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Defences to Tortious and Contractual Liability in French Law

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This chapter is in two sections. Section I examines general issues surrounding defences in French tort and contract law, comparing the position to that in English law. Section IA considers the meaning of the term 'defence', and identifies a number of concepts to which the term refers. The focus of the chapter is upon facts which defeat liability even if the elements of a rule are satisfied ('the externalist definition') and, to the extent they differ, facts which defeat or restrict liability, which are for the defendant to prove ('the proof-based definition'). Section IB shows that both English law and French law contain defences in these senses. Section IC considers whether the concept of a defence is recognised as part of the law or as an organising idea in doctrinal understanding of the law in each system. Section II of the chapter examines some particular defences and compares their scope and rationales in each system.

I. General Issues Surrounding Defences

A. What is a Defence?

In the common law of tort and contract, the term 'defence' is used to mean a variety of different things, often without the precise meaning being clear. It can mean at least the following:[1]

(1) any fact (proof of) the existence of which entails that no liability arises;[2]
(2) a fact (proof of) the existence of which entails that no liability arises, although the elements of a cause of action/liability-generating rule are satisfied;

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[1] For a similar list, see J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing, 2016) 1–5.

[2] Strictly: 'which entails that no liability arises with respect to a particular cause of action'. 'Fact' should be taken to refer to 'fact or set of facts'.

(3) a fact (proof of) the existence of which entails that no liability arises, although the elements of a cause of action/liability-generating rule are satisfied, for reasons which bear upon the substantive merits of the case;
(4) a fact (proof of) the existence of which entails that an established liability is reduced or restricted in some way; and
(5) a fact which releases the defendant from liability, or reduces their liability, the burden of proof of the existence or non-existence of which is upon the defendant.

According to definition (1), the plea that the defendant did not breach a duty of care is a 'defence': the absence of a breach of a duty of care entails that no liability arises in the tort of negligence. Definition (1) therefore includes what are also referred to as 'denials': a fact whose absence entails that a cause of action is not satisfied. This usage is similar to that found in the French Code of Civil Procedure, where a *défense au fond* is defined as: 'any plea which may reveal, after examination of the substantive law, the claim of the opponent to be unjustified'.[3]

Definition (2) refers to a subset of the facts referred to by definition (1). It refers to those facts which defeat liability *despite* the elements of a cause of action being possibly satisfied. A limitation of actions defence has this form. If the defendant argues that the claim is barred because the limitation period has expired, this is nonetheless consistent with the elements of the cause of action being satisfied. Call this the 'externalist definition', since it defines a defence as a fact that is external to the elements of the cause of action or liability-generating rule.

Definition (3) refers to a subset of the facts referred to by definition (2). Where the defendant raises a limitation defence, his argument is not that his conduct, which would otherwise have given rise to liability, was in some way rationally defensible, for instance, that it was justified. Rather his argument is that the claim should fail for reasons which have no bearing upon the merits of the case. According to definition (3), then, a limitation of actions rule is not a defence. The distinction between definitions (3) and (1)/(2) is recognised in the French Code of Civil Procedure. A substantive defence (*défense au fond*) is distinguished both from an *exception de procédure* (arts 73–121 CPC) and a *fin de non-recevoir* (arts 122–26 CPC), all falling within the category of '*moyens de défense*'. An *exception de procédure* refers to procedural irregularities or jurisdictional lack of competence barring the hearing of the claim, while a *fin de non-recevoir* concerns the absence or loss of the right to sue due, for instance, to prescription. Call definition (3) the 'merit-based definition' of defences.

Definition (4) refers to rules which restrict the scope of the remedy or range of remedies available where liability is established, but do not defeat liability *entirely*. For instance, contributory negligence is routinely referred to as a defence in English law, but is not under definitions (1)–(3).

[3] Art 71 CPC (author's translation).

Definition (5) refers simply to who has the burden of proof in relation to a factual issue. If the defendant must prove the absence of fault under a particular rule, then the absence of fault is a 'defence' according to this definition. Typically, the classification of a fact as a defence in the sense of definition (2) entails that the burden of proof is on the defendant in respect of that fact. Thus there is a significant overlap between definitions (2) and (5). Call this the 'proof-based definition' of defences.

This chapter will primarily be concerned with defences in the externalist definition (2) and proof-based definition (5) senses. Why? First, the externalist and proof-based conceptions have some claim to being the central or, at least, most widely employed notions of defence.[4] Second, if we use defence to mean definition (1), then we are essentially referring to the entirety of tort and contract law. If definition (1) includes a 'fact' such as the absence of breach, or the absence of damage, then any absent element of any cause of action can be described as a defence. Similarly, if definition (4) is employed, then any remedy-restricting fact, such as a break in the chain of causation, will be counted as a 'defence'. It is not possible to compare the entirety of English and French tort and contract laws in this chapter: a more restrictive definition is needed. This is subject to the caveat that, if a fact is counted as an externalist defence in English law, but is a denial in French law (or vice versa), then it merits inclusion here. Furthermore, the focus will be upon facts which satisfy both the merit-based and proof-based definitions. This is, again, partly for reasons of space, but also for the reason that such facts are likely to be within the core of what is counted as a defence.[5]

B. Do French and English Law Recognise Defences?

English tort law recognises defences on any of definitions (2)–(5) identified above. For instance, self-defence would fall within each definition except definition (4).[6] The terminology of 'defence' is less prominent in contract, but it is clear that, for instance, duress, misrepresentation and frustration would satisfy at least one of these definitions, namely, the proof-based conception of defence (5).[7] It is more difficult to identify merit-based defences (3) in contract law – that is fact(s) which defeat liability in virtue of a feature of the defendant's conduct, despite the cause

[4] See, on the pervasiveness of the proof-based definition, E Descheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77 MLR 493, 499; for the externalist conception, see K Barker, 'What Is a Contractual Defence (and Does It Matter)?' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Contract* (Oxford, Hart Publishing, 2017) 17, 28 (describing it as 'popular within the academic community').

[5] For a conception of 'defence' which combines the merit-based and proof-based definitions, see L Duarte d'Almeida, 'Defining "Defences"' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015).

[6] For an extensive list of existing defences in tort satisfying definition (3): Goudkamp (n 1) 135.

[7] See A Dyson, J Goudkamp and F Wilmot-Smith, 'Thinking in Terms of Contract Defences' in Dyson, Goudkamp and Wilmot-Smith (n 4) 2–6.

of action being satisfied – necessity, self-defence and statutory authority are rarely discussed in contract law works.

Strikingly, the core *Code civil* provisions on extra-contractual tortious liability make no reference to a merit-based defence (3).[8] Indeed, there are no such defences to liability under article 1240 Cc. Liability-defeaters such as self-defence, necessity and statutory authority are folded into the concept of *faute*: where one of these is made out, the defendant's conduct is not *fautif* and so one of the elements of the rule in article 1240 Cc is not satisfied. Similarly, barring the claim in virtue of the claimant's illegal conduct is primarily relevant, if at all, to the existence of *dommage*, which requires interference with a *legitimate* interest.[9] So this defence (2) in English law is also merged into the elements of liability in French law. Contributory fault (*faute de la victime*) is recognised, despite the absence of clear provision for it in the Code: it is an example of (4) and (5).

