

The background of the entire page is a repeating pattern of small, teal-colored stars or snowflakes on a light cream or off-white background. The pattern is dense and covers the entire surface.

Liability for products:
English law, French law,
and European harmonization

by Simon Whittaker.

Liability for Products

*English Law, French Law, and European
Harmonisation*

by

SIMON WHITTAKER

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*For my parents,
Edmund and Margaret Whittaker*

Preface

The idea for a book on liability for products comparing the approaches of English and French lawyers and the wider context of the two legal systems, came to me soon after the enactment of the EC Product Liability Directive in 1985, but its appearance has taken very much longer than I anticipated. This is due in part, no doubt, to a number of other projects which have caught my attention, but it is also due to the fact that, as I worked, I felt that I needed to explore further into first French law and then (so as to compare what I found there) English law, looking beyond the private laws of contract and tort and into the laws of administrative liability, criminal law, and criminal and civil procedure and including material on the EC Consumer Guarantees Directive in 1999 (which added a second European dimension to the study).

I would like to start by thanking the editors at Oxford University Press who have been both encouraging and very patient over the years in relation to this work: Richard Hart, John Louth and, most recently and in particular, Gwen Booth. At times a work of this kind can become a strain rather than a joy and Gwen has been a great and practical help in getting the work finished. I have also had the benefit of and am most grateful to a number of research assistants who have helped me in particular to keep the work up-to-date and by checking references: Jonathan Bremner, Charles Clarke, Hadrien Costa de Beauregard, Lydie Reiss, and Andrew Scott. Given the range of its subject-matter, I have set a cut-off date of 1 January 2004 and while I have included some primary material after this date, I have not included new secondary material.

I have also had the benefit of many discussions with friends and colleagues both at home and abroad. Of these, I would particularly mention the following: Denis Baranger, John Bell, John Cartwright, Sergio Camárá Lapuente, Bénédicte Fauvarque-Cosson, Michele Graziadei, Denis Mazeaud, Rebecca Williams, and Reinhard Zimmermann. I must make particular mention of my colleagues at St. John's, Paul Craig and Mark Freedland, whose influence is very visible in my developing interest in public law and whose moral support has been invaluable. I also owe a considerable intellectual debt to my former doctoral supervisor and, later, colleague for a number of years, Bernard Rudden, with whose wise support my interest in comparative law first flourished. I am most grateful to them all. Needless to say, though, all faults which remain are my responsibility alone.

I could not have completed this work without the help and support of my wife, Judith, and my children during unknown numbers of weekends of my absence while I have worked. I would also like to thank my parents, Margaret and Edmund Whittaker, without whose encouragement and support I would not have embarked on an academic career. To them, this book is dedicated with my love and respect.

*St. John's College,
Oxford*

Simon Whittaker
20 December, 2004

Abbreviations

French Law

The Codes are referred to in the body of the text in full, the most commonly cited being in English translation, thus, the *Code civil* becomes the Civil Code. References to the Codes in the footnotes are abbreviated as follows:

A.c. pén.	<i>Ancien Code pénal</i>
C. assur.	<i>Code des assurances</i>
C. civ.	<i>Code civil</i>
C. com.	<i>Code de commerce</i>
C. consom.	<i>Code de la consommation</i>
C. constr. et hab.	<i>Code de la construction et de l'habitation</i>
C. éduc.	<i>Code de l'éducation</i>
C.G.C.T.	<i>Code général des collectivités territoriales</i>
C. santé pub.	<i>Code de la santé publique</i>
C. rur.	<i>Code rural</i>
C. org. jud.	<i>Code de l'organisation judiciaire</i>
C. séc. soc.	<i>Code de la sécurité sociale</i>
C. pén.	<i>Code pénal</i>
C.P.P.	<i>Code de procédure pénale</i>
N.c.pr.civ.	<i>Nouveau Code de procédure civile</i>

French Cases

French cases are referred to by their deciding body and date, together with any reference where a report of the decision may be found. Sometimes this is supplemented by the name of a party (e.g. *affaire Jand'heur*), this being standard practice as regards decisions of administrative courts. I have abbreviated the month of the date to three letter English abbreviations. Many decisions of the Cour de cassation and Conseil d'Etat (as well as all codified law and many individual *lois*) are available from the *service public* website, <<http://www.legifrance.gouv.fr>>.

