E. Conclusions

The record-based approach has been achieved by legislation in other jurisdictions.43 It accords with the provisions of Article 9(2) of the Finality Directive, which has yet to be implemented in the United Kingdom. Even in advance of such legislation, this discussion has supported the record-based approach. English private international law, particularly in the commercial sector, is a dynamic branch of law. In order to accommodate changes in practice, previous judgments are judicially applied to new circumstances in a creative manner, often emphasising underlying principle above concrete detail. Through this inherent capacity for non-legislative development, it is argued, English conflicts law has adapted to the computerisation of the securities markets, with the record-based approach.

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DUTY TO RESCUE IN CIVIL LAW AND COMMON LAW: LES EXTRÊMES SE TOUCHENT?

LES SIX PHOTOGRAPHES ET LE MOTARD INTERPELLES ONT ÉTÉ MIS EN ETAT. Les six photographes et le motard de presse interpellés sur les lieux de l’accident mortel de la princesse de Galles ont été mis en examen pour “homicides involontaires, blessures involontaires, et non-assistance à personnes en danger”, mardi 2 septembre, par le juge d’instruction parisien Hervé Stephan, qui les a tous mis en liberté après les avoir entendus dans l’après-midi de mardi.1

A. Introduction

The death of Diana, Princess of Wales, following a car accident in Paris on 31 August 1997, received worldwide media attention. The place of the accident as well as the circumstances thereof raise a number of legal questions. Of particular

43. It informs the concept of a “securities entitlement” in the revised Art. 8 of the US Uniform Commercial Code: s.8-110 (Transfers) and s.9-103(6) (Pledges). Belgium and Luxembourg adopt the record-based approach. In Luxembourg, see Art. 8(3) of the Grand Ducal Regulation of 17 Feb. 1971, as amended. For Belgium, see the Royal Decree No. 62 of 10 Nov. 1967, as amended. The International Bar Association has advocated it more widely: see R. Guynn, Modernising Securities Ownership Transfer and Pledging Laws (1996).

In New York, the record-based approach is also supported by Fidelity Partners v. First Trust Company of New York, 97 Civ. 5184 (SHS) (SDNY) 1 Dec. 1997. The author is grateful to Randall Guynn of Davis Polk Wardwell for this reference.

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1. (“THE SIX QUESTIONED PHOTOGRAPHERS AND THE MOTORBIKE RIDER HAVE BEEN PLACED UNDER OFFICIAL INVESTIGATION. On Tuesday 2 September, the six photographers and the motorbike rider from the press questioned at the scene of the fatal accident of the Princess of Wales have been placed under official investigation for “involuntary manslaughter, involuntary wounding and non-assistance of persons in danger” by the Parisian investigating judge, Hervé Stephan, who released all of them having interviewed them on Tuesday afternoon”): Le Monde (édition internationale, sélection hebdomadaire), Saturday 13 Sept. 1997, p.4.
interest from a comparative tort law perspective are those aspects of the French enquiry that concern the civil implications of the criminal offence of failing to assist accident victims.2

At common law there is no legal duty to go to the rescue of strangers. Feinberg, in particular, has made explicit the moral implications of a legal tradition that fails to address “even harmful omissions of an immoral kind”. Extreme examples include “malicious failures to warn a blind man of an open manhole, to lift the head of a sleeping drunk out of a puddle of water”, or even “to throw a rope from a bridge to a drowning swimmer”.3 In European code-based legal systems the situation is somewhat more complex. The following article compares and contrasts the civil and common law approaches to duty to rescue.

