AUTOMOBILE ACCIDENTS: A COMPARATIVE STUDY OF THE LAW OF LIABILITY IN EUROPE *

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The progress in the technical sciences which followed the industrial revolution, bringing with it the development of machine industry and the speeding-up of communication, has had as important effects upon certain rules of law as upon the human relations which are regulated by those rules. The increased pace of a mechanized society has had a particularly strong influence upon certain aspects of tort law.

From the time of the Roman law down almost to the present, legal liability for invasion of interests of personality or property through external violence presupposed the existence of fault on the part of the actor, whether that fault consisted of misfeasance or nonfeasance. Liability without fault was only exceptionally recognized, either by the Roman jurists, in the modern European codes, or in the English common law. Various norms were set up in what seems like an attempt to provide a convenient legal yardstick for measuring fault. Of such norms the most striking is that of an ideal standard based upon the theoretical conduct of an ordinary person or a *bonus pater familias*. If the individual measured up to this standard, the law attached no importance to the fact that his acts had prejudiced another, and the actor was under no duty to make compensation for the injury which he had caused.

Today we find a different approach to this problem. The change did not occur suddenly, but was the result of a slow evolution. The causes and course of this evolution make a fascinating chapter in legal history for those who are interested in the effect

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which the requirements of daily life produce on law and who search for the ways in which law responds to the pressure brought upon it by changing economic and social conditions.

The law of liability covers a field too vast to permit the tracing of all phases of this evolution in a single article, but a study of one particular aspect is suggestive. This article, therefore, deals with one of the acute problems of our present day life, namely, the problem created in the law of liability with respect to the use of motor vehicles. The number of accidents and injuries caused by motor vehicles in Europe, as well as in the United States, has increased in proportion to the increase in the number of automobiles, and resulted in an enormous increase in litigation. It is not surprising that this had a marked effect upon the law regarding liability. In some countries the law was changed by legislation. In other countries, where the legislature was slow in responding to the exigencies of the situation, the change was brought about by the courts. What follows is a study of the judicial and legislative methods by which various European countries have endeavored to solve the problems of determining liability for injuries and damages caused by the use of motor vehicles and a consideration of the process through which these methods were devised, pointing out the changes which resulted.

I.

Among the European countries where this change in the law was brought about by judicial action without legislative aid, France occupies the most conspicuous place.

Civil liability for injuries was determined in France on the basis of five articles of the Civil Code. The general principles of liability were expressed by the legislature of 1806 as follows:

Art. 1382. "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."

Art. 1383. "Everyone is liable for the damage he causes, not only by his acts, but also by his negligence or imprudence."

Art. 1384, § 1. "A person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible or of things which he has under his control."¹

The text of articles 1382 and 1383 makes it clear that the elements of civil liability under these provisions are (1) an act or omission; (2) damage; (3) causal connection between the act or omission and the damage; (4) fault (which should be understood in its widest sense, whether resulting from negligence or wilful injury). Decisive among the elements of liability under these two articles is undoubtedly *fault*.² In other words articles 1382 and 1383 incorporated the traditional principle of "no liability without fault"; and it should be observed that the other codes, such as those of Germany or Switzerland, of a much later date, have adopted the same general principle in determining civil liability.³

Articles 1382 and 1383 impose liability for damage caused by one's own act, if such act constitutes a fault, article 1384, § 1, provides that one is liable not only for damage caused by his own

¹ Quotation from foreign texts, unless otherwise indicated by the writer. The French text reads:

Art. 1382. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

Art. 1383. "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence."

Art. 1384. § 1. "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."

² LALOU, LA RESPONSABILITÉ CIVILE (1928) §§ 41 *et seq.*; 2 COLIN ET CAPITANT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS (5th ed. 1928) 36 *et seq.*; 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (9th ed. 1923) 269 *et seq.*

³ GERMAN CIVIL CODE, Art. 823 (BGB): "Whoever wilfully or negligently, unlawfully injures the life, body, health, freedom, property or any other right of another, is bound to compensate the other for any damage arising therefrom. . . ."

SWISS FEDERAL CODE OF OBLIGATION, Art. 41: "Every person who causes damage to another in an unlawful [non-privileged] manner, be it wilfully or be it negligently or imprudently, is liable for damages." Cf. this with articles 1382 and 1383 of the French Civil Code. The Swiss Code considers the non-privileged character of the act causing damage also an element of liability. The French Code, drafted a century earlier than the Swiss Code, omitting to limit liability to damage caused by non-privileged [unlawful] acts, proceeded on the Roman law principle: *Neminem lædit, nemo damnum facit qui suo jure utitur*. [26 D. xxix 2, *de damno infecto*.] To balance this omission the theory known in French law as abuse of rights (*abus des droits*) was developed by the French courts and writers. See LALOU, *op. cit. supra* note 2, §§ 406 *et seq.*

act, but also for the acts of persons for whom he is responsible or of things under his control. While liability under articles 1382 and 1383 is expressly made conditional upon *fault*, no such condition is expressed in article 1384, § 1. It would seem, however, that article 1384 should be read in the light of the two preceding articles, which were drafted and enacted at the same time. It should be observed that article 1384, § 1, has an express connection with the two preceding articles. The phrase in article 1384, § 1, "a person is liable *not only* for the damage he causes *by his own act*," refers to articles 1382 and 1383 and by implication may be interpreted to read: "a person is liable not only for the damage he causes by his own *fault, negligent or imprudent act*". The question may then be raised whether the liability imposed by article 1384, § 1, for acts of persons for whom one is responsible or of things under one's control does not also implicitly include the element of fault. In other words, if article 1384, § 1 be read in the light of the two preceding articles, would it not appear that acts of other persons for which liability is imposed, might also be acts containing the elements of fault, negligence or imprudence? And since a thing cannot act, either negligently or otherwise, should not the liability attached to "acts of things" be held dependent on the fault, negligence or imprudence of the person in control? Or rather should the fact that the text omitted the word *fault* be considered intentional and the action of the legislature regarded as imposing a liability *regardless of fault* with respect to either or both of these situations dealt with in article 1384, § 1, namely, liability for (1) damages caused by the acts of *persons* for whom one is *responsible* and (2) damages caused by *things* which one has under one's *control*?

There is nothing in the legislative history of the French Civil Code which would indicate any intention on the part of the drafters of the Code to base liability for one's own acts on fault on the one hand, and set up another rule for liability for damage caused by the acts of another or by a thing under the control of the other. A reasonable reading of these texts would seem to indicate that the basis of liability was considered in all three situations dealt with in articles 1382 and 1383 on the one hand and in article

1384, § 1, on the other, to be fault.⁴ In fact, this was the interpretation given originally to these code provisions. Until the end of the nineteenth century the French courts as well as text-writers rigorously adhered to this principle of considering fault an essential and indispensable element in determining liability.⁵

The fact that liability arising under these articles of the Code was based on fault, carried with it the consequence that the burden of proof rested on the party which suffered damage.⁶ It was only at the very end of the nineteenth century that the Workmen's Compensation Act effected a change in the French law of torts with respect to a determined but nevertheless important type of case.⁷ This law was the result of a slowly evolving opinion in consequence of the industrial revolution, holding that the industrialist should afford compensation for injuries caused by his machines to his employees. The increasing frequency of industrial accidents led public opinion to the conviction that it is contrary to justice and equity that the workman should have to prove the employer's fault,—a proof frequently impossible, or, at least, exceedingly difficult to produce,—in order to recover. The law of 1898 has eliminated fault as an element of

⁴ For the legislative history of the articles of the Civil Code see 13 FEUST, *RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL* (1836) 462 *et seq.* As to liability for acts of persons for whom one is responsible, the subsequent paragraphs of article 1384 specify certain cases in which liability is imposed, namely: by virtue of § 2 the parents are liable for damages caused by their minor children if they are living with their parents; § 3 imposes liability on the master or employer for damages caused by the acts of his servants or employees committed in the exercise of their functions; and § 4 imposes liability on teachers and artisans for damages caused by their pupils and apprentices while under their supervision. Two special cases of liability are dealt with in articles 1385 and 1386. The first imposes liability on the owner or possessor of animals regardless of whether they were under, or had escaped from, his control when causing damage. By virtue of article 1386, the owner of a building is liable for damages caused by it, if the accident was due to lack of proper upkeep or structural defect.

⁵ See: LALOU, *loc. cit. supra* note 2; GARDENAT ET SALMON-RICCI, *DE LA RESPONSABILITÉ CIVILE* (1927) §§ 24-27 and cases cited under § 27. See also: 2 COLIN ET CAPITANT, *op. cit. supra* note 2, 366 *et seq.*; 2 PLANIOL, *loc. cit. supra* note 2.

⁶ See FRENCH CIVIL CODE, Art. 1315: "The person who claims the fulfillment of an obligation must prove its existence." Cf. SWISS CODE OF OBLIGATION, Art. 42. It should be remarked that in continental law *obligatio* comprises contractual as well as tortious relations.

⁷ LOI SUR LES ACCIDENTS DU TRAVAIL, April 9, 1898. See DALLOZ, *RECUEIL PÉRIODIQUE* (1898) 449 (hereinafter cited as DALL., PER.).

the employer's liability, thus greatly facilitating recovery. It also marked thereby the introduction into French law of the theory of "professional risk" or "risk of undertaking" as a basis of liability in certain defined relationships, placing the risk on the one best able to spread and distribute the loss.⁸

Risk as a basis of liability was, however, not accepted, and only recently did the French legislature enact a law concerning aerial navigation by which it imposed liability, regardless of fault, on the user for damages caused by airplanes,—a liability somewhat similar to that imposed on employers for industrial accidents.⁹

Except for these two statutes,—The Workmen's Compensation Act and the Aerial Navigation Law,—there was little inclination evidenced by French text-writers, and, until recently, on the part of the French courts, to depart from the Aquilian theory of liability based on fault. Liability, in the overwhelming majority of cases, was determined on the basis of articles 1382 and 1383 of the Civil Code, except in specific situations provided for in the Code.¹⁰ It should also be pointed out that up to the end of the nineteenth century, article 1384, § 1 was almost completely disregarded by the courts. Even in cases where damage was caused by a thing, liability was dependent upon the fault or negligence of the person in control, to be proven by the plaintiff.¹¹

A change occurred when, in a decision of June 16, 1896, the Court of Cassation, invoking article 1384, § 1, held the owners liable for injuries caused by the explosion of a steam-engine. The highest court of France did not even admit proof by the owner that the accident was due to a defect in construction.¹²

⁸ As to the theory of "professional risk", or, as the French call it, "objective liability", see 2 COLIN ET CAPITANT, *op. cit. supra* note 2, 367; 2 PLANIOL, *op. cit. supra* note 2, 315 *et seq.*

⁹ LOI RELATIVE À LA NAVIGATION AERIENNE. May 31, 1924, Art. 53:

"The exploiter of an airplane is absolutely liable (*responsable de plein droit*) for damages caused by the movements of the airplane or of objects which may detach from it, to persons or property situated on the surface. This liability cannot be mitigated or rebutted except through proving negligence of the victim." See DALL., PER. (1925) 4.41 *et seq.*; *Journal Officiel*, June 3, 1924.

