



# PROPOSALS REFORMING FRENCH CIVIL LIABILITY

Alice Dejean de La Batie

► **To cite this version:**

Alice Dejean de La Batie. PROPOSALS REFORMING FRENCH CIVIL LIABILITY: Translation of the proposals released by the French Government on April 29th 2016. 2016. <hal-01389343>

**HAL Id: hal-01389343**

**<https://hal.archives-ouvertes.fr/hal-01389343>**

Submitted on 28 Oct 2016

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

# PROPOSALS REFORMING CIVIL LIABILITY

*This project was released by the Minister of Justice on Friday April 29th 2016.*

I. Articles 1231 to 1245-17 of the Civil Code are abrogated.

II. Article 1231 of the Civil Code states: “In cases of non-performance, the creditor of an obligation arising from a validly concluded contract can claim compensation for his loss from the debtor under the conditions provided for in subtitle II.”

III. Article 1603 of the Civil Code is completed by a second paragraph that states: “The successive purchasers of a property can invoke the seller's obligations, even if the property is incorporated into another one, and with no regard to the type of contract at the origin of the acquisition. This right is limited by both the seller's obligations and the purchaser's rights.”

Subtitle II of Title III of Book III of the Civil Code states:

## **SUBTITLE II - CIVIL LIABILITY**

### **CHAPTER I - PRELIMINARY PROVISIONS**

#### **Article 1232**

Independently from compensation for the harm possibly suffered, the judge can prescribe reasonable measures in order to prevent or stop unlawful disorder to which the defendant is exposed. [Breaches to a rule of conduct required by law or the general duty of caution or diligence are the only facts that can allow such measures.]

#### **Article 1233**

In cases of non-performance of a contractual obligation, neither the debtor nor the creditor can avoid the application of provisions regarding contractual liability to opt for the rules specific to extra-contractual liability.

However, physical injuries are compensated following the rules governing extra-contractual liability, even though these injuries may have occurred during the performance of the contract.

## **Article 1234**

When the non-performance of a contractual obligation is the direct cause of a loss suffered by a third party, the latter can only ask for compensation to the debtor on the ground of extra-contractual liability. It will be for the third party to prove the occurrence of one of the operative events provided for by section II of chapter II.

## **CHAPTER II - THE CONDITIONS OF LIABILITY**

### **SECTION 1- Provisions common to contractual and extra-contractual liabilities**

#### **Subsection 1. Compensable loss**

### **Article 1235**

A person can ask for compensation of any certain loss arising from an injury and consisting in the harming of a lawful interest, relating to assets or not, individual or collective.

### **Article 1236**

Future loss can be compensated when it is the certain and direct continuation of a present state of affairs.

### **Article 1237**

Expenses incurred by the defendant in order to prevent the imminent occurrence of harm or to prevent its aggravation, as well as to reduce its consequences, represent a compensable loss as long as they were reasonably undertaken.

The only compensable loss of opportunity is the certain and present disappearance of a favourable prospect.

Harm arising from a loss of opportunity is distinct from the advantage that would have accrued had this opportunity come about.

#### **Sub-section 2. The causal link**

### **Article 1239**

Liability requires the demonstration of a causal connection between a fact attributable to the defendant and the harm.

The causal link can be proved by all means.

## **Article 1240**

When a [physical] injury is caused by an indeterminate member of a group of identified people acting together or for similar reasons, each of them is answerable for the entire loss, unless they can prove that they cannot have caused it.

## **SECTION 2 - Provisions regarding extra-contractual liability**

### **Subsection 1. The event generating liability**

#### **§1 Fault**

##### **Article 1241**

Any fault compels its author to compensate the harm it caused.

##### **Article 1242**

A fault is constituted by the violation of a rule of conduct imposed by law or the failure to fulfil the general duty of caution and diligence.

#### **§2 Actions of things**

##### **Article 1243**

A person is strictly liable for harm caused by the actions of tangible things which are in their custody.

