REINFORCING THE RIGHTS OF THE VICTIM IN THE FRENCH LAW ON CIVIL LIABILITY

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In the last century the system of civil liability in French law has moved from being fault based to a system of guarantee, motivated by the desire to provide indemnity to victims. This shift occurred in the common law of France and has been complemented by significant legislative intervention. In this article Dr Sage explains the role and operation of the legislative methods of reinforcing the rights of victims and, in particular, the operation of the guarantee systems established by the state for road accident victims, for the victims of hunting accidents, of criminal injuries, of acts of terrorism, and for persons who have received transfusions of blood contaminated by the AIDS virus.

I INTRODUCTION

> Traditionally, it was considered that the structure of civil liability rested on three bases which, depending on the circumstances, could operate in an autonomous manner, but which most often were found in combination: fault, risk, guarantee.[1]

However, the study of the development of French civil liability since its origin shows a continuing slippage which indicates a clear withdrawal from the first of these bases in favour of the last of them. By linking civil liability solely to the goal of indemnifying the victim it is to be noted that, certainly in the second half of the nineteenth century, civil liability expanded in scope and gained strength;[2] but it appeared particularly as a true right of indemnity conferred on the person who suffered loss.

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1 P Guiho et G Peyrard *Droit Civil. Les Obligations* (Tome I, "Les Sources," Edit L'Hermes, 1991) 418.

2 Fault plays a secondary role. For both courts and academics, the tortfeasor's behaviour was no longer the only issue. Finding its origin in the theory of risks and its consecration by the case

In other words, the risk of the insolvency of the person under the duty to provide the indemnity was not to be borne by the victim. This is the doctrine that came to be known as the socialisation of risks,[3] and its corollary was the right to an indemnity.[4] Private or state insurance, strangers to the damage itself, became involved in the process of indemnification and were more and more frequently substituted for the original debtor.

Though this tendency, whose basis or utility cannot be denied, indubitably shows a reinforcement of the rights of the victim, particularly when the person who has caused the damage is unknown or insolvent, it is nevertheless the case that civil liability no longer plays a role in the indemnification process other than one which is "very much secondary, relative to that of social welfare and private insurance".[5]

The consequence is that this intervention by third parties, which is influential in the process of indemnification, in the end creates non-responsibility on the part of the person who caused the loss.[6]

It should equally be noted that on the borders of the classical law of liability, there has been created a body of rules which ensure a specific compensation regime which looks to compulsory indemnification. In other words, there will be an element of the automatic in the law of indemnification in broader areas which may well end up covering a large number of the circumstances which can give rise to damage either in daily life or where road accidents or assaults are concerned. The same may occur in rather more exceptional circumstances but with consequences which are frequently very serious. These might be terrorist attacks and the losses which result from the use of nuclear energy[7] and dangerous products, or even the risks of contamination by the AIDS virus as a result of blood transfusions.

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law, the current concern is to provide the victim, with adequate indemnification. On this subject, see notably F Terré, *Propos sur la responsabilité civile,* Archives de Philo Dr 1977, T 22, p 37.

3 See notably, Y Lambert-Faivre, "Pour un nouveau regard sur la responsabilité civile", D 1983 Chr 102; J-L Fagnard, "La socialisation des risques par les mécanismes de la responsabilité civile et de l'assurance" *Les Assurances de l'Entreprise* (1988) 419.

4 G Viney *Le déclin de la responsabilité personnelle,* (LGDJ 1965).

5 A Tunc *La responsabilité civile* (Economica) n 174 and following.

6 G Viney "De la responsabilité personnelle à la réparation des risques", Archives Philo du Droit 1987 p 5.

7 On the nuclear operators' liability, see J Depremoz "Les innovations apportées par la loi n° 90-488 du 16 juin 1990 à la mise en jeu de la responsabilité civile des exploitants nucléaires" JCP, 1990, Doctr 3467.

By way of example the law of 5 July 1985, which aimed at improving the situation of the victims of road accidents and the speeding up of the compensation procedures undeniably supports the idea of collective solidarity, and further it makes no reference to the notion of liability.[8]

II THE OPERATION OF INSURANCE CONTRACTS

The question here is not the detail of insurance contracts, or even the different systems that guarantee victims some indemnity for their losses,[9] but simply the way insurance contracts influence the process of indemnification in the field of liability insurance.

Once the liabilities have been established, the existence of a valid insurance contract of which the tortfeasor can take advantage will ensure the victim compensation for the loss suffered.

Liability insurance is extremely widespread in practice, and is of interest both to the insured who has contracted it to protect himself against the risks to which his actions expose him and to the insurer who must bear the final cost of the liability if the insured person is held liable or simply implicated in a way which gives rise to the operation of the guarantee provided in the insurance contract.[10]

It is to be noted therefore that if, in principle, responsibility for compensation rests on the tortfeasor, in practice it is often the insurer who bears the final cost. It is no longer a question therefore between the parties concerned as a simple relationship involving two distinct patrimonies: that of the victim who is a creditor for the indemnity whose patrimony has been reduced by reason of the harm suffered and which warrants protection, and that of the insurance company debtor in respect of this same indemnity.[11]

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8 J Huet, Rev Trim Dr Civ 1986, p 122. A. Lacabarats, La loi n° 85-677 du 5 July 1985, Gaz Pal 1987. I doctrine 79. See also, Y Lambert-Faivre, "L'évolution de la responsabilité civile d'une dette de responsabilité à une créance d'indemnisation" p 103 above n 3.

9 For a complete study of the different insurance contracts' mechanisms, see *Encyclopédie Dalloz Assurances Civil* and *Jurisclasseur Civil*, (Éditions Techniques), "Responsabilité et Assurances", Fasc VIII bis à F 4.

10 The law of 5 July 1985, which states the principle of the non driver victim's indemnification does not exclude the possibility tof taking the victim's fault in consideration (when a particularly important or intentionally fault is committed). Victims of terrorists or criminal attacks could also face the risk of having their behaviour opposed to them, in order to reduce the amount of the indemnification. Cass Civ II, 29 March 1989, Bull Civ 1989 n° 85. Cass Civ II, 20 July 1987, 11 decisions, Bull Civ 1987, n° 160 to 161.

11 Ch Larroumet, "L'indemnisation des victimes d'accident de la circulation, l'amalgame de la responsabilité civile et de l'indemnisation automatique", D 1985. Chr 237.

Another use of the liability insurance contract is that it provides support for a purely case law development which ensures to the victim a claim against the insurer of the assured, by way of direct action.

A Effects of the Insurance Contract of the Assured on Indemnification of the Victim

Logic demands that the insurer be called in guarantee because the insurer is bound to cover the risks created by the insured as a result of the insurance contract made by the latter with the company.

From this it is easily seen that the insurer can have interests which, if they are not contradictory to those of the insured, are certainly contrary to those of the victim. The first gives rise to a tendency to have various clauses, which limit the extent of the cover, inserted in the contract with the insured.

Traditionally three clauses have arisen for consideration:[12]

1 The prohibition on the insured from recognising liability in the event of damage being caused.

If at first glance this clause appears demanding, in reality it must be given its proper value. Indeed the Court of Cassation has been led to decide that the recognition of liability only affects the insured and does not permit the insurer to refuse to cover the risk if the liability of the insured has otherwise been clearly proved.[13]

2 A clause prohibiting compromise.[14]

This clause allows the insurance company to refuse to be bound by any direct agreement which has been entered into between the insured tortfeasor and the victim. But just as in the case of clauses prohibiting recognition of liability, the victim cannot have their rights contradicted by an agreement entered into in this way. The compromise will bind the insured who can be compelled to honour it without being able to resort in the final instance to any protection provided by the prohibition on compromise clause.

3 The clause concerning the control of the process.[15]

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12 Picard et Besson *Les assurances terrestre*, (T I, 4eme éd 1975), n°365 p 542 et s Y Lambert-Faivre, *Droit des assurances,* (Dalloz 1985) n° 376 and following; E Kornprobst *Encyclopédie Dalloz Civil,* "Responsabilité Assurances de dommage", n° 319. The "reclamation to the victim" clause will not be considered. On the subject, see Y Lambert Faivre, D 1992, Chron 13.

