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MEDICAL MALPRACTICE AND COMPENSATION IN FRANCE

PART II: COMPENSATION BASED ON NATIONAL SOLIDARITY

GENEVIEVE HELLERINGER*

INTRODUCTION

Under certain circumstances, the damage cannot be attributed to any misconduct on behalf of a health provider amounting to medical malpractice: on the contrary, the damage occurs pursuant to the performance of regular acts of prevention, diagnosis, or treatment. Title IV of the Act (L. n° 2002-303) of March 4, 2002 provides for the creation of a compensation fund for victims of certain harms independent of any medical malpractice. Schematically, and distinctively from the compensation process by insurers of liable professionals, compensation of the victim will in such cases result from a compensation scheme similar to that available for victims of terrorism and crimes. It is based on national solidarity and dispensed by the National Fund for Compensation of Medical Accidents (ONIAM). Previous specific existing compensation funds (such as the fund for victims of HIV infection through blood transfusion, created in 1991), the jurisdiction of which was not necessarily conditional upon the absence of liability on behalf of healthcare providers, were merged into the new general procedural and compensation scheme set for ONIAM.

A specific compensation scheme may be triggered by the victim under the auspices of cases for which national solidarity is accountable.

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2. Id; ONIAM stands for: « Office National d’Indemnisation des Accidents Médicaux ».

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I. TYPOLOGY OF CASES COVERED BY NATIONAL SOLIDARITY

Only limited types of losses fall under national solidarity compensation schemes. Medical hazards and hospital-acquired infections are the two cases added to the scope of national solidarity compensation in 2002, whereas blood infections and other cases have been recognized as such for a longer time.

A. Medical Hazards

The March 4, 2002 Act provides for specific compensation rules for a medical hazard defined as “the occurrence of an accidental risk inherent to the medical procedure and which occurred without any fault of the practitioner and could not be controlled.” Compensating for the consequences of such medical hazards is beyond the scope of the obligations under which the physician is contractually bound toward his patient. And the law now implicitly provides that the burden of therapeutic risk solely belongs to society.

In order for such damages to be compensated as caused by medical hazard unrelated to medical malpractice, the following requirements have to be met. First, there shall be no malpractice case, and hence damages cannot be compensated, on the basis of medical malpractice liability.

Second, the damage must be directly attributable to acts of prevention, diagnosis, or treatment. This criterion of accountability is supplemented by a criterion of abnormality: the damaging consequences must be regarded as abnormal in relation to the patient’s health status and foreseeable evolution. Thus, excluded from the compensation scheme by the national soli-
darity is the natural evolution of the disease for which the patient received care and accidents that are highly probable under the condition of the patient and/or nature of the act or treatment performed.

Third, compensation is only due when the medical is hazard caused a serious harm. The threshold of seriousness is set in the law by reference to the magnitude of the loss in functional capacities and the impact on the personal and professional life of the patient.\textsuperscript{12} The computed criterion measures the degree of permanent or temporary disability of the victim.\textsuperscript{13} Compensation shall be granted to victims whose disability rate is superior to twenty-five percent and is either permanent or temporary but lasted for six months minimum over a twelve-month period.\textsuperscript{14} In addition, the severity can also be recognized when the victim is declared permanently unfit for the occupation held prior to the occurrence of the damaging accident.\textsuperscript{15}

In other words, victims who suffer an injury caused by a medical hazard and whose disability rate remains below the twenty-five percent threshold will not be entitled to any compensation. In addition, compensation is also set aside when the prior health condition of the patient can account for the hazard.\textsuperscript{16}

This means that, in practice, a vast majority of the victims of medical hazards are granted no compensation. There is no question about the fact that a threshold is necessary; however, it may have been set too high, and the newly introduced compensation of medical hazard in 2002 may be regarded as a mere signal, without substantive effect. Had the floor been set at ten percent of disability, whether permanent or temporary, but suffered for a minimum of six months in a twelve-month period, eighty-five percent of the victims would still have been excluded from the mechanism, but the victims between ten percent and twenty-five percent of permanent invalidity, who amount to ten percent of the total number of victims, would then have been compensated.
B. Hospital-Acquired Infections

Since the Act of December 30, 2002, compensation for hospital-acquired infections is not conditional anymore upon proof of an event of force majeure exempting the professional from liability.17

As an exception to the general scheme of compensation, hospital-acquired infections resulting from treatment after January 1, 2003, and corresponding to a permanent disability greater than 25% may be compensated on national solidarity funds, even if civil liability of a health professional is incurred.18

Otherwise, the conditions set forth in the general compensation scheme for medical hazard apply.