The action of a thing is presumed when the thing, while moving, came into contact with the person or the property which is harmed.

In other situations, it is for the victim to prove the action of the thing by showing either that the thing was defective, or that its position, condition or behaviour was abnormal.

The custodian is the person using, controlling and directing the thing at the time of the harmful event. The owner is presumed to have custody.

The provisions of this paragraph are applicable to the actions of animals.

#### **§3 Abnormal nuisance**

##### **Article 1244**

An owner, a tenant, the holder of a title mainly aiming at authorising them to occupy or manage an estate, a project manager, or the person exercising their power, who causes a

nuisance is liable when the nuisance exceeds normal inconvenience to be expected of neighbours.

When a harmful activity was administratively authorised, the judge can nonetheless grant compensation or order reasonable measures to be taken in order to stop the nuisance, provided these measures do not contradict provisions made by the administrative authorities in order to protect safety and public hygiene.

## **Subsection 2. Liability for the actions of other persons**

### **Article 1245**

A person is liable for harm caused by another person in the situations and under the conditions provided for by articles 1246 to 1249.

Such liability requires evidence of a fact on which the liability of the direct author of the harm could be grounded.

### **Article 1246**

The following persons are strictly liable for the actions of a minor:

- their parents, to the extent to which they exercise parental authority;
- their guardian(s), as long as they are in charge of the minor
- the physical or legal person entrusted by a judicial or administrative decision with the permanent organisation and control of the minor's way of life. In this case, the minor's parents cannot be held liable.

### **Article 1247**

The physical or legal person entrusted by a judicial or administrative decision with the permanent organisation and control of an adult's way of life is strictly liable for the actions of the adult placed under their care.

### **Article 1248**

Other persons who are committed to the care of someone on the basis of a professional contract are liable for the actions of that person unless they can demonstrate that there was no fault on their part.

### **Article 1249**

Employers are strictly liable for the actions of their employees. The employer is the person who has the power to give orders or instructions related to the employee fulfilling their functions.

When this authority has been delegated, the beneficiary of the delegation bears this liability.

The employer, or the beneficiary of the delegation, is not liable if they can prove that the employee acted beyond the scope of the functions they had been tasked with, without authorisation, and for purposes not related to their tasks. They are also not liable if they can prove that the victim could not legitimately believe that the employee was acting on behalf of the employer.

Employees are personally liable only in cases of wilful misconduct or when they acted without authorisation for purposes not related to their tasks.

### **SECTION 3 - Provisions regarding contractual liability**

#### **Article 1250**

Debtors are liable for any non-performance of their contractual obligation that caused harm to their creditors.

#### **Article 1251**

Apart from cases of willful misconduct or gross negligence on their part, debtors are only liable for those consequences of their non-performance that were reasonably foreseeable at the time when the contract was made.

#### **Article 1252**

Compensation for loss resulting from a delay in performance requires a prior formal notice made to the debtor. Formal notice is required for the compensation of other losses only when such notice is necessary in order to establish non-performance.

### **CHAPTER III - Causes of exemption from liability or liability exclusion**

#### **SECTION 1 - Causes of exemption**

#### **Article 1253**

Acts of God and the actions of a third party or of the victims lead to total exemption if they satisfy the conditions of *force majeure*.

For extra-contractual matters, *force majeure* is an event that the defendant, or the person whose actions they are accountable for, could not prevent through appropriate measures, or an event whose consequences could not be so avoided by the defendant.

For contractual matters, *force majeure* is defined by article 1218.

#### **Article 1254**

A victim's failure to fulfil their contractual obligations, their fault, or the fault of a person whose actions the victim is accountable for, leads to partial exemption when it contributed to their loss. In cases of physical injury, only gross negligence can lead to partial exemption.

#### **Article 1255**

When the victim has no discernment, their fault does not lead to exemption.

#### **Article 1256**

A fault or non-performance that can be invoked against direct victims can also be invoked against indirect victims.