B. Duty of Care but no Duty to Care in the Common Law

A vital component of any successful claim in negligence is the presence of a duty of care. An expansive interpretation of this concept of duty by the courts in the post-Donoghue v. Stevenson4 era notwithstanding, the common law has never really accepted the existence of a common law duty to go, proactively, to the assistance of needy members of the general public. To be clear, the common law judiciary at times has displayed great creativity in “discovering” certain categories of special relationships between plaintiff and defendant which subsequently are deemed to be governed by a duty of care that effectively takes the shape of a legal obligation to act. Perhaps the clearest example is that of schoolteachers, who are legally obliged to take positive steps for the safety of their pupils by the mere fact of the teacher–pupil relationship. In Richards v. State of Victoria5 an Australian case before the Full Court of the Supreme Court of Victoria, it was said that, as the teacher’s duty is one to take reasonable care only, “foreseeability of harm arising from particular conduct is of course relevant to the question whether there has been a breach of the duty, but it is not, in our opinion, relevant to the existence of the duty itself which arises from the relationship of schoolmaster and pupil”.6 In Geyer v. Downs7 the High Court of Australia went one step further when it held that the existence of this teacher–pupil relationship (and therefore also the legal obligation to take positive albeit reasonable steps to avoid harm) is not necessarily confined to official school hours.

The existence of a similar duty for parents to take “affirmative action”8 for the protection of their children based on a special parent–child relationship would seem more doubtful. Thus, at the end of their visit to friends, the parents of a four-year-old boy were standing at the door to say goodbye. The boy crossed the

2. Also part of the official investigation in France is the suspicion of causing bodily harm, but this will not be discussed in this article.
6. Idem, pp.140–141 (emph. added). Strictly speaking, this observation by Winneke CJ is dictum but, as it has been pointed out by Davies, it was expressly approved by Australia’s High Court in State of Victoria v. Bryar [1970] A.L.R. 809: M. Davies, Torts (1995), p.175.
8. The expression is borrowed from Davies, op. cit. supra n.6, at p.174.
road to where his parents' car was parked. When he attempted to cross back to his parents of his own volition he ran into the path of an oncoming vehicle. The negligent driver sought contribution from the parents. In the Full Court of the Supreme Court of South Australia King CJ said:9

The question of breach of duty can only arise on the present facts if a person in charge of a child who does no positive act in relation to the child of a kind which creates a risk of injury, nevertheless owes a duty to the child to supervise the child in a way which will protect the child from harm ... The law has gone some distance down the road of imposing such a duty by doing so where the custodian does some positive act, such as taking or calling a child on to a roadway, which gives rise to a particular risk of harm. I consider, however, ... that the duty should not be enlarged by the courts into a general [original emphasis] duty to exercise care in supervision for the protection of the child from harm.

But, even when making allowance for the existence of special relationships, to date the general rule continues to be that the common law does not require the priest or the Levite to behave like the good Samaritan. Australia is not out of step with the rest of the common law world in this regard. In New Zealand one is not generally bound to take positive action to prevent injury to another either.10 The same is true for the United States,11 even though some commentators there have observed in recent times a move away from the common law rule against recognizing a general duty to rescue.12 English law continues to be in accordance with the observation by Lord Diplock in Home Office v. Dorset Yacht Co. Ltd, who said:13

The very parable of the good Samaritan (Luke 10:30) which was evoked by Lord Atkin in Donoghue v. Stevenson illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law.

A recent confirmation of the cautious approach to civil liability in a rescue operation under English law can be found in Capital and Counties plc v. Hampshire CC, where Stuart-Smith LJ ruled that not even the fire brigade is under a common law duty to answer calls for help and is not under a duty to take care to do so either.14 That case was applied in Oll Ltd v. Secretary of State for Transport,15 to the effect that the coastguard owes no duty of care to persons known to be in an emergency. Earlier it had already been suggested in Barnett v. Chelsea and Kensington Hospital Management Committee16 that, where the casualty department of a hospital closes its doors to new patients, no duty of care arises.

