THE OPERATION OF THE LAW OF CIVIL LIABILITY IN FRANCE AS A MEANS OF PROVIDING COMPENSATION FOR PERSONS WHO SUFFER LOSS

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L'étude de la responsabilité civile française révèle que pendant longtemps elle a été confondue avec la responsabilité pénale et qu'encore aujourd'hui un même acte peut donner lieu à une action en responsabilité civile et justifier des poursuites pénales.

Sur la trilogie désormais classique de l'existence d'un acte générateur, d'un préjudice et d'un lien de causalité, les règles applicables varieront seulement en raison de la nature et de la fonction de chaque type de responsabilité.

Elles peuvent toutefois être aisément distinguées l'une de l'autre. Ainsi alors que la responsabilité pénale tend à sanctionner un acte ou un comportement que la société réprouve, la responsabilise civile française qu'elle soit de nature contractuelle ou délictuelle, répondra d'abord à une exigence indemnitaire, l'ensemble des règles qui la gouverne accentuant la différence.

A diversified concept with an unclear content,[1] civil liability[2] in French law[3] today nevertheless contains the idea of loss, its repair, and the indemnifying of those who

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1 A Tunc *Responsabilité (en général)*, Encyclopédie Dalloz n 1 and seq. At first glance, the concept of civil liability cannot be defined in simple terms. It presents many aspects and more than one type of liability should be considered: Criminal liability, civil liability, contractual liability, tortious liability and even political liability. Therefore, being aware of its limits, the term "responsabilité civile" is translated into English as "civil liability". A Tunc "A Codified Law of Tort, The French Experience" 39 Louisiana L Rev p 1051 to 1075,

suffered the loss.[4] Seen in this light, civil liability is usually defined as the duty on the person responsible for the loss to repair them.[5] Taken in a broad sense, the compensation process can be of interest to society as a whole or the individual concerned separately or the two together.

Within the French legal system, civil liability (whether tortious or contractual) is distinguished from criminal liability. The latter deals with a person who must answer for losses caused, not to individuals, but to society as a whole.

Unlike criminal liability, civil liability is heterogeneous. It is either tortious or contractual, and the case law and academic opinion both accept this distinction within the notion of civil liability.[6]

It is only in the absence of contractual liability that the liability is categorised as tortious.[7] Liability is contractual if the loss has its source in the total or partial inexecution of a contract between the person who caused the loss and the person who suffered it.

Tortious liability for its part has its origin outside, or independent of the inexecution of any contract. Within tortious liability, a further distinction is made between tortious liability in a strict sense when the loss is caused by an intentional fault on the one hand, and on the other hand quasi-delictual liability which flows from an unintentional fault (imprudence, negligence, carelessness, or lack of attention) or for the action of a person (child or employee) or of a thing for which one must accept responsibility.[8] However,

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2 E A Tomlinson "Tort Liability in France for the Act of Things: A Study of Judicial Law Making" 48 Louisiana Law Rev 1988, p 1300 to 1367.

3 D Veaux, *Jurisclasseur* , Responsabilité civile, Fasc. 175, n° 6 to 10. By comparison, "the common law has not developed a general principle on civil liability", see R Dias and B Markesinis *The English Law of Torts* 1976; Catala and Weir "Delict and Torts, a Study in Parallel" 37 Tul L Rev 573 (1963), 38 Tul L Rev - 221 - 664 (1964), 39 Tul L Rev - 701 (1965); R David *English Law and French Law : A comparison in Substance* (Stevens, 1980).

4 On the other functions which could be attributed to the civil liability, see A Tunc, La responsabilité civile , 2ème éd. Economica, 1989, n°161 and s.

5 P Le Tournaux, La responsabilité civile, Dalloz 3ème Ed, 1982, n° 158 and seq. Weill et Terre, Droit Civil, Les obligations, Précis Dalloz 4ème Ed, 1986, n° 752 and seq. Chartier, La réparation du préjudice dans la responsabilité civile, Traité Dalloz 1983.

6 J Huet, Responsabilité contractuelle et responsabilité délictuelle, essai de délimitation des deux ordres de responsabilité, Thèse Dacty PARIS II 1978.

7 D Veaux, op. cit. n° 9. Actually, it would be more appropriate to use the term "extra-contractual liability" since its domain of application is wider than this attributed to the tortious liability. However, no precedence of the former on the later cannot be infered.

8 See notably P Le Tournaux, La responsabilité civile, op cit., n° 158 and seq Weill et Terre, Droit Civil, Les obligations, op. cit., n° 752 and seq.

"whatever the nature of the liability, the mechanism that it puts in motion is identical. Always it begins with a loss and without that, there can be no possible liability."[9] This loss finds its source in a generating fact,[10] the two being linked by a causal connection of cause and effect.

It is the rules which govern this process (from the harmful act or fact to the application of the liability) which make up the institution of liability in general.

CHAPTER I : THE REQUIREMENTS FOR THE OPERATION OF THE RULES GOVERNING A CIVIL LIABILITY ACTION

From the strictly procedural point of view, the undertaking of a case in civil liability presumes knowledge in those who have the rights to take this action. Once these matters are determined, it is necessary then to determine the legal basis for the court action undertaken.

Section I : the parties to an action in civil liability

§ 1: The Plaintiff

In principle, the right to damages belongs to the victim. The victim is the creditor in the matter[11].

The matter has been interpreted broadly by the courts, and the notion of victim includes "any person who has suffered a direct and personal loss as a consequence of an illegal action imputed to the defendant".[12]

This presents no particular difficulty when the victim is a natural or fictional person. The problem, however, takes on a particular aspect in relation to social groupings which do not have legal personality. Equally the matter is less straightforward in the case of those who bring the action for indemnification in their capacity as substitutes because they

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9 P Jourdain *Les principes de la responsabilité civile;* Connaissance du Droit, Dalloz. 1992 p 2. Moreover the similarity between components of each liability increases the ambiguity of the notion of civil liability. See supra note 1.

10 Not necessarily faulty, see the strict liability situation. L Bach, "Réflexions sur le problème du fondement de la responsabilité civile" Rev Trim Civ 1977, p 13 s and 221 s.

11 The victim's right has to be analysed as a claim against the tortfeasor, the later being bound by the obligation to indemnify the former. See J Vidal "Le droit à réparation de la victime et le concept de dommage réparable" J C P, 1971, I, 2390. On the rights of the victim see Y-L Sage " Reinforcing the Rights of the Victim in the French Law on Civil Liability" VUWLR Vol. 28, 3, 1998, p.543.

12 J Carbonnier, Droit Civil, Tome 4, les Obligations 1990 PUF n° 205.

are not acting in their capacity as a victim of something personal to them, but by virtue of a law which has transmitted the right to them.[13]

A) Suit by associations for compensation for loss suffered by the group.

The principle is clear: "Only associations which have been made the object of a declaration, which is the minimum condition for the grant of legal personality, can in terms of Article 6 of the law of 1 July 1901, commence suit in the courts".[14] These associations can bring a claim for compensation for the damage caused to the interests of the collective if they have legal personality. But here the nature of loss itself covers several possibilities.

Loss caused directly to the legal person itself gives rise to no difficulty. It can involve both a material loss which is the result for example of theft or fraud which operates to the detriment of the association, and of moral loss which for example could result from an attack on its name or reputation. The association can certainly claim reparation for this: that is a consequence of its legal personality.[15]

But the question is more complicated for two other types of loss:

1) An action in respect of an individual loss.

The case law in the criminal courts says that, in principle, an association may not bring a civil action alongside, or instead of, its members.[16]

The victims themselves can, of course, enter themselves as civil parties in the case but the association created for their defence cannot. This rule is justified by the provision of Article 2 of the Code of Criminal Procedure which restricts the right to become a civil party to "those who have personally suffered damage directly caused by the offence".

Article L.411-11 of the Labour Code has, however, provided an exception for unions who may become civil parties for the defence of their members. Thus the suit of a union is generally admitted when it is in relation to compliance with labour regulations or work conditions.[17]

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13 Maistre Du Chambon, *Jurisclasseur* , op. cit. Fasc. 220; J Vincent, S Guinchard, *Procédure Civile*, 22ème Ed. Précis Dalloz p 33 and seq.

14 Maistre De Chambon, see below, note 86

15 See note 18.

16 Cass. Crim. 10 November 1966 Gaz Pal 1967, I, 31. Cass. Ch. Réunies 15 June 1923, S, 1924, 1. 1949, note Chavagrin. Cass. Crim. 27 May 1975, DS 1975, I.R 153

17 Cass Soc 06 November 1984, Gaz Pal 1985, Pan. Jur. 96. Cass. Soc. 10 May 1994, JCP 1994, 15 June 1994, Ed G n 24, Actualités.

As against this basic hostility of the criminal courts, the civil courts, for their part, do not deny recognition to legal associations to act in respect of such a loss.[18] The Court of Cassation (civil chamber) for example, accepts that an association can act in respect of the compensation for loss suffered by its members, even before its establishment.[19]

2) Suit for damages for a collective loss.

The concern here is with loss caused, not to the association nor to its members. In practice, the reference is moreover to a different range of possibilities:

In certain cases (associations concerned in the matter), the collective interest coincides at least with the moral interest of its members. Such for example, is the case of associations of Resistance workers.

In another case (associations with no interest in the matter), the collective interest does not relate to any personal interest of its members. Here, examples that can be cited are those of associations for the protection of animals, or for the protection of public morality.