### **SECTION 2 - Causes of liability exclusion**

#### **Article 1257**

Harmful events do not give rise to fault-based liability when they were compulsory under legislative or administrative provisions, or imposed by a legitimate authority, or ordered by the necessity of self-defence or of the safeguard of a superior interest.

There is also no liability when the event was harmful to a right or an interest that the victim could dispose of, when the victim consented to it.

## **CHAPTER IV - THE EFFECTS OF LIABILITY**

### **SECTION 1 - Principles**

#### **Article 1258**

Provided that there are no contrary provisions or clauses, the object of compensation must be to place the victim in the position they would be in had the harmful event not occurred. This should lead to neither loss nor gain for the victim.

#### **Article 1259**

Compensation can be in the form of compensation in kind or in the form of damages. Both measures can be combined in order to fully compensate the loss.

#### **Subsection 1. Compensation in kind**

#### **Article 1260**

Compensation in kind must be specifically suitable to extinguishing, reducing or making up for the harm.

## **Article 1261**

Compensation in kind cannot be imposed on the victim.

It also cannot be ordered when it is impossible, or when it would infringe a fundamental freedom, or when it would represent for the person liable a clearly unreasonable cost considering the interest of such compensation for the victim.

Following the same conditions, the judge may also authorise the victim to take measures themselves to get compensation at the expense of the person liable. The latter may be ordered to pay an advance on forthcoming necessary expenses.

## **Subsection 2. Damages**

### **Article 1262**

Damages are assessed at the date of the judgment, taking into account all circumstances which may affect the composition and the value of the loss since the day on which the harm occurred. It also takes into account the reasonably foreseeable development of the loss.

When the harm increased after the court decision, the victim may ask for complementary compensation for the resulting loss.

Each alleged incidence of loss is assessed separately.

### **Article 1263**

For contractual matters, the judge may reduce compensation when the victim did not take those safe and reasonable measures that would have prevented the aggravation of the harm, considering amongst other things the victim's means.

### **Article 1264**

Victims are free in their use of the sums paid to them in compensation, unless exceptional circumstances justify that the judge imposes the use of damages to redress a specific harm.

## **Subsection 3. The effects of several persons being liable**

### **Article 1265**

When several persons are liable for the same harm, they are jointly and severally held to compensate the victim. If they all committed a fault, they each contribute in proportion to the gravity of their respective fault. If none of them committed a fault, they contribute equally. If only some of them committed a fault, they are the only ones bearing the final costs of compensation.



## **Subsection 4. Civil fines**

### **Article 1266**

When the author of a harm was deliberately grossly negligent, especially when such negligence generated a profit or a saving for its author, the judge may condemn them to the payment of a civil fine, provided the decision is specifically justified.

This fine is proportionate to the gravity of the fault, to the payment ability of the author or to the profit they made.

The fine cannot be higher than 2 million euros. However, it can be ten times higher than the amount of the profit or saving made.

If liability is borne by a legal person, the fine can be as high as 10% of the company's highest global pre-tax turnover during any of the completed fiscal years since the fiscal year preceding the fiscal year during which the fault was committed.

This fine goes either to a compensation fund related to the nature of the harm undergone by the victim or, by default, to the Treasury.

## **SECTION 2 - Rules specific to compensation of certain types of harm**

### **Subsection 1. Rules specific to compensation for losses resulting from physical injuries**

#### **Article 1267**

This subsection's rules are applicable to judicial and administrative court decisions, as well as to transactions concluded between the victim and the person liable.

#### **Article 1268**

Damages have to be assessed without taking into account the victim's possible predispositions, as long as these predispositions had not already had harmful consequences at the time when the harmful event occurred.

#### **Article 1269**

Harm, whether relating to assets or not, resulting from a physical injury is assessed, item-by-item, according to a non-restrictive list of the possible heads of loss provided for by a decree of the Conseil d'Etat.

