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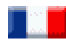

THE ASSOCIATION OF CIVIL LIABILITY ROCEDURES AND NATIONAL SOLIDARITY PROCEDURES IN FRENCH LEGISLATION AS REGARDS THE COMPENSATION OF MEDICAL MISHAP

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THE ASSOCIATION OF CIVIL LIABILITY ROCEDURES AND NATIONAL SOLIDARITY PROCEDURES IN FRENCH LEGISLATION AS REGARDS THE COMPENSATION OF MEDICAL MISHAP

by

Sophie Hocquet-Berg♦

Abstract

In France, the compensation system which deals with medical mishap has undergone sweeping change since the 2002-303 Act was passed on March 4th 2002. This reform has installed two joint procedures for the indemnification of these harms. The first of these procedures is based on civil liability. It mainly deals with professional misconduct and involves the intervention of insurance companies in compensation. The second procedure relies on a new principle – national solidarity. It consists in entrusting state institutions with the redress of medical injuries when no liability is at stake. Initially, these two means of compensation were thought of as complementary. That is, national solidarity only intervened subsidiarily, when the harm could not be compensated by an insurance company. However, a series of Acts passed by the French Parliament have restricted the domain of civil liability while they extended the field of national solidarity. This is why national solidarity is no longer simply considered as complementary to civil liability, but also as an alternative which allows insurers not to pay the compensation that is normally due when a customer's civil liability is involved.

Keywords: Medical mishap - French legislation - Civil liability - National solidarity - National Indemnification Agency – Insurance.

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Civil liability is the legal obligation for someone who caused some harm to compensate for it, either in kind or through equivalence, i.e. by paying damages. National solidarity is more complex as it holds several meanings in obligation law. Although "solidarité" (i.e. joint and several liability) is usually considered as a form of obligation, it has recently been considered as a new way to establish compensation. According to Article 1200 of the French Civil Code, the purpose of joint and several liability is to bind various debtors to a single contract.[1] However, the French legal term "solidarité" also holds a meaning which was borrowed from social and political science. Indeed, it can be conceived of as a humanist initiative taken by people who choose – or feel morally compelled – to help someone. To this extent, solidarity means that the individual in need should be assisted. It is this meaning which the French MPs had in mind when they amended the laws dealing with compensation, thereby creating indemnity funds which mainly rely on public money. Through national solidarity, the French Parliament ordered state institutions to grant compensation to some of the victims of physical harm, even though these institutions are not accountable for such wrongs.[2] Until very recently, only civil liability determined whether a victim of medical mishap could be granted compensation or not. However, because the new laws somewhat oddly combine these two indemnity procedures, they have greatly helped these victims to obtain damages.

The regulations pertaining to medical mishap have indeed undergone a sea-change, and this appears very clearly when they are examined from a historical viewpoint. Not so long ago, hardly anyone would have thought it normal to file a civil lawsuit against a physician and to sentence him to damages on account of professional misconduct. It is only from the middle of the 19th Century that French law courts took such view– while the harms committed in the private medical sector were examined in the Civil courts, those which occurred in public hospitals were dealt with by administrative tribunals.[3] The French judicial system thus established a body of case law on liability based on the notion of proven fault. However, from the 1900s onwards, civil liability law evolved in order to improve the compensation system destined to the victims of physical harm. This is why in an increasing number of rulings, defendants were found liable without fault, especially in the domains of transports, traffic accidents and defective products. The development of civil liability insurance allowed this change to take place.[4] It goes without saying that this change influenced the conception of medical liability. Step by step, it dawned upon people that the victims of medical mishap could not simply be left by the side of the road, and that they should receive compensation even when nobody had been found guilty of any wrong.[5] French courts took into account this emerging expectation, so that it influenced new verdicts. This appeared in the case of AIDS-contaminated blood,[6] and later, in lawsuits related to hospital infections[7] and faulty medical equipment.[8] More recently, this change has also affected rulings in a wider perspective, in a series of cases connected to medication.[9] Henceforth, compensation did not depend upon a proven fault, but merely on a causal link between the victim's harm and his/her treatment.

