French judicial decisions

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French judicial decisions are just one of the many aspects of French Law which may leave the Common Lawyer baffled. The problem is not only one of comparative law, but is also a major one of the interaction of law and language. Before any practical use can be made of a French judgment, it is essential to overcome the difficulties arising from its structure, its style and its language. The purpose of this paper is principally to give a translator's viewpoint in the examination and surmounting of these difficulties.

I. GENERAL FEATURES OF FRENCH JUDGMENTS[1]

French courts and their decisions are governed by a number of legislative enactments. As regards the form and structure of French judgments, the following are most important.

First, a judge cannot refuse to decide a case because of the silence, insufficiency or ambiguity of the law. The penalty is the crime of denial of justice.[2] So unless he or she can decide that there is a basic lack of jurisdiction a French judge must settle the matter in dispute.

French judges are under a strict obligation to indicate the legal grounds upon which they are basing their decision.[3] Where these are not indicated the decision will be held to be void.[4] Furthermore, reliance on principles expressed in a different case decided between different parties is not considered to be a sufficient

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1 For a more in-depth discussion of the general features of French judgments and the relevant legislative enactments, see David *French Law, Its Structure, Sources and Methodology* (Louisiana State University Press, Baton Rouge, 1972) 45-46 and 151-194; Leon Julliot de la Morandière *Introduction à l' Etude du Droit* (Editions Rousseau. Paris, 1951) 271-273; Sladitz *Guide to Foreign Legal Materials — French, German, Swiss* (Oceana Publications Inc., Dobbs Ferry N.Y., 1959) 3-42; Amos and Walton *Introduction to French Law* (Clarendon Press, Oxford, 3 ed., 1967) 7-14.

2 Article 4 Civil Code: Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.

3 Article 455 new Code of Civil Procedure: Le jugement doit exposer succintement les prétentions respectives des parties et leurs moyens; il doit être motivé. Le jugement énonce la décision sous forme de dispositif.

4 Article 458 new Code of Civil Procedure: Ce qui est prescrit par les articles . . . 455 . . . doit être observé à peine de nullité.

basis for decision.[5] Previous decisions are never considered to be binding though they are frequently persuasive authority.

Thirdly, the Civil Code prohibits judges from making pronouncements of a general or normative kind on the cases brought before them. The court must refer to a particular legislative provision as the basis for its decision. Nevertheless, where the law is silent on a particular point, the court may rely on principles of equity,[6] reason, justice or tradition.[7]

Judicial decisions are not regarded as an important source of law in France.[8] In most areas of French law, the only formal source of law is legislation. This, coupled with the absence of any principle of binding precedent of the kind that exists in Common Law countries, means that French judicial decisions do not have the same importance as Common Law judgments. This may be one reason for their particular style and structure.[9]

Two final points of interest are that all judgments are anonymous and unanimous, and minority judgments are never given.

II. STYLE AND STRUCTURE OF FRENCH JUDGMENTS

A. Style

"Verbosity is understandable when you are paid by the line, but a judicial decision must assert itself in rigorous brevity".[10]

A mere glance at a French judgment reveals that the writing of opinions in France is a highly technical matter.

French judgments are usually couched in the form of a syllogism, in which a short statement of the facts is a minor premise and the statement of applicable law the major premise, the decision being the conclusion following from the two premises.

One of the immediately striking features of the judgments is their brevity. The accepted principle is that good opinions are short; in fact, the shorter the better. In general, the higher the court is in the hierarchy, the briefer are its opinions.[11]

5 Civ. 6 June 1894, S. 94. 1. 392; Civ. 20 November 1895, S. 96. 1. 8.

6 Reference here is not to principles of Equity as developed originally by the English Court of Chancery, but to general principles of fairness and justness. An example of this is the principle prohibiting unjust enrichment.

7 David, supra n. 1, 181.

8 David, supra n. 1, identifies five sources of French law: legislation, custom, judicial decisions, scholarly writing, and supereminent principles.