Theoretically, the action taken by an association when it is authorised has a particular character. These actions have a quality somewhere between "private civil action properly so-called and a public action".[20]

These particular possibilities have given rise to a very great number of decisions within the criminal courts, though there are very few decisions in the civil courts. The reason for this is that the associations are not primarily concerned with receiving money awards,

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18 When the action is exercised before civil courts, article 2 of the Code of Criminal Procedure is no longer applicable. Since the civil action does not trigger the criminal procedure, there is no reason to adopt a more restrictive position than that applied before criminal courts.

19 Cass. Civ. I 27 May 1975, D S 1976, 318, note Viney, Rev Trim Droit Civil 1976, p 147 obs Durry Cass. Civ. III, 14 March 1978, JCP 1978. Ed G. IV, 102.

20 J Vincent et S Guinchard, below n 35. Conversely, the Common Law knows the notion of class action. So far, this institution does not exist in French law, despite strong academic pressure, especially for granting such benefit to the consumer's associations according to article 5 and 6 of the law n° 88-14 of 5 January 1988. On the consumer's associations rights, see J Calais Auloy, "Les actions en justice des associations de consommateurs" D. 1988, Chronique 194. G Viney, "Un pas vers l'assainissement des pratiques contractuelles, la loi du 05 January 1998 relative aux actions en justice des associations agréées" JCP 1988, Ed. G. I. 3. J Huet "Les hauts et les bas de la protection contre les clauses abusives à propos de la loi of the 18 January 1992 renforçant la protection des consommateurs" J.C.P 1992, Ed. G. 3592. R J Martin, "L'action collective" JCP 1984 . I. 3162, n° 7. H P Glenn "A propos de la maxime nul ne plaide par procureur" Rev Trim Dr Civil 1988, 59.

which in any case are generally purely symbolic: what the associations want is the imposing of criminal sanctions.[21]

On an analysis of the decisions of the courts, it may be noted that overall the decisions of the Criminal Chamber of the Court of Cassation are restrictive and justify that approach on the basis of Article 2 of the Code of Criminal Procedure. The principle goal here is to avoid individuals taking over the functions of the Public Prosecutor under cover of associations which have voluntarily established.[22]

The acceptance by the court of the establishment of a civil party suit, can at least be supported in the case of associations with an interest in the matter and the Criminal Chamber appears prepared to accept that.[23]

It has also been admitted for a long time that the law is similar[24] in respect to professional association. But as far as associations which have no interest are concerned, the civil party action is never accepted unless there is express legislative provision to that effect.[25]

Also to be noticed is the recent tendency of more and more frequent occurrence which is that which exists outside of any specific legislative provision of extending the law relating to civil party rights for associations or groups when the matter in question is the defence of collective interests of a general character.

It may however be noted that express provisions are becoming more frequent in the law.[26] Benefiting from such provisions are:

- associations for the support of families (Article 3-4 of the Code on the Family and Social Support);[27]
- associations against racism;[28]

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21 Weill et Terre, op.cit n° 742.

22 Maistre De Chambon, op. cit. n° 60.

23 Cass. Soc. 06 nov. 1984.

24 See notably, article L 411-11 of the Labor Code and note n° 23 supra.

25 Cass. Crim. 6 June 1989; JCP 1989, éd. G., VI, 320; Cass. Crim. 6 July 1994; J.C.P 1994, éd. G., VI, 2376, where the claim for loss from the Medical Board Association was accepted since its main general function is to monitor the good exercise of the doctors' activities, despite the lack of specific legal provision which could *ab initio* , authorises the claim.

26 B Bouloc, Rev. Sc. Crim. 1986 p132. C Roca, "De la dissociation entre la réparation et la répression dans l'action civile exercée devant les juridictions répressives" D. 1991, p. 85.

27 Article 3-4° of the Family and Welfare Code .

- consumer groups;[29]
- associations for protection against prostitution;[30]
- associations for the protection of animals and for the protection of nature and the environment;[31]
- associations for the protection and improvement of living conditions and the environment;[32]
- associations for the support of victims of criminal activities;[33]
- associations for the support of victims of collectives accidents.[34]

Each of these texts sets out in relation to the nature of the associations concerned the offences for which these associations can seek a remedy and in most of the cases, the right equally to appear as a civil party is subordinated to the recognition of the public usefulness, or at least, the approval of the administrative authority.

B) The exercise of right of action by the heirs of the victim.

The right of action which belongs personally to the heirs for the compensation of their personal loss must be distinguished since the law relating to damage by ricochet regulates this matter.[35]

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28 The law of 1 July 1972, articles 5 and 8 (which created an Article 2-1 within the Code of Criminal Procedure)

29 The law of 27 December 1973. Article 46 known as the "Law Royer", and Article 1 of law number 88-14 of 5 January 1988, which became the article L-421-1 of the Consumer Code. Cass. Crim. 6 July 1994; J.C.P 1994, éd. G., VI, 2376.

30 Law of 9 April 1975.

31 The law of 10 July 1976, Articles 14 and 40.

32 The law 31 December 1976, Article 74.

33 The law 90-589 of 6 July 1990. Article 706-3 to 706-15 of the Code of Criminal Procedure.

34 The law 95-125 of 8 February 1995. Article 2-15 of the Code of Criminal Procedure. C Lienhard "Le droit pour les associations de defense des victimes d'accident collectifs de se porter partie civiles" D. 1996; chron p 314.

35 The loss must be personal to the plaintiff, even if, from time to time, the case law authorises claims based on a loss by ricochet, Carbonnier, op. cit. p. 375 . Cass. Crim. 20 March 1973, J.C.P 1974, Ed. G. IV, 177.

The Criminal Chamber of the Court of Cassation authorises actions for victims of such damage even if the initial victim is not already deceased.[36] However the exercise by the heirs presents a difficulty when the original victim is deceased.

Theoretically, one must know whether the heirs' action will be exercised on the basis of a right which initially belonged to the deceased and then transmitted by succession or only on the basis of the specific and personal damage incurred by the death.[37] As a matter of fact, heirs have two actions at their disposal. The first has its origin in the loss which they have suffered personally, and the other in the existence of the property of the deceased[38].

In relation to the latter possibility, the important thing to know is whether the action which personally belonged to the victim is passed on to the heirs. This transmission creates no problems in two types of case: when the loss is purely material; and when the victim had commenced suit before dying.[39]

However, there has been much hesitation in respect of cases where the damage was of a purely moral kind, or where the victim had died without commencing suit against the wrong-doer. In these cases, the action is linked to the rights of personality. It can be readily sustained that only the person who has been the victim of the moral loss is able to appreciate its existence and seriousness, and also the appropriateness of claiming compensation for it. In favour of the transmission of the right of action, it may be observed that if the right is not omitted, the person who caused the action is advantaged if the victim dies before he has been able to commence action, and will therefore have some interest in that result.

But countering this point is the view that it is not very morally satisfying to see the heirs making money from the physical and moral suffering of the deceased.[40]

The Criminal Chamber of the Court of Cassation has refused to accept such actions, because an action for compensation for moral prejudice is personal to the victim.

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36 Cass. Crim. 9 February 1989, Bull. Crim. n° 63.

37 See G Viney "L'autonomie du droit à réparation de la victime par ricochet par rapport à celui de la victime initiale" DS 1974, Chr 3.

38 The law of 31 December 1991 on the compensation fund for victims of blood transfusions took up again this distinction, since it authorises relatives of blood transfusions victims to be compensated for their loss.

39 Crim. 22 Nov. 1961, D 1962, Som. p. 29.

40 To corroborate the reasoning, it has been argued that the legislator dismissed such action for insults to the memory of a person (law of 29 July 1881 on the Press, art. 34).

As far as the Civil Chambers are concerned the action of the heirs was possible in principle: it could be set aside only when the failure to action by the deceased could be interpreted as a renunciation by the deceased of the right to sue.

The question was brought before a mixed chamber which gave the judgment in favour of the approach of the civil chambers. Therefore the right to compensation for a loss of whatever kind is transmitted to the heirs of the victim just as any other asset within the estate.[41]

However, the acceptability of such an action is ruled out when the victim died at the very moment of the accident or within a short time after it.[42] This has sometimes been explained by saying that in this instance the right to compensation has not had the time to arise within the person of the victim.

In reality however, even in the case of instant death, there is still between the accident and the death a moment of reason which is sufficient to give rise to the right. More precisely, it should also be said that no loss could take birth in the person of the victim because that person did not have the time to experience the loss themselves.[43] But even in case of sudden death, there is always between the accident and the death a period of reason which is enough to give rise to a right.

On the basis of the same principles and independently of transmission to an heir, the case law recognises that the action can be exercised by a person to whom the rights of the victim have been assigned: this is the case for instance of an insurer.[44]

In the same way, the right can be exercised by a creditor of the victim, by way of the oblique action. Some reservations must however be made about assignment to a third person, and the exercise of the oblique action by a creditor which are possible only in respect of material loss.[45]

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41 Mixte Chamber 30 April 1976, D. 1977, n° 185, note Contamine-Raynaud. Rev Trim. Dr. Civil. 1976, obs. Durry.

42 Raymondis, "Problème juridique d'une définition de la mort" Rev.Trim.Dr. Civil 1969, 29.

43 Raymondis, op.cit. p 30 and seq.

44 On the principle, nothing could prevent a free transfer of a right of action to obtain compensation for material loss. However a controversy arises whether it is possible to transfer rights of actions exclusively attached to the person. See Le Tourneau, op. cit. n° 996; *contra* Weill Et Terre, op. cit. n° 765

45 Article 1166 of the Civil Code, provides a possibility for creditors to fulfil all rights and actions of the debtors, except those attached to the debtors' persons. It is also called the "oblique action". See Amos and Walton, op. cit. p. 241 and s. or B Nicholas, *French law of Contract*, 1982, p. 187.

