help put these theories into perspective.

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<sup>434</sup> See Sintez, *supra* note 25, at 39-87.

<sup>435</sup> *Id.* at 29, 242.

<sup>436</sup> *Id.* at 36.

<sup>437</sup> *Id.* at 115-35.

<sup>438</sup> *Id.* at 454.

## 2. A short outline of the evolution of tort law in France

The gist of the French tort law system is to be found in just five civil code articles: 1382-1386. At their origin these articles were intended to create a universal system of civil liability inspired by the individualism and moralism of the natural law school,<sup>439</sup> having one, and only one, foundation: the fault principle.<sup>440</sup> Every action in tort was supposed to be triggered by three cumulative elements: fault, damage and causation.<sup>441</sup> Through these articles, French law abandoned medieval forms of actions,<sup>442</sup> and the codal system had the great advantage of concentrating only on the substance of a tort claim. The concept of "fault" was the one and only foundation for the imposition of civil liability.

This approach endured until the end of the nineteenth century. The development of industry and the use of machines for various activities proved to be a challenge for a tort system based solely on fault, especially in a legal system that gives lesser importance to discovery devices (as opposed to common law systems).<sup>443</sup> It became increasingly difficult for victims to prove fault when industrial or labor accidents occurred or when damage resulted from the use of machines or vehicles. French doctrine was quick to react, and an alternative foundation was found in the idea of risk,<sup>444</sup> later *garantie*,<sup>445</sup> and nowadays under the idea of control.<sup>446</sup> French tort law opened itself up to a new form of liability no longer dependent on fault: strict liability, thus creating a broader basis for recovery.

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<sup>439</sup> The French code civil was largely inspired in this regard from the doctrinal texts of Jean Domat. VINEY, *supra* note 16, at 21. *See also* JEAN DOMAT, 1 LES LOIS CIVILES DANS LEUR ORDRE NATUREL; LE DROIT PUBLIC ET LEGUM DELECTUS 205-212 (1777); For a translation in English of Domat's treatise see JEAN DOMAT, 1 THE CIVIL LAW IN ITS NATURAL ORDER (Cuther S. Cushing trans., Little, Brown & Co. 1853).

<sup>440</sup> VINEY, *supra* note 16, at 23.

<sup>441</sup> These are the three elements of fault based liability even today. FABRE-MAGNAN, *supra* note 14, at 85.

<sup>442</sup> VAN GERVEN ET AL., *supra* note 50, at 2.

<sup>443</sup> *See* JOHN HENRY MERRIMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1015 (The Michie Company 1994).

<sup>444</sup> VINEY, *supra* note 16, at 110-11;

<sup>445</sup> BORIS STARCK, ESSAI D'UNE THÉORIE GÉNÉRALE DE LA RÉSPONSABILITÉ CIVILE, CONSIDÉRÉE EN SA DOUBLE FONCTION DE GARANTIE ET DE PEINE PRIVÉE (L. Rodstein 1947).

<sup>446</sup> LE TOURNEAU ET AL., *supra* note 14, at 1809.

It is important to mention that strict liability did not take over, and never replaced fault based liability completely. The new theories of strict liability were accepted and applied successfully based on an extensive interpretation of existing codal provisions to those areas of tort law where the problem arose (mainly for accidents—liability for things under one's guard, animals and the ruin of buildings, as well as for vicarious liability).<sup>447</sup> However, strict liability was rejected by courts as a general rule. Fault survived, but had to share its reign with strict liability.<sup>448</sup>

The next step was for the law of torts to develop outside the *Code Civil*. These extraneous texts followed the general trend. Various new laws introduced a series of strict liability schemes during the 20th century.<sup>449</sup> Some legislative acts went even beyond strict liability, allowing compensation even for cases of *force majeure* (act of god).<sup>450</sup>

The role played by legal doctrine in this process was essential, not only because of a diversification of foundations of liability, but also because after the first world war, authors like Boris Stark and André Tunc argued forcefully for a new approach in the area of tort compensation, which is mindful of the interests of victims.<sup>451</sup> The result was a shift from emphasizing the importance of sanctioning wrongful behavior of the tortfeasor (the normative function, understood as sanctioning morally wrong behavior<sup>452</sup>), towards a focus on individual rights and the interests of victims. That is why French tort law became more and more "victim-friendly" and "victim-oriented", and the legal discourse focused so much on compensation.<sup>453</sup>

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<sup>447</sup> VINEY, *supra* note 16, at 121.

<sup>448</sup> *Id.*

<sup>449</sup> *See supra* notes 152, 153 & 155.

<sup>450</sup> *E.g.*, Loi 85-677 du 5 juillet 1985, *supra* note 66.

<sup>451</sup> VINEY, *supra* note 16, at 116-19.

<sup>452</sup> And consequently, at changing the behavior of persons in order to conform to socially acceptable standards. VINEY, *supra* note 16, at 86.

<sup>453</sup> France is a jurisdiction where many compensation schemes, usually accompanied by comprehensive mandatory insurance schemes, are based on national solidarity. Examples include compensation funds created for medical



### 3. The road towards functional diversity

The great challenge for prevention-oriented authors in the context of the French tradition is to escape the exclusivity of the compensatory function. Looking at the functions of civil liability, Professor Thibierge pointed out that although compensation is commonly regarded as the sole or the principal function of tort liability today, it was not always so.<sup>454</sup> Taking a step back and looking at things in a historical perspective, French law has been going through a dynamic process that implies the diversification of the functions of liability, although this process is not readily apparent. In order to understand this process one ought to look at the law of torts in France from an earlier starting point—prior to the French Civil Code. *Liability* in general, civil and criminal, historically went through a maturing process.<sup>455</sup> This maturing process looks very much like *cell division* in biology.<sup>456</sup> The predominant function of tort law in the beginning of the middle age has been the punitive function,<sup>457</sup> which at those early stages of societal evolution seemed sufficient, civil and criminal law coexisting in the law of torts. Gradually, from within the punitive function, compensation grew as an accessory function, matured through time, and finally the two functions were permanently separated.<sup>458</sup> Liability in general can be said to have reached a certain level of maturity when compensation separated from punishment. In France, the scission between the punitive function and the compensatory function coincides with

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accidents, crimes and acts of terrorism, contamination due to blood transfusions, asbestos-related injuries, or damage generated by hunting activities. See LE TOURNEAU ET AL., *supra* note 14, at nos. 724, 763, 8334, 8490, 8508, 8545, 8571.

<sup>454</sup> Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580.

<sup>455</sup> *Id.*

<sup>456</sup> *Cell division* is a process which involves the distribution of identical genetic material, the DNA, from an initial *cell* to two or more *daughter cells*.

<http://www2.le.ac.uk/departments/genetics/vgec/highereducation/topics/cellcycle-mitosis-meiosis/> (Last visited May 11, 2013).

<sup>457</sup> VINEY, *supra* note 16, at 12, 162.

<sup>458</sup> Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580.

the division between criminal liability and civil liability<sup>459</sup>—one centered on punishment of unlawful behavior, and the other on compensation of damage.

Now separated, these new cells—civil liability and criminal liability—started evolving on their own, and continued the maturing process. Criminal law is no longer exclusively punitive, having accessory functions of disgorgement,<sup>460</sup> re-education and rehabilitation,<sup>461</sup> or incapacitation.<sup>462</sup> Civil liability is adding on new functions as well, such as disgorgement<sup>463</sup> and, of course, prevention.

That is why Professor Thibierge anticipated a new division,<sup>464</sup> triggered by the fact that compensatory function has reached its peak,<sup>465</sup> where the preventive function would grow from the compensatory function into an autonomous function. Thus, a new form of liability would

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<sup>459</sup> The exact moment when this scission occurred in legal thinking and in practice is not very clear. What is a certain, however, is the fact that by the time of Domat there was a distinction, although not always very clear, between civil law and criminal law. VINEY, *supra* note 16, at 15-16, 162.

<sup>460</sup> Criminal punishment is supposed to cause other people to forgo any criminal intent, and therefore have a deterrent effect. HARVEY WALLACE & CLIFFORD ROBERSON, *PRINCIPLES OF CRIMINAL LAW* 4 (2nd ed., Allyn and Bacon 2001). The idea of deterrence is also intrinsic to some of the more specific sanctions. For example, measures like confiscation are not necessarily punitive in nature. Their goal is to prevent enrichment based on criminal activity, and have a clear deterrent effect. Communication from the Commission to the European Parliament and the Council, *Proceeds of organized crime. Ensuring that “crime does not pay”*, at 3 (Brussels, 20 Nov. 2008, COM (2008 Final)), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0766:FIN:EN:PDF> (Last visited May 11, 2013).

<sup>461</sup> WALLACE & ROBERSON, *supra* note 460, at 3. This function has grown from within the actual structure of punishment itself. The scope of punishment in criminal law is not to inflict harm anymore. The Old Testament eye-for-an-eye idea has long been abandoned for a more compassionate or paternal punishment, aimed at re-educating the wrongdoer. There is even a growing emphasis on helping criminals get back into society and helping them re-integrate and build a fresh, crime-free life after they have paid their dues to society. However, most criminologists contend that punishment generally does not re-educate or reform convicted criminals, and statistics tend to prove this as well (i.e. there is a high degree of recidivism). *Id.* at 3.

<sup>462</sup> This is based on denying the convicted person the possibility of committing another crime by constraining him. *Id.*

<sup>463</sup> Proposals for tort law reform in French law have integrated the concept of punitive damages (*dommages-intérêts punitifs*). See Rapport à Monsieur Pascal Clément Garde des Sceaux, *supra* note 5, at 148, and article 1371, at 162. *Proposition de textes. Chapitre des délits*, *supra* note 6, article 54, at 10. Unlike the American equivalent, French punitive damages are not really punitive at their core, the main goal being disgorgement, in the sense of preventing unjustified enrichment based on the commission of a delict.

<sup>464</sup> Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580.

<sup>465</sup> Some French authors speak of a “crisis of tort liability”, an idea which was criticized by Cyril Sintez. Sintez, *supra* note 25, at 30. The author rightfully argues that liability itself is in no crisis; in this context, the crisis is one of legal *imaginarium*: our representations of the law are not adapted and are lagging behind the present positive law. *Id.*

emerge—called “preventive liability”— which, unlike its progenitor, would not require damage as an element, the whole point of preventive liability being to have the possibility to intervene prior to the occurrence of any injury.<sup>466</sup>

However compelling and logical this may seem, there are still many reasons to keep preventive remedies within the civil law, and simply diversify the functions of civil liability, instead of creating a new form of liability. Preventive liability and compensatory liability have more things in common than things that set them apart, and for that reason, a separation does not seem necessary. Perhaps the only essential difference is the position of the decision-maker in time. But, having previously seen that liability intrinsically has a retrospective and a prospective side which not only coexist, but are interdependent,<sup>467</sup> a scission between preventive and compensatory liability would make it harder to approach the interdependencies between the two perspectives on liability. Civil liability and criminal liability, on the other hand, are bridged by a great number of differences which explain why it was necessary to separate them. It is clear that distinctions between civil liability and criminal liability, as well as between compensatory liability and preventive liability, should be based on the characteristics of the legal effects attached to liability and not liability itself. Criminal liability is distinguished from civil liability

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<sup>466</sup> Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580. The way the author describes this new, prospective form of liability makes it seem like a form of liability based on the precautionary principle. *Id.* From this point of view, this model seems to be too narrow, since there are many cases where preventive action is necessary without having to deal with catastrophic harm or scientific uncertainty. On the other hand, the model is too broad, because the author sees it as a form of liability that transcends the civil law, or even national law, having a transversal domain. *Id.* at 580-81. A general and default system of direct prevention needs to be developed in the civil law, because prevention involves first and foremost inter-personal relations. At a national level, of course, the administration can take special measures for special circumstances, especially the ones envisaged by the precautionary principle, where the interest of large collectivities or the nation as a whole is at stake. At international level, the cooperation between states and the development of international institutions is apt to find solutions for situations that involve the interests of many states, or humanity as a whole. Of course, the precautionary principle can be present at all these levels and be applied in the decision-making process, and at a national and international level problems of liability will need to be addressed, but they would have their specificity and there is nothing to gain from uniting the rules that are applied in the private law with the ones applied in public law and international law.

