Contents

| A | bbreviations | XV11 |
|----------------|--|------|
| Table of Cases | | xxix |
| To | able of Legislation | xlix |
| | | |
| 1 | General Introduction | 1 |
| | 1. The Starting Point for this Study | 1 |
| | 2. 'Liability for Products' | 5 |
| | (a) The relative attractiveness of claiming against different defendants 6 (b) Recourse between potential defendants 9 | |
| | 3. Broadening the Investigation Further | 10 |
| | 4. The Limits of the Study | 14 |
| | 5. The Structure of the Work and its Treatment of the Material | 15 |
| | PART I CIVIL LIABILITY IN RESPECT OF THE | |
| | | |
| | MANUFACTURE, SUPPLY OR USE OF PRODUCTS | |
| | APART FROM IMPLEMENTATION | |
| | OF THE EC DIRECTIVES | |
| 2 | Introduction to the Private and Public Laws of Liability in France | 19 |
| | 1. The Private Law | 21 |
| | (a) Contract 21 | |
| | (b) Delictual liability 23 | |
| | (c) The relationship between contractual and delictual liability 27 | |
| | 2. The Administrative Law of Liability | 30 |
| | (a) Administrative extra-contractual liability 30 | |
| | (b) Liability arising from administrative contracts 33 | |
| | 3. 'Solidary Liability' in Private and Public Law | 33 |
| | 4. The Time Element | 34 |
| | 5. The Significance of Insurance, Social Security and Fonds de Garantie | 35 |
| | 6. How do these General Frameworks of Liability and Recourse | |
| | Impact on 'Liability for Products'? | 38 |
| 3 | Droit Privé: Delictual Liability for Fault and for the 'Deeds of Things' | 40 |
| | 1. Defining and Finding Delictual Fault | 40 |
| | (a) The institutional context 40 | |
| | (b) The definition of la faute délictuelle 42 | |
| | (c) Establishing fault in the French civil process 46 | |
| | (d) The gathering of evidence 48 | |

X

| | The Restricted Significance of Delictual Fault for Liability for Products Liability without Fault for Harm Caused by Things | 50 52 |
|---|--|----------|
| | (a) Who is liable? 52 | |
| | (b) Causation and attribution 544. Reform of the Law of Motor Vehicle Accidents | 60 |
| | 5. Compensation for Accidents at Work | 61 |
| , | | |
| 4 | Droit Privé: The Law of Sale | 63 |
| | 1. Introduction | 63 |
| | 2. Obligations d'Information | 64 |
| | Liability under the Garantie Légale and its Rivals (a) 'Defect' 73 | 69 |
| | 4. The Buyer's Rights in Respect of Defects | 79 |
| | (a) Does the buyer have a right to the replacement or repair of the goods? 79 (b) Termination, restitution and price reduction 81 (c) Actions for damages 84 | |
| | (d) Causation and defences 86 | |
| | 5. The Bref Délai and its Avoidance | 91 |
| | 6. The Contractual Exclusion of Liability | 93 |
| | 7. Liability beyond Privity | 95 |
| | (a) The general position: actions directes and actions récursoires 96 (b) Manufacturers' guarantees 98 | |
| 5 | Droit Privé: Liability for the Provision of Services Involving Products | 99 |
| | The General Approach to Liability for the Provision of Services Suppliers of products and services 100 The liability of repairers 101 | 99 |
| | (c) Designers, advisers and certifiers 102 | |
| | 2. The Law of Construction | 104 |
| | 3. Hire of Property | 108 |
| | (a) The owner's liability to the hirer 108 | |
| | (b) Other liabilities arising in the context of hire 111 | |
| 6 | Droit Administratif and Liability for Products | 113 |
| | 1. Administrative Liability for Products Based on Fault | 114 |
| | 2. A Restrained Role for the Administrative Law of Contract | 116 |
| | 3. Dangerous Things and Activities | 118 |
| | 4. Liability in Respect of 'Public Works' | 121 |
| | (a) Travaux publics and ouvrage public 122 (b) The bases of liability for harm caused by 'public works' 124 (c) The defendants and their recourse 129 | |
| 7 | Public Services, Service Public and Liability for Products | 132 |
| | 1. The Key Distinction: 'Users of a Service Public' and | |
| | 'Contractual Customers' | 134 |