¹⁰ *Supra* note 4.

¹¹ Dame Painvin v. Deschamp, (Cass. Civ., 1870) DALL., PER. (1870) 1.361.

¹² Guissier, Coussin, et Oriolle v. Vve. Teffaine, (Cass. Civ., 1896) DALL., PER. (1897) 1.433; SIREY, RECUEIL DES LOIS ET DES ARRÊTS (1897) 1.17 (hereinafter cited as SIR.). A steam engine, constructed by Oriolle and owned by Guissier

Thus, instead of predicating liability upon fault, the court held that the owner of the machine causing damage is liable although there was no fault. Moreover, the Court said that this liability can be avoided only by proving *force majeure* or an unforeseen event, and did not regard the fact that the defect was due to the fault of the constructor and was unknown to the defendant, as constituting a defense. This decision was interpreted by some writers, and also by some courts, as a turn in jurisprudence of the Court of Cassation, in no longer basing liability arising under article 1384, § 1 on the traditional notion of fault, but on ownership or control. This idea, however, was later denied by the Court in the case of *Foulatier v. Busson-Lavalière et Colas*, declaring the liability of the owner is not based on ownership, but on presumed fault with consequent shifting of the burden of proof.¹³

Attention should be called to the language of the Court in this case. The Court stated that article 1384, § 1 raises a presumption of fault (*présomption de faute*), which presumption results in shifting the burden of proof (*renversement de la charge de la preuve*). Although these expressions,—technical terms in

and Coussin, exploded while being operated by Tefaine, an engineer in their employ, who died in consequence of the injuries thus received. His widow sued the owners for damages, who, in turn, sued the constructor. The trial court rejected both suits, which decision was reversed by the Court of Appeals of Paris. By analogy to Art. 1386 (liability of owners of buildings), the Court held that Guissier and Coussin were liable for damages when the accident causing the injury was due to a defect of construction. This decision was affirmed on appeal by the Court of Cassation, which stated that since the explosion was due to a defect in construction and not to *cas fortuit* (unforeseen event) or *force majeure* (superior force, act of God) which would have exonerated the owners of the machine, they were therefore, liable by virtue of Art. 1384, § 1. This liability cannot be rebutted, said the Court, by proving the fault of the constructor of the machine or a hidden defect. Cf. *Vve. Grange v. Cie Gle. Transatlantique*, (Cass. Req., 1897) DALL., PER. (1897) 1.440, where defendant company was held not liable for an accident caused by the explosion of one of its ships' steam engines because it was proved that the engine was in perfect condition and the explosion was not caused by a defect in construction.

¹³ (Cass. Req., 1908) DALL., PER. (1909) 1.73; SIR. (1910) 1.17. The case came on appeal from a decision of the Court of Appeal of Bourges [DALL., PER. (1906) 2.249] for violation of article 1384, § 1, deciding that the owner of a threshing machine is liable for fire originating in the machine and destroying property. The Court of Appeals said that liability is a consequence of ownership and is not refuted by proving a defect in the machine or negligence of the person operating it. The Court of Cassation, while affirming this decision, pointed out that liability is not based on ownership, but on control. The presumption of fault can be rebutted only by proof that the machine was not under his or his employee's control when the fire started, or that it was caused by an unforeseen event, *force majeure*, or a cause not imputable to him.

French legal language,—occur subsequently in almost every case involving the application of article 1384, § 1, and are used by every writer in the discussion of this text, they have a different meaning from that normally attached to them in Anglo-American law. When the French courts speak of “presumption of fault” raised by article 1384, § 1, against the owner of a thing causing damage, they do not mean a true presumption which the defendant can rebut by proving that he was not negligent. There is no similarity between the Anglo-American doctrine of *res ipsa loquitur* and the French doctrine of *présomption de faute*. The doctrine of *res ipsa loquitur* at most raises a presumption of negligence against the defendant which may be rebutted, or, according to many cases, it shifts the burden of going forward with the evidence; but in either event the defendant is not liable if the evidence shows that he was not at fault. When the American courts speak of presumptions they speak of procedural devices which operate to shift the burden of ultimately persuading the jury on a given issue or, in the alternative, to shift the burden of going forward with the evidence.¹⁴ Thus, the French *présomption de faute*, on the other hand, has a much more far-reaching effect. Taken literally, the expression is indeed misleading to an American lawyer. It is not a presumption of fault in the true sense of the words for it cannot be refuted by proving absence of fault. In the very language of the courts, this “presumption of fault” cannot be rebutted except by proving *force majeure* or an unforeseen event (*cas fortuit*) or a cause not imputable to the person presumed to be liable—*i. e.* contributory negligence or the fault of a third party. What the courts really mean by “presumption of fault” is, therefore, a rule of substantive law imposing liability regardless of fault. The sense in which the terms “presumption of fault” and “shifting the burden of proof” are used by French judges and writers should constantly be kept in mind, when, on the subsequent pages of this article, references are made thereto.

¹⁴ See Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1919) 68 U. of PA. L. REV. 307.

Since the beginning of our century, French courts have resorted more frequently to article 1384, § 1 for the determination of liability for damages caused by inanimate things. This text was interpreted by the courts as raising a "presumption of fault", but there was a considerable divergence of opinion in the different jurisdictions as to the true meaning and extent of this "presumption". The most important qualification devised by the courts,—a qualification which attained particular significance when, in cases of automobile accidents, a choice had to be made between articles 1382 or 1384, § 1 for the determination of liability,—was that article 1382 alone is applicable whenever the accident occurred at a moment when the thing was operated by the hand of man.¹⁵ On the other hand, article 1384, § 1 is applicable whenever the damage is caused by the thing alone without participation of man. In a decision, usually referred to by French writers as one of the leading cases as to the interpretation of article 1384, § 1, the Court of Cassation affirmed a decision of the Court of Appeals of Paris which held the owner of a restaurant liable to pay damages for injuries which a guest received in consequence of the explosion of a siphon of seltzer-water placed on a nearby table.¹⁶ Defendant pleaded that the burden was on the victim to prove the fault of the company or its employees. The Court of Cassation held article 1384, § 1 applicable and the decision proper because the company did not produce proof to rebut the fault presumed by virtue of that article.¹⁷ It should be remarked that the Court of Cassation did not take into consideration whether or not the siphon was abandoned or manipulated by man when the explosion occurred. It simply held article 1384, § 1, with its "presumption of fault", applicable, and stated the extent, for the time being, of this presumption in declaring that it can be avoided by the person in control only by proving

¹⁵ Bugand v. Ville de Dijon, (Cour d'Appel, Dijon, 1907) DALL., PER. (1910) 2.132.

¹⁶ Soc. du Café Riche de Rivaud, (Cass. Civ., 1914) DALL., PER. (1914) 1.303; SIR. (1914) 1.128 [*aff'g*] (Cour d'Appel, Paris, 1912) SIR. (1913) 2.164].

¹⁷ Cf. Chemin de fer de l'Ouest v. Mercault, (Cass. Civ., 1919) DALL., PER. (1922) 1.25, at 27, and note by Prof. Ripert; SIR. (1922) 1.265, where a railroad company was held liable for injuries caused by the explosion of an engine, the cause of which remained unknown.

an unforeseen event, *force majeure*, or contributory negligence of the victim.

The disagreement as to the basis of liability for damages caused by inanimate things, or more accurately, the discussion whether this liability is determined by virtue of article 1382 on the basis of proved fault, or by virtue of article 1384, § 1, on the basis of fictional fault, became a particularly acute problem chiefly with respect to injuries caused by motor vehicles. The rapidly increasing number of accidents crowded the court calendars heavily and, in view of the most contradictory decisions rendered by the various jurisdictions, it is not surprising that this topic became one of the most exploited in French juristic writings during the past few years.¹⁸

When motor vehicles first appeared, liability for injuries caused by this new means of transportation was determined on

¹⁸ For discussion of the evolution of the law of liability in general see 1 BAUDRY-LACANTINIERE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* (Supplement by J. Bonnecase, 1924) 296 *et seq.*; 5 DEMOGUE, *TRAITÉ DES OBLIGATIONS* (1925) 380 *et seq.*; 2 GENY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (2d ed., 1919) § 174; LALOU, *op. cit. supra* note 2. See also CORNU, *DES PRÉSUMPTIONS DE FAUTE EN MATIÈRE DE RESPONSABILITÉ CIVILE* (Thesis, Montpellier 1929) Avignon; CAHIERRE, *DES CHOSSES INANIMÉES SOUMISES À L'OBLIGATION DE GARDE* (Thesis 1929) Rennes; HALLER, *ESSAI SUR L'INFLUENCE DU FAIT ET DE LA FAUTE DE LA VICTIME SUR SON DROIT À RÉPARATION* (Thesis 1926) Paris. For a comprehensive exposition of the whole French law of liability on the basis of articles 1382-1386 of the Civil Code as interpreted by the courts, see GARDENAT ET SALMON-RICCI, *op. cit. supra* note 5.