<sup>467</sup> *See supra* p. 29.

because of its different function(s), but also because the legal relationship generated by criminal liability is between the state and the accused, as opposed to civil liability, where the legal relationship is between two private persons.<sup>468</sup> That is why a different procedure is attached to criminal liability,<sup>469</sup> with different guarantees. Also, criminal sanctions are of a different nature and are based on the violation of a behavioral norm expressly incriminated by the law. The incrimination texts in the criminal law also refer to particular types of fault, whereas in the civil law, any type of fault, even the *culpa levissima*, gives rise to liability.<sup>470</sup> By contrast, “preventive liability” creates relationships between persons, just like “compensatory liability”.<sup>471</sup> Also, both preventive remedies and compensation are triggered by the breach of a pre-existing legal duty, and the general duty of care which operates in the realm of compensation can act as a basis for preventive remedies as well (when the actor fails to take reasonable precautions). Compensatory (reparatory) and preventive remedies do not have to violate specific texts in the law in order to apply or to dictate their content. The general field of application of preventive remedies, and the generality of the duty to take reasonable precautions, would warrant keeping them in the private law and, more specifically, in the civil law. The law can, of course, create preventive mechanisms and special preventive remedies for particular rights, and this can be done in other areas of the law or within the civil law. Administrative law has much to do with the regulation of preventive and precautionary measures. Special provisions can be enacted for the protection of

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<sup>468</sup> The legal action is also brought by the state in case of criminal liability, whereas in case of civil liability, the action is introduced by a private person (the victim). VINEY, *supra* note 16, at 164.

<sup>469</sup> In distinguishing civil liability from criminal liability, Glanville Williams considered the procedural differences the most essential. See Glanville Williams, *The Definition of Crime*, fragment published in JOSEPH GOLDSTEIN, ALAN M. DERSHOWITZ & RICHARD D. SCHWARTZ, *CRIMINAL LAW: THEORY AND PROCESS* (The Free Press 1974).

<sup>470</sup> VINEY, *supra* note 16, at 164.

<sup>471</sup> It is not hard to imagine preventive liability of administrative bodies, within a particular legal system, or even of countries, in international law. The question here would not be one of having the possibility to create such a form of liability. The question is how feasible is it to reunite all these different forms of liability under a single set of rules? The particularities of public law and regulatory schemes on the one hand, and international law, on the other, make it extremely unlikely that liability in those cases will follow the same rules as in the private sphere.

particular rights, which require special attention.<sup>472</sup> The question is: can or should there be a set of default rules for preventive remedies in the law, and if so, in what part of the law should they be developed? The author of this study believes that a set of default rules for direct prevention can and should be developed within the civil law, and more precisely within the area of tort law,<sup>473</sup> and there is enough jurisprudential support for such a conclusion.<sup>474</sup> If direct prevention deals with legal relationships between private persons and a set of general default rules can be devised for the application of such remedies, then the default place for direct prevention is also going to be the civil law of torts.

#### 4. The emergence of new species of damages and the precautionary principle

For the author advancing it, the new concept of “preventive liability” seems intrinsically linked with the precautionary principle.<sup>475</sup> The necessity for prevention is seen as a consequence of two realities: the dangers of catastrophic harm generated by new levels of power attained by man, mainly due to the use of modern technology; and the realization that many of the modern risks are generated in activities where a high degree of scientific uncertainty makes their assessment extremely difficult. It is in large part a reflection of the philosophical ideas laid down by Hans Jonas.<sup>476</sup> For Jonas and for the authors who embraced his philosophy, the emergence of new species of damages, triggered by the use of modern technology,<sup>477</sup> mandate a transformation in our understanding of key ethical and juridical concepts. The premise is that the technological era, besides transforming our lives for the better, has exposed mankind to unprecedented danger.

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<sup>472</sup> This is already the case with privacy and image rights in the French legal system (*see* art. 9 of the French Civil Code).

<sup>473</sup> *See infra* Ch. VI.

<sup>474</sup> *See supra* Ch. IV.

<sup>475</sup> Thibierge, *supra* notes 3 & 7.

<sup>476</sup> *See supra* pp. 35-36.

<sup>477</sup> JONAS, *supra* note 117, at 13, 43.

A tool was required in order to safeguard collective interests in a climate of scientific uncertainty.

The precautionary principle was mentioned in a number of international conferences regarding pollution,<sup>478</sup> before finally receiving universal recognition within the Rio Declaration on Environment and Development.<sup>479</sup> European countries and the European Union were quick to adopt the principle. The European Union introduced the precautionary principle in Article 130r (2) of the Maastricht treaty,<sup>480</sup> and then again in art. 191 of the Treaty on the Functioning of the European Union (Lisbon treaty).<sup>481</sup> The member states are obliged to follow this policy and are directly bound by article 191 of the Lisbon treaty after ratification. Subsequent EU legislation related to environmental and health issues, particularly Directives<sup>482</sup> and Regulations,<sup>483</sup> is also

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<sup>478</sup> See Second International Conference on the Protection of the North Sea, Declaration of Ministers (London, 24-25 Nov. 1987), at VII: "Accepting that, in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence". The Declaration is available online at <http://www.seas-at-risk.org/Images/1987%20London%20Declaration.pdf> (Last visited May 11, 2013). The precautionary principle is also mentioned in a number of international conventions regarding marine pollution, like the ones organized in Paris (1992) and Helsinki (1992).

<sup>479</sup> United Nations Conference on Environment and Development, The Rio Declaration on Environment and Development, at Principle 15, available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> (Last visited May 11, 2013).

<sup>480</sup> Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, O. J. (C 325/5; 24 December 2002), article 130r (2):

“Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the *precautionary principle* and on the principles that *preventive action* should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies” (emphasis added).

<sup>481</sup> Treaty of Lisbon (Consolidated Version), amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, O. J. (C 306/1; 17 December 2007). The article mentioned above needs to be read and understood as a whole, although the precautionary principle is expressly mentioned only in the second paragraph, which is almost identical to his counterpart from the Maastricht Treaty:

“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the *precautionary principle* and on the principles that *preventive action* should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay” (emphasis added).

<sup>482</sup> EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so (the means for implementing these goals are left at the discretion of Member States). Concerning one, more, or all Member States, directives are aimed

based on the precautionary principle. The topics range from environmental issues in general,<sup>484</sup> pollution,<sup>485</sup> movement of chemical substances,<sup>486</sup> and genetically modified micro-organisms.<sup>487</sup> Other documents make the precautionary principle a guiding principle in the Union's food policy,<sup>488</sup> or recommend it in the area of consumer protection.<sup>489</sup>

In France, the precautionary principle was first introduced into ordinary legislation,<sup>490</sup> and in 2005 it was introduced in the French Constitution through the Environmental Charter.<sup>491</sup> Courts, whether administrative,<sup>492</sup> or civil,<sup>493</sup> have clearly been influenced by the precautionary

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at bringing different national laws into line with each other and in line with some common EU policy.

[http://ec.europa.eu/eu\\_law/introduction/what\\_directive\\_en.htm](http://ec.europa.eu/eu_law/introduction/what_directive_en.htm) (Last visited May 11, 2013).

<sup>483</sup> Regulations are the most direct form of EU law—as soon as they are passed, they have binding legal force throughout every Member State, on a par with national laws. National governments do not have to take action themselves to implement EU regulations. [http://ec.europa.eu/eu\\_law/introduction/what\\_regulation\\_en.htm](http://ec.europa.eu/eu_law/introduction/what_regulation_en.htm) (Last visited May 11, 2013).

<sup>484</sup> Directive 2004/35/CE of 21 April 2004, on environmental liability with regard to the prevention and remedying of environmental damage, O.J. (L 143/56 , 30 April 2004)..

<sup>485</sup> Directive 2010/75/EU of 24 November 2010, on industrial emissions (integrated pollution prevention and control), O.J. (L 334/17, 17 December 2010).

<sup>486</sup> Regulation (EC) nr. 1907/2006 of 18 December 2006, concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) nr. 793/93 and Commission Regulation (EC) nr. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, O.J. (L 396/1, 30 December 2006).

<sup>487</sup> Council Directive 90/219/EEC of 23 April 1990, on the contained use of genetically modified micro-organisms, O.J. (L 117, 8 May 1990).

<sup>488</sup> The General Principles of Food Law in the European Union (Commission Green Paper), at viii, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0176:FIN:EN:PDF> (Last visited May 11, 2013).

<sup>489</sup> Council Resolution of 28 June 1999 on Community consumer policy 1999 to 2001, O. J. (C 206 , 21 July 1999), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0721%2801%29:EN:HTML> (Last visited May 11, 2013).

<sup>490</sup> Loi 95-101 du 2 février 1995 relative au renforcement de la protection de l'environnement [Law nr. 95-101 of February 2, 1995, regarding the consolidation of environmental protection], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], February 3, 1995, p. 1840 (The Law Barnier). Loi 98-535 du 1 juillet 1998 relative au renforcement de la veille sanitaire et du contrôle de la sécurité sanitaire des produits destinés à l'homme [Law nr. 98-535, of July 1, 1998, regarding the consolidation of healthcare monitoring and safety control of products designed to be used by human beings, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 2, 1998, p. 10056.

<sup>491</sup> Article 5 of the Environmental Charter, Loi constitutionnelle 2005-205 du 1 mars 2005, *supra* note 157.

<sup>492</sup> Although the Council of State (Conseil D'État), by its jurisprudence, has been hesitating to recognize a veritable obligation of precaution. *See* Aude Rouyère, *Principe de précaution et responsabilité civile des personnes publiques*, D. 2007 (Dossier: "Principe de précaution", Christine Noiville coord.), at 1537-38 ; Yves Jegouzo, *Le principe de précaution : bilan de son application quatre ans après sa constitutionnalisation*, (report of the public hearing of October 1, 2009, organized by Claude Birraux, representative (député), and M. Jean-Claude Etienne), <http://www.senat.fr/rap/r09-025/r09-0253.html> (Last visited May 11, 2013); The Conseil d'État has, however, recognized the direct applicability of the precautionary principle in the administrative decision-making process, in a

principle in their analysis and decisions. A number of lower courts and courts of appeal have even imposed preventive remedies based on the precautionary principle,<sup>494</sup> but this practice is likely to stop after a recent decision from the Tribunal de Conflits, which severely curtailed the jurisdiction of civil courts.<sup>495</sup>

Applying the precautionary principle means to give more weight to safety, in the sense of securing the essential rights of human beings and humanity as a whole: the rights to life, health and a clean environment, as opposed to the interests of industry.

What must always be kept in mind is the fact that the precautionary principle is rather specialized and should have a narrow scope. In order to apply the principle, the situation must be one where:

- (1) The risk is major, and has to be both *catastrophic* and *irreversible*; and
- (2) There is *scientific uncertainty* influencing the assessment of the risks involved.

Only when these cumulative conditions are fulfilled, can the precautionary principle be applied. It is important to emphasize the two conditions for the application of the precautionary principle because they also reveal the steps which need to be taken before reaching the conclusion that the situation is of the sort which requires a decision based on the principle. Particularly the second condition, regarding scientific uncertainty, must never be ignored. The decision-maker must make best efforts to scientifically assess the risks of a situation before

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case involving the installment of relay antennas. Conseil d'État [CE] [highest administrative court], July 19, 2010, nr. 328687, JurisData 2010-012229 (even in this case, the court did not find that the administration failed to apply the precautionary principle, and as a consequence did not order the relay antenna removed).

<sup>493</sup> See Viney, *supra* note 25, at 1543-44; Subsequent to the article written by Professor Viney, the Court of Cassation went a step further in the Hepatitis B jurisprudence, and now the defect of a vaccine can be proved by way of presumptions (not just causation, as it was in the previous jurisprudence). Cour de Cassation [Cass.] [supreme court for judicial matters] 1<sup>e</sup> civ., Sept. 26, 2012, *supra* note 67.

<sup>494</sup> Discussed *supra* in Ch. IV Part B.1.

<sup>495</sup> *Id.*



reaching the conclusion that recourse to the precautionary principle is necessary.<sup>496</sup> The precautionary principle works as a “tie-breaker”, when the scientific evidence can only produce approximations which do not incline the balance one way or the other. Also, it is not enough just to show that there are contradictory studies. If on one side there are studies which are great in number and reputable, and on the other a few studies which suffer in credibility, there is contrary proof, but hardly any true scientific uncertainty. It might, however, be necessary to rethink and reimagine the measures taken in order to assure that scientific investigation is not biased, and perhaps more weight should be given to studies produced by independent and objective scientists.

The precautionary principle needs to be understood as a “principle of action,”<sup>497</sup> not as a paralyzing one, and as an expression of a humanistic<sup>498</sup> approach for the 21st century. The present generation seems to be living at the expense of future generations and the world faces serious environmental problems which require special attention. We find ourselves today in a position where in order to preserve our future, we must practice some form of self-restraint, and it might be the moment to resurrect an idea exposed by Thomas Jefferson in a letter to James Madison: “that the earth belongs in usufruct to the living.”<sup>499</sup> We should not forget that we are mortal, and that this world is not ours to keep. The precautionary principle, in its moral dimension, transmits a wake-up call to a generation that is sacrificing the future of its children and the generations to come. In its technical dimension, however, it is often misunderstood as

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<sup>496</sup> Communication from the Commission, *on the precautionary principle*, *supra* note 216, at 4.