The French Parliament took action in this legal field lest such an evolution in case law should eventually overturn the principle of medical liability in case of fault. Parliament also intervened in order to prevent insurance companies from deserting the medical liability market. At the same time, French MPs wished to lend an ear to the victims of medical mishap who were rightfully claiming for compensation. The 2002-303 Act of Parliament which was passed on March 4th 2002 was prompted by the then Health Minister, Mr. Bernard Kouchner. It aimed to settle all these issues, as contradictory as they may seem. This Act has indeed succeeded in improving the situation of the victims without putting financial strain on healthcare institutions and the related insurance companies. This was

achieved through the creation of a refunding system which makes national solidarity accountable for part of the indemnity. The other part of this indemnity system relies on the civil liability of medical practitioners. These practitioners now have to take out a liability insurance policy so as to ward off any legal sentence linked to their professional activity.[10] Because of its dual nature, this indemnity system needs coordinating.[11] Solidarity used to be considered primarily as a subsidiary means of compensation which intervened only when the victim could not obtain damages on the basis of civil liability. However, this principle has not only been used for the benefit of victims. It has been redirected towards healthcare practitioners and their insurance companies. This biased use of national solidarity has occurred quite frequently in medical mishap cases. In addition, national solidarity is no longer conceived of as simply a complement to medical liability, but rather as an alternative means of compensation.[12] Indeed, Parliament ended up associating the procedures of liability and solidarity. After choosing a subsidiary approach (see part 1), French legislation evolved towards a substitution system (see part 2.)

Part I: The combination of civil liability and national solidarity as subsidiary rules

The 2002-303 Act of Parliament passed on March 4th 2002 broke new ground in French legislation by causing two complementary compensation rules to interact. The first of these relies on the time-honoured standards of civil liability. They are mostly based on fault and they imply the intervention of professional liability insurers (1). The second procedure's keystone is the new principle of national solidarity, which entrusts the community of French citizens with compensating the medical injuries when there is no insurers' liability (2). In a nutshell, French law sticks to the rule of the medical practitioners' civil liability, even though it allows the victims of medical hazard to subsidiarily claim compensation from a national fund.

1. Confirmation of the medial liability principle

Medical liability is subject, in principle, to fault. That is, when it is established that a patient did not get conscious, thoughtful care, or that his/her cure was not based on sound, valid scientific knowledge. This solution first established in the well-known Mercier judgment, which was issued on May 20th 1936 by the Civil Chamber of the French Supreme Court (Cour de cassation), was never really put in doubt.[13] Despite the numerous doctrines challenging this ruling, the Supreme Court repeatedly confirmed the above-mentioned principle – doctors are only subject to the obligation of providing the means of appropriate treatment.[14] Notwithstanding, the notion of fault may be somewhat distorted when the courts implicitly infer misconduct through stating that the wrong from which the victim suffers is an abnormal one.[15]

The 2002-303 Act of March 4th 2002 has not challenged the Mercier ruling either. Still, it has greatly improved the situation of the victims of medical mishap. As it has been rightly noted, in this domain as well as in others, "those who wished to replace civil liability by a mutualised compensation system have failed."[16] As a result according to the L 1142-I, I article of the Public Healthcare Code, resultant from this Act, medical practitioners are subject to civil liability.[17] This is explained in an abstract phrasing that evades the question whether such liability is contractual or not.[18] Medical fault therefore is and remains the keystone of medical liability. Such a situation may occur, for instance, when a patient has not been tended with proper care, in case of a surgeon's awkward gesture causing an organ

to be cut through, or when a nerve is cut off during an operation. Liability may also result from a faulty diagnosis made by an unwise physician, from the prescription of incompatible or inappropriate drugs, from defective medical team management, and so on. All medical practitioners – doctors, dentists, nurses and nursing assistants, physiotherapists, occupational therapists, and the like – are subject to liability in case of fault, both in the public and the private medical sector. This also applies to healthcare institutions like public and private hospitals, as well as to cooperative surgeries.[19] However, this article of the Public Healthcare Code also echoes rulings which had been issued before the Act was passed, so that it has set up two situations in which liability without fault is established– the cases involving medication, including products drawn from the human body, and the cases which deal with hospital infections. However, as regards the latter, only health institutions can be held responsible without fault, while physicians remain submitted to the obligation of providing secure treatments.[20]