12. Ibid.
C. The Rationale behind a Legal Duty to Rescue in European Civil Law

1. Duty to rescue and the role of the criminal legislature in France

Historically, civil liability for failure to rescue has its origins in criminal law. The original (nineteenth-century) version of the French Penal Code did not contain a duty to rescue, though. In Europe criminal legislation imposing a duty to rescue appeared only from the second half of the nineteenth century onwards. The earliest examples of such legislation can be found in Portugal, the Netherlands and Italy. By contrast, in France a special statute was not adopted until 1941. Even so, Tunc has argued that the French legal system can lay claim to being the best developed in giving “the greatest encouragement to the Good Samaritan”. The 1941 Act punished those who failed to report would-be criminals as well as those who failed to bring (or call for) aid to someone in peril, whenever such intervention did not involve risk to the rescuer.

The introduction of the duty-to-rescue legislation in France occurred under the Vichy administration and was directly related to the events of the Second World War. The German occupying forces effectively secured the 1941 Act’s introduction in the wake of the murder of a German military officer and the subsequent killing of some 50 French hostages in reprisal. It has been suggested that, ultimately, the adoption of the Act was a pragmatic decision as the French preferred to keep control over crimes against Germans rather than submit to German reprisals for such crimes. This explains why the emphasis of the initial French legislation was on “promoting” a greater willingness among the general public in offering assistance to public authorities such as the police. Even so, the available case law shows that the 1941 legislation has been used to hold a person liable for failure to rescue a drowning girl.

After the war a new Article 63 of the Penal Code was adopted. The new provision broadens the earlier Vichy legislation by doing away with the requirement of serious bodily harm. Article 63, adopted by the Law of 25 June 1945 and currently enshrined in Article 223–6 of the New Penal Code, stipulates that there shall be punished by imprisonment and/or a fine: “Whoever abstains voluntarily from giving such aid to a person in peril that he would have been able to give him without risk to himself or to third persons by his personal action or by calling for help.”

19. A. Tunc, “The Volunteer and the Good Samaritan”, in Ratcliffe, op. cit. supra n.17, p.43 at p.44.
23. Op. cit. supra n.20, at p.640, n.66. The relevant part of the text in French reads as follows: “Sera puni … quiconque s’abstient volontairement de porter à une personne en péril l’assistance que, sans risque pour lui ni pour les tiers, il pouvait lui prêter, soit par son
The duty to rescue applies with respect to any person "at risk" ("en péril"). It is established case law that this involves something that is serious, imminent and constant, and which requires immediate intervention.24 When the public prosecutor brought an action against the authors of a manual on how to commit suicide following the successful "application" of the manual by one of its readers, it was argued—successfully—that anyone is at risk who stands to lose his or her life or suffer serious bodily harm, regardless of the origin of the risk.25 The Cour de cassation upheld the conviction and it confirmed that, even though suicide is not itself a criminal offence under French law, incitement is.26 In this particular instance the deceased had written twice to the author of the book with specific questions about how to commit suicide. Each time a reply was received, both as regards the author's preferred type of poison and as regards the dose needed for the poison to be lethal.

Recent criminal case law on the duty to rescue suggests that a major area of application concerns the failure to come to the assistance of children whose physical integrity is at risk. In a decision of 23 April 1997 the criminal division of the Cour de cassation convicted the father of a young child for failing to seek medical assistance following an incident where a pot of boiling water had tipped over the child's body.27 Other cases have involved instances of sexual28 or physical29 abuse. In this regard Article 223-6 of the new Penal Code incorporates both Article 63 and Article 62 of the old Code. The latter provision created a separate offence for failure to report child abuse.30

2. Duty to rescue and civil liability

(a) Articles 1382–1383 of the French Civil Code. In France civil liability in tort is regulated by Articles 1382 et seq. of the Civil Code. Article 1382 of the Code provides the legal basis for civil liability in instances of intentional infliction of harm, whereas Article 1383 governs instances of "mere" negligence. Both Articles 1382 and 1383 are fault-based. Significantly, the notion of fault is deemed sufficiently broad to cover not only positive acts but also abstentions by the tortfeasor. Thus, in principle, it ought to make no difference that the blameworthy conduct consists of a failure to act rather than actual action. Each time the core determinative criterion for civil liability is fault, i.e. legally reprehensible conduct. The origins of the fault approach to civil liability predate the nineteenth-century codification movement and it continues to receive widespread support of "la doctrine" to date.31