Among the numerous treatises devoted specially to liability for injuries caused by motor vehicles, the following may be referred to: CHEVALIER, *LA RESPONSABILITÉ DES AUTOMOBILISTES ET LA JURISPRUDENCE RÉCENTE* (Thesis 1926) Paris; CHARIER, *DE LA RESPONSABILITÉ DES PROPRIÉTAIRES D'AUTOMOBILES AU CAS D'ACCIDENTS* (Thesis 1926) Angers; 1 BERINGUIER, *LE PROBLÈME DE LA CIRCULATION* (1929) (especially pages 141 *et seq.*); GUAIL, *LES ACCIDENTS AUTOMOBILES ET LEURS CONSÉQUENCES JURIDIQUES* (1929); AMBLARD, *LE CODE DE LA ROUTE* (1929); TAUZIN, *LA RESPONSABILITÉ DES PROPRIÉTAIRES DE CHOSSES DANGEREUSES ET SPÉCIALEMENT DES AUTOMOBILISTES* (1929); TAUZIN, *UN EXEMPLE DE "SOCIALISME JURIDIQUE" EN MATIÈRE DE RESPONSABILITÉ CIVILE: L'ARTICLE 1384 ET LES ACCIDENTS D'AUTOMOBILES* (Thesis 1929) Paris; LUCO, *DES CONFLITS DE PRÉSUMPTIONS DE FAUTE À L'OCCASION DE LA CIRCULATION DES VÉHICULES* (1928).

On the problem of liability for injuries received by free passengers (gratuitous transport) see CHATILLON, *LE TRANSPORT GRATUIT DES PERSONNES EN AUTOMOBILE* (Thesis 1929) Paris; VIE, *DE LA RESPONSABILITÉ CIVILE DU TRANSPORTEUR BÉNÉVOLE* (Thesis, Montpellier 1929) Lyon.

No attempt has been made to refer to the innumerable articles and notes which were published in various French legal periodicals and in the annotated publications of court decisions.

the basis of article 1382 of the Civil Code. The injured party had the burden of proving the fault of the person causing the injury.¹⁹

As has been pointed out by a student of this problem, at the beginning of the era of the automobile, this means of transportation, being exceedingly expensive, was at the disposal of well-to-do people only; moreover, it was regarded primarily as a means of pleasure. It can be easily understood that public opinion as a whole on questions relating to the automobilist was not favorable to him. Nevertheless, neither the legislature nor the courts were inclined to respond to public clamor and come to the aid of pedestrians through stiffening the rules of liability. The reluctance of the legislature can partially be explained by the fear that to impose a strict liability might have retarded the development of a promising industry.²⁰ In fact, the only legislative step taken in this direction before the war was a statute making it a special crime to leave the place of an accident ("hit and run" act).²¹

The only help the courts afforded to the victim was a certain liberality in admitting proof and some endeavor to widen the

¹⁹ *Fisson v. Maison & Boutellier*, (Cour d'Appel, Rouen, Corr., 1898) DALL., PER. (1899) 2.295, is the first reported decision concerning injuries caused by an automobile. Appellee's coach met Fisson's automobile, whereupon the horse shied and wrecked the coach, and appellee was gravely injured. The court, rejecting a suit for damages, said that appellant would be liable only if it were proved that he committed a personal fault consisting in "inadvertence, imprudence, inattention, negligence or disregard of traffic rules", and that this fault was the cause of the accident. No provision of the Civil Code was invoked. While the court made no direct reference to the dangerous nature of this new means of transportation, it was pointed out that the court did not disregard the "quite particular care" which appellant was bound to exercise in operating a vehicle of this nature.

On the other hand, the novel or dangerous character of automobiles was emphasized from the very beginning by Swiss courts. *Soc. de Frise v. de Feldau*, (Fed. Sup. Ct. of Switzerland, 1903) 29 *Recueil Officiel des Arrêts des Tribunaux Fédéraux Suisses* 2, 273. (hereinafter cited as *Rec. Off. Suisse*) holding the person causing injury to a particular degree of care, the disregard of which alone is sufficient to constitute negligence. See also: *Haas v. Heyman*, (Fed. Ct., 1905) 31 *Rec. Off. Suisse* 2, 416.

²⁰ CHEVALIER, *op. cit. supra* note 18, at 11 *et seq.*

²¹ LOI DU 17 JUILLET 1908 ÉTABLISSANT, EN CAS D'ACCIDENT LA RESPONSABILITÉ DE CONDUCTEURS DE VEHICULES DE TOUT ORDRE. See DALL., PER. (1908) 4.68; *Journal Officiel*, July 20, 1908. The statute provides that any driver who, after causing an accident, leaves the place in order to escape civil or criminal liability, shall be punished by imprisonment and fine, without prejudice of punishment which may be imposed in addition. It is furthermore provided that in case articles 319 and 320 of the Penal Code are applicable (*i. e.*, if homicide through imprudence or involuntarily inflicted wounds and injuries are involved), the penalties provided by these articles shall be doubled.

conception of fault. But the application of article 1384, § 1, to determine liability for automobile accidents, although advocated by some outstanding writers, found no favor with the judiciary. Almost invariably it was held applicable only if the automobile was not being operated by anyone when the injury was inflicted.²²

The outbreak of the war diverted attention from this problem. After the war, however, the rapid increase in the number of motor vehicles, together with their increasingly extensive employment as a practical means of transportation, brought forward the question in an acute form, and it became an inspiring theme of juristic speculation. The controversy raged around the question whether liability for injuries caused by the use of motor vehicles should be determined on the basis of article 1382 or article 1384, § 1 of the Civil Code. On the basis of a survey of the above-indicated literature,²³ the theories advanced may be grouped as follows:—

(1) One school of thought desired to retain article 1382 as the basis of liability, imposing the burden on the victim of proving fault. It was suggested, however, that the sphere of application of this article be enlarged by minute prescription of traffic rules. If an accident occurred, the violation of such rules could

²² *Gouineau v. Naud*, (Cour d'Appel, Bordeaux, 1909) DALL., PER. (1912) 2.255. Suit for damages by appellee on basis of article 1384, § 1. Appellee's child was killed by appellant's car. The court refused to apply article 1384 because the accident was due not to the vehicle, to the risk inherent in it, but to the fact that it was directed in a vicious or careless manner by its driver. It was held, therefore, that article 1382 alone was applicable and the burden of proof was placed on the victim. Appellee also invoked a statute of 1899 (traffic rules) which, according to his pleading, created a presumption of fault. The court denied this assertion, saying that the claimant has to prove the *disregard* of these rules as well as the causal relation between this disregard and the accident. The court pointed out that the mere *use* of an automobile cannot create a presumption. The court indicated that it would be liberal in admitting proof by saying that the management of an engine so powerful requires particular attention and precaution and the slightest negligence, such as excessive speed, must receive great weight.

Accord: *Léon & Cie. v. Bouche*, (Cour d'Appel, Bordeaux, 1912) DALL., PER. (1912) 2.226.

Cf. Vve. Goffin v. Cie. des mines de Bethuse, (Cass., 1911) DALL., PER. (1911) 1.354; *SIR.* (1914) 1.214.

In Switzerland it was held that the observance or disregard of traffic rules does not, in itself, determine the existence of liability. *Tornare v. Brandt*, (Fed. Ct., 1907) 33 Rec. Off. Suisse 2.555.

²³ *Supra* note 18.

be ascertained and the proof of fault would follow. In short, a broader and more precise definition of "fault" was sought.

(2) A second school of thought, finding this inadequate, while retaining fault as the determining element of liability, advocated the shifting of the burden of proof. It should be again observed that although the advocates of this theory invariably speak about the "shifting of the burden of proof" (*renversement de la charge de la preuve*), two groups can be distinguished within this school which, in fact, while using the same technical terms, suggested two entirely different proceedings. One group argued that article 1382, putting the burden of proof on the plaintiff, is more favorable to the automobilist than to the victim. It was also argued that the former is usually in a better financial position and thus he can better defend himself. Therefore, this group suggested the remedy of "shifting the burden of proof" to be accomplished by the application of article 1384, § 1. In other words, this group advocated a presumption, or *prima facie* case, of fault, similar to the Anglo-American rule of *res ipsa loquitur*.

The other group argued that a person, in putting a motor vehicle into circulation, created a risk of accident through this dangerous instrument. Therefore, applying the principle *ubi emolumentum ibi onus*, he should bear the consequences. Not being satisfied that this can be covered by article 1384, § 1, this group advocated legislation to supplement article 1382, providing specifically for the liability of drivers and introducing the system of "presumed fault" with the consequent "shifting of the burden of proof". While this group also spoke of "presumed fault" and "shifting the burden of proof", they were really advocating a change in the rule of substantive law and not merely a change in procedure. In other words, a "presumption of fault" rebuttable only by proving *force majeure*, an unforeseen event or contributory negligence.

(3) Finally, a third theory openly and frankly suggested risk instead of fault as the basis of liability for damages caused by motor vehicles to be brought about by statute similar to the Workmen's Compensation Act or the Aerial Navigation Law.²⁴

²⁴ See 2 COLIN ET CAPITANT, *op. cit. supra* note 2, at 402 and 367; CHEVALIER, *op. cit. supra* note 18, at 17 *et seq.*

An indirect effort to improve the situation and facilitate recovery was made by the legislature in enacting, in 1922, the *Code de la Route*,²⁵ containing detailed rules for vehicle traffic, and, in 1923, a statute providing that in case of a civil *délit* the competent tribunal may be either that of the defendant or the place of the accident.²⁶ This departure from the traditional principle *actor sequitur forum rei* was made primarily in the interest of victims of automobile accidents as is apparent from the motives set forth in the introduction of the bill.

The provisions of the *Code de la Route* were intended to facilitate a more precise determination of the causes of accidents and, therefore, of liability. The courts continued to exact from the victim proofs of the driver's fault and they insisted on a distinction between accidents occurring while the car was being operated and those caused by the vehicle alone, without the participation of a human agency. In the former case they held that the accident was due to an act of man (*fait de l'homme*) and not an act of the thing itself (*fait de la chose*), and, therefore, held that article 1382 alone was applicable.²⁷ Article 1384, § 1 could be relied upon only if the accident occurred without a human agency; for instance, if the car, while abandoned by its driver, ignited and exploded, injuring a passer-by. Up to 1924, rarely did any French court apply article 1384, § 1 without this distinction between an independent act of the thing and an act of man.²⁸

A new chapter was opened by the decision of the Court of Cassation in the *Bessières* case on July 29, 1924, which caused great confusion in juristic circles.²⁹ Plaintiff's wife was in-

²⁵ DALL., PER. (1922) 4.324, Law of December 31, 1922, [modified by the law of September 12, 1925, DALL., PER. (1925) 4.358].