The principle of medical liability in case of fault is a rational one, since it illustrates the undeniable fact that the medical activity is not an exact science. As a result, owing to the hazards of medical treatments, doctors should not be held responsible when a patient's treatment is ineffective.[21] Moreover, healthcare practitioners ought to be allowed to work in peace, without fearing of being sued because of their professional activities. Last, physicians should not be found responsible for medical hazards which – in most cases – they never initiated. In most cases too, these medical hazards existed before they intervened as they are linked to the patients' diseases. This is why medical liability law is the legal sector which has been the most hostile to the "objective" trend of an evolving civil liability legal system. Nobody has ever seriously challenged the principle of liability in case of fault. However, its drawbacks have often been exposed as regards the compensation reserved to the victims of medical mishap. Many people have found it unfair to bar them from damages when they were unable to prove that professional misconduct actually occurred. This situation appeared particularly shocking when new, little-tested medical techniques had been used.[22] It is in this view that national solidarity was devised – as a subsidiary compensation mechanism assisting victims of medical injuries.

2. The subsidiary function of national solidarity

The function of the National Indemnification Agency ("Office national d'indemnisation")[23] is to grant compensation to people who have been harmed by medical injuries, according to the national solidarity principle.[24] This agency is a Civil Service institution which directly depends from the French State. It is headed by the Health Minister and its funds are bestowed by the Public Healthcare Fund (i. e. the "Assurance Maladie.") The conditions attached to the compensation of these harms are prescribed restrictively in the Public Healthcare Code (L1142-1, 2nd Article, 1st paragraph.)[25] This legal document limits the resort to national solidarity to situations in which no fault can be established, i.e when nobody can be held responsible for the harm – neither any healthcare practitioner, nor the establishment in which the treatment was carried out, nor any other organism such as a medication supplier. These limits explicitly describe the subsidiary nature of this kind of compensation – it only intervenes when no fault can be assigned to any person in charge. As no civil liability can be invoked, national solidarity comes into play and expresses society's collective sympathy towards the victims of harms which cannot be redressed by any civil liability insurer. National solidarity indemnities are also restricted through a

threshold which reflects the extent of the harm. This threshold was defined in the 2003-314 decree, published on April 4th 2003.[26] Thus, the decree emphasised the subsidiary nature of national solidarity by limiting its use to particularly dramatic situations involving serious physical harm for the patient. Consequently, only some of the effects of medical hazard are redressed and the "petty victims", who are the most numerous, do not benefit from the new system.[27]As a result, even though the principle remains that of the insurers' civil liability, the new provisions have allowed "national subsidiarity" to intervene in exceptional circumstances.

The National Indemnification Agency has got another subsidiary function in the cases involving physical harm. It also intervenes when the liability of a doctor or a healthcare organism is established but the liability insurer declines to refund the damages, either in part or in total. The grounds for declining payment may range from the sheer absence of any insurance policy to unpaid policy fees, along with an incompatibility of the amount with the policy's indemnity ceilings. The subsidiary function of the national agency therefore makes compensation more coherent by levelling the various indemnity ceilings established by insurance companies. Indeed, the agency makes for the differences in compensation between various insurance policies, implementing the principle of full compensation. As observers have rightly noted, this is one of the most satisfying and innovating aspects of this new Act of Parliament.[28]

Such a combination of civil liability and national solidarity seems to have created a balanced system, since "liability has still precedence over solidarity."[29] Healthcare practitioners should be prompted to provide treatments in a thoughtful and conscientious manner, according to the scientific background of medical science. In this context, we cannot simply rely on these practitioners' sense of professional responsibility. Neither can we simply trust their basic ethical principles.[30] Civil liability remains an indispensable means of regulating of social behaviour, and it seems inseparable from private medical practice.[31] National solidarity has got a different aim. However, it does not run contrary to civil liability – it stands as its complement, because it emphasises the social body's collective assistance towards the people who were struck by medical mishap and whose plight can't be redressed through civil liability. As seen above, the latter remains the main rule and the insurer is still supposed to compensate the victims, while national solidarity and collective damages only intervene in exceptional situations.

French law has therefore succeeded in keeping fault at the core of the medical liability system, even though it has set up an emergency compensation procedure destined to victims who stand in dire situations. Regrettably, however, the coordination of civil liability and national solidarity has not only been considered in a subsidiary perspective. It has also been subjected to a biased substitutive interpretation.