The legal nature of certain facts which defeat liability under the strict liability for the act of things under article 1242 Cc is not entirely clear. For instance, the defendant may rely upon self-defence.[10] However, self-defence is normally conceptualised as a fact which precludes 'fault'.[11] Since fault is not an element of liability under article 1242, the plea cannot function as a defeater of fault. There are at least two possibilities: either it involves a denial of an implicit unlawfulness or wrongfulness requirement under article 1242, and is thus not a defence in sense (3), or it is extraneous to an established liability under article 1242, and is thus a defence in sense (2). At any rate, there are a number of liability-defeaters under article 1242 for which the defendant bears the burden of proof and thus are defences in sense (5) – for instance, the burden of proof for *force majeure* rests upon the defendant.[12]

The contract *Code* provisions refer at various points to the idea of an 'exception'.[13] For instance, article 1219 Cc is part of a subsection entitled *Exception d'inéxecution*. This article provides that a person is entitled to withhold performance of their contractual obligation in the event of the other party's non-performance, if that non-performance is sufficiently serious. Other provisions state defences in the proof-based sense of (5), even if they are not explicitly termed 'exceptions'. Thus, a person will be liable in damages for breach of contract *unless* they prove that the breach was due to *force majeure*.[14] As in English law, vitiating factors such

[8] Arts 1240–1244 Cc. Art 1245-11 Cc, on liability for defective products, refers to a 'cause d'exonération'. For other references to 'exceptions' in the general part on obligations, see art 1315 Cc (defence (*exception*) of co-debtors available to each debtor, unless personal to the debtor); art 1324 Cc, (debtor's defences against assignee of debt); art 1328 (defences of substituted debtor); art 1336 Cc; art 1346-5 Cc (defences opposable against subrogated creditor); art 1386 Cc.

[9] See below pp 305–307.

[10] See below p 291.

[11] See below p 291.

[12] A Bénabent, *Droit Civil, Les Obligations*, 12th edn (Paris, LGDJ, 2010) [622].

[13] See further art 1182 Cc; art 1216 Cc (concerning 'exceptions').

[14] Art 1231-1 Cc. Similarly, art 1151 Cc referring to a party's ability to '*faire obstacle à*' an action for nullity of a contract, without using the word 'exception'.

as duress and mistake are integral to whether a valid agreement exists, as opposed to defences in sense (2) or (3). However, the burden of proof for these issues is on the defendant.

The primary contrast in relation to defences between French and English law, then, is between their tort laws: in French law, there are fewer defences in sense (2) because these are merged within the concept of *faute* or *dommage*. Three explanations of this may be given.

First, the greater Roman law influence: in the classical Roman law of delict, matters such as self-defence went to whether a *damnum* was *iniuria datum*: the issue of fault in the sense of culpability and fault in the sense of wrongfulness were built into a single concept.[15] In German law, too, these issues are not explicitly mentioned in the tort provisions of the BGB, and are part of the issue of unlawfulness (*Rechtswidrigkeit*).

Second, the distinction between elements of the 'cause of action' and elements external to the cause of action is more difficult to draw in systems that are not explicitly focused on the concept of a wrong (putting aside questions of the burden of proof). Wrongs call for justification (or excuse). If what the defendant has done is not legally classified as *pro tanto* wrongful, then the idea of justification has no room to operate. French law clearly has implicit wrongfulness ideas, but these are less central to the structuring of the modern law. Relatedly, there appears to be no direct translation of 'cause of action' in French, so it is not straightforward to describe certain elements of liability as external to something else (a cause of action).

Third, English law was conceptualised as a system of *actions* until relatively recently. In a system structured around the procedure for obtaining a court-ordered remedy, there is a natural focus on what must be pleaded by whom and when.[16] This perhaps helps to explain why certain elements of liability came to be considered external to the 'cause of action'.

C. The Concept of a Defence in French and English Law

A legal system could have defences and not recognise the concept of a defence, or not consider 'defences' to be an important legal category. This is not the case in French law. This is shown in at least two ways. First, as noted earlier, the Code of Civil Procedure recognises a general category of *défenses*, which isolates merit-based liability-defeaters from others.[17] Second, doctrinal writers group together

[15] See E Descheemaeker, *The Division of Wrongs: a Historical Comparative Study* (Oxford, Oxford University Press, 2009) 171.

[16] For the view that *pleading* is essential to the notion of 'defence', see R Stevens, 'Should Contributory Fault be Analogue or Digital?' in A Dyson, J Goudkamp and F Wilmot-Smith (n 4) 247, 250.

[17] See above, p 286.

certain liability-defeaters in one overarching category – *causes d'irresponsabilité* – and have elaborated taxonomies of this category. The overarching feature of this category – although this itself is often not considered explicitly to be the important unifying feature of this category – is that the burden of proof is on the defendant in respect of these liability-defeaters.

Although merit-based defences in English law tend to be collapsed into elements of the 'cause of action' in French law, the merit-based conception of defence is nonetheless implicitly recognised. Consider Jourdain's reason for holding that consent is not a justification (*fait justificatif*): 'it acts much less as a justification than as a circumstance which prevents ab initio the characterisation of the harmful event as *fautif*'.[18] The distinction being drawn here seems to be similar to that between an element of liability which prevents there being a wrong, and one which justifies an established wrong.[19]

In English law, the concept of defence in sense (2) is clearly recognised, though a clear distinction between defences in sense (2) and defences in sense (5) is really only present in more abstract doctrinal works.[20] Tort textbooks include sections on 'defences', almost always in relation to specific torts rather than across torts as a whole. The underpinning idea is usually an unarticulated amalgam of defences in sense (2) or sense (5). There is rarely a need to distinguish between sense (2) and sense (5), since all defences in sense (5) are also defences in sense (2). However, not all defences in sense (2) are defences in sense (5). Goudkamp gives the example of limitation of actions: the claimant bears the burden of proof that their claim is not beyond the relevant time period.[21]

D. The Taxonomy of Defences

Certain liability-defeaters are typically grouped together by doctrinal writers as *causes d'irresponsabilité*.[22] This category is, in turn, typically subdivided between *faits justificatifs* (justifications) and *causes d'irresponsabilité subjectives* (subjective agent-focused factors which defeat liability).

[18] P Jourdain, 'Droit à réparation – Responsabilité fondée sur la faute – Fait Justificatifs', JCl Civil Code, arts 1382–1386, Fasc 121-20, [67]: 'il agit bien moins comme un fait justificatif que comme une circonstance qui empêche ab initio de reconnaître au fait prétendument dommageable un caractère fautif'.

[19] See also the revealing title to the *faits justificatifs* section in G Viney, P Jourdain and S Carval, *Traité de droit civil, Les conditions de la responsabilité civile*, 4th edn (Paris, LGDJ, 2013) 644: 'Les circonstances permettant de justifier la transgression d'une norme juridiquement obligatoire.'

[20] See generally Goudkamp (n 1) ch 1.

[21] ibid 4.

[22] See P Jourdain, 'Droit à réparation – Responsabilité fondée sur la faute – Imputabilité', JCl Responsabilité civile et assurances, Fasc 121-10, [1].