§ 2 : The defendant

Three different situations must be considered: when there is only one tortfeasor, when multiple tortfeasors are involved, or when they are unknown.

A) When there is only one tortfeasor.

First of all one must note that nothing prevents an association from being defendant as well as plaintiff.[46]

When one offender is involved, the defendant will be either the offender himself or the person legally responsible for torts committed by the offender or the person who bears a presumption of liability for things under his control. One difficulty remains when the responsible person lacks capacity. In such circumstances (and to limit the analysis to the delictual liability only), [47] the argument was settled with the law of 3 January 1968 which clearly states that someone who is suffering from psychological disorders who causes damage to a third party, remains liable.[48]

However, for minors the solution is not really clear: the latest decisions of the Court of Cassation suggest that gradually the idea of the lack of judgment or the absence of maturity, is no longer accepted.[49]

B) When multiple tortfeasors are involved.

In delicts when multiple tortfeasors are involved and when it is difficult if not impossible to determine[50] the extent of the personal liability of each, the case law,[51] after

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46 See section I § 1.

47 In contractual relationships, the minor cannot be held responsible as long as the liability requires a valid contract. It will only be the case if the contract was made by the minor's representative or when the minor knowingly deceived the other party (Art. 1307 of the Civil Code).

48 Now article 489-2 of the Civil Code .

49 Court of Cassation, Assemblée Pléniere, 9 May 1984, see J Huet "La responsabilité du jeune enfant; vers l'uniformisation de la responsabilité délictuelle" Rev. Trim. Dr. Civ. 1984, p. 508. A teenager remains liable for delicts and quasi-delicts he or she commits (art. 1310 of the Civil Code), but from a practical perspective this liability is carried out by the person whose the teenager depends upon.

50 On the contrary, if the liability of each individual can be easily ascertained, their respective duty to compensate the victim will remain distinct. See Cass. Civ. 2 ieme, 19 April 1956, D. 1956; p. 538.

51 Leading decision of 29 February 1836, Cass. Civ. 29 February 1836, S. 1836, I, 293 and more recently, Cass. Ch. Mixte, 26 March 1971. J.C.P. 71. II. 16762, note Lindon.

some academic and judicial uncertainties,[52] favours the principle of liability *in solidum*.[53] The only onus on the victim is to establish that each tortfeasor took part of the damage.

Thus the Court of Cassation uses formula such as " The co-author of damage who took part in the entire damage must bear the full indemnification",[54] or "each liable person of a single damage must be condemned to redress it for the full amount, the sharing of liability decided by the judge deals only with the relationships between the tortfeasors and cannot affect their obligations toward the victim".[55]

The principle is now perfectly well stated and the victim is entitled to claim the entire payment from any tortfeasor,[56] or unequal shares from each of them,[57] regardless of the nature of the liability which could be different for each tortfeasor.[58]

C) When the tortfeasor is unknown

In such circumstances, and if one follows the strict application of the theory of causation, the absence of the link of causation (a common situation when the tortfeasor is unknown) will prevent any compensation.

The illogicality of the reasoning added to the unjust consequences imposed on the victim, has justified alternative solutions by the legislator and the courts.

- First, to provide a remedy to the victims, the case law has used either the concept of collective fault[59] or collective legal liability for hunting accidents or games[60].

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52 Some academics advocate that the final liability sharing should be decided, according to the degree of importance of the respective action of each individual at the time when the loss occurred. For an application of this theory by courts, see Cass. Civ. 9 March 1962, D. 1963, note Meurisse.

53 Raynaud "La nature de l'obligation des coauteurs d'un dommage: Obligation in solidum ou solidarité", in Mélanges dédiés à J. Vincent, p 317 and s; M. J. Gebler, "es obligations alternatives", Rev. Trim. Dr. Civ. 1969 p. 1 and s.

54 Cass. 2e, 12 February 1969, Bull. 9, II, no 46, p. 35.

55 Cass. 2e, 5 March 1969, Bull. 69, II, no 68, p. 51. See also, Cass. Civ. 26 March 1971, J.C.P. 71, II, 16, 762, note Lindon.

56 In general the most solvent.

57 See notably, Cass. Civ. 2 ieme, 8 May 1978. J.C.P. 1981; II. 19506, note Perrelat.

58 One can be held liable on contractual grounds, and the other for tortious liability. Paris, 18 February 1957, J.C.P . 1957, II, 9944. note Esmein.

59 For losses occurring during a poorly organised hunting party. The Court of Cassation considered that all hunters were deemed to be collectively guardians of the group of bullets

- More recently, the Court of Cassation, has used an intermediate ground, based on the concept of the "common action".

Therefore, in respect of tortious matters when there are several persons liable and it is difficult or impossible to determine the share of liability of each, the court recognises the collective liability of a group member who "took part in a common action and completed related steps which were at the origin of the damage".[61] The court takes the view that the debtors are bound *in solidum* towards the victim in such a way that the victim can claim payment from any one of those responsible and even do so when the total due is not necessarily in an equal amount for each co-debtor, and even when the basis for the liability of each of the debtors is different.

In 1951 the legislator set up a guarantee fund to indemnify the road accidents victims when the tortfeasor is unknown or insolvent,[62] which was extended by the law of 11 July 1966 to the hunting accidents.[63] More recently the legislator enacted specific measures for victims of terrorist attacks or blood transfusions.[64]

SECTION II : SEEKING THE BASIS OF THE RIGHT OF ACTION WHICH HAS ACCRUED TO THE VICTIM

§ 1: The principle of the autonomy of actions in liability based on fault and on a presumption of liability

A) Fault which is the object of criminal punishment as a source of civil liability.[65]

If the act which gives rise to the liability is seen as a criminal offence which, in its turn, is the source of civil liability, the victim will dispose of the option between civil process and criminal process.

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coming from their hunting guns and therefore liable., see Cass. Civ. 5 June 1957, J.C.P. 1957, II, 10205, note Esmein, D. 1957-493, note Savatier.

60 Cass. Civ. 20 Nov. 1957, D. 1958, Somm. 82.

61 Cass. Civ. 15 December 1980, Bull. Civ. 80. II. n° 269; D. 81. 455, note Poisson-Drocourt.

62 Law of 31 December 1951. 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).

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

64 Law n° 91-1406, of 31 December 1991, art 47, J.O. 4 January 1992, p. 184 et Decree 92-183, 26 February 1992, J.O. 27 February 1992.

65 P. Jourdain, Recherche sur l'imputabilité en matière de responsabilité civile et pénale, Thèse Paris II, 1982.

The application, however, of the rule "electa una via" forbids a victim who has chosen civil process to switch over then to the criminal process.[66]

This procedural part excepted, the civil action will have two characteristics.

- In the first place, in commencing action as a civil party, the victim can bring the compensatory action before the criminal court along with the criminal prosecution. The procedure is quicker and less costly than the process before a civil court, and often in practise the victim opts for this method. The constituting of the civil party claim before the examining judge (Juge d'Instruction) or the prosecutor sets the public criminal process in motion.[67]
- Secondly, it should be noted that even if the action for civil compensation is commenced in the civil courts, the criminal nature of the act which gives rise to the liability will still be of some significance. Indeed, that is to say first of all, the criminal judgment has force in the civil courts. The civil process cannot contradict what has been decided in the criminal court. The civil courts must refrain from deciding until judgment is given in the criminal action: it is therefore said that the criminal process holds the civil process in state.[68] Further, the criminal sentence has the force of res judicata as far as the civil courts are concerned.[69]

B) The doubling of the action for liability for the acts of things and personal actions or the possibility of choice which is open to the victim.

Since the landmark case of *Jand'heur* [70] the victim has the choice between an action based on the presumption of liability[71] and one based on fault.[72]

The point here is to allow the victim a choice of opting for the simplest possible procedural system — that of liability on the basis of fault (Articles 1382 and 1382 of the Civil Code) and that based on a presumption of liability (Article 1384 of the Civil Code).

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66 P Le Tourneau Op. Cit. n° 127, 267, 283.

67 Y Buffelan-Lanore, Droit Civil 2ème Année, Masson, 1986 p. 234. It compels the prosecutors' office to prosecute, see: Amos and Walton's Introduction to French Law (Third Edition) by Lawson Anton L. Neville Brown, 1967, p. 200 to 238.

68 Article 4 § 2 of the Code of Criminal Procedure.

69 Y. Buffelan-Lanore, op. cit. n° 707.

70 Cass. Chambres réunies 13 February 1930, D.P. 1930. 1. 57, rap. Le Marc'hadour, conclusions Matter, note G.Ripert, S. 1930. 1. 121. note P Esmein.

71 Based on article 1384 of the Civil Code.

72 Based on articles 1382 and 1383 of the Civil Code.

The latter will generally be chosen because it obviates the need for the victim to bring proof of the existence of fault of the defendant since that is presumed and as a matter of principle without consequence for the amount of the final award.[73]

Each of these liabilities operates in different areas and respond to different basic principles. Therefore from the moment a thing has intervened in the causing of the damage, concurrently with the fault of the person who caused the damage, it is perfectly open to the victim to choose one or other of these two liabilities.

Nevertheless, if by chance the victim has wrongly cast the plea, the judges may always in accordance with the provisions of Article 12 of the Code of Civil Procedure, attribute to the plea the appropriate legal basis.[74]

The Court of Cassation which maintains a rigorous control[75] over these matters allows the victim to proceed:

- by Article 1382 alone when the requirements of Article 1384 paragraph 1 are present.[76]
- by Article 1384 paragraph 1 alone, and this is the case where Article 1382 could also find application.[77]
- simultaneously Article 1382 and 1384 paragraph 1, in which case the judges must obligatorily consider the two bases and as alternatives and successive causes.[78]

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73 Bore, Le cumul de la responsabilité du fait personnel et de la responsabilité du fait des choses, J.C.P. 1965. I. 1961.