| | • |
|-----------|----|
| Contents | V1 |
| CUTIVITUS | A1 |

| | Liability in Respect of the Supply of Public Utilities Public Transport Liability for Medical Services and Medical Products (a) The liability of doctors and hospitals 142 (b) The liability of manufacturers and pharmacists 146 (c) The affaire du sang contaminé: Part I—civil liability of the producers and suppliers 149 (d) Legislative intervention in 2002 151 | 136 139 141 |
|---|---|-------------------|
| 8 | Introduction to Private and Public Liability in English Law | 156 |
| | 1. The Legal Bases of Civil Liability | 156 |
| | 2. The English Law of Administrative Liability | 166 |
| | 3. Public Contracts | 169 |
| | 4. A Crucial Unity: The Joint Liability of Tortfeasors and | |
| | Contract Breakers | 172 |
| | 5. Insurance and its Practice; Social Security and Recourse | 173 |
| | (a) The significance of liability insurance in the development of liability (b) Recoupment of sums paid to primary claimants from tortfeasors 17 | 173 |
| 9 | The Tort of Negligence, its Adjudication and its Satellites | 179 |
| | 1. The Dominance of the Tort of Negligence | 179 |
| | 2. Liability for Physical Damage | 181 |
| | 3. Liability for 'Pure Economic Loss' | 183 |
| | 4. Defining Negligence | 186 |
| | (a) Negligence as a lack of reasonable care 186 (b) The standard of care 188 (c) Breach of duty: from jury verdicts to a judicial cost/benefit analysis (d) The relevance of crimes, statutory and other duties, and safety standards 5. Establishing Negligence: Burdens of Proof, Evidence and the Finality of Decision Making (a) The roles of the parties and of the court 205 (b) The notion of evidence, proof and burdens of proof 208 (c) The collection and trial of evidence 210 (d) The finality of decisions on negligence 214 (e) The relationship between the civil process and decisions on negligence or fault 218 | |
| | 6. Breach of Statutory Duty | 218 |
| | 7. Public Nuisance | 224 |
| 0 | The English Law of Sale of Goods | 226 |
| | 1. The Disunity of the English Law of Sale | 227 |
| | 2. The Legal Bases of a Seller's Liability (a) Misrepresentation, non-disclosure and mistake 230 (b) Contract terms as to the quality of goods 232 | 228 |

| | Buyer's Remedies for Failures in Quality, Safety and Fitness for Purpose (a) The right to reject the goods and repudiate the contract 251 (b) Restitution of the price 254 (c) Damages 255 (d) Comparative observations 257 4. Contractual Exclusion of Liability 5. Seller's Liability beyond Privity and Indemnity Actions | 250260264 |
|----|---|---|
| 11 | The English Law Governing Public Services, Private Services and Liability for Products | 267 |
| | Services and Products under the 'Ordinary Law' (a) Liability in respect of the supply of goods and services 271 (b) Contracts involving buildings: tenancies and building contracts 274 | 270 |
| | 2. The Public Supply of Gas, Electricity and Water (a) Liability to customers 276 (b) Liability to non-customers 279 (c) Comparisons with French law 279 | 276 |
| | 3. The Liability of Carriers (a) The general position 281 (b) The rejection of a strict liability for products used by carriers 283 (c) A special vicarious liability via contract 284 (d) Comparisons with French law 285 | 280 |
| | 4. Medical Liability and Medical Products (a) The personal liability of medical practitioners 287 (b) The liability of hospital authorities 289 (c) Contractual liability and medical products 291 (d) The liability in negligence of manufacturers and suppliers 292 (e) The State as manufacturer and supplier of medical products 294 (f) Comparative observations 299 | 286 |
| | PART II ADMINISTRATIVE LIABILITY FOR FAILURE TO REGULATE OR CONTROL PRODUCT SAFETY | |
| 12 | French Law: Formal Bases of Liability and Practical 'Irresponsibility' | 305 |
| | 1. Sources of French Administrative Power and Product Safety | 306 |
| | 2. Liability in the Administration in Respect of Failures in the Exercise of Product Safety Powers (a) Faute simple, faute lourde and illegality 311 (b) The affaire du sang contaminé: Part II—State liability for failures in the control of safety 315 (c) Systemic tendencies towards the 'irresponsibility' of the administration 319 | 310 |