(i) Faits Justificatifs

The *faits justificatifs* category includes legitimate defence (*légitime défense*), necessity (*état de necessité*), legal authority or permission (*ordre de la loi; permission de la loi*), and order of a legitimate authority (*commandement de l'autorité légitime*).[23]

The unity of *faits justificatifs* is usually said to be that they are all objective circumstances which prevent an act from being classified as *fautif*.[24] They are 'objective' in the sense that they alter the normal legal quality of the act in question, rather than bearing upon the (subjective) imputability of the act to the agent. The standard definition implies, then, that *faits justificatifs* are denials of fault, rather than pleas which are external to the notion of fault. However, this is not entirely correct, as there can be a *fait justificatif* to liabilities not based upon fault.[25] Perhaps in recognition of this Jourdain states that a *fait justificatif* removes the *unlawfulness* (*illicéité*) of an act, though this would require one to grant that strict liability under, eg article 1242 Cc, has an implicit unlawfulness requirement.[26]

The admitted 'justifications' in French law are similar to those found in English law. But there is no generally applied taxonomy of defences in English doctrinal writing, such as the French one between 'justifications' and 'subjective liability defeaters'.[27] This is perhaps a reflection of the relative neglect of the subject of defences in tort law. As a consequence of this, too, it is not always clear how justificatory defences operate. This is likely to vary, however, across torts. In the tort of negligence, for instance, (justified) self-defence would preclude a finding of breach of duty. In trespass to the person, self-defence appears to be extraneous to the cause of action: the tort is fully established, but justified nonetheless.[28]

(ii) Causes d'Irresponsabilité Subjectives

This category refers to factors negativing the 'imputability' of the act to the defendant's agency, such as the defendant's insanity or infancy, thereby relieving the defendant of liability. This seems to be an empty set in French tort law: there are no subjective agency-based factors which defeat tort liability.[29] In criminal law, this category would include matters such as insanity. It is clear that the insanity of the

[23] ibid [1].

[24] S Hocquet-Berg, 'Synthèse – Faute delictuelle' JCl Responsabilité civile et assurances, 18 November 2018, [31].

[25] Cass civ (2) 10 June 1970, D 1970, 691; Jourdain (n 18) [43] (on the former art 1384 Cc).

[26] For the view that it does, see O Moréteau, 'Basic Questions of Tort Law from a French Perspective' in H Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Wien, Jan Sramek, 2015) [1/161]–[1/165].

[27] However, recent work (Goudkamp (n 1)) has led to the re-organisation of a doctrinal text: see E Peel and J Goudkamp (eds), *Winfield & Jolowicz on Tort*, 19th edn (London, Sweet & Maxwell, 2014) ch 26.

[28] Goudkamp (n 1) 107.

[29] Jourdain (n 22) [2].

defendant does not bar their civil liability under article 1240ff of the *Code civil*, nor even the possibility of their being at fault.[30] However, although factors concerning the reasoning ability of the defendant, which negate imputability in the criminal law, are irrelevant, factors which negate 'physical' imputability defeat fault-based personal liabilities. Thus, if a person's leg entirely unforeseeably strikes another person due to an uncontrollable muscle spasm, this will prevent liability under a liability rule where liability is contingent upon one's own act (eg article 1240 Cc).[31]

In relation to the tort of negligence, English law and French law reach similar results here. A person may be liable in this tort for acts done during a schizophrenic episode; only a condition which 'entirely' eliminates responsibility, such as full loss of consciousness, would relieve of liability.[32] It is not clear, however, that a person who is so relieved benefits from a 'defence' in English law, unless the first expansive notion of defence is adopted.[33] An implicit requirement of liability in the tort of negligence is that one is engaged in conduct – one is 'acting'. Suddenly falling unconscious is not something one *does*. Similarly, in French law, it might be questioned whether, under article 1240 Cc, *fait de l'homme* already requires attributable conduct.

(iii) Causes d'Exonération

Causes d'exonération are usually distinguished from *faits justificatifs*, but partially overlap with *causes d'irresponsabilité subjectives.* Thus each of the recent reform proposals distinguishes *causes d'exonération* from *causes d'exclusion*, the latter mirroring the category of *faits justificatifs*.[34] The central instances of this category are *force majeure* and contributory fault. Sometimes, *acceptation des risques* and *consentement* are also included here.[35]

One explanation of this distinction is that *causes d'exonération* are denials, while *faits justificatifs* are defences in the sense of (3). This works for *force majeure*: where this plea is accepted, it will either be the case that the defendant is not at fault, or the causal link between the defendant's conduct, or the causal link between the thing or person for whom the defendant is responsible, and the claimant's damage, has been broken (or never existed).[36] But it does not account for *faute de la victime*, which is not a denial (except where it acts as *force majeure*). Moreover, there is a general problem with this way of drawing the distinction: because *faits justificatifs* operate to negate *fault*, it is not straightforward to treat them as other than denials.

[30] Art 489-2 Cc.

[31] See Cass civ (2) 4 February 1981, Bull civ II no 21, D 1983, 1 note P Gaudrat, JCP G 1981 II 19656 (no liability for injury inflicted from fall caused by heart attack). See further G Viney, 'Réflexion sur l'article 489-2 du Code civil' RTD civ 1970, 262.

[32] *Dunnage v Randall* [2016] QB 639.

[33] See above, p 285.

[34] Arts 1349–1351-1 of the *Avant-projet Catala* (*exonération*); art 46 of the *Avant-projet Terré*; arts 1253–1256 of the *Projet de réforme*. See also Bénabent (n 12) [621]ff.

[35] Bénabent (n 12) [621].

[36] It is true that 'factual' or *sine qua non* causation will not have been disproven, but attributable or legal causation will have been.

Another possibility is that *causes d'exonération* are distinguished from *faits justificatifs* by their rationale, rather than their conceptual form. The former might be termed 'responsibility-based' defences: they release from or reduce liability on the basis of the reduced responsibility the defendant bears for the outcome. Where the victim's fault is partially causative of their damage, this reduces the defendant's responsibility (at least if the defendant's conduct is not especially culpable in relation to the claimant's damage). But the fit is imperfect. To the extent that consent is treated within this category, as it is in the 2017 reform proposal, this understanding is misleading.[37] The fact a person that consents to an act does not show that they are responsible for its occurrence. Suppose that I permit you to destroy my goods, but you would have destroyed my goods regardless of my permission. My permission has no bearing upon your action, so your action cannot be said to be my responsibility. Nonetheless, the fact that I permitted you to destroy my goods could relieve you of liability. This shows that consent operates to defeat liability independently of its bearing on the victim's responsibility for the damage caused. It seems, then, that *causes exonératoires*, as a category, lacks unity either of form or rational justification, albeit, by and large, it could be said to be concerned with reduced responsibility for the outcome. The practical import of the classification of these rules as *causes exonératoires* in French law is that the burden of proof for their existence is placed upon the defendant.[38]

English doctrinal writers typically classify contributory fault as a defence, though a minority treat it as part of the law of damages, in virtue of the fact that it does not defeat liability, but reduces the amount of compensatory damages.[39] There is no general defence of *force majeure* applicable across tort and contract, though an unforeseeable, uncontrollable event[40] for which the defendant was not responsible could entail that an element of liability (for instance, breach of duty in negligence) is not satisfied.[41] In practice, since *force majeure* will exclude *faute*, it is not truly a 'defence' to fault-based liability in French law either.[42]

(iv) Other Defences?