9 In reality though, judicial decisions do have some authoritative value. French *lois* (laws) leave great latitude to the judge, such that often a code article or other statutory provision will only take on real meaning as the courts apply it. See, for example, the judicial development of art. 1384 Civil Code.

10 Mimin *Le Style des Jugements* (Libraires Techniques, Paris, 3 ed., 1951) No. 88, 193.

11 The French system of courts of general jurisdiction appears three-tiered: in the first tier are the 475 *tribunaux d'instance* with relatively minor jurisdiction, and the 175 *tribunaux de grande instance* (composed of several chambers), exercising an unlimited

French jurists consider conciseness as a prerequisite to clarity, since it requires the court to eliminate all that is superfluous and to weigh every word of its opinions. Much importance is placed on the necessity for French judgments to obtain "the greatest possible density"[12] and to maintain "the dignity of the judicial approach".[13]

It seems that a major reason for the brevity of French judicial decisions is the concern of the judge, especially of a judge of the Court of Cassation, not to impair the case law of the future. However, this does not always have the desired effect in that the judgments produced are often so laconic and terse that they are difficult to understand. Indeed many would be unintelligible were it not for the explanatory and critical case-note accompanying them.

The language of French judgments is always very austere and formal, sometimes even esoteric. Elegance and correct grammatical construction are not at a premium. Judges tend to steer clear of any slightly "popular" expression. They often adopt some standard formula, for the sake of convenience and saving time as much as anything else, to express their reasons and decision.

A number of adverse consequences, judicial and social, flow from the style of French judgments. The most significant for present purposes is that it makes them that much more difficult to translate.

These stylistic difficulties are augmented by the unique structure of French judgments.

B. Structure

In its classical presentation, the French judgment[14] is divided into distinct parts: the editorial headnote, the judgment itself consisting of the reasons for decision (*les motifs*) and the decision contained in the disposition clause (*le dispositif*), and the academic note.

After the headnote, the opinion of the court forms a single sentence. The subject is placed at the very beginning and the verb or verbs of the principal clause are right at the end in the *dispositif*. In between are the *motifs,* constituting subordinate clauses introduced by the conjunctions *attendu que* or *considérant que* (for the lower court decisions) or even simply *que*. These are usually translated as "whereas".

Thus the French judgment proper generally follows this format:

jurisdiction. In the second tier are the 29 *cours d' appel* (also composed of several chambers) each hearing appeals from the region's *tribunaux*. In the third and uppermost tier is the *Cour de Cassation,* the only court with jurisdiction over the whole country, composed of five chambers for civil cases and one for criminal. For greater detail see e.g. Nicholas *French Law of Contract* (Butterworths, London, 1982) 7-9.

12 Mimin supra n. 10, 92.

13 Ibid. 215.

14 French judgments are published commercially and appear most notably in the *Recueil Dalloz — Sirey,* in *La Semaine Juridique* and in *La Gazette du Palais,* all of which also include sections on new legislation, and academic writing.

"Le tribunal après en avoir délibéré)	
"Attendu que . . .; que . . .;)	MOTIFS
"Attendu que . . .; que . . .;)	
"Par ces motifs,)	
"Déclare . . .;)	
"Rejette . . .;)	DISPOSITIF
"Condanne . . .;)	
"Et condanne . . .;)	

To illustrate the points made in this section, the reader is referred by way of footnotes to the relevant parts of the French judgment contained in Appendix 1.

1. *Headnote*

Written by the court, the headnote begins with a list of catchwords referring to the main subjects touched upon by the decision.[15]

The headnote proper (*l'en-tête*)[16] that usually follows these catchwords is divided into paragraphs, each dealing with one point of law, at the end of which a number in brackets refers to that part of the note in which the point is discussed. Sometimes this is followed by reference to the legislative provision which provides the legal ground for the decision on that point.

The headnote often does no more than repeat, word for word, parts of the judgment.