The highest court judging civil and criminal cases is the Cour de cassation, which is divided according to the subject matter of the case. These are abbreviated in the notes as follows:

Ass. plén.	Assemblée plénière of the Cour de cassation
Ch. mixte	Chambre mixte of the Cour de cassation
Ch. réun.	Chambres réunies of the Cour de cassation
Civ. (1)	First civil chamber of the Cour de cassation
Civ. (2)	Second civil chamber of the Cour de cassation
Civ. (3)	Third civil chamber of the Cour de cassation
Com.	Commercial chamber of the Cour de cassation
Req.	Chambre des requêtes of the Cour de cassation
Soc.	Chambre sociale of the Cour de cassation

The Cour de cassation's plenary sessions which are now called the Assemblée plénière, used to be called the Chambres réunies; until 1947 the Cour de cassation possessed a Chambre des

requêtes which acted as a filter for the main court. The Chambre mixte sits to resolve divergences of interpretation and case law.

Abbreviations used for other courts

CAA	Cour administrative d'appel
CE	Conseil d'Etat
CE Ass.	Assemblée du contentieux (or Assemblée) of the Conseil d'Etat
CE Sect.	Conseil d'Etat, Section du contentieux
TC	Tribunal des conflits
TGI	Tribunal de grande instance
Trib. corr.	Tribunal correctionnel

The decisions of courts of appeal are cited simply by the place of the court in question. Where a report includes the *conclusions*, the *Commissaire du gouvernement* or *rapport* of the judge assigned to report on the case to the court, this appears as 'concl.' or 'rapp.' respectively followed by the name of the judge in question.

English Cases

The abbreviated citations to the law reports to the official reports and to the *English Reports* follow the standard practice. Abbreviations of unofficial reports are contained in the general abbreviations, below p. xix.

Special abbreviations

1993 Directive = Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts.

'Amending Directive' = Directive 99/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

'Case C-203/99, *Veefald*' or '*Veefald*' = Case C-203/99 of 10 May 2001, *Veefald v Arhus Amtskommune*, [2001] ECR I-3569.

'*Commission v UK*' = Case C-300/95 of 29 May 1997, *Commission v UK* [1997] ECR I-2649.

'Consumer Guarantees Directive' or '1999 Directive' = Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

'Council Resolution 2002' = Council Resolution of 19 December 2002 on the amendment of the liability for defective products Directive (2003/C 26/02) OJ C 26/2 4 February 2003.

'EU Parliament Resolution 2000' = European Parliament Resolution on the Commission Green Paper 'Liability for Defective Products' PE 289.426 (30 March 2000).

'EU Parliamentary Decision 1999' = EU Parliamentary Decision of 23 March 1999 on the common position EC No. 3/1999, OJ C 177 of 22 June 1999.

'European Convention' or 'Convention' = European Convention on products liability in regard to personal injury and death of 27 January 1977, E.T.S. No. 91.

'European Court decisions of 2002' = Case C-52/00 of 25 Apr. 2002, *Commission v France* [2002] I-3827 ('Case C-52/00'); Case C-154/00 of 25 Apr. 2002, *Commission v Greece* [2002] ECR I-3879 ('Case C-154/00'); Case C-183/00 of 25 Apr. 2002, *González Sanchez v Medicina Asturiana SA* [2002] ECR I-3901 ('Case C-154/00' or '*González Sanchez*').

'General Product Safety Directive' or 'GPSD 2001' = Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.

'Product Liability Directive' or '1985 Directive' = Council Directive 1985/374/EEC of 25 July 1985 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products.

'Vienna Convention' = United Nations Convention on Contracts for the International Sale of Goods of 1980.

UK statutes and statutory instruments

1977 Act = Unfair Contract Terms Act

1978 Act = Civil Liability (Contribution) Act 1978

1979 Act = Sale of Goods Act 1979

1987 Act = Consumer Protection Act 1987

1994 Act = Sale and Supply of Goods Act 1994

2000 Act = Powers of the Criminal Courts (Sentencing) Act 2000

2002 Regulations = Sale and Supply of Goods to Consumers Regulations 2002 SI No. 3045

GPSR 1994 = General Product Safety Regulations 1994 SI No. 2328

French Legislation

Constitution of 1958 = Constitution of the Fifth Republic of France of 4 October 1958