74 G. Durry, Rev. Trim. Dr. Civ. 1984. 318.

75 Cass. Civ. II, 6 October 1965, Bull. Civ. II n° 694. If it is important for the court to mention the reasons for using article 1382 or 1384 § 1, it suffices that one component of each liability would be involved F.Benac-Schmidt and C. Larroumet, Encyclopédie Dalloz Civil, Responsabilité du fait des choses inanimées, n° 116.

76 F.Benac-Schmidt et C. Larroumet op cit n° 111 and 112.

77 As a consequence, "judges cannot put aside the liability on the ground of a lack of fault or to share it, by noting a presence of fault" (F.Benac-Schmidt op cit. n°112). As a consequence, res judicata cannot be opposed to plaintiff whom claim will not succeed on the ground of article 1382 of the Civil Code.

78 It has been judged, "that the dismissal of a claim based on section 1 of article 1384 of the Civil Code did not prevent judges to examine whether the personal liability of the defendant was not engaged, since the plaintiff raised the issue in its claim", G. Durry, observations à propos de Cass. Civ. 24 Juin 1970, Bull. II, n° 221 and Cass. Civ. 5 Juin 1971 n° 203, Rev. Trim. Droit Civil 1972 , p. 138.

- in the context of a single case which involves several defendants, the cause of action can differ from one defendant to the next, and this without being bound by the decisions already made in respect of one of the parties, each claim following its own fate in the context of the same court case.[79]

§ 2 : The basis imposed on the victim

A) The principle of impossibility of an option between contractual liability and tortious liability[80]

"In French law, liability is either contractual, tortious and exclusively that".[81]

Inappropriately called the principle of non-cumulation of contractual and delictual liability,[82] it is justified by a different principle — that of the need to respect contractual equality sentence.[83] This is in appearance a line of demarcation between the two systems of liability created by Articles 1382 and following of the Civil Code on the one hand, and on the other hand Articles 1146 and following of the same code.[84]

The enunciation of the principle is clear. But the same cannot be said for its operation which shows serious difficulties, particularly when it is a question of deciding what matters arise within the field of contractual liability, and which are in the field of tortious liability sentence (especially in cases of gratuitous transportation).[85]

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79 Cass. Civ. 6 July 1978, Bull. Civ. 145 n° 185.

80 J. Huet, op. cit. see note n° 5; G. Durry, La distinction de la responsabilité contractuelle et de la responsabilité délictuelle, Centre de Recherches De Droit Privé Et Comparé Du Québec (Montréal) 1986.

81 A Tunc, Encyclopédie Dalloz, Responsabilité en général, n° 172. This principle was clearly reminded by the Court of Cassation which stated that article 1382 of the Civil Code cannot be used to provide a remedy to a loss linked to contractual relationships. Cass. 2e Civ. 9 June 1993, Bull. Civ. II. n° 204,p.110.

82 As a matter of fact, when the loss occurred during contractual relationships, the victim cannot opt between the two different regimes and the case law is constant, see notably Cass. Civ., 1ere, 6 January 1981, Bull. Civ. I, n° 17 and Cass. Civ. 11 January 1989, J.C.P . 1989, II, 21326, note Larroumet. Moreover, the interdiction of choice also exists, but the other way round, from an obvious tortious liability situation to an desirable contractual liability one.

83 G.Viney, Traité de Droit Civil, sous la direction de J. Ghestin, T. IV, La responsabilité, Conditions, 1982, n° 216.

84 See notably, P. Le Tourneau, la Responsabilité Civile, Dalloz 1982 and Aubry et Rau par Dejean De La Batie, n° 95.

85 The first Civil Chamber considers that it falls within the domain of the contractual liability (on the ground of a gratuitous convention), while the second Civil Chamber considers that it is a matter of tortious liability. See Cass. 1ere Civ., 27 January 1993; Bull. Civ. I, n° 42. G. Viney ,

It follows from the application of this principle that the breach or failure to perform the terms of a contract does not allow the parties to the contract to use Articles 1382 and following of the Civil Code, because the liability is maintained within the strict field of application of contractual liability and that also includes rules relating to jurisdiction and limitation periods.[86]

This is what causes some writers to say that tortious liability has a general vocation by contrast to contractual liability which has only a subsidiary role.[87]

The full court of the Court of Cassation affirmed in its decision of 12 July 1991[88] that the rule of the non-cumulation of contractual and non-contractual liability must be applied in the framework of the relationships between persons in a chain of contracts, which are not inter-linked by a direct contractual relationship.[89]

The only area of resistance which remains concerns the situation where the chain of contracts organises a transfer of ownership, the sub-purchaser keeping against the previous owners an action based on the contractual liability. However, one may expect that the case law will in the near future follow the decision of the European Court of Justice stating that the sub-purchaser's action was of tortious liability.[90]

B) The basis imposed on the victim by virtue of special legal provisions

It sometimes happens, and this is a situation which is becoming more and more frequent, that by reason of special provisions in legislation, the general principle of liability does not find application and co-relatively the cumulation of actions is impossible.

Following this principle, by virtue of the principle according to which it is not possible to commence an action in compensation for loss on the basis of a piece of legislation of general application when the loss is the subject of a special legal provision, the losses

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Responsabilité civile, J.C.P . 1993, ed G, I, 3727, n° 5. Cass. 2 ieme Civ, 26 January 1994, Resp. Civ. et assur. 1994, n° 114.

86 On the procedural rules, see Cass. Civ. 21.11. 1911, first case, D.P. 1913, 1, 249, note L. Sarrut. On the time limitation rules, see Cass. Civ. 9 October 1979, Bull.Civ.I, 241, Rev. Trim. Dr. Civ. 1980, 354, observations G. Durry.

87 G.Viney, op.cit n°190.

88 Court of Cassation (Assemblée Pleinière), 12 July 1991. D. 1991, 549, note J. Ghestin. J.C.P. 91, ed.G. II, 21743, note G.Viney.

89 This trend has been confirmed, see notably Cass. Civ. 1ere, 23 June 1992, J.C.P. 92, Ed.G. IV, 2445; Cass. Civ. 3eme, 18 November 1992, J.C.P 93, Ed.G. IV, 240.

90 Aff. C-26/91, decision 17 June 1992; J.C.P. 92, Ed.G.II, 21927, note Larroumet. On the consequences of this decision on the case law, see G Viney. J.C.P. 1993. Ed. G. I, 3664.

which result from a fire can only be regulated by the application of the provisions of Article 1384 paragraph 2 of the Civil Code, under which it is for the victim to prove the fault of the guardian or of the person for whom the guardian is responsible.

The same consequence follows within the context of an action for liability which arises from the collapse of a building where in accordance with Article 1386 of the Civil Code clearly against the strict application of the general principle set out in Article 1384 paragraph of the Civil Code, the victim must prove that the loss had its origin in the collapse which itself is the consequence of a failure to maintain or a inadequate construction.

SECTION III : THE PROCEDURAL RULES

As for any other action which is commenced in a court, an action in civil liability must be commenced within the time periods set out in the law. In order to work out in respect of a civil liability action which is the right court, it is necessary to refer to the classic distinction between jurisdictions founded on the nature of the subject matter and jurisdiction founded on a geographical basis.[91]

§ 1: The time for beginning an action in civil liability.

Formerly as a principle, the prescription at the end of 30 years, applied to any civil action.

Furthermore, when the legal action has its origin in a criminal offence, the shortened criminal statute of limitation governed the issue (10 years for a crime, 3 years for a delict, 1 year for a contravention).

The law of 5 July 1985[92] by adding a new article 2270-1 in the Civil Code, has introduced a uniform time period in all non-contractual liability actions. According to this provision, civil actions will be bared at the end of ten years, starting when the damage or its worsening took place. Identical principles will be applied when the victim decides, while a criminal action is pending, to dissociate its civil action. The civil court will have competence, and according to article 10 of the Code of Criminal Procedure, the 10 years' time limitation period will be used.

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91 H Solus, "Compétence d'attribution et compétence territoriale", JCP 1947 1, 663. Morel "Traité Elémentaire de Procédure Civile" 1949. n°4, p. 194 and seq. *Jurisclasseur* Responsabilité Civile, op. cit. fascicule 221.

92 Loi n° 85-667 of 05 July 1985, also called the "Badinter law". Art. 2270-1 of the Civil Code. JCarbonnier, "Droit Civil, Les obligations" 13ème Ed. 1988 p. 478 and seq. J Huet, Revue Trim. de Dr. Civil 1987 p. 326. Larroumet, D, 1985, Chron 237.

If under agreement, the time limitation period cannot be extended (it will contravene article 2220 of the Civil Code), it still remains possible to reduce it[93] or to renounce to its benefit, as long as it is based on a formal agreement taking place after the rise of the obligation and within the legal time limitation period.[94]

§ 2 : Jurisdiction based on subject matter.

In principle, an action in civil liability is within the jurisdiction of the civil courts: the first instance court if the damages claimed do not exceed 30,000 francs, and the superior court if the claim is above that.[95] The criminal courts are similarly competent when the wrongful act is a criminal offence, and in that case the competent court will be determined by the seriousness of the offence (a crime a delict or a contravention).[96]

When the claim is made against a body with a public law role (the State a local government body, or a public corporation) the jurisdiction in the matter will be exercised in principle by the administrative tribunal.[97] This principle is however tempered in those situations where jurisdiction is given to courts as a result of specific legislative revisions or particular court decisions.