Below the headnote, in brackets, are the names of the parties; *C.* meaning *contre,* being the equivalent of the English "v" or "against".[17]

2. *The Judgment*

(a) *Les motifs: the reasons for decision*[18]

These commence by stating the subject of the sentence: *La Cour* or *Le Tribunal.*

If the opinion is that of a court of first instance, the facts giving rise to the litigation will then be introduced by an *attendu que.* If, however, the opinion is that of a court deciding on appeal, the first words after *La Cour* will generally be *sur le premier moyen* (on the first ground),[19] then *attendu que . . .*[20] The full facts in such a case will not generally be given. Instead, the judgment will go straight into the section of the *motifs* known as *l'objet du litige* (the object of the suit). This part contains the claims of the parties and their grounds,[21] as required by article 455 of the new Code of Civil Procedure. Note that this section of the judgment is not intended to give a detailed account of the arguments of the parties. Sometimes this is followed by *la division,* in which the questions to be decided are set out. However this is often dispensed with, especially where issues are self-evident from the statement of the facts and object of the suit.

15 See lines 1-2.
16 See lines 3-11.
17 See line 13.
18 See lines 14-34.
19 See line 14.
20 See line 15.
21 See line 19.

The next part of the judgment is *la discussion,* which covers the reasons for decision.[22] In view of the requirement that reasons always be given, it is an essential part of the judgment. The reasons given may not be of a general nature; they must relate to the specific facts of the case. Usually judgment will be based on a legislative text, in which case the court will announce that it has *vu* (seen) the enactment in question.[23]

The *motifs* are composed of several subordinate clauses independent of each other, each covering a particular point for decision and introduced by *attendu que* or *considérant que.* Each motif is separated from the next and thus from the rest of the sentence by a comma or semi-colon.

If the judgment is reversing the opinion of the court below, this will usually appear from use of *mais attendu que* (but whereas) at the end of the *motifs.*[24]

(b) *Le dispositif: the disposition clause*[25]

Although usually only a few words in length, the *dispositif* is the most important part of the judgment since it is the decision itself. Here the parties' claims are either accepted or rejected.

The *dispositif* is generally introduced by the phrase *par ces motifs* (for these reasons).[26] This serves to underline the logical connection between the decision itself and the reasons which precede it. The judge must decide only the specific questions brought before him or her, and must decide all the matters brought before him or her.[27] Thus each *motif* calls for a decision in the *dispositif.* Finally, the *dispositif* will contain any and all indications necessary to ensure execution of the judgment.

At the end of the judgment can be found the date of judgment, the court from which it emanates, the names of the presiding judge, the reporting judge, the parties' counsel and the name of the member of the *ministère public*[28] who may have been present at the hearing.[29]

Such is the structure of the typical French judgment. Of course, it is not always strictly adhered to, and recently courts have become bolder in their departures from the rigid format, departures which, it is suggested, are not totally unwarranted.

22 See lines 25-34.
23 See line 15.
24 See line 25. This judgment uses the phrase *attendu cependant, que* . . . . which has the same meaning as *mais attendu que* . . . .
25 See lines 35-36.
26 See line 35.
27 Article 5 new Code of Civil Procedure: Le juge doit se prononcer sur tout ce qui est demandé et seulement sur ce qui est demandé.
28 That is, the public prosecutor in criminal cases or representative of the State interest in other cases.
29 See lines 37-38. Article 454 new Code of Civil Procedure requires these matters to be stated.

3. *The Note*

Equally as important as the judgment (though for different reasons), is the academic note which usually follows it. These *notes d'arrêts* constitute an important and influential group of writings. They contain a critical appreciation and explanation not only of the decision at hand, but also discuss and compare previous decisions and relevant statutory provisions with it. Additionally, some *arrêtistes* offer their own solutions to the problem.