loi of 1978 = *loi* no. 78-12 of 4 January 1978 *relative à la responsabilité et l'assurance dans le domaine de la construction*

loi of 5 July 1985 = *Loi* no. 85-677 of 5 July 1985 *tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*

loi of 1996 = *loi* no. 96-393 of 13 May 1996 *relative à la responsabilité pénale pour des faits d'imprudence ou de négligence*

loi of 1998 = *loi* no. 98-389 of 19 May 1998 *sur la responsabilité du fait des produits défectueux*

loi of 2000 = *loi* no. 2000-647 of 10 July 2000 *tendant à préciser la définition des délits non intentionnels*

loi no. 2002-303 = *Loi* no 2002-303 of 4 March 2002 *relative aux droits des malades et à la qualité du système de santé*

Avant projet de loi = G. Viney (président du comité), *Avant-projet de loi sur la garantie de conformité due par le vendeur* (May, 2002) <<http://www.justice.gouv.fr/publicat/RappGTIDE.htm>>.

projet de loi of 2004 = *Projet de loi relative à la garantie de la conformité du bien au contrat due par le vendeur au consommateur et à la responsabilité du fait des produits défectueux*, Sén. No. 358 (16 Jun. 2004)

loi of 9 December 2004 = *loi de simplification du droit* no. 2004-1343 of 9 December 2004

Ordonnance of 17 February 2005 = *Ordonnance* no. 2005 of 17 February 2005 *relative à la garantie de la conformité du bien au contrat due par le vendeur au consommateur*

Other Abbreviations

AJDA	<i>Actualité juridique du droit administratif</i>
<i>Am. J. Comp. L.</i>	<i>American Journal of Comparative Law</i>
Ass. nat.	Assemblée nationale de la République française
BLR	Building Law Reports
BMLR	Butterworths Medico-Legal Reports
Bull. civ.	Bulletin des arrêts des Chambres civiles de la Cour de cassation (a selection of the decisions of various civil chambers of the Cour de cassation which are reported in four different sections, designated by the appropriate Roman numeral. The references in the text refer to their numbers rather than the page).
Bull. crim.	Bulletin des arrêts de la Chambre criminelle de la Cour de cassation
CA	Court of Appeal (England and Wales)
CJD	Creutzfeld-Jakob disease
CPR	Civil Procedure Rules
CJEG	Cahiers juridiques de l'électricité et du gaz
<i>CLJ</i>	<i>Cambridge Law Journal</i>
CLY	Current Law Yearbook
Comm. gouv.	<i>Commissaire du gouvernement</i>
<i>Cont., Conc., Cons.</i>	<i>Contrats, concurrence, consommation</i>
Cr App R	Criminal Appeal Reports
<i>Crim LR</i>	<i>Criminal Law Review</i>
D	Recueil Dalloz
DA	Recueil Dalloz analytique
D. adm.	<i>Droit administratif</i> (a review annexed to Juris-Classeur Droit Administratif (Editions techniques, Paris))
DC	Recueil Dalloz critique
<i>Déc.</i>	<i>Décret</i>
DH	Recueil Dalloz hebdomadaire
Dig.	The Digest of Justinian
DP	Recueil Dalloz périodique
<i>Dr. mar. fr.</i>	<i>Droit maritime français</i>
<i>Dr. soc.</i>	<i>Droit social</i>
<i>Droit pénal</i>	<i>Droit pénal</i> (a review annexed to Juris-Classeur Pénal (Editions techniques, Paris))
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EDCE	<i>Etudes et documents du Conseil d'Etat</i>
EDF	Electricité de France
<i>ERPL</i>	<i>European Review of Private Law</i>
E.T.S.	European Treaty Series
GDF	Gaz de France
fasc.	fascicule, i.e. a division of large-scale work such as the Juris-Classeurs, q.v.
GP	Gazette du palais
HC Deb.	House of Commons Debates (Hansard)
HGH	Human growth hormone
HL Deb.	House of Lords Debates (Hansard)