1. In the first place, the operation of state liability takes the place of school teachers[98] and the cases heard within the ordinary judicial system. This jurisdiction has a very general extent: it applies both for loss caused by a student and to a student, and it will be immaterial whether the fault of the teacher appears to be a personal fault or a fault of the employment.[99] In the case where the personal fault of the teacher amounts to a criminal offence, although the criminal court cannot condemn the teacher to payment of damages, the victim can nevertheless become a civil party to the action in order to put in motion public action and the state must support any monetary award made by the criminal court.

According to the decisions of the Criminal Chamber of the Court of Cassation, from the moment that the fault of the government is characterised as a fault of the employment

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93 Cass. Civ. 8 December 1895, DP 1896,1, 241, 2eme decision.

94 Cass. Civ. 1ere, 13 March 1968, D. 1968, 626. JCP.1969, II, 15903, note Prieur.

95 Vincent- Guinchard, op. cit. p. 128 n° 119.

96 See section II, § 1, A.

97 Trib. Conflits 08 fev 1873, *Bianco* , D. 1873-3-20) . Le Tourneau, op. cit. p. 102 n°287.

98 Law of 5 April 1937 Article 2.

99 The ordinary judicial system's competence which is the common rule when a school-teacher commits a personal offence, has been extended by the case law to situations where the administration fault is involved. Trib. Conflits Gavillet, 31 March 1950 , D. 1950 - 331. Council of State 17 July 1950. D. 1950. Somm. 67. Le Tourneau, op. cit. p. 106, n° 297.

service or not independent of the service, only the public action will be dealt with by the criminal court. The civil action will then only be able to be brought before the administrative courts.[100]

2. The jurisdiction also belongs to the ordinary courts by virtue of a law of 31 December 1957[101] in those cases where the damage is caused by a state owned vehicle. The purpose of this provision is the avoiding of an injustice which could result from a divergence between the decisions of the administrative courts and those of the civil courts: formally, the victim of an accident involving a State-owned vehicle was compensated less fully than a person damaged in an accident involving a private vehicle.

But the field of application notably as to the definition of the meaning of "State-owned vehicle", public purpose and the cause or link has not passed without giving rise to a great number of difficulties.[102]

The promulgation of law number 85-677 of 5 July 1985[103] has not changed the fields of jurisdiction of the courts in respect of motor accidents caused by State vehicles. Indeed Article 1 of the law speaks without distinction about private vehicles as about State vehicles, and Article 45 makes it clear that the competent courts are, in principle, the superior courts. The criminal courts can of course become competent if the public action is instigated by virtue of the commission of a criminal offence. The interpretation of vehicle is taken in its broadest sense, and includes sea, river, air, and land vehicles.[104]

Since the law of 5 July 1985 on road accidents, the cause or link between the vehicle and the damage has been reduced to its simplest expression since it is sufficient that the vehicle is "implicated" in the accident.[105]

The law of 31 December 1957 has no application if the guardian of the State vehicle was not at the relevant time in the performance of his or her duties. The consequence is

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100 *Jurisclasseur* op. cit. Fasc. 221-2. Cass Crim 19 Nov 1959, Bull. Crim. n° 502, J.C.P 1960, Ed. G. III, 11386, note P. Aymond. Cass Crim 05/02/1974; Bull. Crim n° 54. Cass Crim 27/11/1984 , Bull. Crim, n° 369.

101 Law n° 57-1424 of the 31/12/1957 (J.O. 05/01/1958, J.C.P , 58, Ed. G. III, 22839).

102 See V E Hamaoui, "La recherche d'un critère d'application de la loi du 31/12/1957 en cas de dommage ayant un lien avec une opération de travaux publics" Rev. Trim. de Dr. Civ. 1970. 268. Le Tourneau , op. cit. p. 107 n° 299 and seq.

103 See note n° 98.

104 When a river boat or a ship are involved, the commercial tribunals will have exclusive jurisdiction, in first instance.

105 *Jurisclasseur* op. cit. n° 50.

that any action which is completely outside the State employment, is excluded from the jurisdiction of the ordinary courts.[106]

The rules applicable to the protection of persons and property have equally provided an extension in favour of judicial competence.

It is the result that mandatory assignment to psychiatric hospitals and invasions of individual liberty by the government which have their legal justification respectively in the provisions of the Public Health Code and the invasion of rights of property which can incur the liability of the government, will be within the jurisdiction of the ordinary courts.[107]

The provision of law number 77-5 of 3 January 1977,[108] allow the victims of terrorist offences to obtain from the French State compensation for the losses suffered, and the competent court is the normal judicial hierarchy.[109]

§ 2: Geographical jurisdiction

In accordance with the rules of civil procedure, when the jurisdiction is with the civil courts, the plaintiff has the choice between several geographically competent courts:[110]

- Either relative to the defendant: the competent court is that of the defendants domicile or, failing that, the place of the residence of the defendant, or that of any one of the defendant's if there are several. This is an application of the general rule provided by Articles 42 and 43 of the new Code of Civil Procedure and of the rule *actor sequitur forum rei*. [111]

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106 It has been decided that since it is a preliminary question, the administrative courts only, can decide whether or not the act at the origin of the loss are linked to an official duty. Tribunal des Conflits, 25/11/1963, Caruelle, J.C.P 64 ; Ed. G. II, 13473, note OD.

107 Articles 342 and 343 of the Code of Public Health and article 136 alinéa 3 of the Code of Criminal Procedure. See notably, R. Chapus, Droit Adm. Général, T. 1, 4è Ed. Domat Montchretien, 1988, n° 934-938. These are common situations in expropriation cases.

108 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 (D.1987, 333). Amended several times and most recently on 6 July 1990.

109 See art 706-3 and seq. of the Code of Criminal Procedure ; Law 85-1407 of the 30/12/1985 (J.O. 31/12/1985, J.C.P. 86; Ed. G. III, 58135); Law 90-589 of the 06 July. 1990 (J.O. 11/07/1990 - J.C.P 90; Ed. III, 64024). See also, art 706-14 of the Code of Criminal Procedure and loi n° 81-82 of the 02/02/1981.

110 Cass. Civ. II - 28 February 1990 - Bull. Civ. II n° 4.

111 Le Tourneau, op. cit. n° 309 and seq.

- Or, by reason of the action which caused the loss: in this case the competent courts are those of the place where the act happened and also that of the place where the loss is suffered.[112]

The jurisdiction of the court in the place where the action happened was granted by the law of 26 November 1923. The new Code of Civil Procedure added to it the place where the damage was suffered which can be different in some cases. But the place where the loss is suffered will sometimes be very difficult to determine, notably in those cases where there are moral damages sought.

In contractual matters the plaintiff has a choice between the courts where the defendant lives, which is an application of the general principle, and the place where the effective delivery of the thing will take place, or the performance of the contracted service.[113]

The law sometimes provides a special jurisdiction[114] and this is notably the case for a company, which will be sued in the courts of the place where its head office is,[115] a work dispute where the court that is usually competent will be that of the place where the employee works However the jurisdiction of the court at the domicile of the employee will be used if the employee works at home.[116]

CHAPTER II: COMPENSATION FOR THE LOSS

"French law does not in any way tolerate a system which detracts from complete compensation for losses which result from civil fault attributable to physical or fictive persons in private law whatever be the seriousness of those faults".[117]

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112 Article 46 of the new Code of Civil Procedure. Vincent-Guinchard, op. cit. n° 218. *Jurisclasseur* Proc. Civ. fasc. 211.

113 The exclusive jurisdiction clauses are valid, only if they take place between commercial parties, if they are express and mentioned in apparent and distinctive forms; see notably 2 ieme Civ 20 February 1980, G.P 1980, 2, 494.

114 All specific jurisdictions will not be considered (for an exhaustive list see Le Tourneau, op. cit. n° 309 and seq.)

115 Article 43 paragraph 2 of the Code of Civil Procedure. However, according te the "main railways stations" theory, it is still possible to serve a company, in order to appear before the court where a subsidiary of the company operates its business;see notably, Rouen 26 janv. 1968, D 68, som. 80.

116 Article R 517-1 of the Labour Code.

117 Constitutional Council , 22 oct. 1982, DS 1983, 189, note Luchaire.

According to this principle, which must be strictly applied in tortious liability[118] the right to compensation exists from the moment of the damage. If it is a contractual matter, the debtor is bound to perform the contract only if it was given notice unless the matter involves an obligation with successive performances or an obligation to abstain. In tortious matters however the right to compensation exists from the time the loss is known. The right is certainly not quantified in any definitive matter, but it exists at law and this carries with it the following consequences:

- The victim has the opportunity of taking protective measures in order to avoid the insolvency of the debtor.
- The Paulian action will allow the victim, or the victims heirs, to have cancelled any fraudulent acts which would tend to create insolvency in the debtor.[119] Action is directed against third parties who have acquired goods from the debtor.
- Article 724 of the Code of Civil Procedure confirms the principle of the transmission of the right to sue to the victim's heir or beneficiaries.[120] The victim or the victims heirs may either have the amount of the compensation fixed by a court, or agree on a sum by way of compensation with the debtor.

Here the concern will be with the settling of the amount of compensation by judicial means. The first goal of compensation for the courts is to ensure in the most appropriate manner possible a compensation which is as complete as possible and consistent with the goal of a total compensation for the loss.

Once the problem of assessing the amount of the compensation, and the form that it will take, it is then necessary to determine who will be responsible for it.