<sup>497</sup> le Tourneau, *supra* note 14, at no. 242.

<sup>498</sup> PHILIPPE KOURILSKY & GENEVIEVE VINEY, *LE PRINCIPE DE PRÉCAUTION. RAPPORT AU PREMIER MINISTRE* 26 (Odile Jacob 2000).

<sup>499</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) reprinted in *THE WRITINGS OF THOMAS JEFFERSON* (H.A. Washington ed., 1861), available at <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl81.php> (Last visited May 11, 2013).

economically paralyzing,<sup>500</sup> while in truth it is a principle which encourages action, only it has to be “action accompanied by wisdom.”<sup>501</sup> Applied correctly, the precautionary principle serves the higher interests of society and even promotes both large scale and long term economic efficiency and scientific discovery and innovation.<sup>502</sup> The precautionary principle implies a particular way of acting, which has to be rigorous, in the sense that the lack of certainty does not excuse decision-makers from analyzing and managing risks strictly<sup>503</sup> and with great attention to detail, employing all available data, and flexible, in the sense that the measures must be subject to revision,<sup>504</sup> since more scientific data can come in the future and change the results of the risk analysis, or new technology can help control the risks better.

### **C. England and the United States. A brief survey on the evolution of tort law and the preventive function in the common law**

If prevention is likely to grow in the civil law as an extension of tort liability, just like a new branch grows in a tree, in the common law, prevention looks more like an entirely different tree, having been developed mainly by the chancellor in equity, and not by common law courts.

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<sup>500</sup> Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003), at 1004. The author refers to “strong” forms of the precautionary principle. We believe there is no such thing as a strong form of the precautionary principle. There are, of course, “irrational” ways of understanding the principle, which abandons any scientific investigation for the benefit of some predetermined values, but this is not the precautionary principle as envisioned by the Rio Convention, the European Union, or any European State for that matter. The precautionary principle is a last resort risk assessment technique. The first step is careful scientific investigation and highly complex risk assessment calculations. Only after any other methods of risk assessment fail, and the uncertainty attached to some specific activity is high enough so as to create a zone of absolute error, should the precautionary principle be used. At this point only, the principle requires decision-makers to err on the side of safety, which means to give more weight to values like human life or the environment, as opposed to erring on the side of the countervailing interests, which most of the time are purely economic (development of industry, mining, farming, etc). Communication from the Commission, *on the precautionary principle*, *supra* note 216, at 4.

<sup>501</sup> le Tourneau, *supra* note 14, at no. 242.

<sup>502</sup> Since the precautionary principle is applied only in cases of uncertainty, it creates a strong incentive for corporations to remove or diminish uncertainty through scientific discovery, or to find alternative, more efficient, and perhaps even eco-friendly and safer methods of performing a specific economic activity.

<sup>503</sup> KOURILSKY & VINEY, *supra* note 498, at 21.

<sup>504</sup> *Id.* at 19.

In the common law, the law of torts never reached the level of generality encountered in the French civil law. Such a generalization was not considered desirable<sup>505</sup> and would come into conflict with the cautious,<sup>506</sup> stratified<sup>507</sup> way in which the law of torts evolved in the common law. Tort law developed on a case-by-case basis, with an emphasis on the facts of each particular case. Large classifications founded on the substantive abstractions are relatively foreign to the common law. Historically, the law of torts began not with authentic general principles, but with an enumeration of particular remedies.<sup>508</sup> That is why the whole classificatory logic of the law of torts, or the lack of it,<sup>509</sup> is grounded in the old common law procedure, which was based on the causes of action. Each cause of action was associated to a specific fact pattern, and a wrong was actionable only if it fit the cause of action attached to it. Even though procedural law is no longer dependent on the old causes of action, substantive tort law kept the old structure.<sup>510</sup> Today, the law of torts still looks like a “miscellaneous group of civil wrongs.”<sup>511</sup>

Some torts are, however, more general than others. The highest level of generality was reached by the tort of negligence, which seized a substantial portion of the territory occupied by tort law.<sup>512</sup> Based on a general duty of care, negligence triggered in common law theory a

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<sup>505</sup> The principle that one must not do unlawful harm to one’s neighbor was known in the common law and could have supported a more general theory, but in order to find out what kind of harm was considered unlawful, and who is a “neighbor” according to the law, common law lawyers had to look into the actual case law. Put another way, this general principle was simply too broad in order to become a rule of law. POLLOCK, *supra* note 45, at 6.

<sup>506</sup> In the common law, it is considered preferable that the law should develop new categories incrementally and by analogy with established categories. R. A. BUCKLEY, *THE MODERN LAW OF NEGLIGENCE* 10 (Butterworths 1988). See also JOHN CHARLESWORTH & RODNEY ALGERNON PERCY, *ON NEGLIGENCE* 21 (Sweet & Maxwell 2001): “if in an unprovided case, the decision passes for the plaintiff, it will not be because of a general theory of liability, but because the court feels that there is a case in which existing principles of liability may be properly extended”.

<sup>507</sup> Olivier Moréteau & Jacques Vanderlinden, *La structure des systèmes juridiques* 45-48 (XVI<sup>e</sup> Congrès de l’Académie internationale de droit comparé, Brisbane, 2002, Collection des rapports, Bruylant ed., 2003).

<sup>508</sup> POLLOCK, *supra* note 45, at 20.

<sup>509</sup> Some authors consider that the preoccupation of the early common lawyers with form rather than substance led to a “lack of classificatory logic”. Oliphant, *The Nature of Tortious Liability*, *supra* note 170, at 7.

<sup>510</sup> Maitland’s words are most illuminating: “The forms of action we have buried, but they still rule us from the grave.” F. W. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 296 (A. H. Chaytor & W. J. Whittaker eds., Cambridge University Press 1929).

<sup>511</sup> PROSSER, *supra* note 13, at 3; SPEISER, KRAUSE & GANS, *supra* note 56, at 53.

<sup>512</sup> MILLNER, *supra* note 15, at 6.

reaction against the “pigeonhole”<sup>513</sup> approach, and attempts were made to replace the classification based on the old causes of action with classifications based on general principles.<sup>514</sup> Although courts have accepted the generality of negligence, other more narrow torts, which were based on the old causes of action, endured (such as battery, conversion, trespass to land, etc.). Consequently, the “pigeonhole” approach was never fully abandoned.

This does not mean that the common law is in any way rigid or that the list of torts and protected interests are set in stone.<sup>515</sup> Both in American and English law, torts need not be nominate, and the mere fact that a claim is novel should not, of itself, operate as a bar to the remedy.<sup>516</sup> New torts are constantly being created by courts.<sup>517</sup>

A series of similarities can be found between common law and civil law systems, when it comes to the development of the law of torts. The same phenomenon of expansion of liability that we have previously analyzed in the civil law was experienced in an almost equal measure within the common law.<sup>518</sup> However, in the common law, the expansion of liability materialized

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<sup>513</sup> *Id.* at 11.

<sup>514</sup> Sir Frederick Pollock, for instance, wanted to divide all wrongs based on three major duties: (1) to abstain from willful injury, (2) to respect the property of others, and (3) to use due diligence to avoid causing harm to others. POLLOCK, *supra* note 45, at 21.

<sup>515</sup> Oliphant, *The Nature of Tortious Liability*, *supra* note 170, at 9.

<sup>516</sup> PROSSER, *supra* note 13, at 4; this has not always been, however, the tendency followed in the case law. Examples of either refusal or opposition to expanding causes of action because the case at bar did not fit into predetermined categories can be found in both American and English law. See, for instance, the refusal of Vermont courts to recognize a cause of action to a wife for loss of consortium before the intervention of the legislature, even though a husband would have had such a cause of action. See *Baldwin v. State*, 125 Vt. 317, 215 A.2d 492 (1965) overruled by *Whitney v. Fisher*, 138 Vt. 468, 417 A.2d 934 (1980) and overruled by *Hay v. Med. Ctr. Hosp. of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985). In England, an equally powerful example can be found in the treatment of pure economic loss. See Mauro Bussani & Vernon Valentine Palmer, *The Liability Regimes of Europe—their Façades and Interiors*, in PURE ECONOMIC LOSS IN EUROPE, at 140 (Mauro Bussani & Vernon Valentine Palmer eds., Cambridge University Press 2003).

<sup>517</sup> Some examples from the XXth century include Intentional Infliction of Emotional Distress, or privacy torts. See SHAPO, *supra* note 149, at 29-32.

<sup>518</sup> “It happens that the dominant trend of creativity in tort law, despite occasional episodes of reversion . . . has been one of expanding liability.” SPEISER, KRAUSE & GANS, *supra* note 56, at 23.

through the judicial creation of new causes of action,<sup>519</sup> as opposed to the civil law, where the enlargement of tort law was based primarily on the interpretation of codal provisions.

Also similarly to the civil law, a direct relation between the changes in the law and the evolution and sophistication of society has been proven by experience. In the words of Justice Miller from the Supreme Court of West Virginia: “the history of the common law is one of gradual judicial development and adjustment of the case law to fit to changing conditions of society.”<sup>520</sup>

Generally, the civil law and the common law systems deal largely with the same types of problems, and that is why it is normal for them to move towards similar solutions.<sup>521</sup> The ways in which the law reaches these solutions, however, is quite different, in the sense that the concepts and the techniques employed are different. Also, the doctrinal speech is distinct. As opposed to the civil law, where doctrine generally sees the law of torts as a mono-function subject matter, in

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<sup>519</sup> Going through the early history of the common law, Professor Winfield observed that:

“In the early days of the English writ-system new remedies were created freely enough. In Glanvill’s time, the king not only sold writs, but made them, and the courts, unhampered by precedent, were doing justice on principles of moral fairness, and were administering equity long before men had dreamed of equity as something different from the common law . . . In 1285, the Statute of Westminster II certainly confined to Parliament the power of making new writs, while the clerks of the Chancery were restricted to the invention of writs *in consimili casu*. But two points of this enactment are apt to be overlooked. In the first place, the clerks of Chancery not only may, but must, issue writs within the region assigned to them. The complaint just before the Statute had been not that they were too profuse in this direction, but that they were not generous enough. Secondly, after the statute, the Chancery found actions upon the case for trespass and for other recognised wrongs so plastic that it is no exaggeration to say that they were frequently creating new remedies.” Percy Henry Winfield, *The foundation of Liability in Tort*, 27 COLUM. L. R. 1, 2 (1927).

And then he adds: “Torts of a specific character have increased steadily in number throughout our legal history, and the courts can even now, if they think fit, enlarge the list.” *Id.* at 5.

<sup>520</sup> Bradley v. Appalachian Power Co., 256 S.E.2d 879, 884 (1979), citing POUND, THE SPIRIT OF THE COMMON LAW:

“The chief cause of the success of our common-law doctrine of precedents as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do. Certainty is insured within reasonable limits in that the court proceeds by analogy of rules and doctrines in the traditional system and develops a principle for the cause before it according to a known technique. Growth is insured in that the limits of the principle are not fixed authoritatively once for all but are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.”

<sup>521</sup> MILLNER, *supra* note 15, at 10.

the common law, a great majority of legal doctrine characterizes tort law today as being *functionally* diverse.<sup>522</sup> The use of punitive damages shows that the punitive function still has a great impact on the law of torts in the common law, and this is acknowledged in doctrine as well.<sup>523</sup> A few authors mention even the preventive function of tort law.<sup>524</sup> It is true that some identify the preventive function with the concept of deterrence,<sup>525</sup> but there are also others who attach it to the special remedies created by the courts of equity, with a particular emphasis on injunctions.<sup>526</sup>

Although there is no theoretical equivalent to the abstract notion of “preventive liability” in the common law, preventive remedies do operate directly in the case law. Injunctions, declaration of rights, self-help, or estoppel,<sup>527</sup> have been used to prevent the occurrence of harm for a very long time in the common law. It would not be wrong to say that these remedies actually have primarily a preventive purpose, being often applied prior to any manifestation of injury, and sometimes even before a wrongful act is completed.<sup>528</sup> The pragmatism of the common law led to a very sophisticated classification of preventive remedies, generally accepted in doctrine and in the case law.

The principles and rules regarding preventive remedies are almost identical in English and American law. However, there are great differences when it comes to a more specialized

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<sup>522</sup> See the British and American authors cited *supra* at note 14.