| | Contents | xiii |
|----|---|------|
| 13 | English Law: Recurrent Themes and Endemic Casuistry | 331 |
| | 1. Sources of English Administrative Powers and Product Safety | 332 |
| | 2. Recurring Themes Concerning Duty of Care in Respect of the Exercise of Statutory Powers (a) The statutory context 336 (b) The relationship between the illegality of a public body's action and the need to protect 'policy decisions' 339 (c) The relationship to 'private law' 340 (d) The distinction between persons primarily and secondarily responsible 343 | 335 |
| | 3. The Context of the Safety of Products (a) A failure to enact appropriate rules 344 (b) The enforcement of rules 346 (c) Supplying information about products 349 (d) Controlling access to or continuance in the market of a particular product 351 (e) Choosing between regulatory responses 354 4. The HIV Haemophiliac Litigation and the Disclosure of Documents | 344 |
| | 5. Comparative Observations | 360 |
| | PART III CRIMINAL RESPONSIBILITY FOR UNSAFE PRODUCTS AND ITS RELATIONSHIP TO COMPENSATION | |
| 14 | Fraudes, Homicides and the Role of the Partie Civile | 367 |
| | 1. Introduction | 367 |
| | 2. The Traditional Picture and its Application to Liability for Products (a) The substantive criminal law and whom it governs 369 (b) The role of the partie civile 380 | 368 |
| | 3. Reform, Complexity and Uncertainty (a) Making criminal fault more subjective 387 (b) Protecting 'public decision makers'—and some others 388 | 387 |
| | 4. The Affaire du Sang Contaminé: Part III—Criminal and Constitutional Dimensions of Product Safety (a) The first stage: proceedings against the officers of the National Blood Transfusion Centre in the ordinary courts 395 (b) The second stage: proceedings against government ministers 398 (c) The third and final stage: thirty defendants discharged by the Cour d'appel of Paris 400 | 394 |
| | 5. Conclusion | 401 |
| 15 | English Law: Crime, the Criminal Process and 'Essentially Civil Claims' | 403 |
| | The Substantive Criminal Law and Product Safety (a) Offences special to the product context 405 (b) Offences not special to the product context 407 | 404 |

(c) The defendants 416

| | (d) Concluding remarks 418 2. The Criminal Process and Compensation for Personal Injuries or Death (a) The decision to prosecute and the role of the victim 419 (b) Practical disincentives for private prosecution 422 (c) The restrained use of powers of the criminal courts to order compensation 423 | 419 |
|---|--|-----|
| | PART IV THE EC PRODUCT LIABILITY AND THE CONSUMER GUARANTEES DIRECTIVES AND THEIR IMPLEMENTATION IN FRENCH AND ENGLISH LAW | |
| 6 | The Creation and Maintenance of the EEC Directive on Liability for Defective Products and the Process of its Implementation in the UK and France | 431 |
| | Creating and Maintaining the Product Liability Directive (a) From European Convention to European Directive 431 (b) The EEC competence for the Product Liability Directive and its lasting significance 436 | 431 |
| | (c) The European Court's decisions of 2002: 'complete harmonisation' and its exceptions 440 (d) Review and reform of the Product Liability Directive 444 2. The Process of Implementation of the Product Liability Directive in French Law (a) How the Product Liability Directive looks to French lawyers 451 (b) Abortive attempts at legislative implementation 452 (c) 'Implementation' of the Product Liability Directive by the Cour de cassation 455 | 450 |
| | (d) The loi of 1998 and its correction by the loi of 9 December 2004 457 (e) The present status of earlier French jurisprudence 461 3. The Process of Implementation of the Product Liability Directive in English Law (a) The legal and political debate 465 (b) The form of the legislation and its relationship with other English law 468 (c) Consumer safety, civil liability and the European Court's decisions of 2002 474 | 465 |
| 7 | A Closer Look at the Product Liability Directive | 476 |
| | 1. 'Product' | 476 |
| | The Standard of Liability: Defect, Fault and Development Risks (a) Defect and fault 481 (b) The development risks defence 494 | 481 |
| | 3. Claimants and Recoverable 'Damage' (a) The European Court's decision in Veedfald v Århus | 502 |