²⁶ LOI DU 26 NOVEMBRE 1923, MODIFIANT LES ARTS. 2 ET 59 DU CODE DE PROCEDURE CIVILE. See DALL., PER. (1925) 4.46; *Journal Officiel*, Nov. 27, 1923.

²⁷ *Meriam v. Vve. de Mathuisieux*, (Trib. Civ., Nice, 1920) (1920) *Gazette du Palais* (hereinafter cited as *Gaz. Pal.*) 1.584; *Lajarige v. Loire*, (Trib. Civ., Valence, 1921) (1922) *Gaz. Pal.* 1.195; *De la Chapelle v. Pinel*, (Cour d'Appel, Grenoble, 1921) (1922) *Gaz. Pal.* 1.499.

²⁸ *Gallier v. Parisot*, (Cour d'Appel, Paris, 1922) (1922) *Gaz. Pal.* 2.129.

²⁹ *Epoux Bessières v. Cie des voitures d'Abeille* (Cass. Civ., 1924) DALL., PER. (1925) 1.5 (comment of Prof. Ripert); *SIR.* (1924) 1.321 (comment of Prof. Esmein); (1924) *Gaz. Pal.* 2.385.

Cf. with Goffin case, *supra* note 22.

jured by an automobile owned by defendant and operated by Saverne, a soldier on leave of absence, to whom the defendant entrusted the vehicle. The accident occurred when the car, in consequence of a lurch, ran on the sidewalk and into a shop where plaintiff's wife stood. Saverne was tried and acquitted by a military court from criminal liability. A civil suit for 50,000 francs damages was filed against the defendant company on the basis of article 1384. The complaint charged defendant with negligence in confiding the vehicle to Saverne and in not keeping the vehicle in good condition. The trial court dismissed the suit, holding article 1384, § 1 inapplicable because the breaking of the steering wheel cannot be imputed to the machine alone, independently of the act of its driver, as it occurred when the operator steered violently to the left in order to avoid collision with a bicyclist. On appeal, the Court of Appeals of Paris, in an interlocutory decision, ordered an expert report on the circumstances of the accident and, especially, on the question whether it was due to the bad condition of the vehicle. The expert reported that the breaking of the steering wheel was not the cause, but a consequence of the accident. On the basis of this expert opinion, the Court of Paris rendered a decision holding article 1384, § 1 applicable, without giving any reason or explanation for applying it; but dismissed the suit on another ground, namely, that the accident not being caused by the bad condition of the vehicle, no fault could be imputed to defendant and, thus, the "presumption of fault" against him, raised by article 1384, § 1, is rebutted. On appeal, the Supreme Court set aside the decision of the Court of Appeals because of false application of article 1384, § 1. The "presumption of fault" raised by that article, said the Court, can be rebutted only by proof of an unforeseen event, *force majeure*, or of a cause not imputable to the person in control. It is not sufficient to prove that he committed no fault or that the cause of the accident remained unknown. The Court of Paris, in exonerating defendant from liability because he could not be charged with negligence and because the cause of the accident remained unknown, was held to violate article 1384, § 1.

The decision of the Supreme Court in the *Bessières* case was followed by a spirited discussion of writers as to its significance; it created much confusion in the courts, which rendered many contradictory decisions, some adhering to and others refusing to apply the principle pronounced by the Supreme Court,—whatever that principle was, for there was disagreement among the individual courts as to the interpretation it should receive.

One opinion advanced by a group of jurists held that the decision was chiefly based on the hidden defect in the vehicle which caused the accident; the court had held article 1384, § 1 applicable because of this defect in the thing; the Supreme Court therefore intended to maintain the traditional distinction between “acts of things” alone, to which article 1384, § 1 is applicable, and “acts of things” with the participation of a human agency, in which case article 1382 determines liability. The decision of the Court of Appeals was set aside, according to this theory, not because the Supreme Court intended to apply article 1384, § 1 indiscriminately to every automobile accident. The reason for this was found in that the Court of Appeals violated the law in considering the presumption rebutted by proof of absence of negligence and by the fact that the cause of the accident remained unknown, whereas this presumption, according to a long line of uninterrupted decisions, can be rebutted only by proving an unforeseen event, *force majeure*, or a cause not imputable to the person in control. Hence, according to this opinion, by the *Bessières* decision the Court of Cassation did not abandon its traditional distinction between “acts of things” and acts of man.

Another group of jurists considered the *Bessières* decision as marking a turn in French jurisprudence. According to them, the Court of Cassation’s intention was to apply article 1384, § 1 to automobile accidents regardless of whether the injury was caused by the vehicle while abandoned or while operated by its driver. Their argument was that the Code, in raising a presumption against the person in control of a thing, in no way made a distinction between an injury caused by the thing alone or by the thing operated by a human agency. This distinction, not justified by the text of the law, but for some time read into it, was simply

abandoned by the Supreme Court which, in doing so, brought French jurisprudence once more in harmony with the language of the Code.

In view of this divergence of opinion, and also in view of the fact that French judicial precedent has not the binding character which it has in the common law,³⁰ it is not surprising that the courts rendered contradictory judgments in automobile cases. The division of the courts' opinions was almost equal. It would necessitate a volume's space to follow and analyze the hundreds of decisions in automobile cases which French courts rendered since the *Bessières* decision of the Court of Cassation. The review of a few cases will, however, show sufficiently the tendency as well as the line of reasoning which determined the respective attitudes taken by the courts in the two opposing camps.

It is to be noted that the point of view taken by the Court of Cassation in the *Bessières* case was also adopted by the *Conseil d'Etat* (the highest administrative court in France). On December 22, 1924, in determining the state's liability for injuries caused by an automobile operated in the service of the state, the *Conseil d'Etat* said:

"Considering that the particularly dangerous character of the circulation of motor vehicles at the present time (*à l'heure actuelle*) necessitates admitting presumption of fault against the operator of the vehicle causing the accident; but that this presumption could be rebutted, either by proof that the accident was due to a cause not imputable to the author, or to unforeseen event, or to *force majeure*, as the case may be."³¹

³⁰ Concerning *stare decisis* and its place in continental, as compared with Anglo-American law, see Pound, *The Theory of Judicial Decision* (1922) 36 HARV. L. REV. 940 *et seq.*; ALLEN, *LAW IN THE MAKING* (2d ed., 1930) 122 *et seq.*, 201 *et seq. passim*; 2 GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (2d. ed., 1919) §§ 145, 146, 149, 150; 1 GIERKE, *DEUTSCHES PRIVATRECHT* (1895) 176 *et seq.*; SAUER, *DIE GRUNDSÄTZLICHE BEDEUTUNG DER HÖCHSTRICHTERLICHEN RECHTSPRECHUNG FÜR PRAXIS UND WISSENSCHAFT* (1929) 122 *et seq.* Cf. article 5 of the French with article 1 of the Swiss Civil Code.

³¹ Soc. d'assurances mutuelles contre les "Les Travailleurs français" v. l'Etat, DALL., PER. (1925) 3.9 (with note of Professor Appleton); (1925) Gaz. Pal. 1.157; DALLOZ, RECUEIL HEBDOMADAIRE (1925) 30 (hereinafter cited as DALL., HEBD.). A truck owned and operated by the government overtook a man leading horses, which shied. In struggling with them, their conductor fell

Since the *Bessières* decision, a number of jurisdictions resorted, in a variety of automobile accidents, to article 1384, § 1, for the determination of liability, following the lead of the Court of Cassation.³² Some courts went so far in their interpretation of this "presumption of fault" that it amounted almost to imposing absolute liability, as for instance, when defendant was held liable for an accident caused by its stolen ambulance.³³

under the truck and was killed. The insurance company requested from the government the reimbursement of the insurance paid to the victim's family. This request was refused by the competent government department, whereupon the company appealed to the Conseil d'Etat. The Conseil, accepting the government's proof that the accident was due to an unforeseen event, rejected the appeal. *Accord*: Cie. d'assurance la Préservatrice Grenet v. Ville de Paris, (Conseil d'Etat, 1925) (1926) Gaz. Pal. 1.358.

³² Perhaps one of the most enlightening decisions was rendered by the Tribunal Civil of Lectoure in the case of Lannes v. Nouvel, (1925) DALL., PER. (1925) 2.105 (with note of Prof. Josserand); (1925) Gaz. Pal. 2.113; DALL., HEBD. (1925) 400, which was a suit for damages caused to plaintiff by defendant's car, driven by the latter's employee. The suit was brought on the basis of article 1384, § 1, and, subsidiarily, on the basis of article 1382 and article 1384, § 3 (master-servant rule). The decision contains a careful and exhaustive consideration of the development of the French law of liability and the evolution in the interpretation by the courts of article 1384, § 1. The court also discussed the terms "unforeseen event" (*cas fortuit*) and *force majeure*, which are always used concurrently in the language of almost every decision as rebutting "presumption of fault",—and pointed out that in reality, the two terms are identical.

See also Perrat v. Michel, (Cour d'Appel, Paris, 1924) DALL., PER. (1925) 2.45; DALL., HEBD. (1924) 691, which is particularly interesting from the point of view of burden of proof. It demonstrates that the French, in speaking of the reversal of the burden of proof (*renversement de la charge de la preuve*), consequent upon the "presumption of fault" raised by article 1384, § 1, understand, in the language of an American lawyer, not merely shifting the burden of going forward with the evidence, but shifting the burden of proof to the defendant. In this case defendant, who ran over and killed plaintiff's 12 year-old child, pleaded contributory negligence of the victim. As the testimony of witnesses was contradictory, the court held that defendant had not rebutted the presumption of fault raised by article 1384, § 1, by proving contributory negligence and he was condemned to pay 15,000 francs damages.

Accord: Cardozo v. Declercq-Verhille, (Cour d'Appel, Douai, 1924) DALL., PER. (1925) 2.45; (1925) Gaz. Pal. 1.427; *cf.* Petit v. Silder, (Trib. Civ., Versailles, 1924) (1925) Gaz. Pal. 1.485.