13 Cass Civ 18 February 1964, Rev Gén Ass Terr 1964, 502.

14 B Legrand et H Margeat "Le rôle de la transaction dans les accidents de la circulation" Gaz Pal 1979, doctrine 222.

According to one author, this clause "caps the protecting structure provided by insurance to its benefit".[16] The process in matters of liability interest the insurance company primarily because it will bear the final cost of the payment. Frequently, therefore, insurance policies contain a clause by which the insurer reserves to itself the right to control any court proceedings.

This has been analysed as a promise of agency, and the case law deduces from it that the powers which are conferred on the insured do not permit the insured thereby to harm the interests of the insured.[17] The putting into operation of this condition by the insurer involves the renouncing of all the exceptions of which the insured had knowledge at the time it took up the control of the proceedings.[18] and therefore it will be bound to indemnify the victim subject only to the liability of the insured person being upheld in the courts.

The consequence of non-respect by the insured of this clause results in the failure of the insurance contract if the insured defends the case alone.[19] As a matter of prudence it is therefore necessary, if the insured has not done so, for the victim to join the insured in the process in order to guarantee the final settlement of the compensation.

B Direct Action by the Victim Against the Insurer

The nature of an insurance contract leads one to think that the insurer will first indemnify the insured person who in turn will indemnify the victim, but it is easy to see the practical difficulties in such a handling of the matter which, at the end of the day, would not always ensure compensation for the victim. That is why the Court of Cassation from 1911[20] has recognised the existence in the victim of a right of direct action against the insurer of the person who is responsible for the loss suffered. Article 53 of the law of 13

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15 V C Freyria "La direction du procès en responsabilité par l'assureur" JC P 1954. I 1196.

16 E Kornprobst, above n 12, n° 350.

17 Paris 20 January 1956, D 1957, 400, Note G Briere de l'Isle.

18 Article L.113-17 of the Insurance Code.

19 Cass Civ 5 December 1972, Gaz Pal 1973. I 414, note HM.

20 Cass Civ 17 July 1911, D.P 1912. I 81. Cass Civ 19 January 1932, S 1932. I 108. On the historical background of the direct action, see Picard et Besson, *Les assurances terrestres* (5è ed, t I 1982) n° 379.

July 1930 confirmed this line of case law[21] in order to make it "one of the key aspects of liability insurance".[22]

1 The legal basis of direct action

This is a purely case law development and the direct action finds its basis in the existence of a valid insurance contract which covers the person liable. The Court of Cassation confirms this unequivocally in providing that the direct action of a person who has suffered loss can be exercised against the insurer of the person liable, at the same time as this insurer is liable to claims made by the insured.[23]

On first analysis, the direct action resembles the oblique action[24] or the third party benefit contract. Such an analysis however is erroneous.

In fact, since the oblique action requires the existence of an actual credit or of an executory title, it would be sufficient for the victim, who wished to sue the insurer of the tortfeasor on the basis of the direct action, to rely on a credit which is already established[25]. Furthermore, unlike the oblique action, the direct action allows the victim to avoid competition with other creditors of the insured.[26]

Similarly, the clause for the benefit of the third party cannot alone explain the basis of the direct action.[27]

Article 2102 paragraph 8 of the Civil Code which gives a victim a privilege in respect of the insurance indemnity, combined with the necessary existence of the insurance contract, requires that the direct action has an original basis of its own. As a result , it is distinct on a strict analysis from the contract of insurance, while being closely linked to it, and the

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21 Article 53 of the law of 13 July 1930 (DP 1931. 4 I) became article L 124-3 of the Insurance Code.

22 L Aynes et G Durry *Encyclopédie Dalloz Civil*, "Assurances de dommages", n° 378.

23 Civ III , 22 July 1987, D 1988, Somm. 151, obs Groutel; Bull Civ III, n° 149 Civ I, 16 February 1988, D 1989, Somm. 245, obs Groutel ; Bull Civ I , n° 41.

24 Article 1166 of the Civil Code.

25 The Court of Cassation has stated that "the direct action exercised by the victim presupposes a preliminary assessment of the quantum of the victim's compensation ", Cass Civ 30 October 1984 D 1986, I R 95, obs Berr and Groutel.

26 L Aynes et G Durry above n 22, n° 378. On the conditions of the oblique action, see in particular Aubert, 1969 Rev Trim dr Civ 692. From a practical perspective, due to security reasons, it is common to join the debtor in the proceedings, when the action is made against the insurer. See Guiho *Cours de Droit Civil: Les Obligations* (Ed L'hermes 1983 and 1987).

27 L Aynes et G Durry above n 22, n° 380.

victim can even exercise rights against the insurer which the insured is not claiming.[28] However, the natural corollary of this original characteristic is that the victim has to have a true right against the person liable before the action can be used, without this neither compensation, confusion, nor prescription can operate against the insured.[29]

Jurisdiction in matters of the direct action is not without its difficulties.

First of all, the action relies on the attribution of jurisdiction of the courts.[30] The law of 8 July 1983[31] provides (and this against all legal logic) that the criminal courts have jurisdiction to deal with claims against insurers who are called to compensate for loss suffered.[32] This therefore excludes all jurisdiction in the administrative courts to make the insured person liable.

Articles 42, 43, and 46 of the new Code of Civil Procedure, which regulate the operation of the common law rules relating to territorial jurisdiction, are applied in direct action cases in such a way that the victim can choose to bring the case either before the court of the domicile of the insurer, or even of the insured by way of appeal brought by the insurer.[33]

2 The effects of the direct action

The insurer and the insured are jointly liable for the payment of the compensation to the victim, and the victim can, on the basis of a direct action, proceed directly for payment against the insurer.[34]

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28 Cass Civ 28 March 1939, DP 1939, I 68, note Picard, Berr and Groutel *Les grands arrêts du droit des assurances* Sirey 1978, 220. Civ 8 April 1986, Bull Civ I, n° 78.

29 Civ 10 March 1982, D 1984, IR. 33, obs Berr and Groutel. Cass Civ, 1è, 10 May 1988, D 1988, IR. 145, Rev .Gén. Assur. Terr 1988, 540, obs R.Bout, Bull Civ I, n°129. Cass Civ 1è, 20 July 1988 , Bull Civ I, n°254.

30 Tribunal des Conflits, 14 March 1988, D. 1988 IR 145.

31 Law n° 83-608 of 8 July 1983, D. 1983, 351, to be considered in association with art. 388-1 § 2 of the Criminal Procedure Code.

32 L Aynes et G Durry, above n 22, n°399. Crim 2 March 1988, D. 1988, Somm. 355, obs Pradel, Gaz Pal 12 July 1988.

33 It is an exception to art R 114-1 of the Insurance Code which indicates which court has geographical jurisdiction for claims between insurance companies and their policyholders. Cass Civ 14 December 1983, Bull Civ I, n° 296. Paris 30 September 1987, D 1988, Somm 160, obs H Groutel.

34 Cass Civ 17 November 1965, Rev Gén Ass Terr 1966, 393, obs AB.

The Court of Cassation has decided that:[35]

> If the action of the victim of an accident against the insurer is subordinated to the existence of a contract between this latter and the tortfeasor and can only operate within these limits, it finds by virtue of the statute, its basis in the right to compensation for the loss caused by the accident for which the insured is found liable.

It is from the time of suffering of the loss that the rights of the victim arise,[36] and consequently the insurer is unable to raise against the victim the exceptions in the contract that it can raise against the insured. Therefore all the circumstances that could have arisen after the creation of the right of the victim, and which could involve a diminution or a denial of the guarantee granted by the insurer to the insured cannot be raised against the victim.