Part 2. The combination of civil liability and national solidarity towards a substitution system

In the bill which later became the 2003-303 Act on March 4th 2002, national solidarity was pictured as a subsidiary means of compensation destined to ward off a failure in liability. Still, as soon as the MPs examined this law project, it was reinterpreted as a way to "rescue" civil liability[32] – through laws that have been rightly deemed "dishonest."[33] Indeed, in this view, the nation is expected to pay damages *instead of* people whose civil liability is being established. This substitution occurred when medical liability was watered down (1) and replaced with national solidarity (2.)

1. Watering down medical liability

It makes no doubt that in recent times healthcare practitioners have been made far less accountable than they were previously. The parliamentary reforms that have occurred in a few years' time have indeed proved lenient to them, for this new legislation has set conditions which make it harder to invoke their civil liability. Despite rumours which spread even into Parliament, the 2002-303 Act of March 4th 2002 has not reinforced the healthcare practitioners' liability – it has toned it down.[34] As shown above, MPs began with cancelling the Supreme Court's case law which made physicians accountable in case of hospital infection even without fault. Such watering down also occurred independently from parliamentary action. Under the directive on defective products requirements, it seems that tribunals will be hardly able to invoke the physicians' liability as product providers or users of a defective product, even though the L 1142-1, 1st paragraph of the Public Healthcare Code describes this rule through vague, abstract phrasing. In all such cases, if no mistake was made by the healthcare practitioner and if nobody else can be held accountable, the victims of medical mishap are unable to obtain compensation from the practitoners' insurers. Last, this toning down of medical liability has also appeared in injuries linked to birth. Public opinion reacted strongly to a ruling of the French Supreme Court whereby compensation had been granted to a severely disabled child whose mother had caught German measles during her pregnancy. The practitioner had failed to detect this problem before the child's birth.[35] This event led healthcare lobbies, physicians and the media to ask Parliament to restrict the field of civil liability in the 2002-303 Act of March 4th 2002,[36] which had been first entitled – paradoxically enough – "*Solidarity for the Disabled*."[37] As a consequence, a child suffering from a severe congenital disability which occurred because the physician or the analysis laboratory failed to detect his/her condition before he was born cannot legally claim compensation for his injury in civil liability.[38] In addition, the parents of a child who was born with a severe disability cannot claim damages so as to redress their pecuniary loss. As regards their non-pecuniary loss, it shall only be open to compensation if a blatant fault is established. Through depriving children and – partly at least – parents of the compensation rights guaranteed by civil liability principles, Parliament has created some kind of immunity. This is hardly compatible with the rule of compensation for fault, although this rule was declared of Constitutional nature by the Constitutional Council.[39] True, the new Act considers that "the compensation of such harms is a matter of national solidarity", adding further down that "any disabled person is entitled to benefit by the solidarity of the whole national body, whatever the cause of his/her disability." This generous statement is misleading, however. Not only have these victims been barred from the damages which were previously granted through civil liability but they can no longer claim compensation at the National Indemnification Agency, even though this institution was set up by the same Act.

Since then, MPs have kept watering down medical liability, giving more scope to the National Indemnification Agency in the same time.[40] For instance, the 2002-1577 Act passed on December 31st 2002 ordered the "France Hypophyse" charity to stop compensating the victims of the Creutzfeldt-Jakob disease who had been treated with extracts of growth hormone. This mission was transferred to the National Indemnification Agency. Hence, the tasks carried out by this charity, which stemmed from its original function – it helped organising growth hormone treatments between 1973 and 1988 – are now under the responsibility of the Agency. Likewise with the 2004-806 Act, passed on August 9th 2004, which deals with public health policies in the field of biomedical research.[41] Indeed, the Act has restricted the recourse to civil liability in this medical area.

From now on, the laboratories' liability relies on an assumed fault, for which they can easily declare themselves unaccountable.[42] As the domain of the research organisers' liability has shrank, their compensation duties have been alleviated, although these research organisers still have to take out insurance policies. Accordingly, the field of national solidarity has been extended. As concerns this kind of wrongs, victims may be compensated by the National Indemnification Agency, whatever the extent of the injury.

All these new pieces of French legislation have a common point. Instead of trying to better the condition of those who were harmed by medical mishap, they allow the people who were previously deemed accountable for such faults to pay less compensation. The watering down of civil liability is therefore a godsend to insurance companies. While insurers have obtained lower compensation expenses in case of medical mishap, only some of them have taken the trouble of adapting the medical practitioners' insurance policy premiums to this new state of things. And in most of the cases in which the victim cannot pinpoint any person accountable for his/her wrong, legislation has transferred the obligation of payment from insurers to the National Indemnification Agency, in a process guided by national solidarity.