31. See C. Larroumet, note under Cass. civ., 13 Dec. 1972, D. 1973, 493 at 494 and the references there. For a general discussion see also M. Vranken, Fundamentals of European
In practice, under the civil law's deductive approach to legal reasoning, general tort principles such as fault acquire meaning only through their application to individual cases. Of necessity room is made for pragmatism in the process. Thus, even though the drafters of the Code did not expressly distinguish omissions from other instances of wrongful conduct, it soon became clear that, in order to hold defendants legally accountable, at least some reprehensible behaviour on their part needs to exist (or be found). 32

This qualification to the general duty to rescue was articulated by the Cour de cassation in the 1924 case of Compagnie des Messageries maritimes. 33 On its facts that case did not involve an application of the duty to rescue in a direct manner. Rather, at issue was an alleged obligation in tort for a transport company to inform its customer as to the identity of the ship by which the transport of certain goods was to occur. In this particular instance no such duty existed under the contract. The appellate court nonetheless considered that, as only the defendant had the relevant information, which was of crucial importance in allowing the plaintiff to take out effective insurance coverage in times of war, the failure to inform amounted to negligent conduct. The Cour de cassation disagreed. In language reminiscent of the common law rule of no breach without duty, the highest court of France specified that omissions can trigger liability only where the defendant is under a duty to act in the first place: 34

Si, aux termes des art. 1382 et 1383 c.civ., tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer et si chacun est responsable de sa négligence, l'omission ne peut entrainer une responsabilité qu'autant qu'il y avait, pour celui auquel on l'impute, obligation d'accomplir le fait omiss.

(b) Duty to act by statutory mandate. However, as the earlier discussion of criminal liability made clear, 35 a legal duty to act exists where the legislature expressly stipulates to that effect. Criminal liability can trigger civil liability. Thus, indirectly, a civil duty to act may be created by situations governed in the first instance by the criminal code. 36 Specifically, where a criminal offence causes harm the victim may

Civil Law (1997), chap.6. French administrative law recognises the liability of the State for failure to exercise police powers to put an end to an illegal action which is causing loss to another: L. N. Brown and J. Bell, French Administrative Law (5th edn, 1998), p.198.

32. Prior to the above-discussed 1941 and 1945 legislation the question whether mere omissions could give rise to civil liability had been the subject of much discussion: Tunc, op. cit. supra n.19, at p.49. By contrast, the civil law traditionally has had less difficulty in recognising that, where someone volunteers to come to the assistance of someone else, the former is entitled to compensation by application of the Roman law concept of negotiorum gestio. Initially, the emphasis was on the protection of economic interests only, though: J. P. Dawson, "Rewards for the Rescue of Human Life?", in Ratcliffe, op. cit. supra n.17, at p.63.


34. "If, pursuant to Articles 1382 and 1383 of the Civil Code, any human act whatever which causes harm to another creates an obligation for the person by whose fault it occurred to repair the damage, and if everyone is liable for their lack of care, an omission only triggers liability if the responsible person was under an obligation to do that which was not done": idem, p.121 (emph. added).