The logical consequence of such a situation is that the insurer can find itself bound, as regards the victim, even though it is no longer so in respect of the insured person. Furthermore, the criminal chamber of the Court of Cassation has held that where the insurer has properly been put in cause in a criminal action, that insurer is held to have foregone any exception even if it does not participate.[37]

The corollary of the principles established by the Court of Cassation is that the defects or failures which have arisen before the occurrence of the loss will, subject only to any contrary provisions, be available to the insurer against the victim.[38]

II COMPENSATION FOR THE VICTIM IN THE ABSENCE OF LIABILITY INSURANCE

As soon as it is accepted that there is a logical basis for a right to compensation going beyond the principle of liability, application of that logic demands that society (in effect the French government) guarantees victims a system in which compensation for loss suffered will be made in a manner which is totally autonomous by comparison to the classical law relating to civil liability.[39]

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35 Cass Civ 28 March 1939, above n 28.

36 Cass Civ 15 June 1931, S 1932, I, 169, note Esmein. See art R 124-1 § 1 of the Insurance Code.

37 Cass Crim 10 November 1987, D 1988. IR, 10.

38 See Civ 28 February 1939, DH. 1939, 274 (intentional fault of the policyholder). Civ 1 October 1980, Rev Gén Ass Terr 1981, 2. Cass Civ 3 November 1981, Rev Gén Ass Terr 1982, 35 (absence of payment of insurance premium).

39 Then specific guarantee funds were set up for victims of hunting accidents, road accidents, terrorist and criminal attacks.

It is for this reason that various guarantee funds have been established, whose sole purpose is to provide a social compensation for persons who suffer specific losses. This development has been accepted without too many reservations by most writers, and has taken a dominant position in French positive law.[40]

A Guarantee Fund for Road Accidents

The first of its kind, and created by the statute of 31 December 1951, this guarantee fund is supported both by the contributions of insurance companies (on the basis of a proportion of the insurance premiums that they receive) and by a contribution by those who have not fulfilled the duty to take insurance.[41]

This guarantee fund compensates for physical injury and material loss suffered by road accident victims, their spouses, ascendants or descendants, where the tortfeasor is insolvent, insufficiently insured, unknown or unidentified, and even when the insurer itself is totally or partially insolvent (this last case being significantly less frequent than the first).[42]

In conformity with article L.420-13 of the Insurance Code, this guarantee fund can operate in three types of case. Primarily, it can be directly impleaded during the court case and then, having compensated the victim, it will find itself subrogated in the rights of the victim against the person liable to the extent that person is known.[43]

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40 P Escande considers that the guarantee fund system provides a legal social security to the victim, *Droit Pénal,* n° 6 bis, Éditions Techniques (1983) n° spécial, p. 7. J Appieto "Fonds de Garantie et la loi Badinter: la détérioration du sort des victimes", Gaz Pal 1988, I, October 121. M Caratini," La loi du 5 Juillet 1985 sur la réparation des accidents de la circulation accélère-t-elle l'indemnisation des victimes? "Gaz Pal 1986, I, Doct 119. P. Couvrat, "La loi de 6 Juillet 1990 relative aux victimes d'infractions, ALD 1990", 143. J Favard et J-M Guth "La marche vers l'uniformisation la quatrième réforme du droit à indemnisation des victimes d'infractions" JCP 1990. I 3466.

41 Amended in 1959, 1976, 1985, and by laws of 6 July 1990 (law n° 90-5 D 1990, 315) et of 26 July 1991 (law n° 91-716, Dalloz 1991, 347). The latter amendment obliges all insurance companies doing business in France to be members of the National Insurance Bureau.

42 Article L 420-1 of the Insurance Code, amended by the law of 5 July 1985. G Baron "Le fonds de garantie automobile" 1974 Rev Trim Dr Civ p 250. G.Durry et F Chapuisat "Fonds de garantie automobile" *Encyclopédie Dalloz Civil* n°22 and following.

43 P Esmein, "Le rôle et le caractère juridique du fonds de garantie des accidents d'automobile", D 1954, Chron 87. On the procedure to follow in order to join the guarantee fund in a trial, see *Répertoire de Droit Civil, Encyclopédie Dalloz,* mise à jour 1992, "Fonds de garantie automobile". When the guarantee fund is the main defendant, it may challenge the claim or the amount of compensation. Versailles, 9 May 1979, Gaz Pal 1980. 1 46.

B Guarantee Fund for Hunting Accidents

Compulsory insurance already exists for hunting matters and is an integral part of the Rural Code.[44] However this insurance is far from guaranteeing total indemnity to the victims of hunting accidents[45] and a specific guarantee fund was created in 1966.[46]

This has become responsible for damage or loss as a result of harm to persons in relation to hunting matters or the destruction of noxious animals, and operates even when the matter is covered by the compulsory insurance imposed by the Rural Code, subject to the requirement that the losses are caused by an unknown person, an uninsured person, or a person who is totally or partially insolvent.[47]

Since 1988 the operation of this guarantee fund follows the same rules as that for the guarantee fund in respect of traffic accidents.[48]

C Compensation for Victims of Criminal Actions under the Law of 6 July 1990 [49]

This indemnity is available only as a subsidiary matter because the victim has to show that he or she has exhausted all the possibilities that are available for an indemnity to be provided by the person responsible for the criminal action.[50]

A decision on the amount to allocate to the victim can therefore be made directly by the Commission when the decision of the guilty party is impossible to establish, either after the decision of a court (which has decided on civil law interests) or the execution of the judgment has proved unsatisfying.

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44 Article 366 of the Rural Code.

45 Guilbaud, "De quelques difficultés concernant l'assurance de chasse," JCP 1964. I 1874.

46 Law n° 66-497 of 11 July 1966 , D 1966, 328, adding art 366 ter to the Rural Code.

47 Rouen 31 March 1981, Gaz Pal 1982, 2, 507. Rennes 14 January 1971, JCP 1971, II, 16733; RevTrim Dr. Civil 1971, 378. Aix en Provence 27 January 1976, D 1977, IR, 108, obs Larroumet.

48 The similarity appears clearly in the decree of 18 March 1988 (J O 20 March 1988) which deals in a same chapter with "The guarantee fund for road and hunting accidents".

49 Law n° 90-589 of 6 July 1990 amending the Criminal Procedure Code and the Insurances Code and on the criminal activities' victims, in force 1 January 1991, becoming part of the Criminal Procedure Code (articles 706-1 to 706-15). JCP 1990, III, 64185 bis, JO 1990, p.8175. J Favard et J M Guth, "La marche vers l'uniformisation?: la quatrième réforme du droit à indemnisation des victimes d'infractions. Above n 40. A D'Hauteville, "L'indemnisation des victimes d'infractions pénales. Commentaires de la loi du 6 July 1990". Rev Gén des Ass Terr 1991. 291.

50 R Maurice *Encyclopédie Dalloz Civil* , "Fonds de Garantie", n° 212.

A Special Commission[51] has the task of ensuring that victims receive total compensation. No maxima have been fixed either for the personal or property damage[52] which flows from acts which may be regarded as criminal and are committed on French soil. Victims have access to indemnity, subject to the fulfilment of certain conditions relating to nationality, if the claim is made within three years from the offence. This period can, in certain cases, be extended if it is proved to the Commission that the facts alleged constituted a good reason for granting the extension.[53]

Compensation has been open to any resident of a member state of the European Union since the law of 11 July 1990, and to every person who is a regular resident on French soil if there is a relevant treaty or international agreement.

Added flexibility was brought to the law of 1990 as a result of the decision of the Court of Justice in Luxembourg[54] which, in the context of a judgment of the Court of Appeal of Paris, declared that the former provisions of article 706-15 of the Code of Criminal Procedure were incompatible with article 7 of the Treaty of Rome on non-discrimination among citizens of the European Union. As a result of the joint impact of this decision and the coming into force of the European Convention, the French legislator decided to harmonise French law with the Community law.

Since its coming into force, the text of 1990 has allowed better compensation for victims of criminal acts. It is to be noted that somewhat paradoxically the victims of acts of terrorism have been excluded from the benefit of the provisions of this statute.