Among the many decisions determining liability for injuries caused by automobiles, on the basis of article 1384, § 1, the following may be referred to: Troussière v. Bartassot, (Cour d'Appel, Riom, 1924) DALL., PER. (1925) 2.45, (1925) Gaz. Pal. 1.176; Lemignon v. Pactat, père et fils, (Trib. Civ., Seine, 1924) (1925) Gaz. Pal. 1.429; Largillet v. Drouard frères, (Cour d'Appel, Douai, 1925) (1925) Gaz. Pal. 2.112; Béranger v. Fabre, (Trib. Civ., Gaillac, 1925) (1925) Gaz. Pal. 1.429; Besnier v. Bazile, (Trib. Civ. Chateaubriant, 1925) (1925) Gaz. Pal. 1.430; De Ravinel v. François, (Cour d'Appel, Nancy, 1925) (1925) Gaz. Pal. 1.756; Langlois & Borreau v. Michel, Thibault & Rein, (Trib. Civ., Seine, 1925) (1925) Gaz. Pal. 1.659.

³³ *Lavoye v. American Red Cross*, (Trib. Civ., Seine, 1925) (1925) Gaz. Pal. 2.81. *Contra*: Jourdan v. Laporte, (Cour d'Appel, Nîmes, 1928) DALL., HEBD. (1928) 375.

These decisions followed with slight variations, the language of the Court of Cassation in the *Bessières* case, holding that article 1384, § 1 is applicable to automobile accidents as the text makes liable a person in control of a thing whenever it causes injury regardless of whether the thing is directed or operated by man; that this article raises a "presumption of fault" which can be rebutted only by proving *force majeure*, unforeseen event or a cause not imputable to the person in control. Many of these decisions invoked the dangerous character of the automobile, explaining the necessity of control on which, in turn, liability is based, and which also justifies the presumption raised against the person in control.³⁴ It is evident, however, that the courts insisted on interpreting article 1384, § 1 as merely raising a "presumption of fault" and by no means imposing absolute liability. In other words, they asserted that the traditional basis of liability was maintained,—this basis being fault or negligence. This fault, with respect to things under control,—under control because of the dangers inherent in them,—merely raises a "presumption of fault" and all the courts did was to broaden the notion of fault. More correctly, they gave an increasingly wider application to the Roman law principle of fault *In lege Aquilia et culpa levissima venit*.³⁵

³⁴ This is similar to the doctrine of dangerous instrumentalities developed recently in our courts. See (1922) 22 COL. L. REV. 680. Cf. Voirin, *La notion de chose dangereuse*, DALL., HEBD. (1929) *Chronique*, 1 et seq.

³⁵ That fault as basis of liability was emphasized is evident from the language of these decisions. See for instance *Largillet v. Drouard frères*, *supra* note 32.

"Whereas a motor vehicle constitutes in itself a dangerous object due to its mechanism, motive power, etc. . . . and it exacts from its driver, in addition to the greatest prudence, an unceasing attention, because, *the smallest mistaken direction or a mere inattention, even for only a second*, could, quite apart from unforeseen events which sometimes cannot be imputed to the driver, such as for instance a blow-out or an overturn, cause the gravest accidents. . . ." (Italics ours.)

Cf. *De Ravinel v. François*, *supra* note 32:

"Considering that this presumption of fault is based on the dangers inherent in the thing itself . . . ; that these dangers impose on the person in control the duty of watchfulness in order to avoid any injury which it may inflict; that *the fact that the thing has caused injury is sufficient to establish that the watchfulness of the person in control was insufficient*; that from this originates, and *this constitutes, his fault*; . . ." (Italics ours.)

While an imposing array of courts indiscriminately applied article 1384, § 1, an equally imposing number of jurisdictions went in the opposite direction, applying article 1382 whenever the accident was caused by an automobile operated by its driver, and exacting, consequently, the proof of the driver's fault from the victim.³⁶

The line of reasoning adopted by these jurisdictions, advocating the application of article 1382 may be summarized as follows: It is impossible to assimilate an automobile, while being operated, when it is constantly under the direction and subject to the impulses of its driver, to an inanimate thing which may sometimes cause injury due to an inherent defect, independently of any human participation.³⁷ If this distinction is discarded, a principle would be established that a person using a thing should always be presumed at fault without any obligation on the victim to prove fault and thus a liability would be imposed based on risk which is not provided for in the actual state of legislation.³⁸

Many courts admitted that the increasing number of automobile accidents justified anxiety and might necessitate mitigating the rigidity of rules with respect to burden of proof in such cases, but the remedy, they felt, ought not to come from the indiscriminate application of article 1384, § 1 to all automobile accidents. The shifting of the burden of proof would "abusively increase" the liability of the automobilist.³⁹ The principle of the Code, exacting proof from the victim ought not to be discarded by the arguments that automobile accidents are frequent and that the victim is often unable to prove the driver's fault. The

³⁶ Giraud v. Léonie Querel, (Cour d'Appel, Montpellier, 1924) DALL., PER. (1925) 2.44; Legerot v. Roche, (Trib. Civ., Bordeaux, 1924) (1925) Gaz. Pal. 1.119; Gallaud v. Crouzière, (Trib. Civ., Valence, 1924) (1925) Gaz. Pal. 1.276; Nicolas v. Faivre, (Trib. Civ., Havre, 1924) (1925) Gaz. Pal. 1.243; Vve. André v. Fougere, (Trib. Civ., Lyon, 1925) DALL., PER. (1925) 2.46; Bourret v. Valette, (Cour d'Appel, Nîmes, 1925) DALL., PER. (1925) 2.46, DALL., HEBD. (1925) 151; Tissandier v. Pavy, (Cour d'Appel, Poitiers, 1925) DALL., PER. (1925) 2.47; Fraper, Groux & Cie. v. Duère, (Cour d'Appel, Rennes, 1925) DALL., HEBD. (1925) 508; Vve. Legras v. Rabineau, (Trib. Corr., Angers, 1925) DALL., HEBD. (1925) 551; Soc. d'alimentation stephanoise v. Dornsnach, (Trib. Civ., Vienne, 1925) (1925) Gaz. Pal. 2.87.

³⁷ Legerot v. Roche, *supra* note 36.

³⁸ Bourret v. Valette, *supra* note 36.

³⁹ Gallaud v. Crouzière, *supra* note 36.

courts should not be substituted for the legislature, which alone has the power, if it finds it necessary, to impose a stricter liability, derogating from the *droit commun*, for injuries caused by this instrument considered to be particularly dangerous.⁴⁰

This confusion in the French courts explains the great interest of the French jurists in the problem of liability for automobile accidents, and the flood of literature on this subject to which reference has been made.⁴¹

The Court of Cassation, while refraining until recently to take a decisive step, consistently maintained the position it had taken in the *Bessières* case. In setting aside several decisions which refused to apply article 1384, § 1 to accidents caused by automobiles under their driver's control, the Court clearly indicated its intention to disregard the distinction, read into the text of the Code, between acts of man and "acts of things". It may safely be said that by 1927, the Court of Cassation had arrived in this respect at a point which the French jurists consider as *jurisprudence fixée*.⁴² While the number of jurisdictions following

⁴⁰ Vve. André v. Fougere; Fraper, Groux & Cie. v. Duère; Vve. Legras v. Rabineau, all *supra* note 36.

⁴¹ *Supra* note 18. How great this confusion was is perhaps best illustrated by the fact that not only the different chambers of the same court rendered contradictory decisions: Cardozo v. Declercq-Verhille; Largillet v. Drouard frères, both *supra* note 32, applying article 1384, § 1; Desmettre v. Goeman, (Cour d'Appel, Douai, 2^e Cham. 1925) (1926) Gaz. Pal. 1.356 applying article 1.382. But the same chamber of a court has changed its attitude from one session to another due to the different conception of the judges composing the bench at one time or another: De Ravinel v. François, *supra* note 32, applying article 1384, § 1; *contra*: Broggin v. Frigerio (Cour d'Appel, Nancy, 1925) (1926) Gaz. Pal. 1.352.

⁴² Rauscher v. Morette, (Cass. Civ., 1927) DALL., HEBD. (1927) 557; Renault v. Huguenel, (Cass. Civ., 1929) DALL., HEBD. (1929) 234, which is particularly interesting because it indicates that, in the opinion of the Supreme Court, the impossibility of establishing the cause of an accident cannot be regarded as an unforeseen event (*cas fortuit*), rebutting the presumption of fault: Renault v. de Morgues, (Cass. Req., 1929) DALL., HEBD. (1929) 284 is illustrative of circumstances destroying the presumption of fault by proving a cause of accident not imputable to the person in control of a thing: Plaintiff's child was injured by defendant's car. The Court of Appeals of Dijon rejected the claim, holding that article 1384, § 1 could not be invoked if the automobile, when causing injury, was being driven. The Court of Cassation, on appeal held that the presumption of fault is based on necessity of control over things which may represent dangers to others without the distinction drawn by the Court of Appeal. On the other hand, said the Court, this presumption is rebutted in the case at bar by a cause not imputable to defendant, namely, that the child suddenly left the sidewalk and got under the wheels of the vehicle, which was keeping properly to the right and proceeding at an exceedingly low speed.

the lead of the Court of Cassation undoubtedly increased as time went on, nevertheless, the supreme tribunal of France was still called upon frequently to correct the ultra-conservative attitude taken by some recalcitrant courts. The principle of *stare decisis* not being an accepted factor in the shaping of continental law, it was not until February 13, 1930, that the Court of Cassation, by rendering a decision with all Chambers of the Court sitting (*tout chambres réunies*) in a test case, finally pronounced the applicability of article 1384, § 1 to all automobile accidents.⁴³ This decision, rendered in solemn session of the Supreme Court, became, for all practical purposes, law which in all likelihood will be followed by the lower courts.⁴⁴ The case in itself is like any other automobile case, presenting no peculiar aspects; its importance is due solely to the fact that it was made a test case in the battle fought for and against the applicability of article 1384, § 1, to all automobile accidents.