HLR	Housing Law Reports
HSE	Health and Safety Executive
ICLQ	<i>International and Comparative Law Quarterly</i>
IHL	In-House Lawyer
JBL	<i>Journal of Business Law</i>
JCP	Jurisclasseur périodique (otherwise known as <i>La Semaine Juridique</i>) (Edition générale)
<i>J.O. Rép. fr.</i>	<i>Le Journal officiel de la République française</i>
Jur.-Cl. Civ.	Juris-Classeur Civil (Editions techniques, Paris)
Jur.-Cl. Proc. Civ.	Juris-Classeur Procédure Civile (Editions techniques, Paris)
Jur.-Cl. Adm.	Juris-Classeur Administratif (Editions techniques, Paris)
Jur.-Cl. Pén.	Juris-Classeur Pénal (Editions techniques, Paris)
Jur.-Cl. Proc. pén.	Juris-Classeur Procédure pénale (Editions techniques, Paris)
Jur.-Cl. Contrats Distribution	Juris-Classeur Contrats Distribution (Editions techniques, Paris)
<i>J. Crim. Law</i>	<i>Journal of Criminal Law</i>
<i>J. Leg. Hist.</i>	<i>Journal of Legal History</i>
KIR	Knights Industrial Reports
LSG	Law Society Gazette
Leb.	Recueil Lebon or Recueil des décisions du Conseil d'Etat
LQR	<i>Law Quarterly Review</i>
LS	<i>Legal Studies</i>
Lloyd's Rep Med	Lloyd's Law Report Medical
Med. LR	Medical Law Reports
<i>Med.L.Rev.</i>	<i>Medical Law Review</i>
MLR	<i>Modern Law Review</i>
NLJ	<i>New Law Journal</i>
OJLS	<i>Oxford Journal of Legal Studies</i>
Ord.	<i>Ordonnance</i>
OUCLJ	<i>Oxford University Commonwealth Law Journal</i>
PD	Practice Direction
PIQR	Personal Injuries and Quantum Reports
PL	<i>Public Law</i>
rapp	<i>rapport</i>
RDP	<i>Revue de droit public et de science politique</i>
<i>Resp. civ. et assur.</i>	<i>Responsabilité civile et assurances</i> (a review annexed to Juris-Classeur Responsabilité et assurance (Editions techniques, Paris))
<i>Rev. crit.</i>	<i>Revue critique de législation et jurisprudence</i>
<i>Rev. marché commun</i>	<i>Revue du Marché commun et de l'Union européenne</i>
RFDA	<i>Revue française de Droit administratif</i>
RGAT	Recueil général des assurances terrestres
RIDC	<i>Revue internationale de droit comparé</i>
RSC	Rules of the Supreme Court
RTDCiv.	<i>Revue trimestrielle de droit civil</i>
RTDCom.	<i>Revue trimestrielle de droit commercial</i>
RTR	Road Traffic Reports
S	Sirey
Sén.	Sénat de la République française
SI	Statutory Instrument

SNCF	Société nationale des chemins de fer
Somm. comm.	Sommaires commentés
<i>Tul LR</i>	<i>Tulane Law Review</i>
Tr L	Trading Law
<i>Washburn LJ</i>	<i>Washburn Law Journal</i>
Web JCLI	Web Journal of Current Legal Issues
WL	Westlaw (on-line resource) (Sweet and Maxwell)

Author Abbreviations

Analysis of Replies = College of Europe, *Analysis of the Replies to the Commission Green Paper on Product Liability* (13 September 2000) <http://europa.eu.int/comm/internal_market/en/goods/prodliability.htm>

Archbold = Archbold, *Criminal Pleading, Evidence and Practice* (2004)

Ashworth, *Principles* = A. Ashworth, *Principles of Criminal Law* (OUP, 4th. edn., 2003)

Bell, *French Legal Cultures* = J. Bell, *French Legal Cultures* (Butterworths, London, 2002)

Bell, Boyron and Whittaker = J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (OUP, 1998)

Bénabent, *Contrats spéciaux* = A. Bénabent, *Droit civil, Les contrats spéciaux civils et commerciaux* (Montchrestien, Paris, 5th. edn., 2001)

Bénabent, *Obligations* = A. Bénabent, *Droit civil, Les obligations* (Montchrestien, Paris, 8th. edn. 2001)

Benjamin = A.G. Guest (gen. ed.), *Benjamin's Sale of Goods* (Sweet and Maxwell, London, 6th. edn., 2002)

Benjamin, Special Supplement = C. J. Miller (gen. ed.), *Benjamin's Sale of Goods, Special Supplement to the 6th edition* (Sweet and Maxwell, London, 2003)

Bianca and Grundmann, *EU Sales Directive* = M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive* (Intersentia, Antwerp, 2000)