<sup>523</sup> WILLIAMS & HEPPLER, *supra* note 14, at 25.

<sup>524</sup> SALMOND & HEUSTON, *supra* note 14, at 28; WINFIELD & JOLOWICZ, *supra* note 14, at 3; WILLIAMS & HEPPLER, *supra* note 14, at 23. JONES, *supra* note 14, at 1. Oliphant, *The Nature of Tortious Liability*, *supra* note 170, at 1-2. The latter goes even as far as saying that “although it is conventional to regard damages as primary remedy in tort, and injunctions as secondary, there is good reason for reversing this order of priority. *Id.* at 24.

<sup>525</sup> E.g., PROSSER, *supra* note 13, at 23; WINFIELD & JOLOWICZ, *supra* note 14, at 3.

<sup>526</sup> JONES, *supra* note 14, at 1; Oliphant, *The Nature of Tortious Liability*, *supra* note 170, at 1-2.

<sup>527</sup> Self-help is a traditional remedy developed by common law courts, whereas injunctions and estoppel have been developed by equity courts. See *supra* Ch. IV, Part C.3. Declarations of right are a modern development in the English law, but were known for a very long time in Scotland under the name of *declarator*. René David, *Ordres de mandamus et jugements déclaratoires dans le droit anglais* in 1 MÉLANGES OFFERTS À MARCEL WALINE, LE JUGE ET LE DROIT PUBLIC at 23 (L.G.D.J. 1974).

<sup>528</sup> A particular form of injunctions was created in order to prevent the occurrence of a wrong, the *Quia Timet injunction*. See *supra* Ch. IV, Part C.2.c.

application of the preventive function: the precautionary principle. Although, as of yet, we found no evidence that the precautionary principle penetrated the law of torts in English law, as a regulatory principle, it seems as though in England, both in theory and in practice, the precautionary principle is widely used by the Government in the regulatory process.<sup>529</sup> England fully embraced the principles set forth in the Rio Declaration on Environment and Development<sup>530</sup> and the guidelines set forth by the European Commission.<sup>531</sup> It is doubtful that the principle has any direct normative value, but it is applied as a guide for the enactment of specialized legislation or administrative regulations.<sup>532</sup> On the other side of the Atlantic, American law shows a high degree of reticence when it comes to the precautionary principle. Influential American scholars consider the precautionary principle “paralyzing—forbidding inaction, stringent regulation, and everything in between,”<sup>533</sup> and the principle is not mentioned in legislation or administrative regulations. That does not mean that the U.S. does not employ precautionary measures, particularly when it comes to administrative regulations. Governmental policy is ambivalent in this respect. Although the phrase “precautionary principle” as such is virtually non-existent, there is evidence that some regulatory schemes follow a precautionary approach. For instance, the Clean Air Act,<sup>534</sup> talks about an “adequate margin of safety” when regulating air quality standards. There are also some voices that support a careful implementation

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<sup>529</sup> Interdepartmental Liaison Group on Risk Assessment, *supra* note 224; Andrew Jordan & Timothy O’Riordan, *The Precautionary Principle in U.K. Environmental Law and Policy*, CSERGE Working Paper, available at [http://www.cserge.uea.ac.uk/sites/default/files/gec\\_1994\\_11.pdf](http://www.cserge.uea.ac.uk/sites/default/files/gec_1994_11.pdf) (Last visited May 11, 2013).

<sup>530</sup> United Nations Conference on Environment and Development, *The Rio Declaration on Environment and Development*, *supra* note 479.

<sup>531</sup> Communication from the Commission, *on the precautionary principle*, *supra* note 216.

<sup>532</sup> Interdepartmental Liaison Group on Risk Assessment, *supra* note 224, at 4.

<sup>533</sup> Sunstein, *supra* note 500, at 1003 and the authors he cites at footnote 3 (we should note however that Professor Sunstein is only criticizing “strong forms” of the precautionary principle). For a criticism of the precautionary principle in general, in both the “weak” and the “strong” form (from England this time), *see* Julian Morris, *Defining the Precautionary Principle*, in *RETHINKING RISK AND THE PRECAUTIONARY PRINCIPLE* (Julian Morris ed., Butterworth Heinemann 2000) (as a matter of fact, all the papers published in this book, some by English and some by American specialists, have attacked in one form or another the precautionary principle).

<sup>534</sup> 42 U.S.C.A. § 7409 (b) (1) (West, Westlaw current through P.L. 112-197 approved 11-27-12).

of the precautionary principle in the American legal system,<sup>535</sup> but so far, there is no sign that the U.S. is going to take this step. Consequently, it comes as no surprise that no trace of a direct application of the precautionary principle in a tort action in the United States can be found.

#### **D. Individualism and collectivism in the law of torts**

After contrasting doctrinal perceptions in French law with their equivalents in English and American law, the end result is rather fascinating, but not at all surprising. The dominant intellectual and political trends permeate the way the area of prevention has been approached. In France, the emphasis on collectivism and solidarity created a medium where the precautionary principle flourished. The precautionary principle is, of course, well adapted to deal with collective interests. It is a safeguard against catastrophic harm, and ideal for the purpose of avoiding damage to large classes or groups of persons, and large scale application (perhaps even trans-nationally). There can be no doubt that that the precautionary principle had fertile ground for development. Generally, the philosophical shift from individualism to collectivism produced positive consequences, by assuring that victims have a broader base for compensation, by distributing major risks into society through insurance, and—why not?—by applying the precautionary principle. But one can get the feeling that somewhere along this process, human beings as individuals are being forgotten. French law provides certain preventive remedies for individuals, but the conditions are very stringent, and the remedies are weak in application, at least in comparison to their functional equivalents from the common law.<sup>536</sup> The consequence in the law of torts is that some influential theoreticians have associated the preventive function of the law particularly with the precautionary principle.<sup>537</sup> The common law, on the other hand, has

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<sup>535</sup> David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003); Noah M. Sachs, *Rescuing the Strong Precautionary Principle from Its Critics*, 2011 U. ILL. L. REV. 1285 (2011).

<sup>536</sup> See *supra* Ch. IV Part C.

<sup>537</sup> Thibierge, *supra* notes 3 & 7; BOUTONNET, *supra* note 25.



remained in large part individualistic (although England is moving closer to the continental trend). The consequence is, of course, a dose of reticence towards the precautionary principle, if not its total rejection. This does not mean that the common law has made little progress in adapting the law of torts to the realities of modern society, only that the path has been different. The common law focused not on the challenges faced by collectivities in the modern world, but on the challenges that the individual is faced with.

The development of preventive remedies in the common law was triggered by the need to best serve individuals and protect their rights and interests. As opposed to the civilian preventive remedies, the remedies developed by the common law have more flexible requirements, are expedient and more effective, but only address risks which are local and individual, easy to identify and easy to quantify.<sup>538</sup>

The need to develop preventive remedies serving human beings as individuals, and which are based on conventional risk assessment, is just as stringent as the need to respond to uncertainty and catastrophic harm. The same societal changes linked to technological developments, growing interconnectivity and population growth also trigger the need to secure individual rights more effectively than before. Property rights, the right to privacy, human dignity, as well as a great number of individual liberties,<sup>539</sup> are under heavy attack in the 21st century. The vital interests of the individual must not be ignored, and the law must find ways to defend these rights and liberties in conjunction with collective interests.

That is why a general theory of prevention can draw inspiration from both common law and civil law theory, and the idea of a hybrid might be appealing. A balanced practical system

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<sup>538</sup> See *supra* Ch. IV Part C.

<sup>539</sup> For a distinction between rights and liberties, as well as a discussion on the instances when they are used as synonyms, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16, 36-37 (1913).

must take into consideration collective, as well as individual interests, and must combine traditional risk assessment with modern models based on uncertainty.

## Chapter VI

### Analytical Tools for a Dynamic Theory of Direct Prevention

#### The Fault Based Standard and Risk Assessment Techniques

##### A. Towards a gap filling theory of prevention?

What is the law of torts if not the set of default rules for legal liability? Other forms of liability encountered in the law cannot take up the charge of devising default rules. Criminal law is specialized and premised on the principle of legality: *nulla poena sine lege*,<sup>540</sup> the maxim says. A special provision in the law is needed in order to incriminate a particular type of behavior abhorrent in the eyes of the legislator. The law of contractual liability is also specialized. Contractual liability cannot deal with behavior generally because the premise for this type of liability is the breach of a contractual obligation.<sup>541</sup> In both the civil law and the common law, tort liability is described as that area of civil liability that is left after contractual liability is subtracted.<sup>542</sup>

If tort liability is the default law of liability, within it one ought to find a set of default rules. Finding such rules might seem an easy endeavor in the area of compensation. Even there however, outside the law of negligence, which indeed is general, there are many special regimes (examples would include strict liability schemes or intentional torts in the common law) which follow slightly different rules. Notwithstanding, there is a strong cohesiveness to civil liability when analyzed from the standpoint of compensation. The rules regarding compensation in the law of torts seem to cover the gaps whenever it is necessary.

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<sup>540</sup> “No punishment without the law authorizing it.” BLACK’S LAW DICTIONARY, *supra* note 33, at 1098.

<sup>541</sup> *E.g.*, FABRE-MAGNAN, *supra* note 14, at 15 ; PROSSER, *supra* note 13, at 2;

<sup>542</sup> *Id.*

The law of prevention on the other hand, might leave the impression that it operates *ad hoc* and with no real structure. It looks as if generalization so far was limited to the division of sanctions (remedies) based on their procedural effects. There has been no attempt as of yet to bind preventive remedies under a common standard, common mathematics, common elements or any determined foundation. It can hardly even be said that all preventive remedies have been accounted for so far in the literature.<sup>543</sup>

Even without a full map of preventive remedies, what is beyond all doubt proven already is the fact that there are some coercive mechanisms used in the law in order to anticipate future damage and prevent it. That much is obvious from the case law.<sup>544</sup>

Taking the list of remedies analyzed herein, however, when looking at their nature, the only ones which can be characterized as preventive remedies, as expressions of direct prevention,<sup>545</sup> are injunctions (and their functional equivalents).

Declarations of right are remedies, even though they are not coercive in the sense that force can be used in order to put them into execution. Declarations of right only recognize the existence of a right or characterize a situation as licit or illicit. There is no real coercion in case of declaratory remedies, since the desired effects of such a judgment are not accomplished by force; the authority of the judgment itself provides its effectiveness. In this regard, declaratory judgments are probably the most civilized and elegant remedies which can be used for preventive purposes, even though they are the least energetic. However, declarations of right are not preventive, in the sense of *direct prevention*. Declarations of right do not bind the defendant for an alternative course of action than the one he is engaged in; they have merely a deterrent effect,

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<sup>543</sup> Although the effort expended by some scholars in this respect needs to be recognized. Cyril Bloch and Cyril Sintez have brought an immense contribution towards this end. See Bloch, *supra* note 228; Sintez, *supra* note 25.

<sup>544</sup> See *supra* Ch. IV.

<sup>545</sup> See definition of “direct prevention” *supra* at p. 25.

and therefore prevention is mediated. The direct effect of declarations of right is simply the judicial affirmation of the rights and duties of the parties. The court does not decide what course of action would be in violation of the law, and that is why prevention is achieved indirectly—the decision-making process is still in the hands of the actor, not the court.

Self-help is also not a preventive remedy, *stricto sensu*. The possibility given to a party to intervene preventively is based on his *right* or *liberty* to intervene, according to the circumstances. The court decision, if the case would eventually go to court because of a dispute, is either merely declaratory (recognizing that the potential victim was right or wrong to intervene), or compensatory (the case of private preventive expenses). The potential victim, using self-help for preventive purposes, is not using the coercive apparatus of the state.

That is why the default rules for direct prevention need to be extracted from the jurisprudence regarding injunctions and other similar mechanisms.

### **B. Methodology and the importance of time in the law of preventive torts**

Imagine the law of torts as a coin, with compensation on one side of it, and prevention on the other. A coin has two sides, but it is just one object and it serves its purpose as a whole. Similarly, prevention and compensation should be understood as a comprehensive whole in the law of torts. Of course there are differences between the two types of remedies, but they do serve a common purpose: the recognition and safeguard of rights and protected interests, and the enforcement of the correlative duties that come with these rights.

The key difference between compensation and prevention is the temporal position of the decision-maker.

On the one side of tortious liability, judges do their best to paint a clear image of a past event. They act in many respects like historians, or detectives, looking into whatever evidence the present still preserved of the past, in order to retrace steps and paint the picture of past events.