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118 J Carbonnier Droit Civil 4, Les obligations, P.U.F, 1988 p. 305 and seq. "according to academic writtings, the decision which grants the compensation..... does not create a specific right, it only takes note of a preexisting right. The decision is a perfect example of an adjudicative judgment. Indeed the right to be compensated, exists as soon as the loss occurs ". *Jurisclasseur* Resp. Civ. op. cit. fasc. 201- N° 12. On contractual liabitity, see J- L.Baudoin, "Oppressive and Unequal Contracts, The Unconscionability Problem in Louisiana and Comparative Law" 1986,60, Tulane Law Review 1119; P Legrand (Jr), "Judicial Revision of Contracts in French Law : a Case Study" 1988, 62, Tulane Law Review 963; P Legrand (Jr), "The Case for Judicial Revision of Contracts in French law (and beyond)" 1988 - 89 - 34 , Mc Gill Law Journal 988. A H Angelo and E P Ellinger "Unconscionable contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States" Loyola of Los Angeles International & Compatrative Law Journal Vol. 14, July 1992, 3. Y-L Sage " French Law of Delict: The Role of Fault and the Principles Governing Losses and Remedies" 26 VUWLR (2) 1995.

119 Article 1167 of the Civil Code. Y Buffelan Lanore, op. cit. n° 404.

120 *Jurisclasseur* , Responsabilité Civile, op. cit. fasc. n° 202-2.

Section I : The two forms of compensation

Two forms of compensation are possible.

Compensation can be made either in kind or in money, courts being entitled in the silence of the law, to opt for any form they consider appropriate.[121] If this last option is a theoretically possible one, its operation in practice, particularly in respect of the assessing of the quantum, is always subject to the assessment of the court.[122]

Compensation in kind remains more difficult to achieve and perhaps is not a true form of compensation.[123] In the absence of express provision in legislation, the courts have total discretion whether to award compensation in kind or in money.

§ 1: Compensation in kind

The victim cannot refuse to accept compensation in kind when it is offered to him by the person who is responsible for the loss.[124] But if the compensation in kind is not offered by the person responsible, the victim is not required to accept it.

Compensation in kind is rarely possible except in the following cases which have as their goal, either to suppress illegality or to publicly denounce the actions of the person responsible:[125]

Such would be the case in a matter of defamation, where an order to the defaming party to publish a correction of the wrongful allegations is a compensation in kind.[126]

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121 Cass. Civ .II. 08 déc. 1977; Bull. Civ . II. n° 236. Cass. Civ .II. 07 June 1979, Bull. Civ. 1979, 3. 95; n°124; the third Civil Chamber of the Court of Cassation, seems to favour the compensation in kind, whenever it is attainable.

122 M Quenillet-Bourrie, "L'évaluation monétaire du préjudice corporel: la pratique judiciaire et données transactionnelles" JCP 1995, Doct. 3818.

123 E Roujou De Boubee, "Essai sur la notion de réparation" LGDJ 1974; Y. Chartier, "La réparation of the préjudice" D. 1983; Cass Civ 3è 07 June1979; JCP 79. II; 19-415, note Ghestin. Cass. Civ. II. 09 July. 1981, Gaz. Pal. 1982, 1, 109, note CHABAS.

124 Le Tourneau, op. cit. n° 1028.

125 E. Roujou Du Boubee op. cit. p. 209 à 253; "It is clear that courts have never clearly distinguished between the suppression of illegality and the compensation itself. On purpose or not, this confusion provides to the judges a discretionary power". Le Tourneau, op. cit. in *Jurisclasseur* Resp. Civ. fasc. 201 n° 48.

126 See notably, TGI Paris 19 nov. 1980, D 1981, 436 note Bouloc. TGI Paris 14 nov. 1980, D. 1981, 163, note Lindon.

In the case of an illegal or improper construction, the first instance judges in their primary duty of the consideration of the facts, can order the demolition of that construction.[127]

In the context of nuisances, the judge can make an order for the cessation of the activities which give rise to the nuisance.[128] The cancelling of a fraudulent act in the context of a procedure based on the Paulian action is also a way of suppressing an illegality.[129]

It can occur in a particular case, for instance, the fraud on those lacking capacity that compensation in kind is more advantageous than compensation in money, and in this case it can amount to a privilege.

Indeed, if the nullity of the act is upheld in the manner that normally occurs in the case of the rules relating to incapacities, the minor must provide third party with damages for any loss which has been caused by the deception. But if the minor is insolvent, the third party will not receive complete indemnification. With the validation of the act, the third party will, in the end, suffer no prejudice.[130]

§ 2: Compensation in money or equivalent

The application of the principle of compensation by equivalent is found in damages. When the loss is caused by a thing, the amount of money provided to the victim will permit him or her then to repair the damaged thing or to obtain a similar object.

The rules applicable to obligations, in terms of sums of money, govern the allocation of damages. Thus, the court is free to decide whether the compensation will be made in the form of a lump sum or periodic payment, and whether it is bound by the conclusions of the plaintiff or the defendant. It should be noted that an indemnification in the form of a periodic payment, which amounts to indemnification of a permanent nature, is the most adequate in those cases where the loss amounts to an incapacity for work or a permanent injury, since then it is a question of replacing lost salary and the prejudiced position is going to extend into the future.

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127 See notably, Cass. Civ. III; 07 June 1979; Bull. Civ III; n° 124. Cass. Civ. III; 08 oct. 1974 , Rev. Trim. Dr. Civ. 1975, 331, obs. Giverdon. Cass. Crim. 30 Mai 1991, unpublished.

128 Court of Appeal of Aix-en-Provence, 1 February 1971, Gaz. Pal. 1971, I , 302. TGI Paris, 1e Ch, 07 June 1989 Resp. Civ. et Assurance, April 1990.

129 H Sinay, Rev. Trim. Dr. Civ. 1948 - 183.

130 J Carbonnier op. cit. p. 94 and art. 1117 of the Civil Code.

One should note equally that the law of 5 July 1985 envisages that the victim of a road accident (Article 44) can request a periodic payment granted to him be replaced by a capital sum.[131]

Equity suggests that compensation made in the form of a periodic payment is more appropriate since it represents a substitution[132] to a lost salary or to a substantial alteration of a previous way of living.[133]

The decisions of the Court of Cassation (6 November 1975) according to which the courts can index the periodic payments that they grant, are however greatly weakened by the provisions of the law of 27 December 1974 which was promulgated at the request of insurance companies to limit extensively the field of application of that rule.

SECTION II : THE CALCULATION AND THE RESPONSIBILITY FOR THE INDEMNITY

The final aspect of compensation is to ensure that it is equal to the loss. But this is a principle that is not easily formulated. In its application a great number of difficulties arise when the extent of the damage fluctuates.

§ 1: the rule of equivalence of compensation relative to the loss suffered

A) "All the loss and nothing other than the loss" is the formula which underpins this rule. The basic principle is that the compensation is measured against the loss.[134] The extent of the damages will not be the subject of any other limitation, in particular a limitation as to foreseeable damages applicable in respect of contractual liability which is not applicable in respect of tortious liability.

The compensation cannot be greater or lesser than the loss suffered. Consequently when the object destroyed was worn out, the person who suffered the loss has the right to a very small sum for such an object.

But this principle is not applicable in every case. When the thing destroyed is a motor car, it will generally be possible to find on the second-hand market a vehicle of the same type and same age, and the victim will thus be put back in the situation before the loss.

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131 On the possibility for awards granted for road accidents to transform a period payment into a lump sum, see article 44 de la loi of the 05 July 1985.

132 Cass. Civ. II, 17 December 1979 , Bull. Civ. II, n° 298. Cass. Civ. II, 21 nov. 1973, Bull. Civ. II n° 304. Rev. Trim. Dr. Civ. 1974, 821, note Durry.

133 Court Of Appeal Paris, 10 November 1983, D 1984, 214, Note Chartier

134 Cass. Civ II 28 oct. 1954 J.C.P 55 - Ed. G II, 8765, note SAvatier. Le Tourneau, op. cit. n° 1075.

But in the case of a truck which has run into and damaged a house. The truck causes such damage that it is necessary to demolish the house and build again. It is not possible to rebuild the house in exactly its former state since it would be necessarily new.

The Court of Cassation has for a long time been of the view that it is necessary, even in a case like that, to apply the principle, by making a deduction from the cost of rebuilding which corresponds to the age of the house damaged.

This solution is not a satisfying, because it includes improvement of the building of a kind that it may not have been intended to make in respect of the old house, and this may result, in practice, preventing the victim rebuilding because the capital necessary to do that is not available.

For this reason the Court of Cassation has finally accepted that in such a case the age of the building should not be taken into account in such a way that the indemnity to the victim will permit the acquisition of a house of equal value.[135]

In the case of damage caused by a vehicle, the following difficulty often arises. In practice, the repair of the damaged vehicle is more onerous than the replacement by another vehicle of the same type, of the same age and with the same degree of wear.

Can the victim demand that the vehicle be repaired?

This is a matter which still gives rise to divergence of opinion between the chambers of the Court of Cassation: the criminal chamber says 'yes', and the second civil chamber says 'no'.

The Civil Chamber says that the cost of the repair can be provided for the victim only where that is less than the market value of the vehicle. It may of course not be the case that value coincides with the market value.

In that case, it is necessary to take account not of the price that the victim would have obtained for the vehicle if it had been sold (because the victim was not a seller), but the sum which it would have been necessary to spend to obtain another similar vehicle. And in order to determine what that sum is, it is not necessary to take account of the prices in the vehicle Argus, which have no official status and which are often in respect of some models not representative of the real state of the second-hand market.

Therefore, use is made of the principle according to which the victim must be placed in the same position that he or she would have been if the accident had not occurred.[136]

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135 Cass. Civ. II, 14 Nov. 1984 , Gaz Pal. 1985, Pan. Jur. 67. LE Tourneau op. cit. n° 1079 and seq. See also J Huet Rev. Trim. Dr. Civ. 88. (2) April/June 1989.p. 339-340.