Illegality, exclusion or limitation of liability, and limitation of actions do not figure amongst *faits justificatifs*, *causes d'irresponsabilité subjectives,* or *causes exonératoires*, albeit these are typically classed as defences in English law. The exclusion of illegality, exclusion of liability, and limitation of actions, from the category 'defences' could arguably be justified on the basis that exclusion of liability, illegality, and limitation of actions, do not bear upon the substantive merits of the case. The fact that the limitation period has expired does bear upon the

[37] Art 1257-1 of the *Projet de réforme*.

[38] See eg Bénabent (n 12) [610]–[611] and [621]–[623].

[39] See NJ McBride and R Bagshaw, *Tort Law*, 6th edn (Harlow, Pearson Education, 2018) 737.

[40] The classic conditions for *force majeure* are *imprevisibilité* and *irresistibilité*: Viney, Jourdain and Carval (n 19) 332–33.

[41] 'Act of God' is termed a defence to the strict liability rule in *Rylands v Fletcher* (1868) LR 3 HL 330.

[42] See Viney, Jourdain and Carval (n 19) 356.

parties' substantive entitlements (their primary and secondary rights). There is some support for the view that illegality operates in this way in French law, and limitation of actions is mentioned in the *moyens de défenses* section of the Code of Civil Procedure.[43]

(v) Comparison with Common Law Taxonomy

The only systematic, in depth, taxonomic study of defences in English tort law is Goudkamp's *Tort Law Defences*. Goudkamp understands the concept of a defence in sense (2) and proposes that the existing law can be profitably divided into two sub-categories: (a) justifications and (b) public policy defences. This taxonomy, perhaps unsurprisingly, cannot be easily transposed to French law. First of all, as noted, *faits justificatifs* are not defences in sense (2). There are no justificatory defences in sense (2) in French tort law. If we adopted defences in sense (5), then the taxonomy captures *faits justificatifs*, and 'policy' defences such as illegality and limitation of actions, but it misses the other rules for which the defendant bears the burden of proof (eg *force majeure*) which are normally classified together.

II. Specific Defences

This section examines a selection of particular defences in each system. The discussion is structured around 'justificatory defences', 'excusatory defences', 'responsibility-based defences', 'consent' and 'public policy defences'. This structure has been adopted to facilitate comparison of the two systems by reference to important normative issues raised by the law on defences. Particular defences are selected (a comprehensive analysis would require at least a book) in order to illustrate general themes, such as the role of the criminal law, the extent to which justified or excused conduct attracts liability, the scope of consent, the extent to which responsibility for outcomes is shared between victims and injurers, and the categorisation of a liability-defeating argument as internal to the claim or as an 'external' defence.

A. Justifications

The terminology, concept and conditions of application of *faits justificatifs* are largely a product of the criminal law and doctrine.[44] The admitted *faits justificatifs*

[43] See below, p 305. On exclusion of liability, see P Delebecque, 'RÉGIME DE LA RÉPARATION.—Modalité de la reparation.—Règles particulières à la responsabilité contractuelle.—Conventions relatives à la responsabilité', JCl Notarial Répertoire, V Responsabilité civile, Fasc 210, [5].

[44] See Jourdain (n 18) [4]: 'Construite par les criminalistes, la notion de "fait justificatif" est issue du droit pénal'.

in civil law, absent from the *Code civil* itself, are drawn largely from the provisions of the *Code pénal*.[45] The recent reform proposals each would incorporate an explicit reference to the relevant provisions of the *Code pénal*.[46] There are additional *faits justificatifs* recognised in special regimes, such as the *exceptio veritatis*, or parliamentary privilege in the law on the press.[47] Strikingly, the general position is that, if a person has a valid justificatory defence in respect of an act under the *Code pénal*, then that act will not give rise to civil liability in virtue of it not being *fautif*.[48] This is said to follow from the general 'primacy' given to the criminal law over civil law and the traditional principle of the unity of criminal and civil fault.[49] As in English law, the criminal law of defences has received much greater doctrinal attention and theorisation than in tort.[50]

(i) Self-Defence; Légitime Défense[51]

The existence of *légitime défense* as defined by the criminal law excludes civil fault in respect of the damaging act which amounted to legitimate defence.[52] Jourdain describes it as 'natural' that an act which is justified for the purposes of the criminal law be justified for the purposes of civil liability.[53] This depends upon what the law is holding when it considers a person 'justified'. Outside of the law, one acts justifiably when one acts for an undefeated reason.[54] If, when the criminal law holds that person is justified, it is saying this – that the person acted for an undefeated reason – then it would indeed seem 'natural' that this conduct could not amount to fault in the civil law. If fault amounts to a failure to behave as a reasonable person, how could acting for an undefeated reason amount to a failure to behave as a reasonable person?

In English law, when a person is held not to be guilty of an offence in the criminal law on grounds of self-defence, the law need not, however, be holding that this person acted for an undefeated reason. It suffices for the purposes of self-defence in English criminal law that the person *honestly believed* that they were responding to a threat, and their response was necessary and proportionate, given

[45] Arts 122-4 to 122-7 CP.

[46] Art 1352 of the *Avant-projet Catala*; art 45 of the *Avant-projet Terré*; art 1257 of the *Projet de réforme*.

[47] See Jourdain (n 18) [17]–[18].

[48] ibid [5].

[49] ibid [5]. See ch 6 above, pp 109–113.

[50] There appear to be few theses on *faits justificatifs* in civil law. The two usually mentioned are: V Bergeret, 'La notion de fait justificatif en matière de responsabilité pénale et son introduction en matière civile' (Thesis, University of Grenoble, 1946); J Dingome, 'Le fait justificatif en matière de responsabilité civile' (Thesis, University of Paris I, 1986).

[51] See generally Viney, Jourdain and Carval (n 19) [563]ff.

[52] See Jourdain (n 18) [43] citing, inter alia, Cass crim 31 May 1972, Bull crim 1972 no 184, Gaz Pal 1972, 2, 633, tracing back to Cass crim 19 December 1817, S 1818, 1, 170.

[53] Jourdain (n 18) [5].

[54] See J Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563, 565.

their beliefs about the threat.[55] It may be that the person's action was objectively unjustified, and even unjustifiable by reference to the beliefs that the defendant ought to have had if they were reasonable. It is consistent, then, for English law to adopt the position it does: that a valid plea of self-defence in the criminal law need not preclude a finding of trespass, or negligence, in tort.[56]

French criminal law, by contrast, adopts a more objective approach to self-defence. It requires not merely an honest belief in the existence of the threat, but a reasonable one.[57] Since the criminal standard is objective, there is thus less room for divergence from the objective standard of *faute* in civil law. However, it still seems open to doubt whether the reasonableness of a belief needs to be assessed in the same way in criminal law and tort law, given their different functions.[58]

Even if one might dispute the logic of excluding the possibility of civil fault where the criminal defence of self-defence is made out, it is likely that in most cases where a person acts in valid self-defence according to French criminal law, the claimant will bear significant responsibility for the damage. This perhaps helps to explain why self-defence extends to exclude strict liability under article 1242 Cc.[59] However, this is not wholly convincing since there could be (perhaps rare) cases where the defendant has a reasonable belief that the claimant is attacking him, and yet the claimant is not posing a threat at all. In such cases, the claimant bears no responsibility at all for their damage (unless they have culpably created the impression that they are about to attack). It is not obvious why such cases should not fall within article 1242 Cc if the self-defence occurs through the use of a thing.[60]

(ii) Necessity; Etat de Necessité

Under certain conditions, necessity excludes civil *faute*.[61] Thus if the only, or only reasonable means for A to avoid a greater evil is to inflict a lesser evil that would normally be wrongful, then, if A is not at fault for this choice having to be made, A is permitted to inflict the lesser evil.