A truck owned by defendant company and operated by their employee ran over and gravely injured plaintiff's minor child. Suit was brought on the basis of article 1384, § 1. The trial court⁴⁵ condemned defendant, holding that the presumption of fault against a person in control of a thing is based on the dangerous or novel character of the thing, regardless of whether it is being operated by man. On appeal by defendant, who pleaded that his liability can be determined on the basis of article 1382 only, the Court of Appeals of Besançon reversed the decision. On plaintiff's appeal, the Court of Cassation set aside the appeal

Cf. Guillerminet v. Droin-Bouvard, (Cass. Civ., 1927) DALL., HEBD. (1927) 472, holding article 1384, § 1 applicable where plaintiff was injured by a stray bullet in a shooting gallery owned by defendant. The Supreme Court held that for the application of this text it is sufficient that there should be a thing subject to the necessity of control by reason of the danger which it may represent to others.

⁴³ Jand'heur v. Les galeries belfortaises, (Cass., Cham. Réun.) DALL., HEBD. (1930) 129; (1930) *La Semaine Juridique* 271.

⁴⁴ As to the significance and practical effects of the decisions rendered by the Court of Cassation, *tout chambres réunies*, see the law of April 1, 1837, LOIS ANNOTÉES (2° ser., 1831-1848) 318; see also 1 PLANIOL, *op. cit. supra* note 2, § 205; 1 COLIN ET CAPITANT, *op. cit. supra* note 2, 39-41.

⁴⁵ Trib. Civ., Belfort.

court's decision and returned the case (*renvoi*) for a new decision to the Court of Appeal of Lyon.⁴⁶ The Court of Lyon decided the case in accordance with the decision rendered by the Court of Besançon and contrary to the indications of the Court of Cassation.⁴⁷ The Court of Lyon reasoned as follows: Article 1384, § 1 cannot be applied to a mechanism while it is operated by man, but only if the accident is caused by the machine alone. The Court denied that automobiles are dangerous; they become such only in the hands of "an incompetent or imprudent agent". The trial court's attempt to base liability—a liability almost irrefutable—on article 1384, § 1 tends to introduce without legislative intervention, which is necessary to effect such a change, the notion of risk (*risque créé*). Courts cannot be guided by social considerations deduced from the number of accidents. "The accident imputed to a motor vehicle in motion under human impulsion and direction," said the Court, "when no proof is offered that it was due to a defect inherent in the vehicle, does not constitute within the terms of article 1384, § 1 of the Civil Code, damage caused by a thing over which one has control." Therefore, the liability of the driver or that of his employer can only be established if their fault is proved; and this proof must be adduced by the victim.

It was on appeal from this decision of the Court of Lyon that the *Jand'heur* case came a second time before the Court of Cassation. The court set aside the decision in solemn session and remanded the case to the Court of Appeals of Dijon, stating that:

"Considering that the law does not, for the application of the presumption it raises, distinguish according to whether or not the thing which caused the damage was being operated by the hands of a person, [the Court] decides that it is not necessary that the thing should have a defect inherent in its nature and likely to cause damage, because article 1384 makes

⁴⁶ For the *renvoi* of the Court of Cassation, see: (1927) Gaz. Pal. 1.407; DALL., PER. (1927) 1.97; DALL., HEBD. (1927) 133.

⁴⁷ For the decision of the Court of Lyon, see (1927) Gaz. Pal. 2.398; DALL., HEBD. (1927) 423.

liability consequent upon the control over the thing and not upon the thing itself."⁴⁸

The *Jand'heur* decision puts an end to the bitter controversy which raged during recent years in France as to liability for injuries caused by automobile accidents. The law on this point seems to be settled conclusively: Article 1384, § 1 is applicable regardless of whether the motor vehicle was operated at the moment of the accident. This text raises a "presumption", which can be rebutted only by proving *force majeure* or a cause not imputable to the person in control. There remains for juristic speculation only the question whether this is good or bad law.⁴⁹ But whether it is good or bad, it undoubtedly is the outcome of an interesting development of case law. It is a striking example of how courts, even under a code system, respond to the pressure of conditions, and, in the absence of, or a delay in, legislative intervention, find a remedy for an increasingly problematic situation.

Two further observations seem to be appropriate with respect to the *Jand'heur* decision. First, the Court of Cassation speaks of "presumption of liability" (*présomption de responsabilité*) instead of the traditional "presumption of fault" (*présomption de faute*) heretofore invariably used by all French courts whenever the application of article 1384, § 1 was discussed. Second, the Court made no reference to the dangerous character of automobiles which had previously been frequently invoked as justifying the presumption. The Court was emphatic in pointing out that this presumption is consequent upon control and not upon anything with respect to the thing itself. Whether or not these changes

⁴⁸ The decision of the Court of Appeals of Dijon is not yet published. In view of the law of April 1, 1837, *supra* note 44, which gives binding effect to a decision rendered, after a second *renvoi*, in solemn session by the highest tribunal of France, the Court of Dijon must decide a case according to the indication of the Court of Cassation.

As to the discussions inspired by the various stages of the *Jand'heur* case see Josserand, *Garde et conduite des automobiles*, DALL., *HEBD.* (1927) *Chronique*, 65 *et seq.*

⁴⁹ Such speculation did, in fact, follow immediately after the decision was rendered. See: Josserand, *La responsabilité du fait des automobiles devant les Chambres réunies de la Cour de Cassation*, DALL., *HEBD.* (1930) *Chronique*, 25 *et seq.*; Capitant, *La responsabilité du fait des choses inanimées après l'arrêt des Chambres réunies du 13 février 1930*, *ibid.* 29 *et seq.*

were intentional, only the future can show us; but this phraseology of the decision may have a profound effect on the further evolution of the French law of liability.

II.

The preceding study would be incomplete without at least a reference to some special problems which arose in connection with this topic, namely, the liability of the master for damages caused by his servant; liability for injuries suffered by free passengers; and, finally, liability in case of collisions. A thorough discussion of these problems is not possible within the limits of a single article but the nature of the problems may be indicated.

a. Vicarious Liability

The liability of the master or employer for damages caused by his servants or employees is governed by the provision of article 1384, § 3 which reads:

"Masters and employers [are liable] for damages caused by their servants in the exercise of the functions for which they have been engaged."⁵⁰

The two important questions then are, first: what constitutes employment, *i. e.*, the relationship of master and servant, and, second: what is the exercise of functions, *i. e.*, scope of employment.⁵¹ As to what constitutes employment, the language of the

⁵⁰ Les maîtres et les commettants [sont responsable] du dommage causé par leur domestiques et préposés dans les fonctions auxquelles ils les ont employés."

Cf. the similar provisions in the German Civil Code (§ 831) and the Swiss Code of Obligations (art. 55). It should be observed that the liability of parents, teachers and artisans (art. 1384, §§ 2, 4, *supra* note 4) can be met according to article 1384, § 5, by proof that they could not have prevented the act in respect of which the liability arose. On the other hand, this possibility of exoneration has not been provided for in the language of article 1384, § 3. Cf. this with the Swiss master-servant rule *supra*. The master is freed from liability if he proves that: (1) he exercised all care, reasonable in the circumstances, to prevent injury (which includes care in selecting the personnel, *culpa in eligendo*), or (2) that the injury would have occurred notwithstanding such care. Also, the master can recover from the servant or employee causing the damage.

⁵¹ As to the master-servant rule in French law see, LALOU, *op. cit. supra* note 2, §§ 482-512; GARDENAT ET SALMON-RICCI, *op. cit. supra* note 5, 437-453; BALIGAT, LA RESPONSABILITÉ DU COMMETTANT À RAISON DES FAITS DE SES PRÉPOSÉS (Thesis 1929) Paris.

Court of Cassation in a recent case summarizes the necessary conditions as follows:

"Considering that liability for the acts of employees, imposed by virtue of article 1384, § 3 on the master or employer, implies that this latter has the right to give orders and instructions to the employee concerning the fulfillment of the functions for the performance of which he was employed; that this right is based on authority and subordination without which a real employment does not exist; that if, for a period or for a determined operation, an employer puts his employee at the disposal of another person under whose authority and direction he is placed, at the moment of the accident, by virtue of a contract or by operation of law, the liability is taken off him [the first employer] and is imposed on the second employer only . . ."⁶²

In applying the principle of vicarious liability to automobile accidents,⁶³ the French law may be stated as follows: The employer is liable if his employee causes damage during the performance of his functions; this liability exists even if he does not properly carry out the employer's instructions. On the other hand, no liability exists if the employee was temporarily placed under the authority of another person,⁶⁴ or if he acted beyond the scope of his employment.⁶⁵ On the other hand the employer may be

⁶² *Chambre de Commerce de Bordeaux v. Soc. des Nouveaux Docks Sursol, et al.*, (Cass. Civ., 1924) (1924) *Gaz. Pal.* 1.648; *DALL., PER.* (1925) 1.134; *DALL., HEBD.* (1925) 201. In this case an accident occurred during the discharge of a ship, and was caused by an elevator. The elevator was operated by a mechanic employed by appellant and put by it at the disposal of appellee company. Suit was brought against both parties by the master of the ship and the lower courts held appellant alone liable. The decision was set aside by the Court of Cassation, which held appellee liable.

Cf. Beaupère v. Billard, et al., (Cour d'Appel, Angers, 1925) *DALL., HEBD.* (1925) 522, where the owner of a truck was held liable for damages caused while the truck was hired because he retained authority over his chauffeur even during hire. *Cf. Dreux v. Chemin de fer Paris-Lyon-Méditerranée*, (Cass. Req., 1924) *DALL., HEBD.* (1924) 373, (free choice of agent; lack of authority to give instruction to employee placed at the disposal of defendant company discharges the latter from liability).

⁶³ On the American law, with respect to automobiles see: Chamberlain, *Automobiles and Vicarious Liability* (1924) 10 *A. B. A. J.* 788; Heyting, *Automobiles and Vicarious Liability* (1930) 16 *ibid.* 225.

⁶⁴ *Block v. Ordoquy, et al.*, (Cour d'Appel, Pau, 1924) (1924) *Gaz. Pal.* 1.744.