Bihl, *Droit pénal* = L. Bihl, *Le droit pénal de la consommation* (Nathan, n.p., 1989)

Bihl, *Vente* = L. Bihl, *Le droit de la vente (vente mobilière)* (Dalloz, Paris, 1986)

Braibant and Stirn, *Droit administratif français* = G. Braibant and B. Stirn, *Le droit administratif français* (Presses de Sciences Po et Dalloz, Paris, 6th. edn., 2002)

Bridge, *Sale of Goods* = M.G. Bridge, *The Sale of Goods* (OUP, 1997)

Brown and Bell = L. Neville Brown and J. Bell, *French Administrative Law* (OUP, 5th. edn., 1998)

Calais-Auloy and Steinmetz = J. Calais-Auloy and F. Steinmetz, *Droit de la consommation*, (Dalloz, Paris, 6th edn., 2003)

Carbonnier, *Introduction* = J. Carbonnier, *Droit Civil, Introduction* (PUF, Paris, 26th. edn., 1999)

Carbonnier, *Obligations* = J. Carbonnier, *Droit Civil, Tome 4, Les obligations* (PUF, Paris, 22nd. edn., 2000)

Chapus, *Droit administratif général*, Tome 1 = R. Chapus, *Droit administratif général*, Tome 1 (Montchrestien 15th. edn., 2001)

Chapus, *Droit administratif général*, Tome 2 = R. Chapus, *Droit administratif général*, Tome 2 (Montchrestien, Paris, 15th. edn., 2001)

Chapus, *Responsabilité publique et responsabilité privée* = R. Chapus, *Responsabilité publique et responsabilité privée: les influences réciproques des jurisprudences administrative et judiciaire* (LGDJ, Paris, 1954)

Chitty on Contracts = H. Beale (gen. ed.) *Chitty on Contracts* (Sweet and Maxwell, London, 29th. edn., 2004) 2 vols. (with specialist editors)

Clerk and Lindsell on Torts = A.M. Dugdale (gen.ed.), *Clerk and Lindsell on Torts* (Sweet and Maxwell, London, 18th. edn., 2000)

Craig, *Administrative Law* = P.P. Craig, *Administrative Law* (Sweet and Maxwell, London, 5th. edn., 2003)

Craig and de Búrca, *EU Law* = P.P. Craig and G. de Búrca, *EU Law, Text, Cases, and Materials* (OUP, 3rd. edn., 2003)

Cranston's Consumers and the Law = C. Scott and J. Black, *Cranston's Consumers and the Law* (Butterworths, London, 3rd. edn., 2000)

de Laubadère and Gaudemet, *Droit administratif*, Tome 2 = A. de Laubadère and Y. Gaudemet, *Traité de droit administratif*, Tome 2, *Droit administratif des biens* (LGDJ, Paris, 11th. edn., 1998)

de Juglart, *Vente* = H., L. and J. Mazeaud et F. Chabas, *Leçons de droit civil*, Tome 3, vol. 2 *Principaux contrats: Vente et échange*, 2e Partie by M. de Juglart (Montchrestien, Paris, 7th. edn., 1987)

Delmas-Marty and Guidicelli-Delage = M. Delmas-Marty and G. Guidicelli-Delage, *Droit pénal des affaires* (PUF, Paris, 4th. edn., 2000)

Desportes and Le Gunehec = F. Desportes and F. Le Gunehec, *Droit pénal général* (Economica, Paris, 10th. edn., 2003)

Dicey, *Introduction to the Study of the Law of the Constitution* = A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th. edn., 1965 by E.C.S. Wade). The first edition was published in 1885.

EC Commission, *First Report* = EC Commission, *First Report on the Application of the Council Directive on Approximation of Laws, Regulations and Administrative provisions of the Member States concerning Liability for Defective Products (85/374/EEC)* Com(95)617 final (13 December 1995)

EC Commission, *Green Paper* = EC Commission, *Green Paper, Liability for Defective Products* Com(1999)396 final (28 July 1999)

EC Commission, *Second Report* = *Report from the Commission on the Application of Directive 85/374/EEC [etc.]* Com/2000/0893 final (2001)

Fairgrieve, *State Liability* = D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (OUP, 2002)

Flour, Aubert and Savaux, *Fait juridique* = J. Flour, J.-L. Aubert and E. Savaux, *Droit civil, Les obligations, 2 Le fait juridique* (Armand Colin, Paris, 10th. edn., 2003)