2. National solidarity used a substitutive means of indemnification

Occasionally, when Parliament wished to put the collectivity in charge of the compensation linked to medical mishap, MPs did not even bother to use the trick of alleviating the civil responsibility of healthcare practitioners. In such a case, the rules of civil liability were sustained for health practitioners, even though the national collectivity was ordered to pay the damages. Two distinct means have been used to this effect.

First, in some legal areas, Parliament transferred the compensation amount from the accountable person or institution to the collectivity, on national solidarity grounds. Thus, as regards the most severe hospital infections, since the 2002-1577 Act passed on December 30th 2002 –the so-called "About Act" –national solidarity is in charge of damages.[43] However, such cases still entail the healthcare establishments' liability without fault, as indicated in the above-mentioned article of the Public Healthcare Code (L 1142-1, second paragraph.) In the situation in which the victim dies or gets a definitive disability rate of more than over 25%, insurers got the State to switch the compensation from themselves to the collectivity, on national solidarity grounds. However, the rules pertaining to these institutions' liability were not modified accordingly. Therefore, in the most dramatic hospital infection cases, damages are not paid by healthcare institutions but by the whole nation, that is, through the National Indemnification Agency. Although the Act allows victims to sue accountable healthcare bodies, such lawsuits are rather exceptional. Actually, victims can only take such legal action if they bring proof of "a fault of the insured organisation which caused the harm, especially the blatant lack of hygiene standards as regards hospital infections." As a result, when a healthcare establishment is held responsible without fault, the collectivity will usually pay the damages, not the insurer. For the Agency cannot the insurer to refund the above mentioned compensation, unless the insured institution committed a rather serious mistake. Clearly enough, Parliament has decided to assign to the collectivity the charge of paying this kind of indemnity, thereby setting up a global distribution of damages between national solidarity and insurers as regards hospital infections.[44] Similarly, as regards the AIDS victims who were contaminated through blood transfusion, the 2004-806 Act of August 4th 2004 has ordered the National Indemnification Agency to pay the whole compensation amounts, regardless of civil liability issues. The Agency therefore replaces the Contaminated Victims' Indemnification

organisation, which had been set up through the 91-1406 Act on December 31st 1991.[45] Likewise with people infected by the C-Hepatitis virus – the 2008-1330 Act, passed on December 17th 2008, entitles them to full compensation on the grounds of national solidarity. They should address their claims to the National Indemnification Agency, but they need not prove that their blood suppliers are accountable for their harms. The Act only allows the Agency to require refunding from insurers if it can be proved that the harm occurred because of a mistake made by the person in charge.[46] In other words, that when someone whose civil liability is involved in a case in which he/she supplied a defective blood product will not pay damages – payment will be carried out by the collectivity.[47] As in other cases, the State is in charge of compensation, whereas the accountable person and his/her insurer should be involved.

In addition, in the name of national solidarity, the collectivity is now liable for part of the insurance premium. In principle, contracting an insurance does not cancel liability. It simply entails that a person who has caused harm can be relieved from paying damages if he/she has paid the relevant insurance premium.[48] But one wonders whether healthcare practitioners *do* pay premiums for their civil liability insurance contracts. Actually, since the 2006-1559 decree was published on December 7th 2006, they only pay a part of these amounts. Indeed, the State has pledged to financially assist healthcare practitioners in this respect.[49] The government initially intended to limit this assistance to irreproachable medical staff, excluding all the people who have been sentenced to some specific penalties. However, this restriction was thrown out by the Council of State.[50] An obstetrician-gynaecologist can now be granted up to €18,000.[51] As the Ministry of Health and Solidarity pointed out, a First Sector gynaecologist who pays € 15,000 for his civil liability policy premium is refunded €10,000.[52] One may ask what civil liability means in such a situation, as it fades into insignificance – not only as regards the fact of paying an insurance policy premium, but also concerning the role of an insurance policy in the context of a legal case. Does civil liability mean anything anymore, even for physicians whose practice is not up to professional standards?