The note provides great assistance not only to lawyers and others, for whom this placing in context of the decision can save a great deal of time and research, but also to the translator, who may look to it for an explanation or clue as to the meaning of ambiguous or technical legal words or compact formulae used by the judge.

III. THE TRANSLATION INTO ENGLISH OF FRENCH JUDGMENTS

With their unique style and structure, French judgments pose difficulties for the translator. These arise not so much in translating the editorial headnote, or the note which is written in journalistic prose with current language and proper sentence structure, but in the translation of the judgment proper. Apart from the usual difficulties encountered in translating foreign legal terms into English, the main problem is whether the translation should retain the structural and stylistic features of the judgment. If not, how should the translation read?

The translator's task is essentially to reproduce the original in the target language. However, the translation should read so as to be understood by the foreign (in this context, English) audience. This is where the difficulties arise. If a French judgment were rendered directly with no structural amendments, a person used to reading Common Law decisions and unacquainted with those of French courts would no doubt have great difficulties.

There would therefore seem to be a strong argument in favour of abandoning the structural features of a French judgment in its translation, especially if the translation is required merely in order to ascertain the French law on a particular topic. Since the translator will not always be aware of the purpose for which the translation is required, a decision will have to be made as to whether to translate the original literally or with greater liberty.

Some help can be derived from a consideration of the reasons for the French form of judgment. Code articles regulating the contents of the judgment make reference to the *motifs* and *dispositif,* but there is nothing in the legislation which requires the decision to be in the form of a single sentence with the subject right at the beginning and the verb right at the end, or which requires the use of *attendus* and subordinate clauses, or the use of such standard phrases as *sur le moyen unique* and *par ces motifs.* The main reason for the form of French judgments seems to be tradition. The courts adopted the form of solicitors' conclusions used before the 1789 Revolution and have retained it ever since. Further, there is much hostility among French jurists to any suggested change. They argue that as it is, the French judgment makes clear what are the reasons, and what

is the decision of the court. They consider its compactness and formality an advantage rather than a drawback.[30]

There exist strong arguments in favour of abandoning the structure of French judgments in their translation. Such structure does not make for easy reading. The decision could be broken down into sentences. This would not harm the decision as a whole, and would make it easier to read in English. The *attendus* could be quite easily suppressed without necessarily detracting from the clarity of the decision; on the contrary, someone not used to their presence may well be confused by them.

If the translator decides to break the decision up into sentences, this removes the basis for the *attendus,* since their chief role is to indicate the commencement of a new subordinate clause containing a new reason for decision.[31] It is submitted that a full stop and possibly a new paragraph would serve the same purpose.

Another consequence of breaking the decision up in this way is that the judgment need no longer begin with *La Cour* or *Le Tribunal.* Each sentence will have its own subject. This is seen as a definite advantage, as with judgments written in one long sentence it is easy to forget who or what the subject of the sentence is.

Such changes in the structure of the translated judgment make the translation more effective without detracting from the legal significance of the decision. The translator must always bear in mind that the purpose of the translation is that the original be accessible to and capable of being understood by the English reader.

Attached to this paper are a sample of a typical French judgment (Appendix 1),[32] a direct rendering of it conserving the French structural details (Appendix 2), and a suggested freer and more proper rendering (Appendix 3) which reads more like a Common Law judgment. A comparison of the two shows how the free translation is considerably easier to read and understand, and that nothing of the meaning or validity of the original is lost.

IV. CONCLUSION

The analogy was once drawn between French judgments and a mass in Latin:[33] the prolongation of an infinitely respectable tradition, but one which may no

30 However it is interesting to note that some French courts are now retreating from use of the traditional form of judgment and are writing their decisions in a much freer style without using *attendus.* See Touffait and Mallet "La Mort des Attendus?" D. 1968, Chr. 123.