However, in contrast to self-defence, it seems that necessity does not exclude the compensatory liability of the person who inflicts harm in order to prevent greater harm under non-fault-based tort liabilities, such as article 1242 Cc.[62]

[55] J Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford, Oxford University Press, 2016) 142.

[56] See *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25.

[57] This seems to be the majority view: C Mascala, 'Faits justificatifs. – État de nécessité', JCl Pénal Code, art 122-7, Fasc 20, [46]–[47].

[58] For arguments against assimilation of civil and criminal fault in this context: Viney, Jourdain and Carval (n 19) 646.

[59] See Cass civ (2) 22 April 1992, Bull civ 1992 II no 127, D 1992, 353 note J-F Burgelin, RCA 1992, comm 257, RTD civ 1992, 768 obs P Jourdain.

[60] Unless, again, there is an unlawfulness requirement under art 1242 Cc, as noted above, n 26.

[61] Viney, Jourdain and Carval (n 19) [566]ff.

[62] See eg Cass civ (2) 26 January 1994, RTD civ 1994, 864 obs P Jourdain.

So the victim of a person who acts in justified, reasonably mistaken, self-defence may have no claim in tort, but the victim of an act of necessity may do so, if the conditions of article 1242 are satisfied. It is not clear what justifies this distinction. If A inflicts harm on B in order to prevent much greater harm to A or C, and B does not have a claim under a strict liability rule, B may still be entitled to a remedy against A or C in quasi-contract.[63] The *Projet de réforme* states that a *fait justificatif* removes liability for a '*fait dommageable*' which entails that necessity should also be a defence to a contractual claim for damages.[64]

In English law, necessity is a tort defence in the sense of definition (3). Some textbooks draw a distinction between 'public' and 'private' necessity, arguing that only the former is a defence.[65] Private necessity is roughly where a person acts in a way that is normally wrongful in order to prevent greater harm to himself; public necessity is where the greater harm avoided is to other persons. The decision of the Minnesota Supreme Court in *Vincent v Lake Erie Transportation Co* is usually adduced in support of the proposition that there is no defence of private necessity.[66] In this case, the defendant shipmaster fastened his ship to the plaintiff's dock during a storm in order to prevent the ship from drifting off to sea. This caused damage to the dock. The Court held that the defendant was liable to pay compensation for the damage caused, holding that the defendant was permitted to damage the dock in order to preserve its property in an emergency, but that compensation must be paid. By contrast, where the important interests of others are at stake, (public) necessity has been held to be a defence.[67] The English courts do not, however, explicitly draw the distinction between public and private necessity. Necessity is almost never discussed as a defence in contract. As a matter of principle, if property rights, as protected by tort law, may be overridden by public necessity, contractual rights also ought to be subject to this override.

B. Excusatory Defences

An excuse can be defined as a plea that the defendant ought to be relieved of liability not because they acted permissibly, but because they were not (fully) blameworthy for what they did.[68] There appear to be no excuses in this sense in French tort law. If insanity is not a defence, then it would be odd if other facts which defeat blameworthiness were relevant.[69] If the plea of *force majeure* operates as a denial of causation or fault, then it, too, is not an excusatory defence.

[63] Viney, Jourdain and Carval (n 19) [571].
[64] Art 1257 of the *Projet de réforme*.
[65] See Peel and Goudkamp (n 27) 796.
[66] *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minnesota, 1910).
[67] *Southport Corporation v Esso Petroleum* [1953] 2 All ER 1204, reversed by the Court of Appeal, but upheld by the House of Lords: [1956] 2 AC 218.
[68] For discussion of distinctions between justifications and excuses, see J Goudkamp (n 1) 85–87.
[69] See above, pp 291–292.

English tort law also appears not to recognise excusatory defences.[70] There are rules which ameliorate the legal position of those who have reduced moral blameworthiness. For instance, the standard of care is modified by reference to a person's youth.[71] This is not a 'defence', however.

None of the defences recognised by French and English contract law is probably best characterised as an excuse. Consider, for instance, the automatic discharge of contractual obligations due to a frustrating event in English law. Where a party successfully relies upon the doctrine of frustration, the legal conclusion is not that they breached their contractual obligation but are relieved of liability due to the absence of moral blame. The conclusion is that their obligation ceased to exist upon the occurrence of the frustrating event: the obligation is *discharged*, not breached.[72] Similarly, the absence of fraud and duress are generally considered to be conditions for the validity of a contractual obligation in both systems, rather than distinct defences.[73]

C. Responsibility-Based Defences

A defence which reduces or eliminates liability in virtue of the attenuated responsibility of the defendant (or the shared responsibility of the victim) in respect of the outcome generating liability can be termed a 'responsibility-based' defence. This section focuses upon one such defence: the contributory fault of the victim. Both English and French law recognise that the victim's own fault, where it causally contributes to their damage, may reduce their entitlement to damages. The law is conveniently considered by reference to these four issues: (a) the legal source and rationale of the defence; (b) the scope of the defence; (c) the assessment and effect of victim fault; (d) reform.

(i) Source and Rationale

Articles 1240–1245 Cc contain no explicit reference to contributory fault except in the incorporated provisions on liability for defective products.[74] Nor is the rule mentioned in the contract provisions. Nonetheless, the rule applied by the courts is that the victim's contributory fault may reduce partially or fully damages in both tort and contract.[75] In English law, the triggering conditions of the defence are

[70] For a defence of this claim, see Goudkamp (n 1) 85–97, and J Goldberg, 'Inexcusable Wrongs' (2015) 103 Cal L Rev 467.

[71] *Mullins v Richards* [1998] 1 WLR 1304.

[72] See generally E McKendrick, 'Frustration: Automatic Discharge of Both Parties?' in Dyson, Goudkamp and Wilmot-Smith (n 4).

[73] Arts 1128 and 1130 Cc.

[74] Art 1245-12 Cc.

[75] P Jourdain, 'Droit à réparation. – Lien de causalité. – Pluralité des causes du dommage', JCl Civil Code, arts 1382–1386, Fasc 162, [56], [67] (contract).

determined primarily by the common law, while the Law Reform (Contributory Negligence) Act 1945 requires the court to apportion liability where the defence is applicable.[76]

As to rationale, French authors have proposed at least two different theories. One is that contributory fault operates as a justified sanction of the claimant's fault.[77] This theory does not fit well with the fact that fault can in principle be established against the insane and against young children. Furthermore, if it operates as a sanction, it is a rather arbitrary one: the quantum of punishment is significantly affected by the size of the loss suffered.