35. See supra Section C.1.

join the proceedings brought by the public prosecutor by means of a civil action ("action civile"). In essence, the purpose of these civil proceedings before the criminal court is to facilitate the victim’s legitimate claim to compensation for any loss suffered.\textsuperscript{37}

On 19 June 1996 the criminal chamber of the French Cour de cassation had an opportunity to confirm that a civil action in damages can be based solely upon the criminal offence of failure to assist a person in need.\textsuperscript{38} Two minors were involved in a car crash. The vehicle had earlier been stolen and it was being driven by someone without a licence. At one point the driver lost control over the car and it hit the pillar of a bridge. The passenger pulled his badly injured friend out of the vehicle. He then fled the scene of the accident without calling for medical assistance. The driver subsequently died from his injuries. The parents of the deceased brought a civil action against the passenger. Expert evidence showed that, but for the lack of timely medical assistance, the victim might have survived the accident. The Court of Appeal of Pau ruled that the passenger was guilty of failure to assist a person in danger and it held him (and his mother) civilly liable for all the (non-pecuniary) loss ("préjudice moral") incurred by the parents and brother of the deceased. The Cour de cassation rejected a submission by the defendant that the victim’s own fault ought to reduce the (civil) liability of the passenger.

This case raises a number of issues. Most obvious, perhaps, is the apparent refusal by the highest court of France to allow contributory negligence to run its proper course. That would be an incorrect inference to draw, though. Rather, bearing in mind its limited function in upholding the rule of law by deciding whether or not to annul ("casser") the decision of the lower court, the Cour de cassation simply was at pains to stress that any apportioning of blame between the parties remains within the complete discretion of the trial judge.

But there is a more fundamental issue at stake here. The facts of the French case are somewhat reminiscent of the scenario that recently confronted the High Court of Australia in \textit{Gala v. Preston}.\textsuperscript{39} In \textit{Gala} the High Court of Australia held that the drunken driver of a stolen vehicle owed his equally drunken passenger, who had earlier participated in the theft, no duty of care at all. Writing for the majority, Mason CJ, Deane, Gaudron, and McHugh JJ concluded: "When attention is given to the circumstances of the present case it is difficult to see how they can sustain a relationship of proximity which would generate a duty of care."\textsuperscript{40} Thus, unlike the High Court of Australia, it would seem that the Cour de cassation is prepared to acknowledge more readily, at least implicitly, the presence of a pre-existing relationship between the parties under the circumstances.

\textbf{(c) Duty to act in the absence of a legislative mandate.} A statutory instruction to act is by no means a prerequisite. Professional practice or tradition can provide an alternative basis for the legal duty to act. In the classic case of \textit{Branly} the Cour de

\begin{itemize}
  \item \textsuperscript{37} See the discussion of criminal proceedings in C. Dadomo and S. Farran, \textit{The French Legal System} (2nd edn. 1996), pp.192 \textit{et seq.} and the discussion of the "action civile" on pp.201–203.
  \item \textsuperscript{39} (1991) 172 C.L.R. 243.
  \item \textsuperscript{40} \textit{Idem}, p.254.
\end{itemize}
cassation held that a legal obligation to do that which has been omitted can arise "soit en vertue 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" (my emphasis). In that case the author of an article on the history of the telegraph machine published in a popular magazine deliberately, albeit in good faith, left out the name of a scientist who was generally regarded as having played a major role in this particular invention. It follows from the decision in Branly that the duty to act is not an entirely abstract one as professionals, acting in their professional capacity, are singled out for special attention. This development is reminiscent of the common law where a duty of care can be triggered by the existence of a special relationship between the parties.

In Branly the Cour de cassation rejected as too narrow the rulings of the first-instance and appellate courts that no duty to act existed for want of an intent to injure. On the other hand, where malice or intent to harm is present the Cour de cassation does not hesitate to impose liability without the need for a separate duty to act. In the case of Gasman the refusal by a divorced spouse to hand over a "letter of repudiation", as required under religious law so as to enable the other partner to remarry, was found to have been inspired by malice or an intention to inflict harm. No legal obligation to provide any such letter existed. Even so, the reluctant party's harmful conduct was held to amount to an abuse of the law ("abus de droit") prohibited by Article 1382 of the Civil Code.