| XV |
|----|
| |
| |

| | 4. | 'Caused by a Defect in his Product' | 509 |
|----|----|---|-----|
| | 5. | Defendants and Defences | 514 |
| | | (a) Acting in the course of business, public bodies and 'putting the product | |
| | | into circulation' 515 | |
| | | (b) The different categories of defendant in article 3 521 | |
| | 6. | Time Restrictions on Claiming | 527 |
| 18 | Th | ne Patterns of Liability | 530 |
| | 1. | French Law | 531 |
| | | (a) The impact of implementation of the 1985 Directive on producers, | |
| | | importers and suppliers 531 | |
| | | (b) Liability for products beyond the Directive's defendants 538 | |
| | 2 | (c) 'Solidary liability' and the potential for recourse 546 | 552 |
| | 2. | English Law (a) The impact of implementation of the 1985 Directive on producers, | 553 |
| | | importers and suppliers 553 | |
| | | (b) Liability for products beyond the Directive's defendants 556 | |
| | | (c) 'Joint and several liability' and the means of recourse 557 | |
| | 3. | The Product Liability Directive's Purposes and Harmonisation | 563 |
| 19 | Th | ne Consumer Guarantees Directive and its Implementation in | |
| | | ench and English Law | 565 |
| | | Introduction | 565 |
| | | Broad Differences between the Product Liability and | |
| | | Consumer Guarantees Directives | 566 |
| | | (a) The purposes of the Directives 567 | 700 |
| | | (b) The parentage of the Directives' provisions 568 | |
| | | (c) The imposition of 'liability' and its remedial expression 572 | y. |
| | | (d) Problems of integration within national laws 572 | |
| | 3. | Implementation in French Law: Wider Reform on a European model? | 574 |
| | | (a) The Working Group's proposals 575 | |
| | | (b) The areas of disagreement 576 (c) The autooma of the arguments and the aventual | |
| | | (c) The outcome of the arguments and the eventual implementing legislation 582 | |
| | 4 | English Law: Implementation but Semi-integration | 583 |
| | 1. | (a) The constitutional role of government in implementation | 703 |
| | | of the Directive 584 | |
| | | (b) The consultative process and the technique of implementation 585 | |
| | | (c) 'Scissors and paste' rather than 'copy-out' 587 | |
| | 5. | A Closer Look at the Consumer Guarantees Directive and | |
| | | its Relationship to French and English Law | 589 |
| | | (a) Initial definitions 589 | |
| | | (b) The basis of liability: 'contractual non-conformity' 591 | |
| | | (c) The buyer's rights 604(d) The time within which claims must be made or brought 619 | |
| | | (e) Protection of the buyer's protection 622 | |
| | | (f) Beyond the parties to the consumer contract of sale 624 | |
| | 6. | Concluding Remarks | 627 |
| | | | |

Contents

PART V GENERAL CONCLUSION

| 20 | General Conclusion | 631 |
|-----|--|-----|
| | 1. The Two Directives Contrasted | 631 |
| | 2. Fault and No Fault | 632 |
| | 3. Judicial Institutions, Legal Procedure and Legal Substance (a) Facts and laws 640 (b) Substantive law and legal process 643 (c) Law, facts and the legal characterisation of facts 645 (d) The EU dimension to law and fact 647 | 640 |
| | 4. Public Law and Private Law | 648 |
| | 5. Public Law, Criminal Law and Civil Law | 651 |
| | 6. European Legislation, National Laws and Implementation | 654 |
| | 7. European Harmonisation and Law Reform | 659 |
| | 8. A Series of Contrasts | 666 |
| Ina | lex | 667 |