A different theory is that the victim is a joint cause of the damage whose *responsabilité* is only triggered by their fault.[78] On this view, the victim is in a similar position to a jointly liable person against whom a contribution claim may be brought. The only peculiarity is that the jointly 'liable' person is the victim. A recognised difficulty with this view is that the victim's fault need not involve a genuine liability to another person: the victim's failure to take care for *their own safety* is not necessarily a generator of liability to the defendant or another person.[79]

This last point has led, in the English context, Robert Stevens to criticise the existence of the defence.[80] His argument is that the claimant's failure to take reasonable care for their own safety is not a breach of a legal duty owed to the defendant, and thus should be left out of consideration, except to the extent that the claimant's unreasonable conduct breaks the chain of causation. In short, since the claimant does not owe it to the defendant to take reasonable care of itself, the fact that the claimant has not done so is not the defendant's concern.[81]

A major difficulty with this argument is that, if the claimant's unreasonable conduct is justifiably taken into account in determining whether there is a break in the chain of causation (as Stevens accepts),[82] and may thereby relieve the defendant *entirely* of liability, then it is not clear why it cannot be taken into account, where it is less serious, in order *partially* to reduce the defendant's liability. The argument for this cannot be that the claimant's fault is none of the defendant's business: this is inconsistent with taking into account the claimant's fault as a matter of causation. A possible argument is that causation is *binary*: either the defendant caused the outcome or they did not. Once the claimant's fault is

[76] The 'fault' of the claimant which gives rise to the defence is conduct which 'would apart from this Act give rise to the defence of contributory negligence': Law Reform (Contributory Negligence) Act 1945, s 4.

[77] B Starck, H Roland and L Boyer, *Obligations I, Responsabilité délictuelle*, 4th edn (Paris, LITEC, 1991) [1291]; B Puill, 'Gravité ou causalité de la faute de la victime en responsabilité civile' D 1984, chron 58.

[78] F Chabas, *L'influence de la pluralité des causes sur le droit à réparation* (Paris, LGDJ, 1967) [47].

[79] The difference is recognised in L Josserand, 'La responsabilité envers soi-même' DH 1934, chron 73.

[80] Stevens (n 16).

[81] ibid 253: 'the risks I run in relation to my own interests are nobody's concern but mine'.

[82] ibid 255.

serious enough, this breaks the chain of causation, such that the defendant is not causally responsible at all; conversely, if the claimant's fault is not at that threshold of seriousness, then the defendant remains fully responsible. However, this argument would require us to accept that (legal) causation – or responsibility for an outcome – cannot come in degrees.[83]

(ii) Scope

Both systems recognise contributory negligence as a generally applicable liability-reducing rule, subject to exceptions. In English law, the defence does not apply to trespass to the person,[84] the tort of deceit,[85] or claims for conversion under the Torts (Interference with Goods) Act 1977.[86] Lord Hoffmann explained that the basis of this exclusion of the defence in relation to deceit is 'moral disapproval of fraud'.[87] The need to signal disapproval of highly culpable conduct does not explain, however, the exclusion of the defence in conversion, which can be committed innocently, and in trespass to the person, which can also be committed without moral culpability. The defence only applies to claims for breach of contract where the contractual duty breached gives rise to a concurrent liability in tort.[88] This has the odd consequence that a negligent breach of contract may be treated more favourably than a breach of a strict contractual duty because the person in breach can then rely upon the concurrent liability in tort to raise the defence; the current position in relation to breach of contract has been cogently criticised on this ground.[89]

In French law, there are two situations where the rule does not apply. First, it does not apply to intentional wrongful interference with goods resulting in a profit to the wrongdoer. Where the defendant had forged the signature of one of the claimant company's directors to cash eight cheques on the company's account between November 2000 and December 2001, the Cour d'appel had reduced the company's damages by half on the ground that it ought to have verified its 2000 accounts, noticed the forgery, and prevented the later cheques from being drawn. The Cour de cassation overturned this.[90] To allow the reduction would have been to permit the wrongdoer to retain some of their fraudulently acquired gains.[91]

[83] For an argument that causation *does* come in degrees, A Kaiserman, 'Partial Liability' (2017) 23 Legal Theory 1.

[84] *Co-operative Group (CWS) Ltd v Pritchard* [2012] QB 320.

[85] *Standard Chartered Bank v Pakistan National Shipping Corp (nos 2 and 4)* [2003] 1 AC 959.

[86] Torts (Interference with Goods) Act 1977, s 11.

[87] *Standard Chartered Bank* [2003] 1 AC 959, 968.

[88] *Forsikringaktieselskapet Vesta v Butcher* [1989] AC 852 (CA).

[89] See Stevens (n 16) 262–63; J O'Sullivan, 'Contributory Negligence and Strict Contractual Obligations Revisited' in Dyson, Goudkamp and Wilmot-Smith (n 4).

[90] Cass civ (2) 19 November 2009 no 08-19.380.

[91] ibid. For a decision allowing contributory fault against an intentional wrong to goods where no gain was made by the wrongdoer: Cass crim 19 March 2014 no 12-87.416.

However, it is clear that the mere fact that the wrong is *intentional* is not a bar to the application of the doctrine of contributory fault.[92] Nonetheless, it could have a significant impact on the size of the reduction.[93]

Secondly, under the special strict liability regime applicable to traffic accidents, the defence is partially excluded. Where the victim is not a driver, and the injury is a personal injury (*atteinte à la personne*), the victim's damages will be reduced only if their fault is 'inexcusable' and the sole cause of the damage.[94] Within this category, there are also protected categories of victim – those aged less than 16 or more than 70, and those with a recognised disability of greater than 80 per cent reduced capability.[95] In all cases, however, if the victim has 'freely sought out' the damage, this bars their claim.[96] Although these rules – apart from those on protected victims – might be considered simply to apply the general law on causation – if the victim's fault is the *exclusive* cause of their damage, then it follows that the defendant is not responsible for it – the defendant is only entitled to this causation argument if the claimant's fault was *inexcusable*. Thus, in theory, the regime is more favourable to victims.