Though it is true that the victims of terrorism have a special compensation system.[55] both logic and common sense would lead to the fusion of these two compensation

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51 Article 706-4 of the Criminal Procedure Code .

52 As defined in art 706-3 of the Criminal Procedure Code.

53 Cass Civ II, 11 March 1987, Bull Civ II, n° 67. Cass Civ II, 23 November 1988, Gaz Pal 1989. I Panor 33. Commission Poitier, 10 June 1991, Gaz Pal 21 June 1992.

54 Luxembourg Court of Justice of 2 February 1989.

55 See sub-part D below.

systems,[56] all the more so since on the strength of the explanatory note that came with the legislative proposal, the new law was introduced:[57]

> Out of concern for the coherence and social justice/equality between victims of serious acts — whatever be their origin — by significantly improving the support system put in place and unifying compensation regimes while at the same time maintaining in their entirety, rights acquired by victims of terrorist attacks.

There is however at least one area where harmonisation of the two compensation systems could not happen by default - that of the practical measures for payment of the compensation.

At this point is found the subordination, purely and simply, of the rules which govern indemnification of victims of criminal actions to those governing the compensation for victims of terrorist attacks. Article 15 of the law of 1990 adds a new article to the Insurance Code[58] which provides that "indemnity provided by the application of Article 706-3 to 706-14 of the Code of Criminal Procedure by the commission set up by Article 706-4 of this Code by the Guarantee Fund for victims of terrorist acts and other offences".

This is proof, if it were needed, that fault maintains a role in civil liability even when there is a question of the indemnities provided by the State, and the behaviour of the victim at the time of the offence, or the relationship that the victim had with the offender can affect the amount of the indemnity.[59]

If compensation for bodily harm was not restricted, that for property loss is, for its part, subordinated to the proof by the victim of a serious material situation, which is to say the victim must prove a resource base which does not exceed that permitted or that which allows benefit from the delay.[60]

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56 Since terrorists attacks are clearly criminal offences, there is no doubt that the law proposed by the French government was intended to harmonise the different procedures. Opposition by Parliament's members can only be explained by political reasons (the compensation regime originated from the Parliament). Moreover Parliament's refusal does not protect the victims' interest, as long as the time limitation period rules remain different in the two regimes (10 years for terrorist attacks and 3 years for criminal offences). See rapport n° 1417, attached to the minutes of the 6 June 1990 Sénat's session . See J Favard et J M Guth, above n 40.

57 See, Document du Sénat, n° 197, 21 March 1990, p 3.

58 L 422-4 of the Insurance Code.

59 Article 706-of the 1990 law.

60 Article 10 of the 1990 law.

It cannot be doubted that this is a situation which is difficult to justify both in law and in fact, and a significant disentitling provision for a whole category of victims.

The law of 1990 also has permitted the involvement of associations. Subject to the requirement that public action has already been initiated either by the victim or by the Minister, public victim support associations can exercise the rights of the civil party in the criminal action, provided they have been properly established for at least five years before the facts in question.[61]

D Guarantee fund for the indemnification or the compensation of victims of acts of terrorism

The perpetrators of terrorist attacks are often difficult to identify, and even when that is not the case their insolvency is the norm, particularly in proportion to the amount of damage that their acts cause.

Although the laws of 9 September 1986 and of 6 July 1990 referred to a single guarantee fund to compensate the victims of terrorism and criminal offences, two distinct regimes continue.[62]

Financed by a levy on property insurance for the compensation for personal injury, property damages remain under an insurance system. This fund guarantees compensation to victims of terrorist acts on French soil, and to French victims of such acts abroad.[63]

In terms of the law of 1986, terrorist acts are all offences listed in article 706-16 of the Code of Criminal Procedure when they are committed either as an individual undertaking or as a collective undertaking which has as its purpose to seriously disturb public order or public peace by intimidation or terror.[64]

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61 Article 2-9 of the Criminal Procedure Code.

62 A J F Renucci, L'indemnisation des victimes d'actes de terrorisme, D 1987. Chron 197. Law n° 86-1020 of 9 September 1986 (D 1986, 468) relative à la lutte contre le terrorisme, amended by the law n° 86-1322 of 30 December 1986 (D 1987, 69) and law n° 87-588 of 30 July 1987, article 103 (D1987, 333). Favard et Guth, above n 40.

63 Article L 126-1 of the Insurance Code; see above sub-part C. Article 2270-1 of the Civil Code allows ten years from the time of the loss or its increase, to lodge a claim before the guarantee fund.

64 There is no civil definition of a terrorist act, therefore it falls within the power of the guarantee fund's officers to decide, under the courts's control, whether or not the specific circumstances of each case, meet the requirements. See, Cass Civ 4 November 1987. Rev Gén Assur Terr 1987. 610.

Personal damages are fully compensated and are according to the present formulation of article 706-3 of the Code of Criminal Procedure which states that the victim "can obtain full compensation for the losses which result from attacks on the person".[65]

As far as property damage is concerned, this can be covered by the normal insurance system, and Article L 126-2 of the Insurance Code forbids excluding from insurance contracts a guarantee for loss which results from terrorist acts or attacks committed within France.

Here again, as in the case of the compensation for victims of criminal offences, the behaviour of the victim at the time of the attack, or his or her links with the offender, can be matters which reduce the amount of compensation.

E The Fund for Compensation for Haemophiliacs and those who have received Blood Transfusions Contaminated by the AIDS Virus[66]

"An indescribable tragedy for thousands of victims and their families"[67] - the victims of blood transfusions which have been contaminated by the AIDS virus have the benefit of a compensation regime which is specific to them.

The French Government, after some hesitation and under pressure from the media and the association of the victims of blood transfusions, put in place a system which ensures full compensation for the losses suffered by victims of blood contaminated by the HIV virus which result from the receiving of blood products, or of an injection of products which have been derived from blood.[68]

The French public authorities, while openly and publicly admitting that a "grave error had taken place" as far as the conditions for the transmission of the virus and in respect of the provision of appropriate tests of screening, and also admitting that "this error of

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65 "The law repealed the notion of indemnity and especially the 400.000 FF limit." Favard et Guth, above n 49, n° 5.

66 Law n° 91-1406, of 31 December 1991, art 47, JO 4 January 1992, p 184 and Decree 92-183, 26 February 1992, JO 27 February 1992.

67 Y Lambert-Faivre, "L'indemnisation des victimes post-transfusionnelles du SIDA : hier, aujourd'hui et demain. RTD Civ 92 (1). January-March 1993. p 8 and following. C Byk, "Le SIDA Mesures de santé publiques et de protection des droits individuels", JCP 1991, 3541. C Debouy, "La responsabilité de l'administration française du fait de la contamination par le virus du SIDA" JCP 1993, 3646.

68 The 1991 law was preceded by a decree of 17 July 1989 from the Ministry of Health, which dealt with the compensation process of AIDS' victims only.

judgment was collective",[69] have decided, not without a certain cynicism,[70] that the Government has to bear the consequences of that error.

Without waiting for legislature, the courts, both civil and administrative, had since 1989 accepted a principle according to which the victims of blood transfusions could receive compensation.[71]

So at an early stage, the civil courts considered that blood transfusion centres had a duty "to supply uncontaminated blood",[72] and the lower courts within the administrative system had, on the basis of the risk run by those using hospital services, introduced the idea of liability without fault[73] on the part of those running hospitals. However, it is only recently that the Court of Cassation, along with the Council of State, have had to specify clearly the nature and extent of the obligations which fall on hospitals and blood transfusion centres on the one hand, and public hospital services on the other.[74]

As far as the first two are concerned, the nature of the liability is a contractual one in relation to the guarantee of the result. As for the latter institutions, the decisions of these highest tribunals confirm the early decisions that the liability of the public institutions is strict.

Undeniably, article 47 of the law of 31 December 1991 which established a public compensation fund, was developed significantly on the basis of this case law,[75] and the victims of contaminated blood transfusions now have at their disposal a legal right to indemnity from the State.