In our opinion, insurance policy premiums should not be paid by society, since these premiums are linked with the practice of a private profession. And the fact that healthcare practitioners work in pursuance of the public interest does not make any difference. In addition, owing to the moral dimension of civil liability, any harm should be compensated by the person who caused it or by his/her insurance company. In a wider view, society should not redress wrongs that involve civil liability. The collectivity should never stand for the person who caused the harm and replace his/her insurer, be it totally or partially. That is, when an accountable person is let off without any sanction, national solidarity should not be a cover-up for such immunity.[53] Let us note that the National Indemnification Agency was bestowed €117m in 2009. Undoubtedly, the share of this public money which is devoted to the victims that cannot claim compensation in civil liability is spent with a genuine sense of collective assistance. However, the portion of these funds which society uses to pay the damages that should be disbursed by the accountable or their insurers – thereby allowing them to evade their duties – does not match our own vision of solidarity.

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[1] See Leçons de droit civil, précit., n° 1053.

[2] See R. Garnier, Les fonds publics de socialisation des risques : JCP G 2003, I, 143.

[3] Cass. civ., 20 mai 1936 : D. 1936, 1, 88, concl. Matter, rapp. Josserand, note E.P ; S. 1937, 1, p. 321, note A. Breton.

[4] As regards the changes in ivil liability provoked by liability insurance, see G. Viney, Introduction à la responsabilité, LGDJ, 3e éd., 2008, n° 19 and following.

[5] In our PhD thesis, under the supervision of François Chabas, we argued that the medical contract should be considered as an obligation to provide safe treatments. See "Obligation de moyens ou obligation de résultat ? A propos de la responsabilité civile du médecin." Paris XII, 1995, Atelier national de reproduction des thèses (ANRT), réf. 20674. Also cf. P. Sargos, Réflexions sur les accidents médicaux et la jurisprudence de la Cour de cassation en matière de responsabilité médicale : D. 1996 chron. 365, n° 17 ; L'indemnisation des accidents médicaux, sous la direction de G. Viney, LGDJ, tome 289, 1997.

[6] Cass. 1re civ., 12 avr. 1995 : Bull. civ. I, n° 179 et 180 ; JCP G 1995, II, 22467, note P. Jourdain ; D. 1995, inf. rap. p. 130 et 131 ; Resp. civ. et assur. 1995, comm. 241 ; RD sanit. soc. 1995, p. 766.

[7] Cass. 1re civ., 21 mai 1996 : Bull. civ. I n° 219 ; Resp. civ. et assur. 1996, comm. 265 et chron. 29 par H. Groutel ; RTD civ. 1996, p. 913, obs. P. Jourdain ; JCP G 1996, I, 3985, n° 24 s., obs. G. Viney ; Dr. et patrimoine 12/1996, n° 1530, obs. F. Chabas ; D. 1997, somm. comm. p. 320, obs. J. Penneau ; ibid, p. 287, obs. D. Mazeaud ; Def. 1997, art. 36526, obs. A. Bénabent. - Cass. 1re civ., 29 juin 1999, 3 esp. : Bull. civ. I, n° 220 ; D. 1999, jurisp. p. 559, note D. Thouvenin ; JCP G 1999, II, 10138, rapp. P. Sargos ; Gaz. Pal. 29/30 oct. 1999, p. 37, note J. Guigue ; Gaz. Pal. 5/6 avr. 2000, doct. p. 13 par S. Hocquet-Berg ; Petites Affiches 15 nov. 1999, p. 5, note I. Denis-Chaubet ; Méd. et Droit 1999, n° 37, p. 3, note P. Sargos ; La Revue du praticien 1999, n° 472, p. 1499, note F. Chabas ; F. Vialla, Méd. et Droit 1999, n° 37 p. 4 ; JCP G 2000, I, 199, n° 15 s., obs. G. Viney ; RTD civ. 1999, p. 841, obs. P. Jourdain ; Resp. civ. et assur. 1999, chron. n° 20 par H. Groutel ; Defrénois 1999, p. 994, obs. D. Mazeaud ; D. 1999, somm. p. 395, obs. J. Penneau.

[8] Cass. 1re civ., 9 nov. 1999 : D. 2000, p. 117, note P. Jourdain.

[9] Cass. 1re civ., 7 nov. 2000, D. 2001, somm. p. 2236, obs. D. Mazeaud, et p. 3085, obs. J. Penneau.

[10] Public Healthcare Code (Code de la santé publique), L. 1142-2 article.

[11] H. Groutel, Quelle prise en charge ? : Resp. civ. et assur. hors série juin 2001, étude 12.