31 Were a translator to retain the *attendus,* how should these be translated? The usual translation of *attendu* is "whereas". The normal connotation of "whereas" is one of negation or contrast, which is not the meaning of *attendu.* However "whereas"' does have the narrower meaning, common in legal language, of "taking into consideration" or "having as a premise the fact that . . .". So "whereas" probably is the most suitable translation for the term, especially bearing in mind that the equivalent of *attendu* in the lower courts is *considérant que,* which means "considering" or "having considered".

32 Reproduced from Dalloz 1983. J. 225.

33 Touffait and Tunc "Pour une Motivation Plus Explicite des Decisions de Justice Notamment celles de la Cour de Cassation" (1974) Rev. trim. civ. 507.

longer be suited to the modern times. Just as the mass in Latin had to be translated and adapted to meet the needs of modern church-goers, so too do French judgments require translation and adaptation to meet the needs of the English reader. Here the translator is faced with no mean task. It has been the object of this paper to provide a general insight into the style and structure of French judicial decisions, and to give examples that may be of assistance in pointing out some of the problems the translator may encounter and in offering possible solutions to them.

APPENDIX 1

COUR DE CASSATION

(1re CH. CIV.)

13 juillet 1982

RESPONSABILITE CIVILE, Responsabilité contractuelle, Faute, Sports, Organisateurs, Participants, Assurance accident, Couverture (non), Omission de les aviser.

Cassation, pour manque de base légale, de l'arrêt ayant déclaré que ne constituait pas une faute de la part d'une association organisatrice, à l'occasion d'une fête locale, d'un match de football entre l'équipe communale et une équipe de "vétérans" recrutés dans les rues par haut-parleur, le fait de n'avoir pas averti ces derniers de l'absence d'assurance les garantissant contre les accidents, alors que la cour d'appel n'a pas recherché si "les vétérans" ne pouvaient pas penser qu'ils étaient assurées, puisque les joueurs de l'équipe communale étaient assurés individuellement et si ladite association n'avait pas commis de faute en omettant d'attirer l'attention des participants sur le fait que l'assurance qu'elle avait souscrite la garantissait uniquement contre sa propre responsabilité délictuelle (1).

REP. CIV., et Mise à jour, vo *Responsabilité du fait personnel,* par R. Rodière, nos 73 s.

(Durant C. Assoc. L'Espoir Loulaysien). — ARRET

LA COUR: — Sur le moyen unique, pris en sa seconde branche: — Vu l'art. 1147 c. civ.; — Attendu que l'Association l'Espoir Loulaysien a organisé, le jour de la fête du village, un match de football entre l'équipe communale de Saint-Hilaire du Loulay et une équipe de "vétérans" recrutés dans les rues par haut-parleur; que M. Durand, qui, ainsi recruté, a accepté de participer à la rencontre, a été grièvement blessé au cours de celle-ci; qu'il a assigné l'Espoir Loulaysien en responsabilité; que la cour d'appel a rejeté sa demande; — Attendu que, pour déclarer que le fait de ne pas avoir averti les "vétérans" de l'absence d'assurance les garantissant contre les accidents ne constituait pas une faute de la part de l'Espoir Loulaysien, l'arrêt infirmatif attaqué (Poitiers, ch. civ., 22 oct. 1980) énonce qu'un tel avertissement n'est pas d'usage en cas de formation, par appel au public d'une équipe de volontaires opposée à l'équipe du club local dans un match à caractère de distraction plutôt que de compétition; — Attendu, cependant, que la cour d'appel n'a pas recherché, comme M. Durand l'y invitait dans ses conclusions, si les "vétérans" ne pouvaient pas penser qu'ils étaient assurés, puisque les joueurs de l'équipe communale étaient assurés individuellement et qu'en outre l'Espoir Loulaysient avait contracté une assurance spéciale à l'occasion de la fête, et si, en raison de cette interprétation prévisible d'éléments connus de tous dans le village, l'association dont il s'agit n'avait pas commis une faute en omettant d'attirer l'attention de M. Durand sur la situation réelle, à savoir que l'assurance qu'elle avait souscrite la garantissait uniquement contre sa propre responsabilité délictuelle; que la décision des juges d'appel manque donc de base légale;

Par ces motifs, et sans qu'il y ait lieu de statuer sur la première branche du moyen, casse . . . , renvoie devant le cour d'appel de Limoges.