#### **Article 1270**

Unless otherwise specifically provided for, functional impairments are assessed according to a single indicative medical scale. The ways in which this scale is made, revised and published are provided for by government regulation.

#### **Article 1271**

[A decree from the Conseil d'Etat provides for the incidences of damage not relating to assets that can be assessed according to an indicative compensation baseline. The ways in which this baseline is made and published are provided for by the same decree. This baseline is regularly re-assessed in light of changes to the average compensation granted by courts.

To that end,] definitive appeal decisions regarding compensation for physical injuries suffered by victims of traffic accidents are gathered in a database, under the control of the State and under the conditions provided for by the decree of the Conseil d'Etat.

#### **Article 1272**

Compensation for the loss of professional gains, the loss of income of those close to the victim or for support of a third party, usually comes in the form of an indexed annuity. The index is provided for by government regulation and is linked to changes of the minimal income.

Annuities may be converted into capital so long as the parties agree to it, or if this decision is specifically justified by the judge, and in accordance with a table provided for by government regulation.

When an annuity was provided for by agreement, or by a court decision, as compensation for future losses, the recipient can ask that remaining annuity payments be fully or partially replaced by capital, when this is justified by their personal situation, and in accordance with the conversion table mentioned in the preceding paragraph.

#### **Article 1273**

Compensatory sums paid to a victim by a third-party payer can only lead to subrogatory actions when provided for by law.

#### **Article 1274**

When the victim of a physical injury receives benefits, a suit against the person liable for damages, or their insurer, is only possible for the following benefits:

1. Benefits paid by agencies, institutions or services in charge of a compulsory social security scheme;
2. Benefits listed by article 1 - II of the #59-76 ordinance of January 7th 1959 concerning suits open to the State and some other public bodies to seek damages;

3. Sums paid as a refund for medical treatment and rehabilitation fees
4. Wages and accessories of wages maintained by the employer during the period of inactivity following the event that caused the harm.
5. Sick pay and disability benefits paid by mutual benefit societies regulated by the *Code de la Mutualité*, welfare institutions regulated by the Social Security Code or the Rural Code, and insurance companies regulated by the Insurance Code;
6. Benefits provided for by article L.245-1 of the *Code de l'Action Sociale et des Familles*.

#### **Article 1275**

Employers have a direct claim against the person liable for damages or their insurer, for refund of the costs related to remuneration maintained or paid to the victim during the time when the victim was unable to work. These provisions are applicable to the State, as an exception to article 2 of the above-mentioned #59-76 ordinance of January 7th 1959.

#### **Article 1276**

Benefits that can be claimed are deduced, item-by-item, only from compensation due by the person liable for the losses covered by the third-party payer, except for losses not relating to assets.

When the insolvency of the person liable would prevent the full compensation of the victim, the latter will have priority over the third-party payer for what is still owed to them.

The victim's fault can only reduce their right to compensation for the part of their loss that is not covered by the third-party payer. The latter is entitled to the residual debt of the person liable.

#### **Article 1277**

Apart from benefits mentioned by articles 1274 and 1275, persons liable for damages, or their insurers, have no claim for payments made to a victim under a legal, contractual or statutory obligation.

However, when it is provided for by contract, insurance companies who paid the victim an advance on forthcoming compensation for an accident have a claim against the insurance company of the person liable for damages. This is limited to what remains after payment was made to the third-parties mentioned by article 1274. When required, these suits must be brought before the deadline imposed by law on third-party payers to lodge their claims.

Any provision contrary to article 1273 to 1276 is deemed inexistent unless it is more favourable to the victim.

#### **Subsection 2. Rules specific to compensation for losses resulting from damage to property**

## **Article 1278**

When a tangible asset was harmed, compensation will be equal to either the cost of reparation or to the cost of replacement, whichever is lower. Obsolescence is not taken into account.

When the asset can neither be repaired nor replaced, compensation will be equal to the value of the asset at the time when the court decision was made, in the shape it was in prior to the harm.