[12] G. Durry, Responsabilité médicale et solidarité nationale : Risques, mars 2002, n° 49, chron. 4.

[13] D. 1936, 1, 88, concl. Matter, rapp. Josserand, note E.P ; S. 1937, 1, p. 321, note A. Breton.

[14] Cass. 1re civ., 25 févr. 1997 : n° 95-11.205

[15] See for example Cass. 1re civ., 30 nov. 1997, n° 95-16.500 : Bull. civ. I, n° 259 ; Resp. civ. et assur. 1997, comm. n° 373 ; Rev. dr. san. soc. 1998-288, obs. L. Dubouis.- Cass. 1re civ., 3 févr. 1998, n° 96-13.329 : Bull. civ. I, n° 46 ; Resp. civ. et assur. 1998, comm. 165 ; JCP G 1998, I, 187, n° 33, obs. G. Viney.

[16] G. Viney, op. cit. n° 47-3.

[17] G. Viney, op. cit. n° 47-3.

[18] This text reads: « *Hors le cas où leur responsabilité est encourue en raison d'un défaut d'un produit de santé, les professionnels de santé mentionnés à la quatrième partie du présent code, ainsi que tout établissement, service ou organisme dans lesquels sont réalisés des actes individuels de prévention, de diagnostic ou de soins ne sont responsables des conséquences dommageables d'actes de prévention, de diagnostic ou de soins qu'en cas de faute* ».

[19] See S. Hocquet-Berg et B. Py, La responsabilité du médecin, Heures de France, coll. droit professionnel, 2006.

[20] Cass. 1re civ., 29 juin 1999, précit.

[21] See S. Hocquet-Berg et B. Py, La responsabilité du médecin, Heures de France, coll. droit professionnel, 2006.

[22] G. Viney, L'avenir des régimes d'indemnisation indépendants de la responsabilité civile, Mélanges Drai, p. 671.

[23] The full name of this institution is the "'Office national d'indemnisation des accidents médicaux, des affections iatrogènes et des infections nosocomiales" (it is usually called through its acronym, i.e. "ONIAM".)

[24] Public Healthcare Code, art. L. 1142-22.

[25] This text reads: « *Lorsque la responsabilité d'un professionnel, d'un établissement, service ou organisme mentionné au I ou d'un producteur de produits n'est pas engagée, un accident médical, une affection iatrogène ou une infection nosocomiale, ouvre droit à la réparation des préjudices résultant du patient et, en cas de décès, de ses ayants droit, au titre de la solidarité nationale, lorsqu'ils sont directement imputables à des actes de prévention, de diagnostic ou de soins et qu'ils ont eu pour le patient des conséquences anormales au regard de son état de santé comme de l'évolution prévisible de celui-ci et présentent un caractère de gravité, fixé par décret, apprécié au regard de la perte de capacités fonctionnelles et des conséquences sur la vie privée et professionnelle mesurées en tenant notamment compte du taux d'incapacité permanente ou de la durée de l'incapacité temporaire de travail* ».

[26] Public Healthcare code, D. 1142-1 article. According to this legal document, the threshold is taken into account when the claimant suffers a disability rate superior to 25 %, or when his harm, his hospital

infection or his medically-induced disease makes him totally unable to work for at least 6 consecutive months, or for six months over a stretch of twelve months. Quite exceptionnally, according to this text, the state of the victim may be declared dramatic either when the victim is found unable to exert his/her former employment before he/she was struck by the medical mishap, the medically-induced disease or the hospital infection ; or when the medical mishap , the medically-induced disease or the hospital infection cause particularly severe damage in his/her daily life, including economic problems.

[27] Y. Lambert-Faivre, La loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé. 3. L'indemnisation des accidents médicaux : D. 2002, chron. 1367.

[28] Y. Lambert-Faivre, chron. précit.

[29] Ch. Radé, étude précitée : Resp. civ. et assur. 2002, étude 7, spéc. p. 11.

[30] About the danger of a lack of liability incurred by the indemnification of medical hazard, P. Sargos notes that many other things, including a basic sense of ethics, are able to help people preserve a sense of professionnal responsibility (« *bien d'autres éléments, à commencer par une éthique élémentaire, sont de nature à maintenir la conscience professionnelle* ») : JCP G 2001, II, 10493, n° 11.