Du 13 juill, 1982. — 1re Ch. civ. — MM. Joubrel, f.f. pr. — Béteille, rap. — Gulphe, av. gén. — George et Garaud, av.

NOTE

(1) L'arrêt rapporté s'inscrit dans la ligne de la dernière jurisprudence en matière de faute d'abstention (1).

La Cour de cassation (2) avait commencé par énoncer que "l'omission ne peut entraîner une responsabilité qu'autant qu'il y avait pour celui auquel on l'impute l'obligation d'accomplir le fait omis".

L'arrêt *Branly* (3) n'avait apporté à cette règle qu'un assouplissement verbal: s'il assimilait en principe la faute d'abstention à la faute de commission (4), il prenait néanmonins le soin de préciser que "l'abstention, même non dictée par la malice et l'intention de nuire, engage la responsabilitié de son auteur lorsque le fait omis devait être accompli, soit en vertu d'une obligation légale, réglementaire ou conventionnelle, soit aussi, dans l'ordre professionnel, s'il s'agit notamment d'un historien, en vertu des exigences d'une information objective".

La responsabilité civile du fait personnel se voyait ainsi gouvernée par un *Ersatz* du principe de légalité des délits et des peines: "de même que l'acte positif n'est fautif que s'il était interdit de le commettre, il faut, pour que l'abstention soit fautive, que l'auteur ait l'obligation d'agir" (5).

La jurisprudence de la cour de cassation commença à évoluer au début des années 1960 (6) avec un arrêt pour lequel "en dehors de toute obligation . . . l'abstention d'une mesure de prudence utile engage la responsabilité de son auteur lorsque le fait omis a eu pour effet de porter atteinte à la sécurité d'autrui" (7).

Il y eut certes depuis des arrêts employant des formules plus restrictives (8), mais on s'orientait très nettement vers un abandon de la règle traditionnelle (9).

Il n'y avait d'ailleurs rien que de normal à cela car cette règle était "largement tributaire de la notion d'illicéité conçue comme l'element constitutif da la faute ou même comme substitut de la faute" (10). Et l'abandon du *nominalisme* que fonde en la matière l'exigence d'un manquement à une obligation d'agir (11) s'imposait à raison du fait qu'à en suivre les voies, c'est toute la responsabilité extracontractuelle qu'il eût fallu remodeler en absolvant systématiquement (entre autres) les malveillants abusant de leur droit.

Il faut donc approuver la solution qu'adopte maintenant la cour de cassation: il n'y a pas lieu d'établir de "différence entre la faute d'abstention et la faute de commission quant au pouvoir d'initiative appartenant aux tribunaux pour la "définir (12). Ce qui importe ici, c'cst de déterminer le comportement qu'aurait adopté le *bon père de famille* placé dans les mêmes conditions (13).

Demeure cependant en suspens le problème de la définition de la faute d'abstention de la victime dans les cas où sa prise en considération n'est pas exclue par l'arrêt *Desmares* (14). Improuvant en effet la jurisprudence des cours d'appel (15), Civ. 2e a refusé (16) alors que le port de la "ceinture" n'avait pas encore été rendu obligatoire, de voir une faute de la victime dans le fait de "ne pas la boucler". Ce dernier bastion du "principe de légalité", sera-t-il emporté à son tour?

Il faut espérer que la réponse à cette question ne contredira pas la solution qu'a entérinée la décision sous examen car, comme on l'écrivait dans ces mêmes colonnes, (17): "pour être indiscutable, le droit prétorien doit être cohérent".

[Footnotes omitted.]

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APPENDIX 2

DIRECT TRANSLATION

COURT OF CASSATION

(1st Civ. Ch.)