On the other side of the coin, judges must paint something that looks more like a puzzle with missing pieces. They are looking at evidence gathered from the past and from the present, and try to calculate and anticipate future events, struggling to imagine what the future might hold based on accessible information from the present.

The reality that time opens up in both directions—the past and the future—needs to be acknowledged accordingly in legal science. Any theoretical model for the law of torts which does not take *time* into consideration would ignore the inherent dynamism which characterizes the *a priori* conditions of the decision-making process in an area of the law which is inescapably fact dependent.

It is the way we think and the way we design models of reasoning in the law of torts that has to integrate time. In this area of the law, the dependence on factual considerations condemns any system of practical reasoning which is a-temporal and based on absolute certainty. Generally, the science of the 20th and the 21st century is no longer a science of certainties. The study of uncertainty has brought about immense progress in other fields of study, like physics (quantum physics to be more exact).<sup>546</sup> It is the moment for legal science to take up the challenge of understanding uncertainty and build theories of liability apt to respond to the challenges of the

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<sup>546</sup> E.g., “the uncertainty principle” developed by Werner Heisenberg. See Jan Hilgevoord & Jos Uffink, *The Uncertainty Principle* in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2012 ed.), available at <http://plato.stanford.edu/entries/qt-uncertainty/#Hei> (Last visited May 20, 2013).

unknown.<sup>547</sup> Anticipating the future is no less scientific than uncovering the past—it is perhaps even more so.

It is probable that the separation between procedure and substantial law has perpetuated the illusion that when dealing with the past, the decision-making process is based on certainties. The truth is that there is some degree of uncertainty in every tort action, only usually the uncertainty is dealt with by procedural law. It has been the role of civil procedure to minimize or eliminate uncertainty as to past events. Standards of proof like “more probable than not” are based on a probabilistic approach, yet, once the standard is met, uncertainty is ignored.<sup>548</sup> So far, substantive tort law cared little about uncertainty or probabilities. The reason for this is the employment of “check-list tests” for liability. In order to make such a system workable, every element in a tort action so far had to be finite and determinable. An element either had to exist or not to exist.

“Check-list” systems are applied for the determination of liability throughout the law of torts, and these theoretical models are not just the fancy of scholars. The influence on jurisprudence is more than obvious. Almost every conceivable tort is analyzed, theoretically and practically, on the basis of a static sequence of elements, which compose the *prima facie* case (i.e., the sets of facts which need to be proved by the plaintiff in order to obtain relief).<sup>549</sup> The test itself implies that once the burden of proof was met for an element, any nuance introducing

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<sup>547</sup> The parallel with physics is not drawn randomly. Preventive remedies can be applied only after using the facts of the present in order to anticipate the future. In 2004, the winner of the Nobel Prize in Physics, David Gross, described physics as a science where, given the past, the future is predicted. See Bradley Dowden, *Time*, at §3-f, <http://www.iep.utm.edu/time/> (Last visited May 20, 2013).

<sup>548</sup> See Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs* in FOUNDATIONS OF TORT LAW 124, 125 (Saul Levmore coord., Oxford University Press 1994).

<sup>549</sup> E.g., (In the common law) for battery: an act causing harmful or offensive contact and intent to cause harmful or offensive contact; for negligence: duty and breach, causation, and damage; etc.; (In the French civil law) for fault based liability: fault, causation and damage; and for strict liability: the *fait générateur*, causation and damage.

uncertainty into the element must necessarily be ignored, and therefore the facts for which the burden proof is satisfied need to be treated as absolutes (the absolute truth).<sup>550</sup>

Moreover, the fact that tort liability focuses on the compensatory function, and has done so for such a long time, generated a system which, from procedure to substance, is *reactive*, rather than *proactive*.<sup>551</sup> Integrating preventive remedies in the law of torts generates the need to renew the methodology and the mathematics employed in this field.

The static representations and the exact mathematics that supported the traditional, compensatory approach on civil liability need not be condemned. They are the result of legal thinking that stretches over hundreds of years. However, the models of reasoning used for compensatory remedies are insufficient for preventive remedies.

What is meant by static representations is the analysis based on breaking down the facts into disjunctive elements: a check-list approach. If all the elements of the tort action are met, the plaintiff would receive his compensation. If just one was absent, the action would be defeated and the defendant would win. Typically,<sup>552</sup> these elements are based on three factual determinations: an act susceptible of generating liability,<sup>553</sup> damage, and causation.<sup>554</sup>

**FAULT + DAMAGE + CAUSATION = LIABILITY (Fault-based liability in the French civil law)**

**(DUTY + BREACH OF DUTY) + DAMAGE + CAUSATION = LIABILITY (Negligence in the common law)**

<sup>550</sup> Levmore, *supra* note 548, at 125.

<sup>551</sup> Or reparatory (*curative*), rather than preventive. See BOUTONNET, *supra* note 25, at 6.

<sup>552</sup> I have chosen the law of negligence as the typical representation for the common law, because negligence is the most general tort and representative for the common law approach on torts during the past two centuries. For French law, fault based liability is the typical example, yet much of what is discussed in this sub-chapter can apply for strict liability as well.

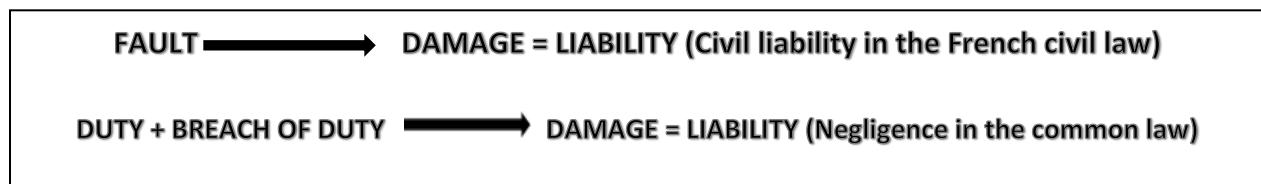
<sup>553</sup> In the common law, from this factual determination the judge can establish the elements of duty and breach of duty, whereas in the civil law, this factual pattern helps to establish *fault* or *le fait générateur*.

<sup>554</sup> The common law splits the element of causation in two: (a) cause in fact and (b) legal cause. DOBBS, *supra* note 13, at 407-08.



For prevention, the static check-list approach needs to be substituted with a purposive, dynamic system, where the law of torts intervenes progressively from the moment a risk is introduced, until the last manifestation of damage. Prevention must assess dangers and anticipate damage, and it must be flexible enough to do so without infringing on individual freedom.

Even traditional tests for the imposition of compensatory remedies can hardly be said to be static, except in some of our representations of it (like the one presented above). The static check-list approach can be challenged even from within its own structure. The element of causation introduces a form of dynamic representation in the law of torts. Causation links A to B, because the damage element must be causally linked to the act reproached to the defendant, meaning that the act is the cause, and damages are the effect.



As a matter of convention, one generally uses the terms “cause” and “effect” in order to distinguish the earlier and the latter members of a pair of events which are related in a particular manner:<sup>555</sup> the earlier one triggers the latter.

Causation itself is therefore an emergent concept; it is derivative from a concept more fundamental to science: *Time*. If B is the effect of A, then necessarily A precedes B. In a dynamic sequence, the arrow of causation is but a segment of the arrow of time, linking two interrelated events.

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<sup>555</sup> The philosopher David Hume described this relationship as “a matter of constant conjunction” (event A’s causing event B is simply a matter of event B always occurring if A does). Dowden, *supra* note 547, at §2.

Time itself is a concept which we employ for the purpose of ordering events.<sup>556</sup> The most common mental representation we have of time is a straight line or an arrow: linear time.<sup>557</sup> The linear representation of time is particularly useful when ordering causally related events. The concept of linear time has been employed in the law of torts, although without much notice, because this is the only way we can make sense of elements related by causation.<sup>558</sup> We order and understand the elements of negligence causally. Yet, doctrinal analysis so often ignores the dynamic of fact patterns. Causation has become almost incomprehensible, both in the civil law and in the common law, either because of multiple standards,<sup>559</sup> or because it is broken down as a hybrid between fact and policy,<sup>560</sup> instead of what it is in its nature, a dynamic temporal relationship between interrelated events.<sup>561</sup>

Every tort can be placed in a temporal segment. The beginning point is the act of the tortfeasor (t1) and the endpoint is the last manifestation of damage suffered (t2). For some facts generative of responsibility, the timeframe is relatively short. For others, however, the timeframe can stretch for months and years. Traditionally, the decision-making process was supposed to take place after the occurrence of the tortious event and the manifestation of damage (t3).

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<sup>556</sup> *Id.* (Introduction).

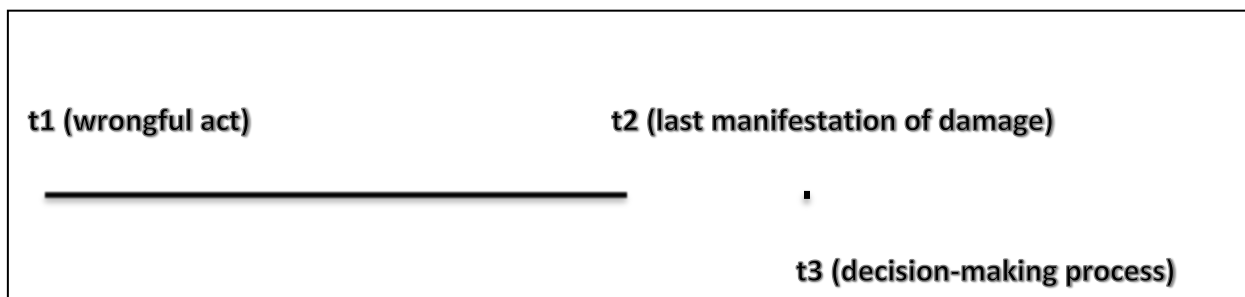
<sup>557</sup> *Id.* at §3-d.

<sup>558</sup> Which should come as no surprise; on a more general level, Immanuel Kant argued that our *reason* creates the linear representation of time, because our inner intuition cannot give shape to the “relation of representations” (representations which themselves stem from our mind). IMMANUEL KANT, *CRITIQUE OF PURE REASON* 77 (Norman Kemp Smith trans., Mcmillan & Co. 1965).

<sup>559</sup> The civil law, for instance, has imagined a good number of alternative theories explaining the standards for causation, like “the theory of equivalence between conditions”, “The theory of proximate cause”, “The theory of adequate cause”, etc. *See* VINEY & JOURDAIN, *supra* note 211, at 188-96. The common law also uses multiple tests for causation. *See* DOBBS, *supra* note 13, at 409-17.

<sup>560</sup> Particularly in American common law theory. DOBBS, *supra* note 13, at 407-08.

<sup>561</sup> That means that when discussing legal causation, scientific causation is always the starting point. Of course, that does not mean that the two are one and the same, because the reverse is not true: not every causal relationship in the scientific sense has legal relevance, i.e., not all factual (scientific) causal relationships qualify as legal causation. Radé, *supra* note 69, at 113.



During the 20th century courts started to deal with situations where they would have to make a decision from somewhere within the temporal segment. Taking just French law as an example for this evolution (in order to illustrate this particular point), some of the first cases dealing with this problem involved the recognition of future damage.<sup>562</sup> Initially, future damage was recognized only when the plaintiff was able to prove that the future damage is certain to occur.<sup>563</sup> This created the illusion that future damage is a reality of the present, and therefore the structure and the analysis did not change. This fiction proved to be more and more paralyzing with the passage of time. Issues involving loss of a chance<sup>564</sup> and the compensation of future damage which is only probable, and not certain, compelled courts to change their approach and employ compensatory remedies based on probabilistic calculations.<sup>565</sup> One such example is provided by a case involving the compensation of damages for contracting HIV due to defendant's negligence.<sup>566</sup> At the moment of trial the plaintiff was infected with the HIV virus, but had not developed AIDS at that point. The Court of Cassation in France had to imagine a mechanism which would take into account the probable evolution of the virus. The court

<sup>562</sup> VINEY & JOURDAIN, *supra* note 211, at 84-85.