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69 Statement of 2 June 1992, from the Ministry of Health .

70 Especially when it is remembered that the error was due to administration failure. See for example the paper published in 23 January 1992 in "l'Express" which established that since 1985 all the blood stocks to be used by the hemophiliacs were tainted.

71 See for example, Paris, 7 July 1989, Gaz Pal 1989. 2.752, Conclusions Pichot et Versailles, 30 March 1989, JCP 1990, II, 21505, note Dosner-Dolivet.

72 Analysed by academics as an obligation of result, see Paris, 28 November 1991, D. 1992, 85, note Dosner-Dolivet.

73 T A Marseille, 11 June 1991.

74 Two decisions of the first civil chambrer of the Court of Cassation, of 12 April 1995; JCP 1995, 22467, note P Jourdain; D 1995, IR 130. Three decisions of the Council of State of 26 May 1995, JCP 1995, 224678, note J Moreau; D 1995, IR 154.

75 M-L Laurencais-Demeester, "Contamination par transfusion du virus du SIDA: Responsabilité et indemnisation", D 1992, Chr 190.

The statute does not exactly say who are the beneficiaries of the duty, so that at present there is nothing to restrict the number of affected persons coming under the legislation, provided they can prove "losses resulting from the contamination by the HIV virus caused through the transfusion of blood products or an injection of products derived from blood".

Thus, as well as the persons who have had transfusions and haemophiliacs, any person who can establish that the contamination results from a transfusion or an injection given by a person who had previously been infected is entitled to compensation.

Once the loss has been established by the victim, the fund has three months to determine "whether the conditions for compensation are present" and to establish what were "the circumstances of the contamination". By way of derogation from the classical rules of civil liability,[76] the fund is subrogated in the rights of the victim to whom it has granted an indemnity. The compensation fund has a right to claim against the person liable for the loss or against any person "bound for any reason to provide total or partial reparation for it".[77]

The classical rules relating to liability find their field of application here and so it is this claim that will be subordinated to the existence of a loss founded in fault. In the chain of persons involved, only those against whom fault can be proved are able to be prosecuted, because the compensation fund must satisfy the burden of proof and the existence of a fault and a causal link.

III THE COMPULSORY OFFER OF COMPROMISE

A Compromise in the Law Relating to Liability

Before 1985 it was, in general, close to three years before a road accident victim could be effectively compensated; it can be easily understood why there was a propensity to favour compromise over a judicial solution.[78]

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76 On the ground of art 1153 of the Civil Code, the guarantee fund organises for the victim's benefit, a presumption of causation. See M-L Laurencais-Demeester, above n 75.

77 It could be the person who caused a road accident (even if ultimately an insurance company carries the payment) or the surgeon whose imprudence or negligence was at the origin of the faulty or defective transfusion.

78 L Boyer, *Encyclopédie Dalloz Civil* "Transaction". F Benac-Schmidt, Jurisclasseur, Resp Civ Ass Fasc 280-2. "To compromise is also to perform justice to oneself, to accomplish one of the State's judicial duties granted to different institutions. It is to substitute oneself for the judge in order to decide ones rights. With a compromise, to perform justice to oneself becomes a refusal of the courts procedures." J P Chauchard, "La transaction dans l'indemnisation du préjudice corporel," RevTrim Dr Civ (1) January/March 1989.

This is so much the case that "in a thousand accidents involving bodily injury 725 of them were settled as a result of compromising".[79] Compromise is then an institution to which the victims have had, and continue to have, frequent recourse.

Though the legislator originally provided 15 articles in the Civil Code to deal with compromise (articles 2044-2058), since 1985 they have been complemented and in some cases there has even been a questioning of the measures which require (before any litigation relevant to the compensation for loss suffered in matters of delict) a prior attempt to settle the matter by way of compromise.[80]

As a general rule, in accordance with articles 2044 and following of the Civil Code, there is nothing to prevent a victim reaching a settlement with the person liable.[81] Compromise, "a contract at the borderline between civil law and procedure",[82] represents for the Court of Cassation and academic writers, a procedure designed to avoid or abandon litigation that is about to begin (article 2044 of the Civil Code) which must contain reciprocal concessions and in particular, in the case of renunciation by one party of their rights (2048 of the Civil Code), should have (as a result of a former contractual counterpart) the transfer of a certain sum of money.[83]

Falling within the most general framework of agreements on liability, compromise does not present any particular problems from a contractual point of view. However on the delictual side the problem of the validity of agreements for total exoneration has not been clearly resolved.

The legislation is silent on this matter, and the case law has deduced rules about it on the basis of the public order character of articles 1382 and following of the Civil Code and declared the nullity of agreements of exoneration in delictual matters.[84]

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79 L Boyer, above n 78, n° 5; Legrand Et Margeat, "Le rôle de la transaction dans les accidents de la circulation", G P 1979, I Doct 222.

80 A Tunc points out that civil liability cases for road accident represent roughly 100,000 trials per year, ie 250 per day; Revue Internationale de Droit Comparé, 4, 1, p 993.

81 For a comprehensive study on the notion of transaction see L Boyer and F Benac - Schmidt, above n 78.

82 P Berchon, "Régime de la réparation", *Jurisclasseur Civil Assurances,* fasc. 240, n°1. J Carbonnier (Variations sur les petits contrats, *Flexible Droit* 1988, p 292) points out that "transaction" was during the 19th century, considered as a "small contract".

83 Combination of art 2044 and 2048 of the Civil Code.

84 Cass Soc, 3 February 1983, Bull Civ V n° 81.

It is certainly true that in delictual matters the infrequency of the situations where the question would arise can serve to explain the position taken by the Court of Cassation.[85] It is nevertheless the case that these clauses will always be valid in contract, and though parties have only rarely had occasion to enter into a contract on this subject, it has not been explained why such a contract should be deprived of legal force.[86]

By way of comparison, it is currently admitted that the theory of acceptance of risks in sport leads in certain restricted conditions, to consider as valid a clause of renunciation of the right to pursue actions based on article 1384 first paragraph, or article 1385 of the Civil Code. It is for this reason that the Court of Cassation has excluded the application of article 1384 paragraph one and of article 1385, deciding that those who participate in sporting competitions can be assumed to have renounced their right to rely on this liability paragraph.[87]

Furthermore (and this is a serious modification of the principle) although agreements on delictual matters ought to be considered as void that would be the case only if they had been agreed upon before the loss was suffered. They must have full value when they have been made after the loss has been suffered, because in this case the compromise is perfectly valid.[88]

Once this preliminary point is resolved, compromise can be valid only on condition that the parties have manifested a common intention to put an end to the dispute that exists between them.[89]

However, without waiting for this concurrence of the wills, the legislator has (with a view to ensuring better compensation for victims and in various different areas), put the burden of responsibility on either insurance companies or the State, of an obligation to

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85 Cass 2è Ch. Civ, 11 Dec 1952, Bull Civ 1952, 28, Gaz Pal 1953, I, 122.

86 A Tunc, *Encyclopédie Dalloz*, "Responsabilité Civile" above n 80.

87 One can imagine for example, the situation where a building contractor obtains, in advance from neighbours, a renunciation to claim any compensation for losses arising from its professional activities. On the theory of accepted risks , see Cass 2è civ, 8 October 1975 (Bull Civ 1975, 2, 198 n° 246 and G. Durry's comment, in Chronique de Jurisprudence, Rev Trim Dr Civ 1976, 357 et I, 77, 328 et Cass 2è Civile, 16 June 1976, JCP. 1977, 18585, note Benabent. Cass Civ 16 June 1976, JCP 1977, 18585, note Benabent. Cass Civ 2eme, 5 December 1990.D. 1991.IR. 11. TGI Paris 10 January 1975 - Gaz Pal 1975,1, 109. Civ 2è, 10 April 1991, I R. 159, Bull Civ II, 121. Durry, Chronique de jurisprudence, Rev Trim Dr. Civ 1976, 357.