⁶⁵ *Cathau v. Demangeon*, (Cass. Civ., 1928) (1928) *Gaz. Pal.* 2.307; *DALL., HEBD.* (1928) 415:

held liable for damage caused by the employee in abusing his function.⁵⁶

b. Free Passengers

Liability to persons transported for a consideration (*à titre onéreux*) is not a controverted question. At first, the courts held that proof of negligence on the part of the carrier established a cause of action under article 1147 of the Civil Code which deals with liability for breach of contracts. Later, especially since 1913, by invoking article 1784 of the Code, dealing with contract of transportation, the carrier was held liable unless he proved that the accident was due to *force majeure* or a cause not imputable to him.⁵⁷

In the case of gratuitous transportation (*transport à titre gratuit*)⁵⁸ the situation is more complicated. The theory that there exists a contractual relation between the automobilists and the free passenger was rejected by most courts and writers,⁵⁹ although a group of jurists advocated, and some courts proceeded on, a theory of a "gratuitous contract" (*contrat de bienfaisance*).⁶⁰

" . . . Considering that if masters and employers are liable not only for damages caused by their servants and employees in the normal and regular exercise of the functions for the performance of which they were employed but, in addition, for those which result from the abuse of such functions, it is so only if the employee can be considered as having acted for the account of his employer; that the latter ceases to be liable when the employee has been regarded by the victim of the act causing damage as having acted not for the account of his employer but for his personal account; . . ."

Accord: Clugnac v. de Maillard (Cour d'Appel, Bordeaux, 1919) DALL., PER. (1920) 2.118.

⁵⁶ Brunswick frères v. Vve. Bourne, (Cass. Req., 1919) DALL., PER. (1920) 1.156.

⁵⁷ 2 COLIN ET CAPITANT, *op. cit. supra* note 2, 580 *et seq.* (particularly page 583); BÉRINGUIER, *op. cit. supra* note 18, 233 *et seq.*; Chemin de fer du Midi v. Mestelan, (Cass. Civ., 1913) DALL., PER. (1913) 1.249, at 253; Thominaux v. Paul, (Cass. Req., 1922) DALL., PER. (1923) 1.209, at 210; Chemin de fer de l'Etat v. Vve. Lemain, (Cass. Civ., 1925) DALL., PER. (1925) 1.233; DALL., HEBD. (1925) 237.

⁵⁸ BÉRINGUIER, *op. cit. supra* note 18, 239: "A transport is gratuitous if no value of any nature whatsoever has been agreed upon, and will not be received by the carrier in consideration of his services."

⁵⁹ De la Chapelle v. Pinel, *supra* note 27; Vve. Bordonnat v. Chaix, (Cour d'Appel, Grenoble, 1924) (1924) Gaz. Pal. 2.189; Chanal v. Vve. Monteil, (Cour d'Appel, Lyon, 1925) DALL., PER. (1926) 2.126.

⁶⁰ Vallier v. Allary, (Trib. Civ., Avignon, 1924) DALL., PER. (1926) 2.128, DALL., HEBD. (1924) 710; Lacondemine v. Lenoir, (Cour d'Appel, Dijon, 1927) DALL., HEBD. (1927) 440. *Contra:* Curvat v. Mornay, (Cour d'Appel, Lyon, 1926) DALL., HEBD. (1927) 177.

It was, however, not long before this theory was discarded. There is, it was argued, no contract in existence; there is no legal obligation involved, the whole action being based on courtesy. Consequently, liability must be determined either on the basis of article 1382 or article 1384, § 1. Those who held that article 1382 should be applied whenever injuries were inflicted on pedestrians by an automobile while operated, naturally excluded resort to article 1384, § 1 with respect to free passengers. A considerable number of jurists who advocated the application of article 1384, § 1, to automobile accidents in general, felt also that in case of a free passenger article 1382 should determine liability. There was, finally, a more radical group which advocated the application of article 1384, § 1 even in case of free passengers.⁶¹

The courts have shown some hesitation in determining the liability of automobilists toward free passengers. Their decisions are unanimous in discarding the theory of contract as the basis of liability, and usually apply article 1382 instead of article 1384, § 1.⁶² Moreover, some jurisdictions, among them the Court of Cassation itself, indicate a certain reluctance to hold an automobilist liable for injuries caused to a free passenger. They not only consider article 1384, § 1 inapplicable to such cases, but require

⁶¹ Josserand, *Le transport bénévole et la responsabilité des accidents d'automobiles*, DALL., *HEBD.* (1926) *Chronique*, 21 *et seq.* See also: VIE, *op. cit. supra* note 18; LEFÈVRE, *DE LA RESPONSABILITÉ CIVILE EN CAS DE TRANSPORT GRATUIT DES PERSONNES PAR AUTOMOBILE* (Thesis 1927) Paris.

⁶² *De la Chapelle v. Pinel*, *supra* note 27; *Giraud v. Querel*, *supra* note 36; *Tissandier v. Pavy*, (Cour d'Appel, Poitiers, 1925) DALL., PER. (1925) 247, (1925) *Gaz. Pal.* 1.484; *Devolle v. Bedel*, (Trib. Civ., Thiers, 1929) DALL., *HEBD.* (1925) 254; *Jaworski v. Faure & Peretti*, (Cour d'Appel, Pau, 1925) DALL., *HEBD.* (1925) 617; *Lacondemine v. Lenoir*, *supra* note 60; *Olivier v. Jacquotot*, (Cour d'Appel, Dijon, 1928) DALL., *HEBD.* (1928) 246; *Vve. Gaise v. Saby*, (Cass. Civ., 1928) DALL., PER. (1928) 1.145 DALL., *HEBD.* (1928) 221; *Cathau v. Demangeon*, *supra* note 55, applying article 1382.

Contra: *Allean v. Caillaud*, (Cour d'Appel, Poitiers, 1925) (1925) *Gaz. Pal.* 1.503, DALL., PER. (1925) 248, applying article 1384, § 1. It should be remarked, however, that in this case the Court of Poitiers did not apply article 1384, § 1 to a free passenger, independently of any other factor, but considered the gross negligence of the driver. *Bader v. Julien*, (Trib. Civ., Chateau-Thierry, 1925) (1925) *Gaz. Pal.* 2.103; *Vincent v. Liénard*, (Cour d'Appel, Douai, 1925) DALL., PER. (1926) 2.127.

proof of *gross negligence* on the part of the driver, in order to permit a recovery under article 1382.⁶³

c. Collision Between Vehicles

Another problem arises in connection with the collision between automobiles or an automobile and another kind of vehicle. How should liability be determined in such a case? Should the general law be applied, determining liability on the basis of the respective faults of the drivers? Or should article 1384, § 1 be applied? In the latter case, as has been argued with much force by those who opposed, in principle, the application of this article to accidents caused by automobiles while operated, the presumption of fault against the two drivers would mutually destroy or, rather, neutralize each other.⁶⁴

⁶³ Jaworski v. Fauré & Peretti, *supra* note 62; Jubin v. Lechand, (Trib. Civ., Seine, 1926) (1926) Gaz. Pal. 2.408; Olivier v. Jacquotot, *supra* note 62; Epoux Plantet v. Liesse, (Trib. Civ., Seine, 1928) (1928) Gaz. Pal. 2.260; Vve. Gasse v. Saby, *supra* note 62:

"Considering, in fact, that the presumption instituted by article 1384, § 1 of the Civil Code against the person in control of an inanimate movable thing, subject to the necessity of 'control' by reason of the dangers which it may represent to others, has been established in order to protect the victims from damages by a thing in the use of which they have not participated, in assuring them, in any case, their indemnity; that, this presumption cannot, therefore, be invoked against the person in control of a motor vehicle by persons who took a place in this vehicle either by virtue of a contract, or in consequence of an act of courtesy, purely benevolent in its nature; that the former will find protection in the obligations imposed on the carrier by the express or implicit stipulations of the contract; that as to those who accepted or requested to take part, gratuitously, in the use of the vehicle, with full knowledge of the dangers to which they were exposing themselves, they cannot recover damages from the person in control of the automobile, unless they prove his negligence or that of his employee, imputable to him within the terms of articles 1382 and 1383 of the Civil Code."

Accord: Brousse v. Guiraud, (Cass. Req., 1928) (1929) Gaz. Pal. 2.256, DALL., *HEBD.* (1928) 382; Cathau v. Demangeon, *supra* note 55.

Contra: Dupont v. Vve. Langle, (Cour d'Appel, Caen, 1924) DALL., *HEBD.* (1925) 33.

⁶⁴ Josserand, *Les collisions entre les véhicules et la responsabilité civile*, DALL., *HEBD.* (1928) *Chronique*, 33 *et seq.* Dean Josserand suggests the following solution: In case of a collision between vehicles of the same category, there is a "neutralization" of risks and each bears his own damage unless the negligence of one of the drivers is proved. In collision between vehicles of different categories, there should be established a hierarchy according to their novelty, power or motive-force; the more powerful should bear all damages because the creation of a greater annihilates a lesser risk and the dominant position shall carry with it the burden of proof. Cf. 1 BÉRINGER, *op. cit. supra* note 18, 210 *et seq.* See also: LUCO, *op. cit. supra* note 18, *passim*.

The courts, in general, apply the *droit commun* and determine liability, in case of collision between two automobiles, on the basis of article 1382. As the presumption raised by article 1384, § 1 cannot be simultaneously invoked against both parties, it is discarded.⁶⁵ The same procedure is, incidentally, adopted by French admiralty practice in ship collisions.⁶⁶

III.

While in France it was almost exclusively the judiciary which brought about the development outlined above,⁶⁷ in other countries the legislature was more responsive and inclined to meet the problem with adequate statutory regulations. A statute regulating motor vehicle traffic was enacted by Germany before the war.⁶⁸ This statute imposed liability regardless of fault on the lawful possessor (*Halter*) for damages caused "by the operation of a motor vehicle". This liability can be met only by proving an inevitable event (not including, however, hidden defect or failure of the mechanism) or contributory negligence exclusive of the fault on the part of the possessor and of the driver.⁶⁹ Liability does not exist for damages caused to person or property conveyed in the vehicle or to a person engaged in the operation.⁷⁰ On the other hand, the statute limits the amount which may be recovered.⁷¹

In Switzerland, the Intercantonal Concordat, in force between several cantons since 1914, while it did not change the rules of

⁶⁵ *Aumont v. Soc. des Transports* (Trib. Corr., Jonfleur, 1927) (1927) *Gaz. Pal.* 2.35. Cf. *Devos v. Lecoigne*, (Cour d'Appel, Paris, 1930) (1930) *La Semaine Juridique* 611.