Flour and Aubert, *Rapport d'obligation* = J. Flour and J.-L. Aubert, *Les obligations, 3 Le rapport d'obligation* by J.-L. Aubert, Y. Flour, and E. Savaux (Armand Colin, Paris, 1999)

Fontaine and Viney = M. Fontaine and G. Viney (eds.), *Les sanctions de l'inexécution des obligations contractuelles, Etudes de droit comparé* (Bruyant, Bruxelles and LGDJ, Paris, 2001)

Gaudemet, *Droit administratif*, Tome 1 = Y. Gaudemet, *Traité de droit administratif*, Tome 1, *Droit administratif général* (LGDJ, Paris, 16th. edn., 2001)

Ghestin, Goubeaux and Fabre-Magnan, *Introduction générale*, = J. Ghestin (dir.), *Traité de droit civil*; J. Ghestin, G. Goubeaux, and M. Fabre-Magnan, *Introduction générale* (LGDJ, Paris, 1994)

Ghestin, *Conformité* = J. Ghestin, *Conformité et garanties dans la vente (Produits mobiliers)* (LGDJ, Paris, 1983)

Ghestin, *La formation du contrat* = J. Ghestin (dir.) *Traité de droit civil*; J. Ghestin, *La formation du contrat* (LGDJ, Paris, 3rd. edn., 1993)

Ghestin, *Sécurité des consommateurs* = J. Ghestin (ed.) *Sécurité des consommateurs et responsabilité du fait des produits défectueux*, Colloque (LGDJ, Paris, 1987)

Ghestin (1986) = J. Ghestin, 'La directive communautaire du 25 juillet 1985 sur la responsabilité du fait des produits défectueux' D 1986 Chron. 135

Ghestin (1988) = J. Ghestin, 'L'avant-projet de loi sur la responsabilité du fait des produits défectueux: une refonte partielle du code civil' *Revue du jurisprudence commerciale* (1988) 201

Ghestin (1998) = J. Ghestin, 'Le nouveau titre IVbis du Livre III du Code civil "De la responsabilité du fait des produits défectueux:" L'application en France de la directive sur la responsabilité du fait des produits défectueux après l'adoption de la loi no. 98-389 du 19 mai 1998' JCP 1998.I.148

Ghestin and Desché, *Vente* = J. Ghestin (dir.) *Traité des contrats*, J. Ghestin and B. Desché, *La vente* (LGDJ, Paris, 1990)

Guinchard and Buisson = S. Guinchard and J. Buisson, *Procédure pénale* (Litec, Paris, 2nd. edn., 2002)

Harris and Tallon = D. Harris and D. Tallon (eds.), *Contract Law Today: Anglo-French Comparisons* (OUP, 1989)

HL Select Committee, *Tenth Report* = House of Lords Select Committee on European Communities, *Tenth Report on Consumer Guarantees* (4 March 1997)

Hodges, *Report* = C.J.S. Hodges, *Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products* (May 1994)

Huet, *Principaux contrats spéciaux*, = J. Ghestin (dir.) *Traité de droit civil*; J. Huet, *Les principaux contrats spéciaux* (LGDJ, Paris, 2nd. edn., 2001)

Huet, *Responsabilité du vendeur* = J. Huet, *Responsabilité du vendeur et Garantie contre les vices cachés* (Litec, Paris, 1987)

Ibbetson, *Historical Introduction* = D. Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 1999)

Lambert-Faivre, *Droit des assurances* = Y. Lambert-Faivre, *Droit des assurances* (Daloz, Paris, 9th. edn., 1995)

Lambert-Faivre, *Droit du dommage corporel* = Y. Lambert-Faivre, *Droit du dommage corporel: Systèmes d'indemnisation* (Daloz, Paris, 4th. edn., 2000)

Larroumet, *Contrat* = C. Larroumet, *Droit civil*, Tome 3, *Les obligations, Le contrat* (Economica, Paris, 4th. edn., 1998)

Larroumet, D 1998 Chron. 311 = C. Larroumet, 'La responsabilité du fait des produits défectueux après la loi du 19 mai 1998' D 1998 Chron. 311.