13 July 1982

CIVIL LIABILITY, Contractual liability, Fault, Sport, Organisers, Participants, Accident Insurance, Whether cover, Omission to inform participants.

Quashing, for lack of legal basis, of the judgment declaring that an association organising, on the occasion of a local festival, a soccer match between the municipal team and a team of former players recruited in the streets by loud-speaker, was not at fault in failing to inform the latter of the absence of insurance indemnifying them in the event of accident, while the appeal court did not inquire whether the former players could not have believed they were insured, since the members of the municipal team were individually insured and whether the said association was at fault in omitting to draw the participants' attention to the fact that the insurance it had taken out indemnified it only from its own tortious liability (1).

REP. CIV. and Updates, under the entry "Responsabilité du fait personnel" ("Responsibility for Personal Acts"), by R. Rodière, Nos. 73 et seq.

(Durand v. *Association l'Espoir Loulaysien).* — Judgment.

THE COURT: — On the sole argument, taken in its second part: — Seen art. 1147 civ. code; — Whereas the Association l'Espoir Loulaysien organised, on the day of the village festival, a soccer match between the municipal team of Saint-Hilaire du Loulay and a team of former players recruited in the streets by loud-speaker; Mr Durand who, recruited in this way, agreed to take part in the match, was seriously injured during the course of it; he brought an action against the Espoir Loulaysien; the Court of Appeal rejected his claim; — whereas, in order to hold that the Espoir Loulaysien was not at fault in failing to inform the former players of the absence of insurance indemnifying them in the event of accident, the judgment here under review (Poitiers, civ., ch. 22 Oct. 1980) declared that such a notification is not common practice where a team of volunteers is formed by way of public invitation to play against the local club's team in a match of a recreational rather than a competitive nature; — whereas, however, the court of appeal did not, as it was requested to do by Mr Durand in his statement of claim, inquire into whether the former players could not have believed they were insured, since the members of the municipal team were individually insured and further, since the Espoir Loulaysien had taken out special insurance on the occasion of the festival, and whether, by reason of this foreseeable interpretation of facts known by all in the village, the association in question was at fault in omitting to draw Mr Durand's attention to the actual situation, namely, that the insurance it had taken out indemnified it only in respect of its own tortious liability; therefore the decision of the appeal judges lacks legal basis;

For these reasons, and without it being necessary to rule on the first part of the argument, quashes . . . , sends down to the Court of Appeal of Limoges.

13 July 1982 — 1st Civ. ch. — Joubrel, ff. pr. — Béteille, rep. — Gulphe, adv. gen. — George and Garaud, adv.

APPENDIX 3

A SUGGESTED PROPER TRANSLATION

COURT OF CASSATION

(1st Civ. Ch.)

13 July 1982

CIVIL LIABILITY, Contractual liability, Fault, Sport. Organisers, Participants, Accident Insurance, Whether cover, Omission to inform participants.

Quashing, for lack of legal basis, of the judgment declaring that an association organising on the occasion of a local festival a soccer match between the municipal team and a team of former players recruited in the streets by loud-speaker, was not at fault in failing to inform the latter of the absence of insurance indemnifying them in the event of accident, in that the court of appeal did not inquire whether the former players could not reasonably have believed they were insured, since the members of the municipal team were individually insured, nor did it inquire whether the said association was at fault in omitting to draw the participants' attention to the fact that the insurance it had taken out indemnified it only in respect of its own tortious liability (1).

REP. CIV. and Up-dates, under the entry "Responsabilité du fait personnel" (Responsibility for Personal Acts) by R. Rodière. Nos. 73 et seq.

Durand v. *Association l' Espoir Loulaysien* — Judgment.

Decision is only upon the second part of the argument. Having considered article 1147 of the Civil Code the court decides as follows:

The Association l' Espoir Loulaysien organised, on the day of the village festival, a soccer match between the municipal team of Saint-Hilaire du Loulay and a team of former players recruited in the streets by loud-speaker. Mr Durand, who was recruited in this way, agreed to take part in the match and was seriously injured during the course of it.