⁶⁶ See the law of July 15, 1915, modifying article 407 of the Code of Commerce. *DALL., PER.* (1919) 4.282.

⁶⁷ The legislature attempted several times to meet the problem created by the increasing number of automobile accidents by introducing bills. These bills provided compulsory insurance in one form or another, and endeavored to facilitate recovery. These attempts, however, never achieved completion. For the recent legislative efforts in France to provide statutory regulation of this problem, see: *JOURNAL OFFICIEL* (1922) *Doc. Parl., Ch. Annexe*, No. 4075, 398; *ibid.* (1923) *Doc. Parl., Ch. Annexe*, No. 5198, 418; *ibid. Doc. Parl. Sen., Annexe*, No. 210; *ibid.* (1925) *Doc. Parl., Ch. Annexe*, No. 1519, 577.

⁶⁸ *REICHSGESETZBLATT* (1909) 473 *et seq.* *GESETZ ÜBER DEN VERKEHR MIT KRAFTFAHRZEUGEN*, May 3, 1909, (amended by the law of July 21, 1923, *REICHSGESETZBLATT* (1923) §§ 7-20.

⁶⁹ *Ibid.* § 7.

⁷⁰ *Ibid.* § 8.

⁷¹ *Ibid.* § 12.

liability, provided for compulsory insurance.⁷² Liability was determined on the basis of the general law,⁷³ *i. e.*, on the basis of fault, and the insurance merely purported to secure the solvency of the defendant. Most of the Swiss cantons which are not parties to the Concordat, or have failed to put it into effect, have provided subsequently, by cantonal legislation, for such compulsory insurance, these provisions being mostly drafted *per analogiam* with the Concordat.

The post-war legislative movement was not satisfied with merely providing for compulsory insurance to secure the solvency of the defendant. While compulsory insurance is provided for, the main characteristic of these statutes is that they impose liability regardless of fault for injuries caused by motor vehicles. Such legislation exists today in Finland, Norway and Denmark, and it is pending in Switzerland.⁷⁴

The Finnish law of April 28, 1925⁷⁵ imposes liability on the owner for damages caused by the motor vehicle to person or property not conveyed in the vehicle; such liability exists regardless of defect in the vehicle or of the driver's negligence. The entire liability of the owner must be covered by insurance.⁷⁶ In fastening the liability on the owner, the statute seems to be based primarily on the theory of risk-bearing,—although it is provided that under certain circumstances the owner may ultimately recover from the driver, or the lawful possessor, but the owner is directly liable for compensation to the injured party.⁷⁷ The owner's liability is mitigated only,—*i. e.*, the amount of compensation may be

⁷² 20 RECUEIL OFFICIEL 67. *Concordat en vue d'une réglementation uniforme de la circulation des véhicules automobiles et des cycles*, § 11. A Concordat is a document similar to our interstate agreements, concluded between several cantons. In order to acquire the force of law, such intercantonal agreement must, according to the Swiss Constitution, be approved by the Federal Council and ratified by the competent cantonal authorities.

⁷³ CODE OF OBLIGATIONS, Art. 41 *et seq.*, *supra* note 3.

⁷⁴ As to compulsory liability insurance for automobilists, in some of our States, see: Chamberlain, *Compulsory Insurance of Automobiles* (1926) 12 A. B. A. J. 49; W. J. Heyting, *Automobiles and Compulsory Liability Insurance* (1930) 16 A. B. A. J. 363.

⁷⁵ SUOMEN ASETUSKOELMA (Finland's official journal) (1925) 557, No. 148.

⁷⁶ *Ibid.* § 13.

⁷⁷ *Ibid.* §§ 2, 8.

decreased at the court's discretion,—in case of contributory negligence, or if it is proved that the cause of the accident was extraneous to the operation of the vehicle.⁷⁸ If the car is operated without permission, the unauthorized person is liable.⁷⁹ In case of collision, the owners are jointly liable.⁸⁰ If the vehicle is operated for public use for profit, liability exists also with respect to damages caused to the persons conveyed by the vehicle.⁸¹ An interesting provision is that the insurance company is liable to the injured party even if the compensation was already paid to the insured and the injured did not receive it.⁸² This provision, placing the responsibility on the insurer to see that the victim is paid, not only facilitates recovery, but also guarantees its receipt by the injured party. However, this is the only case in which the injured party had direct recourse against the insurance company.

The Norwegian law of February 20, 1926⁸³ is similar to the Finnish statute. It also imposes liability on the owner for damage caused through the use of the vehicle to person or property not conveyed in the vehicle. This liability exists regardless of any negligence of the owner or the driver;⁸⁴ the owner's entire liability must be covered by insurance.⁸⁵ The Norwegian law, however, extends liability in case of a vehicle operated for profit, not only to persons, like the Finnish law, but also to property conveyed in the vehicle. No liability exists if the victim deliberately contributed to the accident or in case of the victim's exclusive gross negligence; contributory negligence, on the other hand, merely decreases the amount of compensation due from the owner, as in the Finnish law. Finally, in case of collision, liability does not exist with respect to damage which the vehicles cause to each

⁷⁸ *Ibid.* § 5.

⁷⁹ *Ibid.* § 7.

⁸⁰ *Ibid.* §§ 6, 17 (2).

⁸¹ *Ibid.* § 4.

⁸² *Ibid.*, § 10.

⁸³ *Lov om motorvoguer*; and the executive ordinance, *Fyreseguer av 20 desember 1926 fra Arbeids-departmentet etter Lov om motorvoguer fra 20 februar 1926*.

⁸⁴ *Ibid.* § 30.

⁸⁵ *Ibid.* § 11.

other.⁸⁶ If the vehicle is used without the owner's permission, the unauthorized user is liable.⁸⁷ Contrary to the Finnish law, which holds the owner always liable, giving him merely a possibility of recoupment where a bailee actually was in possession, the Norwegian law considers the lessee owner if the car is leased.⁸⁸ As to recovery, the law provides that the victim can sue the insurance company directly.⁸⁹

From the point of view of legislative history, Switzerland presents as interesting a field of study as France from the point of view of judicial history. In order to enact a federal statute concerning automobiles, the Swiss Constitution was amended in 1921,⁹⁰ and on the basis of this amendment, after a careful study by the Department of Justice and Police, a federal law was enacted on February 10, 1926. A request for a referendum was then submitted to the Federal Council, in consequence of which the law was submitted to and rejected by a popular vote on May 15, 1927.⁹¹ The question of liability for automobile accidents since then has been widely discussed in Swiss juristic circles and the rejected law, in slightly modified form, will be introduced in the Swiss legislature during its next session.⁹² There seems to be little doubt in well-informed and competent circles in Switzerland as to the acceptance of the newly introduced bill.

The draft, in addition to regulating motor vehicle traffic, defines the extent of liability⁹³ and provides for compulsory insur-

⁸⁶ *Ibid.* § 30.

⁸⁷ *Ibid.* § 31.

⁸⁸ *Ibid.* § 35.

⁸⁹ *Ibid.* § 11.

⁹⁰ Article 37 (b): "The Confederation can legislate concerning automobiles and cycles."

⁹¹ I BUNDESBLATT (1927) 752-753.

⁹² See "*Loi fédérale sur la circulation des véhicules automobiles et des cycles.*" (*Avant-projet du département fédéral de justice et police, 15 septembre 1930.*) This question was the chief subject of deliberation at the last meeting of the Swiss Jurists' Society held in early September, 1930, and the question of liability was especially discussed in two comprehensive reports by two outstanding jurists. See: Prof. Dr. A. Homberger, *Haftpflicht ohne Verschulden*; Prof. Max. Petitpierre, *La responsabilité causale*, (*Verhandlungen des Schweizerischen Juristenvereins*, 1930, Heft 1).

⁹³ *Ibid.* Tit. III, c. I, arts. 31-40.

ance.⁹⁴ The purpose of the insurance, according to the motives of the draft⁹⁵ is to secure the solvency of the defendant. It imposes liability on the lawful possessor (*détenteur*) (not necessarily on the owner) for all damages and injuries caused to persons or property not conveyed by the vehicle, by the operation of the automobile. This liability is based on use, and the only material element is causal connection between the use of the vehicle and the damages (*responsabilité causale*). He is freed from liability if the accident was caused by *force majeure*, gross negligence of the victim, or the fault of a third person, exclusive of any fault of the possessor or of persons for whom he is responsible. Ordinary negligence of the victim, on the other hand, only gives an option to the judge to reduce the compensation due from the possessor. The possessor is also freed from liability if the vehicle was being used by a non-authorized person without the possessor's fault.⁹⁶ The liability of the possessor must be covered by insurance;⁹⁷ the victim has direct recourse against the insurance company.⁹⁸

The foregoing study, however inadequate, clearly shows an interesting evolution of law following the development of a phenomenon of our changing civilization. It is indicative, first, of the effect which this change has produced on law, and the changes which it has wrought in well-entrenched conceptions. It indicates further that in certain circumstances the traditional notion of no liability without fault no longer satisfies the requirements of modern life. Whether by legislation or by judicial process, every legal system seeks to find a new, more adequate basis of liability. Whether the change is accomplished through the artifice of a conclusive presumption, by shifting the burden of proof, or by providing for compulsory insurance, or simply by statutory imposition of what may be called absolute liability, it seems that the tendency is towards a conception of liability, based on risk, or on use, or

⁹⁴ *Ibid.* Tit. III, c. II, arts 41-45.

⁹⁵ See *ibid.* Tit. III, c. II, *Remarques introductives*.

⁹⁶ *Ibid.* art. 31.

⁹⁷ *Ibid.* art. 41.

⁹⁸ *Ibid.* art. 41 (b).

on the dangerous character of the instrument, rather than on the heretofore general principle of liability based on fault or negligence. A similar evolution is taking place in this country. While it may be argued that negligence, in many cases, still would be a more suitable test of liability than risk, use, or the dangerous nature of the instrument, our courts or our legislatures may well derive some benefit from the experiences and experiments which are found in the European endeavors to bring law more in harmony with life.