Law Com. No. 160 = Law Commission, *Sale and Supply of Goods*, Law Com. No. 160 (1987)

Le Tourneau and Cadet, *Droit de la responsabilité* = P. Le Tourneau and L. Cadet, *Droit de la responsabilité et des contrats* (Daloz, Paris, 2000)

Lovells, *Report* = Lovells, *Product Liability in the European Union: a Report for the European Commission* (February 2003)

MacCormick, *Report* = D.N. MacCormick, *Report on the Commission Green Paper 'Liability for defective products'* PE 232.108 (1 March 2000)

Malaurie, Aynès and Gautier, *Contrats spéciaux* = P. Malaurie, L. Aynès and P.-Y. Gautier, *Les contrats spéciaux* (Defrénois, Paris, 2003)

Malaurie, Aynès and Stoffel-Munck, *Obligations* = P. Malaurie, L. Aynès and P. Stoffel-Munck *Droit civil: les obligations* (Defrénois, Paris, 2003)

Malinvaud (1988) = P. Malinvaud, 'L'application de la directive communautaire sur la responsabilité du fait des produits défectueux et le droit de la construction ou le casse-tête communautaire' D 1988 Chron. 85

Malinvaud (1999) = P. Malinvaud, 'La loi du 19 mai 1998 relative à la responsabilité du fait des produits défectueux et le droit de la construction' D 1999 Chron. 85

Markovits = Y. Markovits, *La directive C.E.E. du 25 juillet 1985 sur la responsabilité du fait des produits défectueux* (LGDJ, Paris, 1990)

Markesinis and Deakin's *Tort Law* = S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law* (OUP, 5th. edn., 2003)

Marty and Raynaud, *Obligations* = G. Marty and P. Raynaud, *Droit civil, Les obligations, Tome I: les sources* (Sirey, Paris, 2nd. edn., 1988)

Mazeaud, *Les victimes* = D. Mazeaud, 'Les victimes et les dommages réparables' in *La responsabilité du fait des produits défectueux (loi du 19 mai 1998) Petites affiches, La Loi* No. 155 (28 December 1998)

- Mazeaud and Chabas, *Obligations* = H. L. and J. Mazeaud, *Leçons de droit civil*, Tome II, Premier Volume, *Les obligations théorie générale* (Montchrestien, Paris, 9th. edn, 1998 by F. Chabas)
- Merle and Vitu, *Droit pénal* = R. Merle and A. Vitu, *Traité de droit criminel, Problèmes généraux de la science criminelle, Droit pénal général* (Eds. Cujas, Paris, 6th. edn., 1984)
- Merle and Vitu, *Procédure pénale* = R. Merle and A. Vitu, *Traité de droit criminel, Procédure pénale*, (Eds. Cujas, Paris, 6th. edn., 1984)
- Moreau, *Droit administratif* = J. Moreau, *Droit administratif* (PUF, Paris, 1st. edn., 1989)
- Nicholas = B. Nicholas, *The French Law of Contract* (OUP, 2nd. edn., 1992)
- O'Hare and Hill, *Civil Litigation* = J. O'Hare, K. Browne and R. N. Hill, *Civil Litigation* (Sweet and Maxwell, London, 10th. edn., 2000)
- Opinion of the Economic and Social Committee* = *Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive amending Council Directive 85/374/EEC [etc.] (98/C 95/17) (30 March 1998)*
- Pacteau, *Contentieux administratifs* = B. Pacteau, *Contentieux administratifs* (PUF, Paris, 5th. edn., 1985)
- Pothier, *Obligations* = R. J. Pothier, *Traité des obligations* (Paris, 1761) in *Oeuvres complètes de Pothier* (Thomine et Fortic, Paris, 1821), Vol. I
- Pothier, *Vente* = R. J. Pothier, *Traité du contrat de vente* in *Oeuvres complètes de Pothier* (Thomine et Fortic, Paris, 1821), Vol. 3
- Pradel, *Droit pénal* = J. Pradel, *Manuel de droit pénal général* (Eds. Cujas, Paris, 14th edn., 2002)
- Pradel, *Procédure pénale* = J. Pradel, *Manuel de procédure pénale* (Eds. Cujas, Paris, 11th edn., 2002)
- Pradel, *Sang et droit pénal* = J. Pradel (ed.), *Sang et droit pénal, A propos du sang contaminé . . .* (Eds. Cujas, Paris, 1995)
- Richer, *Droit des contrats administratifs* = L. Richer, *Droit des contrats administratifs* (LGDJ, Paris, 2nd. edn., 1999).
- Rivero and Waline, *Droit administratif* = J. Rivero and J. Waline, *Droit administratif* (Dalloz, Paris, 18th. edn., 2000)
- Roselli, *Report* = F. Roselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products*
- Roth-Behrendt, *Opinion* = D. Roth-Behrendt, *Opinion for the Committee on Legal Affairs and the Internal Market* PE 232.108
- Roth-Behrendt, *Report* = D. Roth-Behrendt, EU Parliament, Committee on the Environment, Public Health and Consumer Protection, *Report on the proposal for a European Parliament and Council Directive amending Council Directive 85/374/EEC [etc.]* PE 225.962fin. (28 September 1998)
- Smith and Hogan = *Smith and Hogan Criminal Law* (Butterworths, London, 10th. edn., 2002) by J.C. Smith
- Stapleton, *Product Liability* = J. Stapleton, *Product Liability* (Butterworths, London, 1994)