88 P Le Tourneau, *La responsabilité civile*, Dalloz 1982 n° 362 p 123.

89 P Berchon, above n 82, n° 12.

make those banks offer to those who have suffered a loss a compromise which foreshadows "the existence of an agreement" on compensation.[90]

B The Compromise procedure identified by the law of 5 July 1985 (article L211 -9 of the Insurance Code)

Directly inspired by article 2044 of the Civil Code, and also by the fact of the relative lack of adaptability of the body of rules in the Civil Code which relate to consent, articles 12-27 and 33 of the law 1985 set up a procedure for compulsory offers of compromise in the case of motor accidents. It is, however, limited to matters of corporeal damage.[91]

"By obliging the insurer to make a compensation offer to the victim (article 12 and following) the statute has overturned the law of civil liability".[92]

Considered by academic writing as one of the main innovations brought by the law of 5 July 1985, the offer of compensation which has to be made by the insurer of the person liable will be the obligatory first step to any compensation procedures.

Beyond these simple procedural considerations, the institution of prior offer of compromise discloses the logic which today underpins the mechanism of civil liability in relation to compensation for victims of road accidents. That is to say, the evolution of 'civil liability' as a debt of liability to a credit for compensation".[93]

The victim will be limited in the first instance to playing a purely passive role. As soon as the involvement of an insured vehicle is accepted by the insurer who is responsible for the civil liability, the statute obliges the insurer to make an offer of compensation.[94] The

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90 F Benac - Schmidt, above n 78, n° 3.

91 A Tunc, *Encyclopédie Dalloz* "Civil Responsabilité en général," n° 155.

92 J P Chauchard, "La transaction dans l'indemnisation du préjudice corporel," above n 78 p 7 and following.

93 Y Lambert-Faivre, "L'évolution de la responsabilité civile d'une dette de responsabilité à une créance d'indemnisation", Rev Tr Droit Civil 86 (1) Jan/March 1987.

94 Conditions governing the content and the form of the offer are stated in art L.211-9 § 3 and R 211-40 § 2 of the Insurance Code.

compromise will become legally complete only if that offer is accepted by the victim, who always has total discretion to accept or refuse it.[95]

Reflecting concerns for speedy compensation of the victim, the insurer must present the compromise offer within eight months.

This period runs from the day of the accident if the beneficiary of the offer is a direct victim of the accident. The same rules will apply in the case of the death of the victim, and the offer will in that case be made to the heirs and to any surviving spouse.[96] The victims by riccochet of the action have the period running from the day of their claim for compensation.[97]

The right of appeal of the guarantee fund, in respect of its subrogation claim, runs from the day when all the documents which justify its involvement have been submitted to it. Though the offer from the insurer follows a strict procedural regime, the victim on the other hand is not limited by any period of time or particular form in relation to the acceptance of the offer which is made.[98]

Failure to fulfil the duties imposed on the insurer can result in a number of sanctions. For instance, if no offer is presented in the period set down by the law,or is presented outside that period, the judge may, if a matter is raised by the victim in the process of setting the compensation, order payment of interest at double the legal rate from the expiry of the period within which the offer should have been made until the day of the offer, or the day when the court's judgment becomes final.[99]

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95 Article 1 of the 1985 law defines the domain and the scope of the law. It states that the law provides remedies for road accident victims when any motorised land transport vehicle is involved . See, 25 June 1986, D.1987, Somm. 87, obs Groutel. The main goal of the 1985 law was to improve the victim's situation and to accelerate the indemnification process. The 1985 law was complemented by the decree n° 86-15 of 6 January 1986 (Journal Officiel of 7 January 1986) and the ordinance of 20 November 1987 (Journal Officiel of 1 December 1987) which were all integrated in the Insurance Code (art L 211-9 to L 211-24, R 211-43 and R 211-44 and A 211-11).

96 Article 12 of the 1985 law.

97 Article 12 alinéa 2 of the law of 1985.

98 The legislator's concern was to be certain that everything was done to reach an out of court settlement . H Groutel, "Loi n° 85-677 of 5 July 1985 tendant à l'amélioration de la situation des victimes d'accident de la circulation et à l'accélération des procédures d'indemnisation" Responsabilité Civile et Assurances *Éditions Techniques* Droit Civil n° 12 bis de 1985.

99 J P Chauchard above 78 p 20 et s.

Also when the offer has been refused by the victim, article 17 of the law of 1985[100] confers on the judge the power to order the insurer to pay to the Automobile Guarantee Fund a sum in excess which is equal to 15% of the compensation where the court considers the offer was manifestly insufficient.[101]

It is difficult to exactly characterise the process by which these orders may be made. Is the result in these cases the imposition of a criminal penalty or a private law sanction? Reading articles 16 and 17 of the statute leads to the conclusion that the sanction provided applies in strict law (the victim does not have to make any specific claim in this matter), and therefore it can logically be deduced that the sanction can be regarded as a true private penalty.[102]

That said, it still remains to decide what is to be understood by the expression of an offer which is manifestly insufficient. It is in the first place clear that the judge can only "punish very serious abuses".[103] Further, the concrete aspects which authorise a judge to order the penalty relate either to the manifest low value in totality of the offer itself,[104] or to a poor understanding and analysis by the insurer of all liability concerned.[105]

However, as pointed out by J Normand, the idea of fault is obviously inherent in the drafting of article 17 which requires that the faulty behaviour or otherwise of the insurer ought to be taken into account if it can be established that on the basis of the facts that have been presented the compromise offer was, as to its quantum, not without foundation.[106]

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100 Now art L.211-14 of the Insurance Code.

101 As pointed out by some scholars, the general wording of art 17, authorises the judge acting as a judge in chambers to make an order which punishes a manifestly insufficient offer. See for example M C Lambert Pieri, *Encyclopédie Dalloz Civil*, "Régime des accidents de la circulation", n° 444.

102 Y Lambert-Faivre, "L'évolution de la responsabilité civile d'une dette de responsabilité à une créance d'indemnisation. above n 8, p .7 et s.

103 Chartier "Accidents de la circulation accélération des procédures d'indemnisation", D 1986, n° spécial TGI Laval 02 May 1988, Gaz Pal, 1 December 1988, note H. Margeat.

104 H Groutel above n 98, n° 71.

105 M C Lambert - Pieri, above n 101, n° 446.

106 Abnormal behaviour only will be sanctioned. J. Normand, Rev Trim Dr Civ 1987 p 797 and following.

This is the solution which has been accepted by the courts. They have exempted the insurer from the penalty where the insurer was not provided with sufficient information by the victim to precisely assess the loss of resources which is involved.[107]

By way of further confirmation of this analysis, it should be noted that the legislator has authorised the courts to reduce the amount of the penalty just as if it were a civil fine applicable in the case of procedural abuse.[108]

The payment of a sum into the guarantee fund by way of penalty does not exonerate the insurer from indemnifying the victim since the statute envisages that the sanction will operate "without prejudice to any damages which may be payable to the victim",[109] and although the statute is silent on what should be done where there is no offer of compensation, there is no doubt that an order for the sanction is available equally in such situations.[110]

For the validity of a settlement agreement, the law of 1985 combines articles 2044 and following of the Civil Code with provisions which are specific to the statute itself so that the most efficient compensation system possible is available for victims.[111] This is the reason why the consent of the victim and those who must receive compensation must be sufficiently informed.

Articles 13 and 19 of the 1985 law[112] require the insurer, from the time of the first communication addressed to the victim, to indicate to the victim "what may be obtained from the insurer by way of simple request, accompanied by a copy of the record of the police inquiry, and to remind the victim that he or she may at their choice have the assistance of a lawyer and, in the case of a medical examination, of a doctor". The natural consequence of failure to comply with these articles is governed by the provisions of the

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107 TGI Créteil 15 January 1987, Gaz Pal 1987, I , 328, note Chabas et 26 February 1987, Gaz Pal 1987, I, 329, note Chabas.