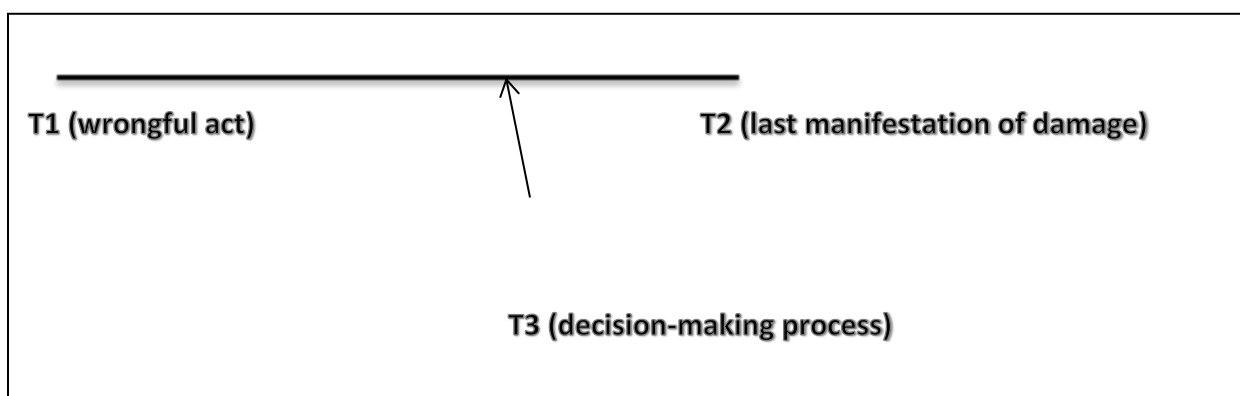
<sup>563</sup> *Id.* citing Cour de Cassation [Cass.][supreme court for judicial matters], June 1, 1932.

<sup>564</sup> For a general discussion on loss of a chance, *see* VINEY & JOURDAIN, *supra* note 211, at 87-103; DOBBS, *supra* note 13, 434-41.

<sup>565</sup> VINEY & JOURDAIN, *supra* note 211, at 87-103, at 103.

<sup>566</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2<sup>e</sup> civ., July 20, 1993, RTD Civ. 1994, at 108 (obs. Patrice Jourdain); For a similar solution regarding professional malpractice (notary), *see* Cour de Cassation [Cass.][supreme court for judicial matters] 1<sup>e</sup> civ., February 29, 2000, RTD Civ. 2000, at 576 (obs. Patrice Jourdain);

ingeniously decided to order compensation for HIV in a lump sum immediately due, and separately, compensation for AIDS under a suspensive condition [the obligation would be enforced only if and when the plaintiff reached stage IV (AIDS)].<sup>567</sup>



The idea of *ex-post* judicial intervention has been going through a process of erosion, which began in the area of compensation. Preventive remedies are the next step in this process. The decision-maker is simply given more tools in order to actually break the normal chain of causation and prevent the occurrence of damage. Preventive remedies are more advanced methods of enforcing the age-old legal duty to take precautions in order to avoid harm to legally protected interests.

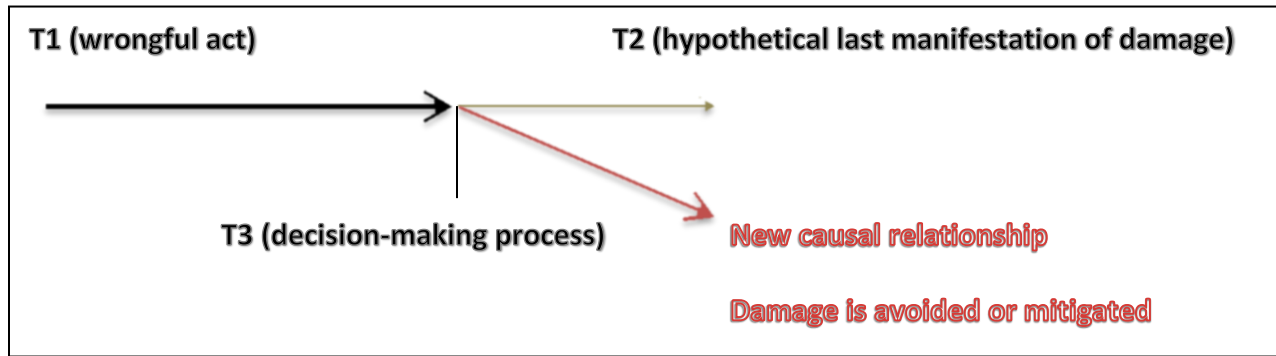
Preventive remedies are characterized by the fact that the decision-making process is situated somewhere on the causation segment, between the first act which introduces the risk of harm and the last manifestation of harm (between T1 and T2, at T3). Even *Quia Timet* injunctions, which can be issued before “a cause of action has yet risen,”<sup>568</sup> require proof of some initial act which created a risk of harm.<sup>569</sup>

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<sup>567</sup> Cour de Cassation [Cass.][supreme court for judicial matters] 2<sup>e</sup> civ., July 20, *supra* note 566.

<sup>568</sup> Oliphant, *The Nature of Tortious Liability*, *supra* note 170, at 1-2.

<sup>569</sup> Fear of damage alone is never sufficient. The plaintiff must prove that the defendant introduced (in the past) or can control (in the present) a risk which is substantially certain to occur in the future. *See supra* p. 95.



The interposition of the decision-maker in the causation timeline makes the proceedings where preventive sanctions or remedies are sought rather complex. In addition to past and present facts which need to be presented, the key point in these proceedings is *risk assessment*. Risk assessment implies both a calculation of probabilities for the occurrence of future harm, and it is a process that implies balancing the interests of the involved parties and the interests of society as a whole.

Understanding the temporal position of decision-makers and the purposes of preventive remedies might shed some light over the methods which need to be employed in order to identify a proper standard for them. Having already seen that, historically, the law of torts began with punishment, it then centered on compensation, and there are indications that in the future it might get more and more preoccupied with prevention, the evolution of the law of torts practically placed the judge closer and closer (in time) to the source of harm.

Chronologically, the first steps which the law must take to protect an interest or a right must be preventive steps. It is only where prevention has failed, or was not feasible, that the next class of remedies comes into question.<sup>570</sup>

If damage is foreseeable, can be avoided with low costs, and the infringement of the defendant's freedom is minimal, by all means, preventive action is recommended and should be

<sup>570</sup> BOUTONNET, *supra* note 25, at 6 (referring to the precautionary principle).

imposed. But where one cannot foresee the consequences, or the costs of prevention are relatively high, or the infringement of defendant's freedom is unacceptable, the analysis moves to the next step. Events must be permitted to take their natural course, and if damage occurs, the plaintiff must now look for a cause of action in order to obtain compensation, or else bear the loss himself.

For a great number of interests, the law does not need to intervene preventively, or preventive intervention should be realized at a later stage, when the probability of harm and the extent of the damage are calculated with more precision. However, for the safeguard of interests which are fundamental in our society (like human life, health, and environmental stability) the law can intervene sooner, and the degree of uncertainty under which the decision is made can be higher.

### **C. The Hand formula and other risk assessment tools**

In order to determine when it is permissible, feasible and necessary for the justice system to intervene preventively, a balancing test is needed which involves identifying the interests at stake and quantifying their value.

For preventive remedies, a test is needed which necessarily implies the use of *risk assessment techniques*. Using fault as a foundation for the imposition of preventive remedies is justifiable because the duty to take precautions, which is enforced by way of preventive remedies, is intrinsic to fault<sup>571</sup> (the duty to take precautions can be seen as equivalent or at least substantially overlapping with the general *duty of care*). The only problem which might hinder the use of fault-based analysis in such cases is the fact that fault has made a career in the area of retrospective analysis and has been so well adapted to compensatory remedies. For that reason, in cases of direct prevention, fault must be enriched with prospective tools. Such tools are to be

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<sup>571</sup> Viney, *supra* note 16, at 156.

found in risk assessment techniques, as well as cost-benefit and risk-utility analysis.<sup>572</sup> Since what is reproached to the defendant is the introduction of a risk, the judge must decide whether or not the risk is worth taking, and whether or not society can tolerate that risk at one particular moment in time, a judgment which requires prospective analysis.

In the search for default techniques of risk assessment in fault-based liability, the Hand formula might supply the necessary prospective view needed in order to adapt fault based analysis to the use of preventive remedies.

Risk assessment is probably the most complicated issue in cases of preventive intervention. Generally when the risk of harm is appreciated at a lower value than the cost of taking precautions (in order to avoid that risk), a reasonable person would not intervene preventively, and therefore neither should the courts. This was the idea encapsulated by Judge Learned Hand in his famous formula.<sup>573</sup> If the burden of precautions is greater than the injury suffered multiplied by the probability of occurrence, the law should not intervene, because the defendant did not have a duty (obligation) to take precautions.<sup>574</sup> The mathematical formula is very simple:

$B < PL$ ; where B is the burden of precautions, P is the probability of harm, and L is the injury.<sup>575</sup>

The Hand formula is quite a wonderful default tool for risk assessment calculations in cases involving prevention and can serve as a unifying standard for direct prevention.

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<sup>572</sup> On risk-utility analysis and the Hand Formula, see DOBBS, *supra* note 13, at 340-48.

<sup>573</sup> “[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.” United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

<sup>574</sup> *Id.*

<sup>575</sup> *Id.*

In fact, the Hand formula is not only good for risk assessment in cases where preventive remedies are sought; it is actually more objective in its preventive use, as opposed to its use as a standard for duty in cases of compensation.<sup>576</sup>

The Hand formula has intrinsic biases when applied as a general standard for the duty element in cases involving compensation precisely because the decision-making process is placed at a different moment than the one when the formula is calculated. The Hand formula is rarely, if ever, based on exact numbers. But what ruins its *ex-post* objectivity is not the usual imprecision of the formula (which can be corrected or tolerated); it is the temporal displacement of the decision-making process. The Hand formula is used at the time of the trial in order to re-analyze a decision made when the defendant introduced a risk of harm. Judges don't actually apply the formula. The reproach made to the defendant is that he ignored what the Hand formula's result was at the time the tort was committed (more precisely, at the time when the risk of harm was introduced).<sup>577</sup> Tortfeasors rarely make risk assessment judgments prior to the occurrence of harm. The rare situations where this happens usually involve decisions made by corporations.<sup>578</sup> Most negligence cases involve simple acts of inadvertence. One might wonder, if the tortfeasor has made the risk assessment calculation, and then ignores the results, isn't this closer to an intentional act, or at least gross negligence, rather than simple negligence?

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<sup>576</sup> Judge Learned Hand and the tort literature analyze the Hand formula as a retrospective tool, as a standard for the duty element in cases involving compensation. Even as such, it is clear that linking fault based liability to the Hand formula is meant to create a shift towards prevention and economic efficiency within the traditional default rules of liability. *Id.*: "the owner's *duty*, as in other similar situations, to provide against resulting injuries is a function of three variables . . ." (emphasis added); *See* U.S. Fid. & Guar. Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022, 1026 (7th Cir. 1982) (opinion written by Judge Posner); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 213-17 (8th ed., Wolters Kluwer 2011). RICHARD A. EPSTEIN, TORTS 129 (Aspen Publishers 1999); DOBBS, *supra* note 13, at 341; 1 RESTATEMENT OF THE LAW. TORTS 3d. LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §3.

<sup>577</sup> The Hand formula is thus a standard for the duty element, a tool for establishing what the ideal behavior of the defendant was.

<sup>578</sup> Even in such cases, risk-benefit calculations might not be followed. One rather famous example is the refusal of the California Court of Appeals to apply the risk-benefit analysis in *Grimshaw v. Ford Motor Co.* because the risk-benefit analysis did not favor consumers. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 802, 174 Cal. Rptr. 348, 377 (Ct. App. 1981). Of course, it should be kept in mind that this was a products liability case, not a regular negligence case.



Moreover, even if an actor were to make the initial risk assessment judgment, he would normally be biased, generally placing more value on the benefits of the act and minimizing the value of the risk of harm generated onto others. One would think that the initial bias would be corrected by the objective determination of the court *ex post*. That is quite false. The fact that the Hand formula is an objective standard does not eliminate the risk of biased determinations. Ex-post decision-making creates a bias into the probabilistic element of the formula. Judges make determinations based on the Hand formula after the harmful effects of an act can be measured, thus creating this new bias, a bias benefiting the victim. When the probability of harm is assessed, it would come as no surprise to find it inflated due to a simple reason: damage *has* occurred! Because this is an ex-post review and damage has occurred, the natural tendency is to consider that under the consequences of the case, the probability of such harm to ensue was high. This is like trying to decide, in a soccer match, if it was a good decision to shoot from a distance or pass the ball, after the ball went over the post.

If used in risk assessment calculations, the Hand formula would be free of such biases. As a risk-assessment technique, the natural moment to apply the formula is *ex ante*, before the risk becomes a certainty—therefore the probabilistic element of the formula would be determined at a moment when its calculation can be done with a higher degree of objectivity.