(iii) Assessment of Victim Fault

In French law, the same principles are said to apply to the determination of victim fault as apply to the determination of defendant fault.[97] This is notionally consistent with the idea that the victim is partially 'liable' for its own damage and the contribution claim between the defendant and the victim coalesces into the claim for damages against the defendant.[98] In English law, it is generally assumed that the same principles apply.[99] Once the false idea that the victim is 'liable' for its own damage is set aside, however, it is not clear that the same principles ought to apply.[100]

(iv) Assessment of Shares

In both systems, judges enjoy discretion to determine the size of the reduction. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides that damages 'shall be reduced to such extent as the court thinks just and equitable

[92] Cass crim 23 September 2014 no 13-83-357.
[93] Jourdain (n 75) [65].
[94] Art 3(1) loi no 85-677 du 5 juillet 1985.
[95] Art 3(2) loi no 85-677 du 5 juillet 1985.
[96] Art 3(3) loi no 85-677 du 5 juillet 1985.
[97] Jourdain (n 75) [58]: 'les règles appliquées sont parfaitement symétriques'.
[98] See above, p 299.
[99] See J Goudkamp, 'Rethinking Contributory Negligence' in S Pitel, J Neyers and E Chamberlain (eds), *Challenging Orthodoxy in Tort Law* (Oxford, Hart Publishing, 2013) 325.
[100] ibid 325–27.

having regard to the claimant's share in the responsibility for the damage'. This has been interpreted as requiring the courts to consider the relative blameworthiness of the parties and the relative causal potency of their conduct.[101] The Act itself does not prescribe specific reductions or other limits on the discretion to reduce damages. However the courts have developed some fixed reductions in particular factual situations – for instance, a 25 per cent reduction applies to a failure to wear a seat belt, if this would have entirely avoided the claimant's damage.[102] In French law, the same considerations – relative gravity of the respective faults in cases of fault-based liabilities and degree of causal contribution – appear to apply.[103]

(v) Reform

Article 1254 of the *Projet de réforme* would give recognition to the defence within the Code as follows:

> A failure by the victim in his contractual obligations, his own fault or that of a person for whom he is responsible, provide a partial exoneration where they contributed to the occurrence of the harm.[104]

Two observations may be made. First, the article distinguishes breach of a contractual obligation from *faute*, and includes the former within the defence. This seems to imply that breach of a strict contractual obligation could reduce the entitlement to damages. If so, it is not obvious why strict contractual obligations should be singled out for special treatment – why not any situation where the victim is in breach of a strict obligation? Second, the second paragraph of article 1254 of the *Projet* adds that only gross fault (*faute lourde*) can lead to a partial reduction in cases of bodily injury. It is not clear whether this should be taken as the only situation (apart from the special regimes dealt with elsewhere in the *Projet de réforme*) where the defence does not apply. The cases involving fraudulently acquired gains are not explicitly considered.[105]

Subject to these points, the *Projet de réforme* would improve the position of victims in two ways.[106] First, it excludes the defence in cases of simple fault contributing to bodily injury.[107] This rule is explicitly extended to driver victims in the context of traffic accidents.[108] Only if the victim's fault is *inexcusable* does

[101] *Stapley v Gypsum Mines Ltd* [1953] AC 663, 682.

[102] *Froom v Butcher* [1976] QB 286. See further J Goudkamp and D Nolan, *Contributory Negligence: Principles and Practice* (Oxford, Oxford University Press, 2018).

[103] Jourdain (n 75) [65].

[104] 'Le manquement de la victime à ses obligations contractuelles, sa faute ou celle d'une personne dont elle doit répondre sont partiellement exonératoires lorsqu'ils ont contribué à la réalisation du dommage.'

[105] See above 14.

[106] One category of victims who would be disadvantaged by the *Projet de réforme* are victims *par richochet*: see art 1256 of the *Projet*.

[107] Art 1254 of the *Projet*.

[108] Art 1287 of the *Projet*. On the other hand, the rule does not apply to product liability: art 1299 of the *Projet*.

it reduce or exclude liability in the traffic accident context.[109] Second, the *faute* of a victim lacking capacity to reason (*privé de discernement*) does not reduce their entitlement to damages unless it amounts to *force majeure*.[110] The *Projet de réforme* would, then, generally enhance the protection of victims and more sharply distinguish the 'responsibility' of victims from that of injurers.

D. Consent and Exclusion of Liability

(i) Consentement, Volenti Non Fit Injuria, Acceptation des Risques

Both systems recognise that the victim's consent to an infringement that would normally constitute a wrong or liability-generating event sometimes precludes the existence of the wrong or liability-generating event. One way in which this is recognised is through the plea of '*consentement*' or, in English law, consent.

In French law, consent is generally described as not an independent *fait justificatif*, mirroring the general position in the criminal law.[111] However, in certain categories of case, it clearly precludes the existence of liability. In relation to interferences with property, privacy and related rights, consent prevents liability.[112] In relation to interferences with the body, the general rule is stated to be that consent does *not* bar liability subject to exceptions. Cases falling within the general rule are, for example, duels and euthanasia.[113] The exceptions are not clearly defined, but include therapeutic medical treatment, organ donation, biomedical research.[114] Aesthetic surgery is permissible with consent so long as the risks are not disproportionate to the expected benefits.[115] Jourdain goes as far as to say that consent defeats liability in relation to interferences which are relatively minor or useful.[116] The *Projet de réforme* in article 1257-1 reflects the existing law in relation to proprietary rights: 'Equally, there is no room for liability where an action causing harm prejudices a right or an interest over which the victim has a power of disposal if the latter has consented to it.'[117] Use of the word *disposer*, which implies an alienable right, seems to preclude the application of this article to bodily interferences. If so, the *Projet de réforme* oddly has nothing (explicit) to say about consent to bodily interference in tort.

[109] ibid.
[110] Art 1255 of the *Projet*.
[111] Jourdain (n 18) [64]. Sometimes the reason for considering *consentement* not to be a true *fait justificatif* is that it does not justify an established *faute*. See above n 19.
[112] Jourdain (n 18) [65]–[66].
[113] ibid [68].
[114] ibid [69].
[115] ibid [73].
[116] ibid [69]: 'légères ou utiles'.
[117] 'Ne donne pas non plus lieu à responsabilité le fait dommageable portant atteinte à un droit ou à un intérêt dont la victime pouvait disposer, si celle-ci y a consenti.'

In English law, the general assumption, albeit there is a paucity of authority to vindicate this assumption, is that consent may defeat liability in relation to any (otherwise) tortious interference.[118] This contrasts with the position in English criminal law, where the limits of consent are more tightly policed; consent to, for instance, certain levels of bodily harm is not valid unless it falls within an exceptional category.[119] Perhaps the general French tendency to follow the criminal law in relation to *faits justificatifs* has influenced the structure of the law here.

In French law, there is also the doctrine of *acceptation des risques* ('acceptance of risk'). The conceptual relationship with *consentement* is not entirely clear. For instance, injuries inflicted during a boxing event fall within *acceptation des risques*, but could presumably also fall within *consentement*.[120] The primary context in which *acceptation des risques* has been applied is sports and dangerous games.[121] There are three main implications in this context. First, the decision to play the sport or game does not preclude strict liability arising under article 1242 Cc; the participants in the game are not taken to have given up their right to sue for injury caused by a thing under another's control.[122] Second, the voluntary nature of the activity can, however, influence what constitutes fault within the activity; generally a higher level of fault seems to be insisted upon.[123] Third, there is an overlap with *acceptation des risques* and *faute de la victime* (this also applies beyond the sporting context). Sometimes the acceptance of the risk may itself be 'faute' and lead only to a partial reduction in damages. The *Projet de réforme* says nothing explicit on *acceptation des risques*. One explanation of this may be that its only role is to influence the interpretation of *faute* and *faute de la victime*: it is not an autonomous defence. Perhaps it is implicitly to that extent retained in references to those concepts in the *Projet de réforme*.[124]

Just as French law contains *consentement* and *acceptation des risques*, English law also has two strands to the notion of *volenti non fit injuria*, although these are not generally disaggregated in the doctrinal literature. One strand is transactional: consent in this sense is something that is given to another person in respect of an act. The other strand is choice-based: here the victim does not communicate or attempt to communicate their permission to another person, but simply freely and knowingly chooses to take a risk. Both strands are likely to defeat liability, but they

[118] See eg Peel and Goudkamp (n 27) 786.