Starck, Roland and Boyer, *Responsabilité délictuelle* = B. Starck, H. Roland and L. Boyer, *Obligations*, 1. *Responsabilité délictuelle* (Litec, Paris, 5th. edn., 1996)

Taylor, *Harmonisation communautaire*, = S. Taylor, *L'Harmonisation communautaire de la responsabilité du fait des produits défectueux, Etude comparative du droit anglais et du droit français* (LGDJ, Paris, 1999).

Terré, Simler, Lequette, *Obligations* = F. Terré, P. Simler, Y. Lequette, *Droit civil: Les obligations* (8th. edn., Paris, Dalloz, 2002).

Testu and Moitry = F.X. Testu and J.-H. Moitry, 'La responsabilité du fait des produits défectueux, Commentaire de la loi 98-389 du 19 mai 1998' *Dalloz Affaires* (16 July 1998) Supplement to No. 125

Treitel, *The Law of Contract* = G.H. Treitel, *The Law of Contract* (Sweet and Maxwell, London, 11th. edn., 2003)

Treitel, *Remedies* = G.H. Treitel, *Remedies for Breach of Contract, A Comparative Account* (OUP, 1988)

Vedel and Delvolvé, *Droit administratif*, Tome 1 = G. Vedel and P. Delvolvé *Droit administratif*, Tome 1 (PUF, Paris, 12th. edn., 1992)

Véron (4th edn.) = M. Véron, *Droit pénal spécial* (Masson, Paris, 4th. edn., 1995)

Véron (9th edn.) = M. Véron, *Droit pénal spécial* (Armand Colin, Paris, 9th. edn., 2002)

Vincent and Guinchard, *Procédure civile* = J. Vincent and S. Guinchard, *Procédure civile* (Dalloz, Paris, 27th. edn., 2003)

Viney, *Introduction à la responsabilité* = J. Ghestin (dir.) *Traité de droit civil*; G. Viney, *Introduction à la Responsabilité* (LGDJ, Paris, 2nd. edn., 1995)

Viney and Jourdain, *Conditions* = J. Ghestin (dir.) *Traité de droit civil*; G. Viney and P. Jourdain, *Les conditions de la responsabilité* (2nd. edn., LGDJ, Paris, 1998)

Viney and Jourdain, *Effets de la responsabilité* = J. Ghestin (dir.) *Traité de droit civil*; G. Viney and P. Jourdain, *Les effets de la responsabilité*, (2nd. edn., Paris, LGDJ, 2001)

Wade and Forsyth, *Administrative Law* = W. Wade and C. Forsyth, *Administrative Law*, (OUP, 8th edn., 2002)

Weatherill = S. Weatherill, *EC Consumer Law and Policy* (Longman, 1997)

Whittaker (1985) = S. Whittaker, 'The EEC Directive on Product Liability' 5 *Yearbook of European Law* (1985) 234

Whittaker (1989) = S. Whittaker, 'European Product Liability and Intellectual Products' (1989) 105 *LQR* 125

Zimmermann, *Liability for Non-Conformity* = R. Zimmermann, *Liability for Non-Conformity, The new system of remedies in German sales' law and its historical context, John Maurice Kelly Memorial Lecture* (Faculty of Law, University College, Dublin, Dublin, 2004)

Zimmermann, *Obligations* = R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (Juta & Co. Ltd., 1990)

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