Branly stands for the general proposition that no legal liability in tort is incurred unless a duty to act can be found. This much has been confirmed in numerous Cour de cassation decisions in the aftermath of Compagnie des Messageries maritimes and Branly. Interestingly, contemporary legal scholarship in France continues to have reservations about the wisdom of the distinction between wrongful action and inaction. In particular, the doctrine tends to reject the distinction where it triggers differential treatment of tort victims. And, of course, the requirement for there to be a duty to act in order for inaction to be wrongful does precisely that. In an attempt to mitigate the discriminatory impact of the duty-to-act requirement its application is now said to be limited to instances of "mere" omission ("abstention pure et simple") as opposed to omissions in the broader context of other wrongful (positive) conduct ("abstention dans l'action").

D. Duty to Rescue and the Common Law: A Rejoinder

Attempts at differentiation between different types of omission are not entirely unfamiliar to a common law audience either. Both the civil and common law legal families correctly fail to see the difference between, for instance, a motor vehicle

41. "either pursuant to a legal, regulatory or contractual obligation, or also, in the professional world involving, in particular, a historian, because of the requirement that informational data are objective": Cass. civ., 27 Feb. 1951, D. 1951, 329, note H. Desbois.
42. See the discussion supra Section B.
44. Larroumet, note, idem, p.494.
driver's failure to stop at traffic lights and that same person's wrongful conduct in driving in excess of the maximum speed limit. In any event, the interests of the victim would not be served by any such distinction. French courts and scholarship alike clearly favour a restrictive interpretation of the category of mere omissions. They also ensure that alleged wrongful conduct consisting of an "abstention dans l'action" is treated in the same vein as other (positive) conduct, i.e. the defendant's conduct is assessed in terms of its reasonableness by reference to the hypothetical third person. 46

But, of course, the correct labelling of conduct and further "wrongful" conduct is not always an easy task and the cases show that demarcation problems are inevitable. When a tourist information office was sued for publishing a list of overnight accommodation places that did not include accommodation provided by the plaintiff the latter argued, unsuccessfully, that the task of tourist information offices is to make available to the public information that is objective and complete and that this precludes the use of discretion. The Cour de cassation instead upheld the decision of the appellate court to the effect that the function of tourist information offices is to facilitate and to organise tourism and that this involves the provision of credible information. The Court ruled that the omission of certain hotels from a list of recommended accommodation places could be considered as within the proper role of a tourist information office provided that the omissions were justified under the circumstances. 47 Similarly, the omission of a researcher's name from a scientific communication at a conference was found to be legally permissible under the circumstances. 48 On the other hand, failure to repair a dyke has been held to trigger the civil liability of the owner of land bordering the water even in the absence of a specific obligation to do so by statute or regulation. 49

The rule of thumb, so it would seem, in classifying omissions as culpable abstinences is to ask how a reasonable person would have reacted under the circumstances. 50 This kind of enquiry is precisely what happens in any instance of alleged wrongful conduct. 51 When applied to the circumstances surrounding the death of the Princess of Wales, a first crucial question then is whether the actual conduct of the journalists in pursuit amounted to a mere omission or, rather, whether it can be qualified as an omission in the broader context of the arguably reckless manner in which they carried out their journalistic task. Second, it needs to be asked what sort of behaviour can reasonably be expected of reasonably prudent journalists. In answering these questions both the civil law and the common law may find it difficult not to take account of the special circumstances of the accident, in particular the celebrity status of one of the parties and the consideration that, over the years, a "relationship", of sorts, had developed between the victim and the class of people of which the defendants are members.

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48. Cass. civ., 31 Jan. 1964, J.C.P. 1964, II, 13620, note R. Savatier. The result in this case may be contrasted with the decision in Branly, discussed supra n.41 and text.
50. "la conduite d'un individu averti": Voulet, note, idem, p.482.
51. Terré, Simler and Lequette, op. cit. supra n.45, at p.566, No.689.
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