108 Cass Civ . 2è, 20 July 1981, RevTrim de Dr Civil 1982, p 197.

109 Article 17 in fine. Classical civil liability rules will be used and therefore the onus will be on the victim to establish the existence of any specific loss.

110 On the assimilation of the absence of offer to a late offer, see M F Chabas, *Le droit des accidents de la circulation*, (LITEC 1988), p 236 et TGI Laval, 2 May 1988; Gaz Pal 1988, 2 , 811.

111 At first, the case law was reluctant to share the legislator's view and did not back up the principle of preeminence of the quasi-automatic victim's right to be compensated, see A. Tunc, "L'indemnisation des victimes d'accidents de la circulation après quatre ans d'application de la Loi Badinter", Revue International de droit compare - 1989, p 995.

112 Now art L 211-10 et R 211-39 of the Insurance Code.

Civil Code on relative nullity, with the effect that those who could benefit from the compensation have, for five years, the right to have the compromise set aside.[113]

The right of renunciation which is also available along with the right to annul, avoids a compromise in respect of a failure to comply with articles 13 and 19 and, as a matter of practice, offers a not unimportant way of putting pressure on insurance companies. This is done in order to avoid any attempt to escape the application of the provisions, and the legislation requires the insurer to reproduce, both in the offer of a compromise and in compromise itself, "in clear print", the provision for the right of denouncing the agreement, and the nullity of any agreement by which a victim abandons the right to denounce it.[114]

The compromise relates only to the loss suffered at the time of the compromise and therefore any worsening or increasing of the loss gives rise to a separate right to compensation. This is provided for in article 22[115] where it is stated that the victim can, within the period set out in article 2270-1 of the Civil Code, demand compensation for any increase in the loss suffered.

This is a rule which derogates from the general rules relating to compromises. Article 2052 of the Civil Code in effect provides that compromises have, as between parties, the effect of res judicata and this normally excludes the possibility of the matter being reopened in the case of any deterioration of the situation.

Article 22 of the statute of 1985 provides otherwise. But since nothing in the system relates to decisions on the loss, it is not possible for an insurer to claim back any money from the victim. Article 2052 of the Civil Code here operates in its traditional way.

The concern of the law is to ensure compensation which is quick and as complete as possible, and in this respect the statute has even derogated from the traditional laws which govern the effects of contracts. For instance with regard to the guarantee fund, in the absence of any identification of the author of the loss, or where the insurer has settled the matter with the victim, the compromise may be held to bind the author of the loss subject

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113 According to art 1304 of the Civil Code. See Cass Civ II, 10 January 1990, JCP 90, Ed G IV, 95.

114 Article 19 of the law, now R 211-9 of the Insurance Code. Minors and protected adults are governed by a specific procedure organised by the art 18 of the law, see M C Lambert Pieri - above n 101, n° 459 and following.

115 Now art L 211-19 of the Insurance Code.

only to the right of that person to challenge in court an amount of money that has been claimed from him or her as a result of the compromise.[116]

If the person who caused the accident is unknown, but the vehicle was an insured vehicle, the insurer is bound by article 23 to make an offer of compensation to the victim on behalf of who ever might be concerned.

If the tortfeasor is later discovered, his or her insurer, or the tortfeasor personally, may challenge the compromise and may seek reimbursement from the guarantee fund of the sums paid to the victim.

There remain those cases where the person who is liable, and insured, has entered into a settlement directly with the victim despite the undertaking of the contract of insurance. The insurer cannot challenge this compromise unless that option has been expressly provided in the contract of insurance.[117]

C The Compromise Procedures of Law.68-1020 of 9 September 1986 concerning Terrorism and Attacks on State security[118]

The wave of murderous attacks that took place in France in the 1980s led the legislator to devise a special compensation procedure for victims, because the traditional rules made the granting of compensation often uncertain and inadequate.

These provisions have been incorporated into the Insurance Code and aim to indemnify the victims of acts of terrorism committed in France and abroad against French citizens.[119]

To this end article L 422-2 obliges the guarantee fund to present the victims of acts of terrorism and other crimes with a compensation proposal within three months "from the time of the demand made against it", as well as a payment which must be made at the latest one month after the demand. The time period begins to run from the delivery to the guarantee fund of all the documents which are necessary to it, to enable a compensation offer to be made.

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116 Article 10 of the law of 1985. The law adds that such a claim cannot challenge the compensation already granted to the victim or the heirs of the victim; see Groutel, above n 98, n° 95.

117 M C Lambert-Pieri, above n 101, n° 491.

118 Law n° 86-1021 of 9 September 1986, D 1986, p 471. L Boyer, *Encyclopédie Dalloz Civil*, "Transaction" above n 78 , n° 170 and following.

119 Articles L 126-1 and seq and R 422-1 and following of the Insurance Code. The guarantee fund for victims of terrorist attack organised by the law of 1986, came in to force only when the law n° 90-589 of 6 July 1990 was implemented.

Just as in the case of the law of 1985 for the compensation of victims of road accidents, a delayed offer, or offer which is clearly inadequate, gives rise to a damages claim against the fund, but unlike the law of 1985 no sanction has been provided against the guarantee fund.

The damages are exclusively for the victim.[120] Provisions which relate to other aspects of the compensation offer, and particularly the right of denunciation provided in the law of 1985, have been extended to cases of acts of terrorism.[121]

D Procedure for Compensation for Blood Transfusion Patients and Haemophiliacs contaminated by the AIDS virus

The compensation committee established by article 47 of the law of 31 December 1991 must, within three months from the receipt of notice from the victim or the successors, make an offer of compensation which in principle must provide for total reparation of the loss.[122]

The offer must specify the amount of compensation for each head of loss,[123] and so excludes the possibility of an offer of compensation being made which is of a global and final nature. On this basis, economic losses of a patrimonial nature and the specific losses which flow from the contamination will be taken into account.[124]

It is nevertheless the case that the fund, with the countless requests for compensation that it is anticipated will have to be dealt with in the near future, must set up norms of standard assessment which will enable it to satisfy the greatest number of applicants. As a result, priority has been given to compensation by way of capital sum rather than by the grant of an annuity, and the fund has set the figure of 2 million francs for a victim of 18

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120 As long as the offer comes from the guarantee fund only and not from the insurance company as provided in the 1985 law, it is impossible for the guarantee fund to be condemned to pay a compensation against itself.

121 Article L 422-2 last paragraph.

122 Law n° 91-1406, of 31 December 1991, art 47, JO 4 January 1992, p 184, D 1992, p 103 and decree 92-183, 26 February 1992, JO 27 February 1992, D 1992, p 212, 213.

123 Paragraph V of Law n° 91-1406 of 31 December 1991, art 47.

124 Y Lambert-Faivre, "Principes d'indemnisation des victimes post-tranfusionnelles du SIDA", D 1993, Chr 67.

years of age[125] in respect of personal losses grouped under the generic heading of "specific losses caused by the contamination of blood".

Once the offer has been made, the victims or their successors, must in their turn inform the fund by registered letter whether the terms of the offer are accepted.[126]

It is to be noted that unlike the provisions relating to the duties of the fund itself there is no time period set within which the victim must make a decision. Where the offer is accepted the fund then has one month from the date of agreement to deposit the sum offered.

The statute and the application decree are both silent on the question of what the consequences for the State are if there is a failure to deposit the sum agreed within the period fixed. In the absence of an express legal provision, there is nothing to prevent a victim from bringing the matter to the Court of Appeal in Paris (the only court which has the jurisdiction to hear litigation involving the Commission)[127] to demand not only that the late payment will include interest at the legal rate, but also that an award of damages should be made.

The payment is to be made in two parts. The first is to be of three-quarters of the indemnity established at the time of the positive blood test, and the remaining quarter at the certification of positive contraction of AIDS.