[31] See F. Ewald, Le problème français des accidents thérapeutiques. Enjeux et solutions, a report addressed to B. Kouchner, Ministry of Health, Public Healthcare and Humanitary Action, sept.-oct. 2002, p. 112.

[32] This is inspired from the title of Ch. Radé's analysis, La solidarité au secours de la responsabilité : Resp. civ. et assur. 2003, étude 5.

[33] This is also the title of G. Courtieu's analysis, L'indemnisation des accidents médicaux : des lois perverses : Resp. civ. et assur. 2003, étude 6.

[34] Ph. Brun, op. cit. p. 517, note 155. And also Ch. Radé, Resp. civ. et assur. 2003, étude 5, spéc. p. 8.

[35] Cass. ass. plén., 17 nov. 2000 : Bull. ass. plén., n° 9 ; JCP G 2000, II, 10438, rapp. P. Sargos, concl. J. Saint-Rose, note F. Chabas ; D. 2001, p. 336, notes P. Jourdain et D. Mazeaud ; *ibid*, somm. p. 2796, obs. Vasseur-Lambry ; Gaz. Pal. 2001, p. 37, rapp. P. Sargos, concl. J. Saint-Rose, note J. Guigue ; Dr. Fam. 2001, n° 11, note Murat ; Contrats conc. consom. 2001, comm. 39, note L. Leveneur ; RTD civ. 2001, p. 103, obs. J. Hauser ; *ibid* 149, obs. P. Jourdain.

[36] P. Jourdain, Loi anti-Perruche : une loi démagogique : D. 2002, Point de vue, p. 891.

[37] These notions are now included in the L. 114-5 article of the Code of Family and Social Initiative (Code de l'action sociale et des familles.)

[38] He was allowed to use this title through the precedent established by the Cassation Court (mentioned in the ruling of the 17th november 2000 session, see note 72).

[39] CCel, déc. 82-144 du 22 oct. 1982 : Gaz. Pal. 1983, 1, p. 60, note F. Chabas ; D. 1983, p. 189, note F. Luchaire.- Ccel, déc. n° 99-419 du 9 nov. 1999 : JCP G 2000, I, 210, chron. N. Molfessis.

[40] See S. Hocquet-Berg, L'Oniam ou La grenouille qui veut se faire aussi grosse que le bœuf … : Resp. civ. et assur. 2004, Alertes 30.

[41] S Hocquet-Berg et P. Peton, Le régime juridique de la recherche biomédicale réformé par la loi du 9 août 2004 : Resp. civ. et assur. 2004, chron. 23.

[42] Public Healthcare Code, L. 11121-10 article.

[43] J. Bigot, La loi n° 2002-1577 du 30 décembre 2002 sur l'assurance médicale, une lueur d'espoir pour les « clauses "réclamations "» : JCP G 2003, I, 118 ; G. Courtieu, art. précit. ; Y. Lambert-Faivre, La responsabilité médicale, la loi du 30 décembre 2002 modifiant la loi du 4 mars 2002 ; Ch. Radé, art. précit. : Resp. civ. et assur. 2003, étude 5 ; P. Sargos, Le nouveau régime des infections nosocomiales, JCP G 2002, act. 276 ; P. Villeneuve, Les vicissitudes de l'assurance de responsabilité civile des professionnels de santé, Les Petites Affiches 17 déc. 2004, n° 252, p. 5.

[44] En ce sens, Ph. le Tourneau, Droit de la responsabilité et des contrats, Dalloz Action 2008/2009, n° 8272-4.

[45] As mentioned in the new L. 1142-22 article (2nd paragraph) of the Public Healthcare Code.

[46] Public Healthcare Code, 3122-4, 1st paragraph.

[47] Public Healthcare Code, 3122-4, 1st paragraph.

[48] Leçons de droit civil, op. cit., n° 372-2.

[49] See Code of the French NHS (Sécurité Sociale), D. 185-1 and D. 185-2 articles.

[50] State Council, november 21st 2009, n° 306152, Union of Franch Surgeons (UCDF)

[51] See code of the French NHS, D. 185-1 article.

[52] Xavier Bertrand, Minister for Health and Solidarity, public declaration to the press, December 11th 2006.

[53] See H. Groutel, Quelle prise en charge ? : Resp. civ. et assur. hors série juin 2001, étude 12, spéc. n° 19.