He brought an action against Espoir Loulaysien. The court of appeal rejected his claim.

In order to hold that Espoir Loulaysien was not at fault in failing to inform the former players of the absence of insurance indemnifying them in the event of accident, the judgment here under review (Poitiers, civ. ch. 22 October, 1980) declared that such a notification is not common practice where a team of volunteers is formed by way of public invitation to play against the local club's team in a match of a recreational rather than a competitive nature. However the court of appeal did not, as it was invited to do by Mr Durand in his claim, inquire whether the former players could not reasonably have believed they were insured, since the members of the municipal team were individually insured, and since furthermore, Espoir Loulaysien had taken out special insurance on the occasion of the festival. Nor did the court of appeal inquire whether, by reason of this foreseeable interpretation of facts known by all in the village, the association in question was at fault in omitting to draw Mr Durand's attention to the actual situation, namely, that the insurance it had taken out indemnified it only in respect of its own tortious liability. Therefore the decision of the appeal judges lacks legal basis.

Without its being necessary to rule on the first part of the argument, the decision is accordingly quashed and sent down for judgment to the Court of Appeal of Limoges.

13 July 1982 — 1st Civ. Ch. — Joubrel, ff. pr. — Béteille, rep. — Gulphe, adv. gen. — George and Garaud, adv.

NOTE*

(1) The judgment reported follows the line of the latest case law in the area of fault by omission.[1]

The Court of Cassation[2] started by declaring that "omission entails liability only if the person allegedly liable was under an obligation to accomplish the omitted act".

The *Branly* judgment[3] merely introduced a verbal flexibility to this rule: although it assimilated in principle fault by omission to fault by commission,[4] care was nevertheless taken to specify that "the omission, even though not dictated by malice and an intention to harm, entails the liability of its author where the act omitted should have been performed, either by virtue of a statutory, regulatory or contractual obligation, or in the professional category (particularly in the case of a historian) by virtue of the requirements of objective presentation".

Civil liability for personal acts thus came to be governed by an *Ersatz* of the principle of legality of offences and penalties: "just as a positive act entails liability only if its commission was prohibited, so for an omission to be wrongful, there must have been an obligation to act."[5]

The case law of the Court of Cassation began to develop in the early 1960's[6] with a judgment in which it was held that "quite aside from any obligation . . . the omission of an appropriate standard of care will entail liability when the effect of the omitted act is to prejudice the safety of another."[7]

Certainly there have been subsequent judgments that used more restrictive formulae,[8] but the trend has been clearly towards an abandonment of the traditional rule[9]

But there was nothing extraordinary in this, as this rule was "largely derivative of the concept of unlawfulness conceived as the element constituting fault or even as a substitute for it."[10] And the abandonment of the "nominalism" which is the basis for the requirement that there be a failure to meet an obligation to act[11] was necessary because to follow it would have meant entirely reshaping the concept of extra-contractual liability, systematically exonerating (amongst others) malicious people who abuse their rights.

The solution now adopted by the Court of Cassation must therefore be accepted, namely that there is no reason to lay down a "distinction between wrongful acts of omission and commission, as regards the courts' power to determine the same".[12] What is important is to determine how a responsible person would have acted in the circumstances.[13]

However, the problem of determining the victim's fault of omission, in cases where consideration of this is not excluded by the Desmares judgment, remains unresolved.[14] Indeed, disapproving of the case law of the appeal courts,[15] the 2nd Civil Chamber refused,[16] at a time when the wearing of seat belts was not yet compulsory, to find fault in the victim who had not "belted up". Will this last bulwark of the "principle of legality" be removed as well?

It is to be hoped that the answer to this question will not contradict the solution confirmed by the decision under study, for, as has been written in these same columns, "in order to be beyond dispute, judge-made law must be consistent."

* [Footnotes of the original not translated.]