But is the Hand formula sufficient? First of all, the Hand formula has one essential weakness: it cannot be calculated with precision.<sup>579</sup> At most, decision-makers can approximate with some degree of tolerance the extent of the potential damage, the percentage of probability

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<sup>579</sup> In the words of Judge Posner: “Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that B, P, and L all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors.” U.S. Fid. & Guar. Co. v. Jadranska Slobodna Plovidba, 683 F.2d at 1026.

for such damage to occur, and even the benefits which would be obtained from the activity.<sup>580</sup> Other mechanisms might be used in conjunction with the Hand formula to correct this problem. The *maxmin model* would suppose making a determination of a best case scenario and a worst case scenario in order to determine intervals or a spectrum which can be brought closer to the best case scenario with the help of a remedy.<sup>581</sup> The precautionary principle could also be used in cases of uncertainty. The precautionary principle would make the decision-maker “err on the side of caution”,<sup>582</sup> which means that, in case of insufficient evidence for determining that the benefits of some activity surpass the risk of harm, the decision-maker would rather do something to protect the environment or human health, instead of putting them at risk, and err on the side of what is usually an economic interest. The inquiry should not stop at this point, however. One interest that should not be forgotten in cases applying preventive remedies is the interest of society as a whole. The Hand formula takes into consideration the interests of the parties involved, but also has within it the flexibility to include the interests of society. Public policy arguments are routinely brought before courts in cases involving preventive remedies.<sup>583</sup>

The emphasis on the conflict between the parties and, to a large extent, the adversarial system, can contribute to a phenomenon named “system neglect.”<sup>584</sup> System neglect is basically the ignorance of the full consequences of legal intervention, and occurs every time a single problem is placed in view, leaving some of the effects of a decision out of the equation.<sup>585</sup> The

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<sup>580</sup> On the approximation of the elements of the Hand formula as applied to the English case *Blyth v. Birmingham Water Works*, 156 Eng. Rep 1047 (1856), see the discussion in POSNER, *supra* note 576, at 216. The case involved compensation, not a preventive remedy, but the same principles would apply.

<sup>581</sup> Farber, *supra* note 215, at 930-32.

<sup>582</sup> Interdepartmental Liaison Group on Risk Assessment, *supra* note 224, at 9.

<sup>583</sup> E.g., *Parker v. Camden London Borough Council*, [1986] Ch. 162; *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1125; 4 RESTATEMENT OF THE LAW. TORTS 2d, §§ 936 (1) f). However, in England, in some cases courts accept arguments regarding the public interest and public policy, while others they do not. Oliphant, *Injunctions and Other Remedies*, *supra* note 170, at 306, n.7.

<sup>584</sup> Sunstein, *supra* note 11, at 1010.

<sup>585</sup> *Id.*

interaction between human beings among themselves, as well as the interaction with our resources, environment, and the systems we have put in place, requires a multi-lateral risk assessment calculation, taking into account the indirect effects of decisions, alongside direct effects. Courts must and generally do take into account the interest of the public in many situations when preventive measures are sought, and not just the interests of the parties,<sup>586</sup> and must also try to anticipate what the effect of a particular case will have if similar cases are all decided the same way. Some civil codes, like the Swiss civil code, require judges to decide new cases as if they were legislators.<sup>587</sup> This is of particular importance in cases involving preventive remedies, particularly borderline cases applying the precautionary principle. System neglect can spring not only from emphasizing the rights and interests of the parties, but also from focusing on only one particular issue, and failing to see the systemic ramification of decisions. For Professor Sunstein, this is the core of “systemic neglect”: the fact that people “tend to assume that a change in a social situation will alter the part at issue, but without altering other parts.”<sup>588,589</sup> The French decisions regarding the electro-magnetic emissions of relay antennas<sup>590</sup> need to be addressed systemically as well. Courts, before ordering the removal of those antennas, must carefully consider the effects of such a decision if it were to be applied uniformly across the

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<sup>586</sup> *Supra* note 583.

<sup>587</sup> CODE CIVIL [CC][CIVIL CODE], Dec. 10, 1907, RS 210, art. 1 (Switz.): “. . . In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. . . .”

<sup>588</sup> Sunstein, *supra* note 11, at 1049.

<sup>589</sup> A fairly good example of “systemic neglect”, at a regulatory level and therefore on a different scale, can be found in the area of bio-fuels. It has been argued that the U.S. ethanol subsidy, while diverting more than 100 million metric tons of corn into ethanol in 2010, has done little for the reduction of global warming, while making basic grains and meat more expensive for most people in the world. JAAP SPIER & ELBERT DE JONG, SHAPING THE LAW FOR GLOBAL CRISES 14 (Eleven International Publishing 2012). The problem in this case is not that producing ethanol is not reducing global warming. It is. The problem is that the systemic effect of producing ethanol is a reduction in the supply of basic grains and an increase in prices of meat, an effect that is not easily visible if one would only look at the environmental issue. Also, a small increase in food prices might seem tolerable in the western world, where people spend around 10% of their income in the supermarket, but if the global prices rise, what seems as a small increase might be catastrophic for third world countries, where people spend 50-70% of their income on food. *Id.* at 28.

<sup>590</sup> *Supra* notes 188, 189, 195 & 203.

territory. The same people complaining about their effects might have a change of heart if made aware that removing relay antennas from the proximity of residential areas would increase their mobile service costs immensely, and they might not have national coverage anymore.

Another great challenge posed by the issue of prevention in the law of torts is understanding uncertainty. No preventive decision can ignore the level of uncertainty inherent to any risk assessment technique. Moreover, every time a judge makes a decision in the law of torts he does so in a climate of uncertainty. This happens because tort actions are inherently fact-dependent. Judgment is passed only after a mental recreation of an event or a set of events.<sup>591</sup> When trying to recreate past events, as it happens in the vast majority of tort actions, the farther the event is in the past, the bigger the uncertainty is.<sup>592</sup> In cases of prevention, the same relationship can be expressed as applied to future events. All other things being equal, there is greater uncertainty when predicting an event which is bound to happen in the far future, than if it is bound to happen in the immediate future. For that reason, at early stages, remedies should be exploratory (like imposing on the defendant the obligation to produce independent and reliable scientific studies, appoint an expert or a commission of experts in risk assessment, etc), less

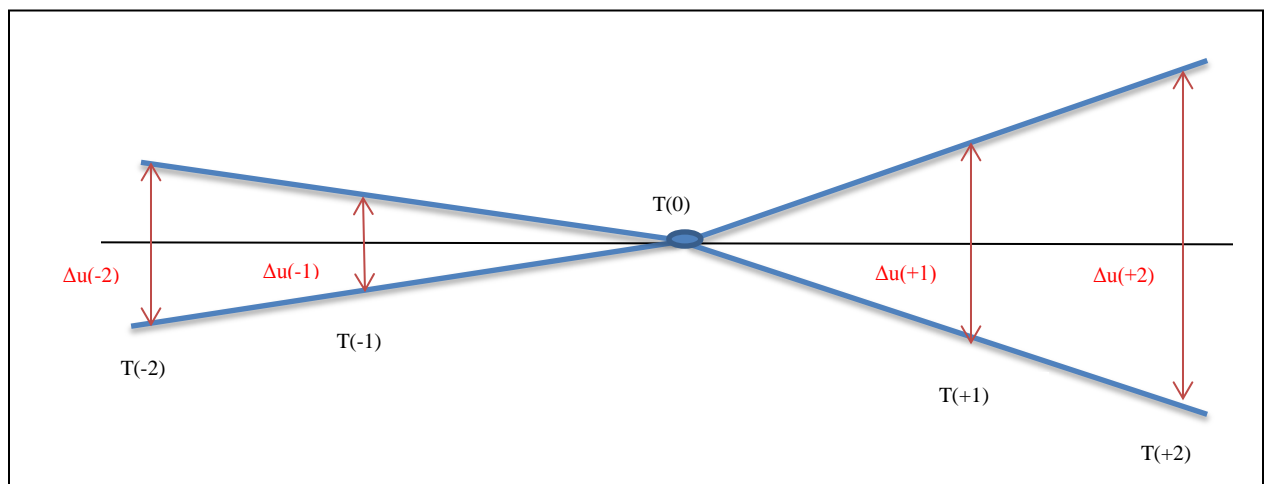
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<sup>591</sup> On the limits of our knowledge and the controversy surrounding the deterministic or non-deterministic nature of our world, see Steven Hawkins, *Gödel and the End of Physics*, a lecture which is accessible online at <http://www.damtp.cam.ac.uk/events/strings02/dirac/hawking/> (last visited 04/01/2013). The world renowned physicist makes the argument that according to the level achieved by science today, and even with the intrinsic uncertainty from quantum physics, the world can still be seen as fundamentally deterministic. *Id.* One of the more plausible explanations is that we cannot *calculate* everything with absolute certainty; either our methods are not evolved enough, or we do not have sufficient knowledge of the facts in order to make accurate predictions. *Id.* Moreover, our own existence might be an impediment: we are trying to measure and anticipate events in a world we are a part of. *Id.* In his own words:

“in the standard positivist approach to the philosophy of science, physical theories live rent free in a Platonic heaven of ideal mathematical models. That is, a model can be arbitrarily detailed, and can contain an arbitrary amount of information, without affecting the universes they describe. But we are not angels, who view the universe from the outside. Instead, we and our models, are both part of the universe we are describing.” *Id.*

<sup>592</sup> The concept of time itself creates an illusion that knowledge of the past is, or can be, certain. Past events are events that took place already, and are therefore certain and unique. However, what the facts from the past are, and what we know about those facts, are two very different things. For the decision-making process, the past is limited to what the decision-maker knows about the past. Decision-makers must mentally recreate the past based on evidence from the present, and this implies uncertainty.

intensive (limiting an activity in order to reduce the risks, rather than forbidding action altogether), or denied until a future moment when risk assessment is possible or more accurate in its results. With the passage of time, more information, and a calculation of risk which implies less uncertainty, judges can apply more aggressive remedies, like imposing positive or negative obligations to act in a specific manner to the defendant.



If  $T(0)$  is the moment when the decision-making process takes place, the degree of uncertainty ( $\Delta u$ ) increases as the events which are under scrutiny (the past events which the court is trying to find, or the future ones which it tries to anticipate) go deeper into the past or into the future.

Awareness as to how uncertainty is bound to influence the risk assessment calculations when preventive remedies are sought, explains the variation of standards between the different preventive remedies described in Chapter IV. The degree of uncertainty is lower if the remedy is close to the moment when damage is supposed to occur and higher when the remedy is remote to such a moment. This does not change the fact that the default risk assessment technique is still the basic Hand formula. For instance, the standard for both the permanent and the interlocutory

injunction should be calculated according to the Hand formula when preventive measures are sought. In fact, Judge Posner explicitly admitted that the “Leubsdorf-Posner” formulation is the procedural equivalent of the Hand formula.<sup>593</sup> However, when a preventive remedy is sought, both the permanent and the interim injunction are made in a climate of uncertainty. The benefit of a full record diminishes uncertainty, but does not eliminate it. That is why it is not enough for the “Leubsdorf-Posner” formula for interlocutory injunctions to calculate the probability of winning or losing at trial and the irreparable harm suffered by one party or the other,<sup>594</sup> because in order to anticipate, even as a probability, what the court will decide at trial would mean to anticipate the level of uncertainty existent at a future decision-making moment, which itself, as a future event, cannot be determined with certainty. It would be much easier simply to make a normal risk assessment calculation based on the Hand formula (calculating the value of the activity on the one side, and the probability of future damage, multiplied by the extent of damage), whilst taking into account the existent degree of uncertainty. The decision itself is provisional (non-definitive) precisely because the degree of uncertainty at the moment when an interim injunction is requested is higher, by comparison, with a decision after a full trial. The focus under this unified standard will, as a consequence, be not on the final decision, but on *the right decision*.<sup>595</sup>

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<sup>593</sup> Am. Hosp. Supply Corp. v. Hosp. Products Ltd., 780 F.2d 593.

<sup>594</sup> For other arguments going against the idea of calculating the probability of success at trial, see Brooks & Schwartz, *supra* note 381, at 392.

<sup>595</sup> This might appease the critics of the “Leubsdorf-Posner” formulation, though the solution proposed by the three authors goes along different lines. By default, these authors would impose effective injunction bonds, in order to shift this risk assessment calculation in the hands of the plaintiff. Brooks & Schwartz, *supra* note 381, at 405. I believe injunctive bonds should be requested by courts on an ad-hoc basis and only exceptionally, when the plaintiff has both the resources to post the injunction and to make the risk assessment calculation. Why deny justice to a plaintiff whose rights are in peril, if he can’t afford the injunction bond, or does not have the resources to make the risk assessment calculation?