[119] *R v Brown* [1994] 1 AC 212, 231 (exceptions including: surgery, male circumcision, tatooing, ear-piercing, boxing).

[120] CA Douai 3 December 1912, DP 1913, 2, 198; TGI Paris 26 June 1973, D 1974, 185.

[121] Jourdain (n 18) [86].

[122] Cass civ (2) 4 November 2010 no 09-65.947, JurisData no 2010-020692, Bull civ 2010 II no 176.

[123] Jourdain (n 18) [89].

[124] In US tort law, arguments about 'assumption of the risk' have increasingly been reallocated to other defences: see K Simons, 'Reflections on Assumption of Risk' (2002) 50 UCLA L Rev 481, 482.

do so in different ways. A free choice to expose oneself to risk is likely to break the chain of causation. By contrast, consent acts independently to defeat liability and not merely through its effect on causation.[125]

(ii) Exclusion and Limitation of Liability[126]

In English law, where a person validly consents to an otherwise wrongful interference, no wrong is committed. Where a person relies upon the defence of exclusion of liability, this is not so: a contractually agreed exclusion or limitation of liability leaves untouched the wrong, but regulates the remedial consequence of that wrong.[127] In short, consent goes to primary rights, exclusion of liability goes to remedial rights.[128] This analysis is also accepted by French authors.[129] Contractually agreed exclusions of tort liability are not valid under the current law, but are valid under certain conditions for contractual liability. The *Projet de réforme* would allow exclusion of non-fault-based liability, except where it concerns bodily injury.[130] There is no necessary inconsistency in allowing consent to operate in relation to fault-based tortious liability but not permitting the exclusion of fault-based liability. As noted, consent operates on primary rights, precluding the existence of a wrong, while exclusion relates to remedial rights.

E. Public Policy Defences

A public policy defence can be said to be one whose justification is not based upon the justifiability of the defendant's conduct or the responsibility of the defendant for the outcome. This section focuses upon one putative public policy defence: the illegal conduct of the claimant.

In French law, the fact that damage arose from an illegal act by the victim may influence the ability to obtain compensation in at least two ways. First, the fact that the damage arose from illegal conduct, or compensation would serve to award a person the revenue they would have made from an illegal activity, could serve, procedurally, to bar a right to have the claim heard, without necessarily affecting the underlying primary rights and duties. Article 31 CPC states that 'the right

[125] See, drawing attention to the need for an *agreement* for *volenti*, and contrasting this with the more expansive state of the law, Peel and Goudkamp (n 27) 789.

[126] See in detail ch 15.

[127] Stevens (n 16) 249.

[128] Occasionally, however, *volenti non fit injuria* is said to require an agreement to waive one's right to sue. See *Nettleship v Weston* [1971] 2 QB 691, 702 ('waive any claim for damages'). This is incorrect: consent relates to primary rights, not rights to sue or to obtain damages.

[129] See above n 43.

[130] Arts 1281–1283 of the *Projet*.

of action is available to all those who have a legitimate interest in the success or dismissal of a claim'.[131] This provision has been used to reject claims based upon the fact that the remedy would restore a person's illegal earnings, for instance.[132] Despite this, there are cases which claim that the maxim *nemo auditur propriam turpitudinem auditur* has no application in civil liability.[133] The procedural bar does, however, provide a route by which illegality can prevent a claim for damages. Second, the illegal origin of the damage may affect the underlying substantive rights. A condition of the validity of a contract, for instance, is that it has a *contenu licite*.[134] Similarly, in tort, sometimes it is said that only damage caused to a *legitimate* interest is compensatable.[135] Nonetheless, it is usually held that the fact that the claimant's damage arose through its own illegal conduct is irrelevant even to this issue.[136] But the support adduced for this general rule is usually rather unconvincing. It consists of cases where the claimant's illegal conduct is not in a causal connection with the damage suffered.[137] Furthermore, the cases where the illegal conduct has been held to bar a claim are ones in which there is a clear causal connection or where permitting the claim would undermine the purpose of the breached prohibition.[138]

Illegal conduct of the victim is conceptualised as a defence in sense (2) in English law[139] and may bar a claim in tort or contract where (a) upholding the claim would be inconsistent with the aims of the prohibition rendering the victim's conduct illegal, or would allow the victim to profit from its illegal conduct, (b) there are no stronger policy arguments for allowing the claim, and (c) rejecting the claim would not be disproportionate.[140] The primary justification given for the defence is consistency: in some cases, an award of compensation would involve the law of tort undermining the criminal law by, for instance, providing compensation in respect of a punishment imposed by the criminal law.[141]

[131] 'L'action est ouverte à tous ceux qui ont un intérêt légitime au succès ou au rejet d'une pretention.' (Translation available at www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations).

[132] Cass civ (2) 30 January 1959, Bull civ 1959 II no 116; Cass civ (2) 18 November 1959, Bull civ 1959 II no 754.

[133] Eg Cass civ (1) 14 December 1982, Bull civ 1982 I no 355, RTD civ 1983, 342 obs G Durry; Cass civ (2) 19 February 1992, JCP G 1993, II, 22170 obs G Casile-Hugues; Cass civ (1) 17 November 1993, Bull civ 1993, I, no 326, RTD civ 1994, 115 obs P Jourdain; Cass civ (1) 22 June 2004, Bull civ 2004 I no 182.

[134] Art 1128 Cc. See also art 1162 Cc.

[135] See art 1235 of the *Projet de réforme*. See ch 9 above.

[136] See eg S Retif, 'Droit à réparation. – Conditions de la responsabilité délictuelle. – Le dommage. – Caractères du dommage réparable', JCl Civil Code, arts 1382–1386, Fasc 101, [105]; Bénabent (n 12) [680].

[137] See Cass civ (2) 2 February 1994, RCA 1994, comm 176, concerning bodily injury suffered by a person negotiating the sale of drugs.

[138] Cass com 30 November 1999 no 97-15978, unpublished.

[139] See the multiple references to 'defence' in the leading decision, *Patel v Mirza* [2016] UKSC 32. These could be understood as references to 'defences' in sense (1), but that is not reflective of some judges' understanding. See eg *Patel* [233] (Lord Sumption), where the defence is considered a rule of procedure akin to the position in French law.

[140] *Patel v Mirza* [2016] UKSC 42 (Lord Toulson).

[141] Ibid [99]–[101] (Lord Toulson).

III. Conclusion

Both French and English tort and contract law recognise defences on both the externalist and proof-based understandings of that concept. Furthermore, both systems recognise these, or closely related, concepts in their self-understanding, either in the law of procedure or in the taxonomy of the substantive law. The primary practical significance of defences in both systems is the allocation of the burden of proof. Two main contrasts emerge from the analysis. First, the French rules on defences are typically formulated with considerable generality: the rules on justification in theory apply across tort, contract and crime, without modification. No such generality is evident in English law. Second, particularly in relation to tort, French law is marked by a relative absence of defences in the externalist, merit-based, sense.