B) On the basis of the principle that compensation cannot be greater than the loss suffered, formerly an erroneous consequence was deduced: the prohibition on cumulation of an indemnity between that provided by insurance and that provided by the person responsible. Account was taken of the fact that to the extent that loss was covered by insurance payment there could no longer be any other payment: the victim could not claim from the person liable more than the amount which remained uncovered by the insurance.

But account has been taken of the fact that there is in this deduction an error of logic. In fact, insurance payments do not repair damage. They do not have their origin in the loss but in the insurance contract, and only in the counterpart of the premiums paid by the insured. Therefore that payment does not arise from the same cause as the payment from the person liable.[137]

The only limitation to mention in this type of situation applies in respect of payments made by social security services, superannuation and public bodies as well as friendly societies. This means all third party payers who have their payments deducted from the damages allocated to the victim, since the situation of a third party payer is similar to that of the insurer of loss who is subrogated by law to the rights of the insured.[138]

C) Another basic principle is that the amount of compensation is independent of the amount of fault. It is possible to conceive a fault of a minor nature which could give rise to a compensation order for a very large sum. On the other hand, the judge may not increase the amount of damages in order to punish a serious fault.

This of course is a difference between the Anglo-Saxon system which allows punitive or exemplary damages to be given in respect of a particularly serious fault that has been committed.

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136 Cass. Civ. II, 18 February 1976, D S 1976, Somm 43. Cass. Civ. II, 17 March 1977; Bull. Civ. II, n° 89. Cass. Civ. I, 06 January 1987, Somm 332, obs. Groutel. H. V. Amouroux, "De l'indemnisation confisquée à la reconnaissance de la valeur de remplacement: la révolution silencieuse de l'assurance automobile" Gaz. Pal. 4 May 1991. J. Barbancey, "Valeur à neuf et enrichissement" , Gaz. Pal. 09/01/1988

137 Le Tourneau, op. cit. n° 1128. Cass Civ 1e 05 Mai 1981, Bull., I, n° 136

138 The law of 1985 on roads accidents victims (see supra note 98) has imposed this duty to all third parties payers. F. Zenati, Trim. Dr. Civ . 1985, p. 798. *Jurisclasseur* Resp. Civ. op. cit. fasc. 230-2. Cass. Civ., 1e 05 June 1967, Bull. Civ. I, n° 198. Paris 13 December 1965, J.C.P 1966, 14784, note Rodiere. See Y.Lambert Faivre, "Le droit et la morale dans l'indemnisation des dommages corporels", D. 1992, Chronique 32, p. 165 à 168. The Paris Court of Appeal has recently decided that the loss of enjoyement of life is distinct from the permanent partial incapacity and therefore could be cumulated with other indemnities. CA Paris, 3 Mai 1994, Gaz. Pal. 94, 1, p.17.

Equally, a full and final settlement indemnity will not be granted.[139]

Nor is there any place for consideration of the relative wealth of the person responsible and the victim, nor of the fact that the person responsible has insurance.

The order for payment of damages must not be one for a greater sum than it would otherwise have been on account of the existence of this insurance.

D) According to these ideal statements, the judges must calculate the loss as exactly as possible, taking account of all the factors within their knowledge.

It will be noticed, however, that the courts sometimes take some liberties in the application of these principles. Indeed they often succumb to a tendency to take account of considerations of justice, or more prosaically to make damages orders larger when an insurer is involved.

But provided that this is not stated expressly, the court's decision cannot be attacked because the assessment or measuring of the loss is a question of fact, and is therefore not susceptible of review by the Court of Cassation.

On the other hand, economic pressure groups have been able to get public authorities to make rules to fix indemnity ceilings which are very low both in contractual and in tortious matters.[140]

From a practical perspective, it is almost impossible to ensure that the victim receives a compensation which will exactly correspond to its prejudice; one can only, at the best, be as close as possible, but a discrepancy, even the slightest one, will always remain.

To that extent the assessment of the loss is governed by a subjective approach of the courts. While it is obvious that the compensatory principle is the guide in French law, the assessment of damages presents a serious difficulty when it is necessary to value personal injury or a moral loss.

Such losses are by their nature unassessable in monetary terms. Neither legislation nor the case law defines moral loss and there is therefore no objective basis for determining the amount of damages to be awarded. If, for example, an accident has cost the victim an arm or a leg, it is possible to calculate the damage that results in terms of the necessary care provided to the victim and in terms of incapacity for work, but it is not possible to

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139 Cass. Crim. 06 December 1983, Bull. Crim. n° 329, J.C.P 84, Ed G IV 55. Cass. Com. 17 Nov. 1987, SARL Armor Bétail et Autres c/ Banque Hervet.

140 *Jurisclasseur* , Resp. Civ. op. cit. fasc. 201, n° 70 and 78.

calculate the loss which occurs in terms of physical suffering and mental suffering, nor loss of enjoyment of life or of sexual capacity.

The determination will therefore necessarily be arbitrary in respect of these matters and the case law has gradually evolved. First, compensation was granted for moral damages only,[141] then extended to the pain suffered after the death of a relative.[142]

Great inequalities can therefore appear between the assessments in different courts, all the more so since these are questions of fact and the Court of Cassation cannot intervene and ensure that there is a uniform approach in these decisions.[143]

It is sometimes true that in order to try to get a certain harmonisation, courts of appeal have the habit of publishing tables of sums which record the decisions given in this area.[144]

Appreciated and assessed *in concreto* the loss and, as a consequence, the compensation which flows from it, prevents any reference to a pre-established table of figures.

It is nonetheless the case that, in practice, the experts designated by the courts have a clear tendency to use tables which are more or less official.[145] The notion of imputability, that is to say "proof of the cause or link between an event and a consequence, has to be established".[146]

If the results of the expert reports are not obligatorily followed by the judges, practice shows that at least on the extent of the loss judges, in fact, do follow the advice of experts

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141 Cass. Crim. 22 September 1837, S. 38-1-331.

142 Cass. Crim. 20 February 1863, S. 63-1-321.

143 M. Le Roy, "L'évaluation Of The Préjudice Corporel" Litec 10è Ed. 1987. R Barrot "Le rôle du médecin et du juge dans l'indemnisation du dommage corporel" Rev. Fse of the dommage corporel, 1983. 13-24.

144 See notably, LE ROY, op. cit. and *Jurisclasseur* Resp. Civ., op. civ. fasc. 202-4 and 202-5. M. Quenillet-Bourrie, "l'évaluation monétaire of the préjudice corporel: pratique judiciaires et données transactionnelles" J.C.P 1995, I, 3818.

145 For example the Mayet-Rey-Mathieu-Padovani's tables of 1939 are still used for victims of labour accidents. By the same tooken, doctors appointed by courts as experts, rely on the tables published in the *Jurisclasseur* (Resp. Civ. op. cit. fasc. 202-3), or "le Barème du Concours Médical de 1993". See C Rousseau "Commentaire sur le barème "Droit Commun" dit du "Concours Médical" , Gaz. Pal. 1994, 1, doctr. p. 29.

146 *Jurisclasseur* op. cit. fasc. 202-3.

most of the time. Only in the measuring of damages in money is there a fluctuation according to the personal perceptions of the judges.[147]

Nevertheless the judges must, in their assessment, precisely identify the elements of their loss, such as temporary incapacity for work, permanent partial incapacity, pain and suffering (pretium doloris), aesthetic loss and loss of enjoyment of life.[148] This is particularly necessary since the passage of a law of 27 December 1973 which restricted claims of social security against third parties responsible for those sums which provided compensation for the particular heads of loss which are indemnified by it.[149] However, this rule is not strictly enforced. The Court of Cassation considered that a court of appeal is not bound to detail all the damages, when a global compensation is granted "all grounds of the claim being merged"[150]

E) Contractual liability on the basis of Articles 11 1149 and 1150 of the Civil Code, relates only to foreseeable loss. The penalty clause added in the contract itself, which indicates the amount of damages to be paid by a faulty party, exempts the creditor from establishing its prejudice. However, since the law of 9 July 1975, judges can remedy any abuse.[151]

§ 2: The development of the quantification of the loss

In order to settle this question, it is necessary to distinguish two periods during which variation can take place - either before the court decision or after.

A) Assessment of the loss

In this case the loss has varied between the day it was suffered and the day of the decision which sets the compensation. Here, the case law is of the view that the assessment of damages must be made at the date of judgment and not at the date the loss occurred.[152]

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147 Margeat et Picard "La réparation of the dommage chez l'enfant" GP 1981, I, Doct. 254.

148 *Jurisclasseur* Civil Responsabilité, op. cit. fasc. 202-3. Y Lambert Faivre, op. cit. p. 165.

149 The law of 1985 on roads accidents victims (see supra note 98) clarified rules governing third party payers' right to be reembursed for the indemnities paid to the victim. Cass. Ch. Réunies 27 April 1959, D. 1959, 345, note Esmein.

150 Cass . Civ I. 16 July 1991 J.C.P 91, Ed .G. IV, p. 367. As noted by G Viney, "One can only regret this behaviour which prevents all controls for lack of motivation, gives rise to arbitrariness in the decision and the negligence of first instance judges " J.C.P, Ed G n° 13 n° 3572.

151 See notably Chabas, La réforme de la clause pénale, D. 1976, ch 229. Boccara "La réforme de la clause pénale conditions et limites de l'intervention judiciaire," JCP 1975, Doct. 2742.