## D. Placing limits on preventive intervention

### 1. Relational limits—supervening administrative or legislative regulation

The law of torts, because it devises default rules of liability, from one point of view, makes the judiciary the first preventive decision-making body, but from another point of view, the last. The gap-filling capacity of the law of torts creates this seemingly dual way to intervene. Judges are placed at the forefront whenever the problem requiring preventive intervention is novel. Novel issues fall through the gaps, and solutions must be found at the level where the citizen first looks for justice. However, whenever special legislation is passed or an administrative body has taken up the challenge to regulate and make decisions for preventive purposes, judges will have to defer to the entity more suited for specific intervention.

In France, the necessity to defer to the administration when the administrative bodies have made a decision, we have seen,<sup>596</sup> is much more than a mere problem of efficient administration of prevention. The relay antenna cases have shown that this can become a problem of separation of powers,<sup>597</sup> in a legal system where the line of separation between the executive, the legislative, and the judiciary is quite prominent.<sup>598</sup> In U.S. law, we have seen that there is also a general practice of deferring to the administration, when the administration has better information and better resources to make a decision.<sup>599</sup> Besides this matter, the U.S. also

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<sup>596</sup> *Supra* pp. 57-59.

<sup>597</sup> Tribunal des conflits [TC] [deciding on conflicts of jurisdiction between the Cour de Cassation and the Conseil d'État] May 14, 2012, 6 decisions, *supra* note 220.

<sup>598</sup> By comparison, the separation of powers has been more radical in the French legal system than in the United States. The limited possibility of judicial review the Constitutional Council had before the reforms in 2008 prove the fact that in the French tradition the emphasis was placed more on separating powers than on the creation of a checks and balances system. See BERNARD CHANTEBOUT, THE FRENCH CONSTITUTION 84-97 (David Gruning trans., Center of Civil Law Studies 1998); Loi constitutionnelle 2008-724 du 23 Juillet 2008 de modernisation des institutions de la Ve République [Constitutional Law nr. 2008-724 of July 23, 2008, regarding the modernization of the institutions of the Vth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 11890.

<sup>599</sup> *Supra* notes 321 & 340.

presents a peculiar feature when it comes to the intervention of federal administrative agencies, who, in some circumstances, can preempt state intervention.<sup>600</sup>

## 2. Foundational limits—freedom and preventive intervention

Responsibility as a whole is justified by ideas of freedom and power, and civil liability, while born out of the same scope of preserving and maximizing human freedom, also finds its effects limited by the same ideas. The use of coercion, and therefore the employment and the strength of preventive remedies, are limited by creating a double limitation<sup>601</sup> on the decision-maker:

(1) A preventive remedy can only be imposed on the one who has breached his duty to take precautions, and the breach needs to be proved. The onus of decision-making and preventive intervention is, as a rule, on the actor, not the court. Courts can order preventive intervention only in the presence of fault, i.e., when the actor failed to take the reasonable precautions required under the circumstances.

(2) The preventive remedy must not place an undue burden on the defendant, and it must be proportional<sup>602</sup> to the risk which was generated.<sup>603</sup>

## 3. Epistemological limits—knowledge and uncertainty

As stated before, no preventive decision can ignore the level of uncertainty inherent to every risk assessment technique. Also, applying preventive remedies presupposes the

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<sup>600</sup> Feikema v. Texaco Inc., 16 F.3d 1408, 1416.

<sup>601</sup> See *supra* p. 43: “If preventive remedies are coercive in nature that means that their application can only proceed after the imperative of prevention is put in balance with the imperative of preserving the individual freedom of the actor subject to sanction. The actor’s freedom of choice gives rise to his responsibility, but his own personal freedom will also justify limits being put on the effects of his responsibility. The law must find the right measure, in its effects, for responsibility.”

<sup>602</sup> Cyril Sintez also describes measures of direct prevention as having a proportional character. Sintez, *supra* note 25, at 53.

<sup>603</sup> See *Kennaway v. Thompson*, [1981] Q.B. 88 (the court found that the defendant’s power boat racing was a nuisance but did not totally prohibit the activity; the court simply limited the number of motor racing events allowed to be held every year and ordered the defendant to keep the noise levels under 75 decibels at all times).



anticipation of future events. The Hand formula, the maxmin model, or the precautionary principle all seem extremely attractive as theoretical models, but more often than not they are not easy to implement in practice for a variety of reasons. All these models involve calculations based on certain variables which need to be identified and assessed with as much precision as possible, and that involves considerable effort, cost and, maybe paradoxically, time.

The reaction to uncertainty in judicial practice has traditionally been one of non-intervention, again leaving the decision-making process on the actor. The court will only involve itself in the decision-making process and sanction the author for his failure to correctly assess risks at a point in time when such failure becomes calculable, or obvious.

The precautionary principle invites a different approach. In cases that fall within the narrow scope of the precautionary principle (catastrophic and irreversible harm to essential human values), the decision cannot wait for uncertainty to dissipate and uncertainty will not excuse the lack of intervention for the protection of fundamental values. However, even in cases like this, intervention must be proportional and the facts need to be analyzed thoroughly. The blind application of the precautionary principle can indeed become paralyzing and absurd, as some of its critics fear.<sup>604</sup>

Moreover, uncertainty also limits the application of preventive remedies in a very particular way. Because, with the passage of time, levels of uncertainty tend to become more and more reduced as the present moves closer to the anticipated effect from the future, preventive remedies can intervene progressively. As already stated, at early stages, remedies should be exploratory (like imposing on the defendant the obligation to produce independent and reliable scientific studies, appoint an expert or a commission of experts in risk assessment, etc), less intensive (limiting an activity in order to reduce the risks, rather than prohibiting it altogether), or

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<sup>604</sup> Sunstein, *supra* note 11; Feldman, *supra* note 195.

refused until a future moment when risk assessment is possible or more accurate in its results. With the passage of time, more information, and a calculation of risk which implies less uncertainty, judges can apply more aggressive remedies, like imposing positive or negative obligations to act in a specific manner to the defendant.

Out of the challenges decision-makers meet when applying preventive remedies, probably the most important is understanding and embracing uncertainty.<sup>605</sup> The law of torts is connected to facts, it is connected to the world, and it is connected to people. Uncertainty is a great part of our world as we know it, and not knowing is, whether we like it or not, a reality derived from our human nature. So often we kid ourselves that we know much about something, or worse, all about everything. Ignoring uncertainty or choosing an easy way out of our problems only creates more problems. The best proof of this is given by the extreme approaches taken on the precautionary principle.<sup>606</sup> Total rejection or the over-stretching of the precautionary principle are in equal measure ways of abandoning reason for foolishness, either because of stubborn wishful thinking or because of unreasonable fear. The cases involving relay antennas, discussed at length above,<sup>607</sup> show this type of perverted application of the precautionary principle. The precautionary principle need not be applied in a context of utter ignorance, without any effort to assess, based on scientific data, the risks involved in a particular case. The principle is not supposed to be paralyzing, and it should definitely not encourage a fear of everything which is modern, or which we do not understand completely.<sup>608</sup> We live in a

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<sup>605</sup> See Farber, *supra* note 215, at 959.

<sup>606</sup> See Cour d'appel [CA][regional court of appeal] Versailles, *supra* note 195; For studies rejecting of the precautionary principle in all its forms see the studies published in RETHINKING RISK AND THE PRECAUTIONARY PRINCIPLE (Julian Morris ed., Butterworth Heinemann 2000), *supra* note 533.

<sup>607</sup> *Supra* Ch. IV, Part B.1.

<sup>608</sup> The precautionary principle usually involves choices between values that are cherished in our society. All interests must carefully be weighed before arriving at a decision. Eliminating one risk might create another, and in these kinds of circumstances keeping the *status quo* might be just as harmful as making a change. That is why the precautionary principle must not be a paralyzing principle. It must be a principle of action, but an action which

technological world, and by no means must we take this as a negative. Scientists are today's great explorers and innovators. The pinnacle of human adventure today is scientific discovery.<sup>609</sup> Through science we can see galaxies millions of light years away. Through science we broke the frontier of sound, gravity and atomic forces. It was the immense power of our minds that brought us to the point we reached today, a point where man wields incredible power, and as time passes, such power is more than likely to continue to grow. In this brave new world, legal science must also play its part.

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stems from careful research. The best solution can be reached only through an intense study of uncertainty and the introduction of new analytical tools. If uncertainty cannot be eliminated, decision-makers must use any tool at their disposal in order to reach the best decision in the given circumstance.

<sup>609</sup> le Tourneau, *supra* note 14, at no. 242.

## Chapter VII

### Final Remarks

Throughout this study, the problem of direct prevention has been analyzed from the following angles: etymology (Chapter II), philosophy (III), jurisprudence (IV), doctrinal perceptions (V), and analytical tools (VI). Attempting to link all these elements into a cohesive whole, the result was a model that follows the actor, on two plains simultaneously: as to the facts, and as to the law. It is a citizen centered view; a model that begins with movement and relational concepts and a dynamic sequence with two key moments: an act which is simultaneously a breach of a preexisting duty and an infringement of a right (the breach of the duty to take precautions) and the decision-making process (when the decision-making power is forfeited due to this failure and, consequently, empowers the court to engage in risk assessment and offer a solution). When ordering preventive remedies, courts engage in two types of judgments: one that is retrospective—deciding if the actor breached his duty to take precautions; and one that is perspective—deciding whether and how to intervene in order to avoid future probable harm.

The study of direct prevention is only at the beginning of the road and the topic is one of fascinating implications. The debate that follows this area of tort law might have far-reaching effects. Indeed, the entire perception we have on tortious liability might find itself reinvented through the study of prevention.<sup>610</sup> One of the major anticipated changes proposed herein is the reassessment of our understanding of liability as a concept,<sup>611</sup> and this is one of the topics that would merit further attention in legal literature. Unfortunately, the subject would have been too

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<sup>610</sup> Or liability itself, as indicated by Catherine Thibierge. *see* Thibierge, *Libres propos*, *supra* note 7, at 562; Thibierge, *Avenir de la responsabilité*, *supra* note 3, at 580.

<sup>611</sup> *See supra* Ch. II, Part B.

vast and too challenging to integrate in this thesis, which has a much narrower topic: direct prevention. The overall scope was to promote a purposive and dynamic approach in the application of preventive remedies.

Limited as to its scope, this endeavor was also limited as to the jurisdictions which were selected for doctrinal and jurisprudential analysis. The choice of jurisdictions for the comparative part of the paper was made in the hope that the joint experience of the three legal systems taken under scrutiny would open up new avenues for reflection. A sort of trans-systemic body of knowledge can be obtained by the merger of the individualistic philosophy, thinking and mechanisms developed in the common law with the focus on collectivism from the civil law. This can be done, particularly because the practical solutions offered within each legal system are quite similar functionally, and differ only in exceptional cases.<sup>612</sup>

Ideally (or perhaps as a matter of utopia), for prevention, the resultant would be a legal system where each person seeking justice is treated as an individual and protected as such, but without forgetting that each person is but a member of a social body, and that court decisions must strike a perfect balance between all the interests involved in each particular case, by weighing efficiency with freedom and by placing the common good above all other policy considerations.

An inspiration for this form of comparative approach was found in Professor Reimann's vision for a vertical, multidimensional approach to comparative law,<sup>613</sup> where comparative law is not just a method,<sup>614</sup> but also "a field of substantive knowledge."<sup>615</sup> The historical context would

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<sup>612</sup> For instance, in the jurisprudential application of the precautionary principle (*see supra* pp. 74-79). But even that is doubtful, since the jurisprudence of the Tribunal des Conflits (cited at note 220) and the Court of Cassation (note 222) severely curtailed the jurisdiction of lower courts in deciding such matters.

<sup>613</sup> Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1116-17 (2000-2001).

<sup>614</sup> Professor Reimann is not the only comparative law scholar to see more than just a method in this field of study. In fact, I believe the majority of scholars see the method (or methods) of comparative law as a tool for higher

favor it: we pride ourselves today on a global perception of society, with openness to diversity and unprecedented social, economic and political interconnectivity. It is a context that favors progress, and that encourages us to learn from each other, to learn from the things that we have in common and from the things that set us apart, for the betterment of the society we live in.

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abstraction and a better understanding of the law. *See, e.g.*, Moréteau, *supra* note 176, at 411; Reitz, *supra* note 176, at 635-636; JACQUES VANDERLINDEN, *COMPARER LES DROITS* 426-28 (E. Story-Scientia: Kluwer éd. juridiques Belgique 1995); RODOLFO SACCO, *LA COMPARAISON JURIDIQUE AU SERVICE DE LA CONNAISSANCE DU DROIT* 8-10 (Economica 1991).

<sup>615</sup> Reimann, *supra* note 176, at 684.