If, on the victim's request, the damaged property is not given to the person liable in its current shape, its residual value is deduced from compensation.

## **Article 1279**

If necessary, compensation also covers deprivation from the use of the damaged property, operating losses, or any other harm.

### **Subsection 3. Rules specific to compensation for losses resulting from damage to the environment**

### **Subsection 4. Rules specific to compensation for losses resulting from delay in payment of sums of money**

## **Article 1280**

Compensation for the loss resulting from delay in the payment of a sum of money consists in an order to pay the interest at the rate set by legislation.

These damages are due with no requirements for the creditor to justify that they suffered any loss. They are due only from the date of service of legal notice, except where legislation provides that they accrue by operation of the law.

A creditor to whom his debtor's delay caused a further loss may recover damages distinct from his award of interest for delay in payment.

## **SECTION 3 - Contracts about compensation for loss**

### **Subsection 1. Contracts regarding liability exclusion or limitation**

## **Article 1281**

Contracts aiming at excluding or limiting liability are valid in principle, for contractual matters as well as for extra-contractual matters.

However, liability cannot be contractually excluded or limited in cases of physical injuries.

#### **Article 1282**

In extra-contractual matters, compensation for harm caused by a fault cannot be excluded or limited.

In cases of strict liability, a contract only has effect when the person trying to invoke the contract can prove that it had been unequivocally agreed to by the victim.

#### **Article 1283**

In contractual matters, compensation limitation and exclusion clauses have no effect in cases of wilful misconduct or gross negligence from the debtor, or when such clauses would be in contradiction with an essential obligation of the contract.

These clauses also have no effect when the party against whom they are invoked could not become aware of their existence before the formation of the contract.

### **Subsection 2. Punitive damages**

#### **Article 1284**

When a contract stipulates that the party failing to perform will pay punitive damages, the other party cannot be allocated higher or lower damages.

However, the judge may, on their own initiative, moderate or increase the so-agreed punitive damages if they are clearly excessive or derisory.

In cases of partial performance, the judge may, even on their own initiative, diminish the agreed punitive damages in proportion to the gain made by the creditor thanks to this partial performance, without prejudice to the provisions of the preceding paragraph.

Any stipulation in contradiction with the two preceding paragraphs is deemed inexistent.

Unless nonperformance is definitive, punitive damages are only due after the debtor was formally notified.

## **CHAPTER V - MAIN SPECIAL REGIMES OF LIABILITY**

### **SECTION 1 - Motorised ground vehicles**

#### **Article 1285**

The driver or custodian of a motorised ground vehicle is strictly liable for any harm caused by a traffic accident in which their vehicle, or their trailer, was involved.

The provisions in this section are public policy provisions and are the only ones applicable to the driver or custodian of a vehicle involved in a traffic accident. They even apply when the victim was transported consequent to a contract.

#### **Article 1286**

Acts of God or the actions of a third-party cannot be invoked against a victim even when such events and actions satisfy the conditions of *force majeure*.

Victims are not entitled to compensation when they deliberately sought the harm.

#### **Article 1287**

In cases of physical injury, the victim's fault has no impact on the victim's right to compensation, unless it is inexcusable and was the sole cause of the accident.

However, physical injuries are always compensated when suffered by victims under sixteen or over seventy years old, or when the victim, whatever their age, held at the time of the accident a certificate attesting to a permanent functional impairment of at least 80%.

#### **Article 1288**

In cases of damage to property, the victim's fault limits or excludes compensation for their loss when it contributed to the production of the harm.

The decision to exclude compensation must be specifically justified by reference to the seriousness of the fault.

However, damages caused to medically prescribed supplies or devices follow the rules of compensation for physical injuries.

When the driver of a motorised ground vehicle is not the owner, the driver's fault can be invoked against the owner for compensation for non-physical harm. The owner then has a claim against the driver.