The goal of the Fund is to provide victims with the benefit of the most rapid possible compensation in order that their way of life is not too disrupted by the illness. This objective, too, has been confirmed by the Court of Appeal of Paris.[128]

Where there is a refusal of a compensation claim, or where there is no offer of compensation within the prescribed time period, the victim and his or her successors can bring a claim before the Court of Appeal of Paris which is the sole court with jurisdiction.

IV CONCLUSION

"The proper mission for law in our times is to increase our well-being, to guide our behaviour and reform our society. A highly refined product of rationalism, law has

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125 Depending on the victim's age, it is based on a decreasing scale. In a set of decisions, the Paris Court of Appeal has upheld the calculation system used by the guarantee fund; Paris Court of Appeal 27 November 1992 (20 decisions), D 1993, Chr p 67.

126 Decree n°92-183, 26 February 1992, art 5 and 6.

127 Paragraph VIII of the Law n° 91-1406, of 31 december 1991, art 47.

128 See above n 125 .

replaced religion and tradition, and has the role of a political instrument".[129] The development of the system of civil liability in France, and the new place that fault[130] occupies, undoubtedly helps explain the process of reinforcing the rights of victims and if the compensation of victims is the corollary of civil liability, the goal is undeniably being better and better attained.

The French system is far from being the only one to have subordinated a fault to a position different from that which it has traditionally occupied, and on closer analysis it represents simply different efforts to redefine the place of fault in civil liability.[131]

Overseas legislation offers other examples of this redefinition in various forms and results which are more or less satisfactory, both in theory and in practice. To take just one example, the New Zealand system has established a form of civil liability in which fault has virtually disappeared.[132]

The French system is therefore in this respect not original, or even innovative. The phenomenon is moreover scarcely new when it is recalled that the legal positivists even in the 19th century considered the compensatory aspect as fundamental and that fault, even if it did not disappear totally from civil liability, had to be circumscribed and kept within its natural domain which was criminal liability.

Prosaically, it may be said that law has had to adapt to the transformation of society and to the new demands for compensation for loss and that could not happen other than at the cost of revision of the basis of liability.

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129 C Mouly, "Le droit peut-il favoriser l'intégration européenne", RIDC 1985 p 895.

130 A Tunc, "Introduction au volume XI, Torts", *l'Encyclopédie Internationale de Droit Comparé*. 1975. "To limit the civil liability domain to somebody's fault is a myth... but it does not mean that fault must be banned from the law of civil liability", G Vinney. RIDC 1976. p 581.

131 ATunc, "Où va la responsabilité civile aux États-Unis", RIDC 1989, 711. Brown "Deterrence in tort and no-fault: the New Zealand experience" 73 Cal L Rev 976 (1985). A Levasseur, *Droit des États-Unis* (Dalloz) 110.

132 A Tunc "Quatorze ans apres: Le systeme d'indemnisation néo-zélandais" RIDC, 1-1989 p 140. T G Ison *Accident Compensation: A Commentary on the New Zealand Scheme* (1980, Croom Helm, London); "Changes to the Accident Compensation System: An International Perspective" (1993) 23 VUWLR 25.

It is obvious that under this collectivisation of compensation, civil liability, without completely disappearing, will be greatly affected. Though the "compensatory role has been extended by the objectivisation which permits the effect of insurance, its other functions have disappeared... the eternal logic of compensation requires a development of liability".[133]

It is no longer just a question of deciding on the conditions required for providing compensation, but of defining the field in which society would provide compensation. Losses are conceived as social risks which it is seen as appropriate to share among citizens. In this system, everyone has *a priori* the possibility of being compensated.

Should one share the pessimism of the theorists who have for several years now spoken of the "crisis of civil liability"?[134] That is obviously an exaggerated position because the elements necessary for civil liability remain the same. But the importance that is given to them is changed. If the concept of fault is being progressively side-lined, it would nevertheless be unwise and premature to conclude that it has already disappeared.[135]

"Fault remains as the basis at the heart of the institution"[136] in respect of liability in general, and that is also the case even for those systems which have been instituted for special liability. In fact, in those systems where the question of indemnifying a victim arises, the notion of fault always has application in its traditional role with the result that it tempers, even if it is only by way of derogation from the general principle, the quasi-automatic character of the principle of indemnification.[137]

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133 P Jourdain *Les principes de la responsabilité civile,* (Connaissance du Droit, Dalloz, 1992).

134 Y Lambert-Faivre, "Pour un nouveau regard sur la responsabilité civile". D 1983, Chr 102. Y Lambert-Faivre, "L'évolution de la responsabilité civile d'une dette de responsabilité à une créance d'indemnisation", above n 3.

135 P Le Tourneau, "La verdeur de la faute dans la responsabilité civile (ou de la relativité de son déclin)" Rev Trim Dr Civ 1988, 505. P Jourdain, *Les principes de la responsabilité civile*, above n 133, p 17.

136 The Constitutional Council, in its decision of 22 October 1982 (D 1983, p 189) has recognised a constitutional value to the principle of liability based on fault.

137 For the law of 5 July 1985, the answer was not immediately accepted. It was only after four Court of Cassation's decisions, that the doctrinal dispute finally ended. N Dejean de la Batie *Droit Civil Français* (8ème Ed.) "Responsabilité délictuelle" (1989, Librairie Technique), p 330 n° 144. J Huet Rev Trim de Dr. Civ 86 (2) Avr. Juin 1987, p 354 and followings. C. Larroumet D 1985, Chr 237, n° 20. H. Groutel, JCP 86. I, 3244. G Wiederkier De la loi du 5 Juilllet 1985 et de son caractère autonome, D 1986, Chr. 255.

"By virtue of the mutualising of risks which results from insurance, the weight of compensation rests now on the collectivity of insured people by virtue of the premiums which they pay. In these conditions, the field is therefore free for the extension of liability".[138]

And so today the tendency is no longer to doubt "the socialisation of the indemnification of victims"[139] and though some authors expressed doubts at the time the law of 1985 on road accidents was enacted, later texts which relate to the indemnification of victims of terrorist attacks and of criminal actions have removed all doubts and have only accentuated the tendency; the state is therefore organising what Escande calls "a true judicial social security" for victims.[140] The final cost of the indemnity is thus passed from the individual responsible to the community which now has the duty to indemnify victims who can, in their turn, take advantage of a true indemnity right.

This is happening to the detriment of the traditional structures of civil liability, but that is not a cause for surprise or complaint if one takes as given the right of compensation being guaranteed to victims. Therefore it would have been impossible, even totally unrealistic, not to conceive of new forms of compensation for victims.

The law could not in areas as important as the compensation for victims of road accidents and blood transfusions (to mention only two examples) allow a disjunction to develop between social needs and legal principles .

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138 P Jourdain *Les principes de la responsabilité civile*; above n 133, p 12.

139 F Zenati, 1985 Rev Trim Dr Civil p 793.

140 Above n 139.

LE RENFORCEMENT DES DROITS DE LA VICTIME DANS LE DROIT DE LA RESPONSABILITÈ CIVILE FRANÇAISE

Le droit de la responsabilité civile en France, au même titre que de nombreux droits étrangers (au premier rang desquels on trouve la Nouvelle Zèlande) révèle l'existence d'un véritable droit à indemnité maintenant garantie à la victime.

Le droit ne pouvait pas dans un domaine aussi important que celui de l'indemnisation des victimes d'accidents de la circulation ou encore des transfusions sanguines (pour ne prendre que ces deux exemples) permettre que s'instaure un décalage entre les besoins de la societé et une application trop stricte des principes juridiques.

Cette situation est connue sous le nom du phénomène de la socialisation des risques, toutefois si l'intervention de tierces personnes (compagnie d'asssurances, fonds de garantie divers) dans les rapports entre les victimes et l'auteur de l'acte dommageable renforce les droits des premiers, il a aussi pour corrolaire d'instituer une véritable irresponsabilité des derniers.

De surcroit la notion de faute, autrefois élément fondamental de la responsabilité civile, se trouve maintenant, sans pour autant disparaître totalement, reléguée dans un rôle secondaire.