152 Derrida, "L'évaluation du préjudice au jour de sa réparation" JCP 1951-I-918.

Assessment at the date of decision has the merit of taking into consideration any consolidation of the loss, for example, if the condition of the victim has improved or,

on the contrary, if it has deteriorated since the accident. In this case there can be no doubt that the court must take into consideration the loss as it exists at the date of judgment, and take account of any improvement or deterioration.[153]

The answer will however be different in as far as it concerns any change to the assessment of loss which follows from monetary instability.[154]

Viewed as a matter of justice, the following considerations can be taken into account:

- The victim has a right to complete indemnification. It is not fair that the victim suffers from the consequences of an increase in prices, or the slowness of the rendering of a decision.
- On the other hand, if the victim had replaced the thing at the time of the accident, there would have been no loss incurred because of increase in prices. But perhaps the victim waited because the granting of compensation was by no means certain, or because the victim did not have the money necessary to replace the damaged thing.

This is not a restriction at the court level. The evaluation of the loss at the day of judgment is subject to a grave objection on the basis that the right to compensation exists from the moment of suffering the loss. If the right exists from that moment, how can the quantum increase subsequently?

In order to set aside this objection, it has been suggested that it is necessary to make a distinction between the duty to compensate, and the duty to pay the compensation. The obligation to compensate arises at the moment of the suffering of the loss. This explains why the right to compensation can be transmitted to heirs. But this duty to compensate is transformed on the day of judgment into a duty to pay compensation. It is therefore at that date that the amount of compensation must be settled.

After a long period of hesitation the case law has been settled on the basis that the appropriate date of assessment is at the time of judgment. The criminal chamber of the

153 Cass. Civ. 28 December.1942, Gaz. Pal. 1943, I, 97.

154 L Mazeaud "L'évaluation of the préjudice et la hausse des prix en cours d'instance" JCP 1942, 2, 275. Req. 21 Mai 1928 , D.H 1928 , 366. Cass. Civ. 2e, 03 March 1982, Gaz. Pal. 03-04 Nov. 1982, note F.C.

Court of Cassation has stated that the assessment in the case of an appeal must be made at the date of judgment.[155]

Certain modifications to the rule must however be considered.

The principle must be set aside if the victim has arranged a replacement or repair before the judgment. In these cases, the assessment is to be as at the date of the replacement or repair.[156]

And it is the same in those cases where the victim has refused a satisfactory offer of compensation and therefore caused an unnecessary court case.[157] In these cases, the assessment is made at the date of the offer of compensation. In the case of the loss of or dispossession of property, a judgment of the criminal chamber of the Court of Cassation of 6 June 1946, while affirming the general rule, did not apply it in two cases of stolen bearer title property which was worth less at the day of judgment than at the date of theft. It was considered that the victim could have sold the bearer documents before the drop in price.[158]

B) Review of the loss suffered

It can happen that the compensation fails to correspond to the real loss suffered because of circumstances such as the cost of living and the amount of the periodic payment.

So the question arises whether it is possible to subsequently review the amount of damages which is fixed by the court's judgment.

If the variation in the nature of the loss suffered is considered, the question arises mainly, but not exclusively, in respect of personal injury.

There is settled case law to the effect that if the condition of the victim has deteriorated, it is possible to obtain an increase in the compensation. A review of the compensation award is admitted because the status of res judicata applies only to the amount of loss which was then known and not on any complementary loss which was in the future, or

155 Cass. Crim 04 Mai 1979, Gaz. Pal. 1980, J . 90.

156 Colmar 02 and 09 Avril 1954 JCP 1954 , II, 8133, note Lyon-Caen. Cass. 2è. Civ, 19 nov. 1975, D. 1976, 137, note Le Tourneau.

157 Paris 16 March 1951, J.C.P 1951, 6182.

158 Cass. Crim. 06 June 1946, D. 1947, 234, note Savatier.

that could have only been suspected. The Court of Cassation has admitted this principle.[159]

However, if the condition of the victim has improved the person who caused the loss cannot obtain a reduction in the damages awarded. The authority of res judicata produces this result. It could only be otherwise if the judges stated that their judgment was given only on the basis of the then current state of the loss, and that the right to vary the judgment by the defendant is formally reserved for the future.[160]

In respect of reviewing the quantum of loss, it is to be noted that in practice it is usually only an increase as a result of the depreciation in the value of money, and the question arises particularly in compensation which is in the form of periodic payment made in respect of incapacity.[161]

Once again, the principle of *res judicata* is opposed to any later revision of the decision given. Moreover any such change would give rise to a very severe practical difficulty because very often the person liable will have deposited a capital sum with a company responsible for the payment of such sums which will have taken a fee for the provision of the periodic payment service. It nevertheless, remains that the absence of a review is serious for the victim who sees his or her resources being constantly devalued or reducing.

In order to resolve the problem in the first instance, judges could not, in their judgment, reserve the possibility of later revision as a consequence of changes in cost of living and provide for an indexing of the periodic payment.

The Court of Cassation was at first opposed to that idea for two reasons.

- Firstly, it relied on the theory of res judicata. However, there would be no derogation from that principle if the original decision had reserved the possibility of a revision - a fortiori - if the original judgment had fixed the basis for an indexing in such a way that it would not be necessary to return to court.[162]
- Secondly, the court equally referred to the absence of a causal link between the fault of the person liable and any increase in the monetary value of the loss. It is noted however that the causal link exists since the damage still remains. It is therefore only its expression in monetary terms which changes.

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159 Court of Cassation (Assemblée plénière,) 9 June 1978, Gaz. Pal. 2, 557.

160 Buffelan Lanore, op. cit. n° 1266.

161 S Brousseau 'le point sur l'indemnisation par rentes indexées", JCP 1977-I-2855.

162 Cass Soc 02 Mai 1952,J.C.P. 52 , Ed G. II, 6974, note Frejaville Cass Crim 05 juill. 1961, J.C.P. 61, Ed G. II, 12369, note P.E. Gaz. Pal. 1961, 2248.

On analysis, the idea underlying the decisions of the Court of Cassation was that the courts should not fail in their duty to respect the principle of monetary nominalism.

It nevertheless remains that this argument has its limits because of the fact that the legislator felt obliged to take account of depreciation.[163]

The main criticisms in respect of the case law concern, on the legal level, the principle of full compensation demanding a periodic payment which truly replaces the lost salary of the victim. This salary will increase consistently with changes in the cost of living.

On a practical level, the case law condemned those who suffered personal injury which resulted in a permanent incapacity and who fell progressively into a state of misery. As a consequence, there was resistance to the case law both by judges and academic writers at first instance.

The Court of Cassation changed its position by two judgments of a combined chamber in 6 November 1974 where it was admitted that the judges of first instance could index periodic payments.[164]

However, as a result of pressure from insurance companies, the legislation in its turn was introduced and by a law of 27 December 1974[165] the impact of the decisions of the Court of Cassation of 6 November 1974 were substantially limited in requiring that indexation could only be for an incapacity of 75% or more.

The law of 5 July 1985 on indemnity for road accident victims amended the earlier legislation and repealed this condition of a minimum incapacity of 75%.[166]

Actually three distinct regimes coexist, confusing the matter, without reason, for the insurance companies which manage the indemnity funds.[167] These regimes are the law of 24 March 1951 (amended by another law of 9 April 1953) on periodic payments, the law of

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163 The rate of the periodic payments was amended by successive appropriation bills after the promulgation of the 1985 law (see note 98), the latest taking place in 1992.

164 JCP 1975. II, 17978, Concl. Geyout, note Savatier, Rev. Trim. Dr. Civ. 1975, 114 and 549 obs. Durry. Cass. Ch Mixte (2 decisions) 06 nov. 1974, JCP, 75, II, 17978, note Savatier. Cass. Civ. 17 April 1975, D S. 1976, note Sharaf el Dine.

165 Brousseau, le point sur l'indemnisation par rentes indexées, op.cit.

166 Article 43 of the law of 05 July 1985 and article 1 of the decree n° 86-973 of 08 août 1986, repealed the condition dealing with the rate of permanent incapacity.

167 *Jurisclasseur* , op. cit. fasc. 201 n° 34.

27 December 1974 on periodic payments allocated to road accidents victims , and the case law.[168]

Beyond the legislation of 27 December 1974 which was amended in 1985 or outside those laws the judge is free to index the periodic payment according to any factor which appears appropriate. It is however not possible to provide indexation for a periodic payment which was not fixed to indexation at its origin.

CONCLUSION

The analysis of the development of civil liability shows that it was for a long time confused with criminal liability. Thus the same act may give rise to both civil liability and criminal liability as for example in the case of assault which is both a criminal offence and also obliges the perpetrator to compensate the victim for the damage caused.[169]

On a common base made of a generating act, a loss, and a causal connection, the rules vary only by reason of the nature and function of each particular type of liability. Thus, in civil liability[170] the law seeks to provide compensation to individuals for their private losses in order to put things back in the state they were before the liability arose, to re-establish the equilibrium which had been disturbed between members within the social group. The sanctioning effect of civil liability appears here as both restitutive and indemnifying, but not punitive as is the case for criminal liability.[171]

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168 Law n° 51-695 of the 24 May 1951 and Law n° 74-1118 of the 27 December 1974.

169 See Chapter I, section II, § 1.

170 In a criminal liability situation, all sanctions are made of punishments whose purpose is to reprimand and discipline on the behalf of the society .

171 From time to time, civil liability fulfils other functions expending its natural scope. For example judges are sometimes incline to equally punish the tortfeasor and to indemnify the victim. Thus, civil liability is also deemed to prevent any behaviours which could threaten the society, especially by the exemplary nature of the condemnations prononced by the courts.