### **SECTION 2 - Liability for defective products**

#### **Article 1289**

Producers are liable for harm caused by a defect in their products, whether or not they are contractually bound to the victim.

#### **Article 1290**

The provisions in this section apply to compensation for losses resulting from physical injuries.

They also apply to compensation for losses resulting from damage to property other than the defective product itself, when the value of such loss is higher than an amount provided for by decree, and on the condition that this asset was of a type normally intended for private use or consumption, and was used by the victim mainly for their private use or consumption.

### **Article 1291**

A product is any movable property, even when it is incorporated into an immovable property, including products from the ground, fishing products, and hunting products. Electricity is also considered as a product.

### **Article 1292**

In this section, a product is defective when it does not fulfil legitimate safety expectations.

The assessment of legitimate safety expectations includes all circumstances, especially the product's presentation, reasonably expected use, and time of release.

A product cannot be considered defective only because a more sophisticated version was subsequently released.

### **Article 1293**

Producers are those who, when acting as professionals, manufacture a final product, produce raw materials, or manufacture a component.

For the application of this section, the following persons are considered producers when they act as professionals:

1° Persons assuming the role of a producer by putting their name, brand or any other distinctive sign on a product;

2° Persons importing a product in the European Union in order to sell, rent - with or without an agreement to sell -, or distribute a product in any other way.

Persons who can be held liable under article 1646-1 and 1792 to 1792-6 are not considered as producers for this section.

### **Article 1294**

If the producer cannot be initially identified, the seller, the lessor - with the exception of a lessor under a lease-purchasing agreement or equivalent -, or any professional supplier, is liable for a product's lack of safety, under the same conditions as the producer, unless they

identify their own producer within three months after they were notified of the victim's demand.

Suppliers can sue the producer under the same rules as the direct victim of the defect. However, they must act within one year after being legally notified that they were summoned to court.

#### **Article 1295**

In situations where harm was caused by the defect of a product incorporated into another one, the producer of the component and the person who incorporated it are severally liable.

#### **Article 1296**

Plaintiffs must prove the harm, the defect and the causal link between the defect and the harm.

#### **Article 1297**

Producers can be liable for defects even when the product was made in accordance with standard practice and existing norms, or when it was administratively authorised.

#### **Article 1298**

Producers are strictly liable unless they can prove:

- 1° That they had not released the product;
- 2° That, considering the circumstances, the defect causing the harm could be considered as inexistent at the time they released the product, or that this defect arose subsequently;
- 3° That the product was not intended for sale or any form of distribution;
- [4° That the state of scientific and technical knowledge at the time of release was insufficient to detect the existence of the defect;]
- 5° Or that the defect is due to the product's compliance with compulsory legislative or regulatory rules.

Producers of components are also not liable if they can prove that the defect can be attributed to the design of the product in which their component was incorporated, or to instructions given by the product's producer

#### **[Article 1299**

Producers cannot invoke the exemption provided for by article 1298, 4° when the harm was caused by a component of the human body or by products coming from the human body, or by any health product for human use mentioned by the first Chapter of Title II of the first Book of the fifth Part of the Public Health Code.]

#### **Article 1299-1**



Provisions aiming at dismissing or limiting liability for defective products are forbidden and deemed inexistent.

#### **Article 1299-2**

Unless producers committed a fault, their liability based on this section ceases ten years after the release of the product that caused the harm, unless the victim started a suit during this time.

#### **Article 1299-3**

Compensation suits based on the provisions of this section become prescribed after three years from the moment the claimant knew or should have known about the harm, the defect and the producer's identity.

#### **Article 1299-4**

The provisions in this section do not prevent the victims of harm from invoking their rights arising from contractual liability.

They also do not prevent victims from invoking the provisions of this chapter regarding extra-contractual liability, or any special liability regime, so long as they are based on a different ground of liability than this section.

Producers remain liable for the consequences of their fault and of the fault of the persons whose actions they are liable for.