It is worth noting that the public health impact and the associated costs of hospital-acquired infections have been considered at the national and European levels. The Council of Europe adopted a recommendation19 and so did the EU Council.20 These recommendations advise the introduction of a framework aimed at improving patient safety and preventing hospital-acquired infections in particular.21 At the national level, a regulation aimed at preventing adverse events associated with healthcare22 was adopted on November 12, 2010.23 Such events shall be prevented through better management of risks associated with healthcare.24 In practice, prevention actions shall be decided by the executive director of the considered hospital, together with the Medical Commission (CME).25 They shall be implemented by a healthcare associated risk manager.26

18. Id.
21. Id. at 4–6.
22. Adverse events (événements indésirables associé aux soins) associated with healthcare are defined as any incident detrimental to a hospitalized patient that occurs during the execution of a medical act of prevention, investigation or treatment, CODE DE LA SANTÉ PUBLIQUE art. R. 6111-1.
24. Id.
C. Blood Transfusions Infections

1. HIV Infection

The HIV-dedicated compensation fund created in 1991 was merged in 2004\(^27\) into ONIAM.\(^28\) Therefore, the common scheme, along with standard conditions, now applies to victims of HIV infection through blood transfusion seeking compensation. The following specifics may, however, be highlighted.

Victims, or their heirs, must demonstrate a human immunodeficiency virus infection and blood product transfusions or injections of blood products.\(^29\) They shall inform ONIAM of all the information available to them.\(^30\) The Code of Public Health establishes for victims a rebuttable presumption of causality between HIV infection and transfusion or injections.\(^31\) It is, however, for the plaintiff to prove the causal link (by any means, including "serious, precise and consistent presumptions" within the meaning of the Civil Code).\(^32\) ONIAM may rebut this presumption by showing, by all means (including serious, precise and concordant presumptions) that alleged transfusions cannot be the cause of the contamination.\(^33\)

2. Hepatitis C Infection

The idea of establishing a compensation fund for victims of post-transfusion hepatitis C was long rejected; however, it finally prevailed in 2008.\(^34\) Pursuant to a newly enacted provision of the Code of Public Health, ONIAM must compensate victims for damage resulting from contamination by hepatitis C from a transfusion of blood or an injection of blood products that took place in French territory.\(^35\)

This compensation scheme is largely based on the one set up for HIV victims. In particular, victims or their heirs, who send their claim to ONIAM, must give evidence of contamination by hepatitis C and of blood

\(^{28}\) CODE DE LA SANTE PUBLIQUE art. L. 3122-1.
\(^{29}\) CODE DE LA SANTE PUBLIQUE art. L. 3122-1.
\(^{30}\) CODE DE LA SANTE PUBLIQUE art. L. 3211-2.
\(^{31}\) CODE CIVIL [C. CIV.] art. 1353.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{35}\) CODE DE LA SANTE PUBLIQUE art. L. 1221-14.
transfusions or injections of blood products. As for HIV victims, a rebut-
table presumption of causality between the hepatitis C infection and trans-
fusion or injection is established by the law. 36 ONIAM shall then
investigate the circumstances of contamination, especially under the condi-
tions laid down in Article 102 of the Act of March 4, 2002. 37

3. Additional Grounds

Since 2002, ONIAM’s jurisdiction has tended to expand to specific
cases of medical personal harm for which the national solidarity is account-
able. In addition to the aforementioned cases of hepatitis C infection, the
national solidarity compensation scheme encompasses a growing number
of harms gathered under the auspices of ONIAM, including infections re-
sulting from mandatory vaccination, 38 care provided by a professional
healthcare provider out of his or her field of specialization, 39 and harm
resulting from growth hormone administration. 40

II. ADMINISTRATION AND ADJUDICATION OF CLAIMS BASED ON
NATIONAL SOLIDARITY

Claims of certain types or pushed forward through certain procedural
routes are adjudicated by ONIAM, notwithstanding the availability of
rights of recourse.

A. Administered Claims

Under the Statute of March 4, 2002, compensation based on national
solidarity may be claimed by victims under three types of circumstances.
First, national solidarity provides compensation for damages not re-
lated to medical malpractice (that is, when no health professional or institu-
tion may be held liable) 41 in cases of medical hazards and hospital-acquired
infections and under certain conditions of serious harm. 42 In such cases,
ONIAM’s jurisdiction is subsidiary, which means that a preliminary as-
essment of the case is to be made by an external commission. 43

36. CODE DE LA SANTE PUBLIQUE art. L. 3122-2.
37. See Loi 2002-303, supra note 1, at art. 102.
39. CODE DE LA SANTE PUBLIQUE art. L. 1142-1-1.
40. CODE DE LA SANTE PUBLIQUE art. L. 1142-22.
41. CODE DE LA SANTE PUBLIQUE art. L. 1142-1-1.
42. Loi 2002-303, supra note 1.
43. See infra p. 108 seq.
Second, and notwithstanding the fact that healthcare providers may be found liable, national solidarity also provides compensation for infections related to blood transfusion and other grounds.\textsuperscript{44} In such cases, ONIAM's jurisdiction is not subsidiary but direct.

Third, national solidarity may also make up for the absence of available compensation on behalf of the liable person's insurer.\textsuperscript{45} This may happen when the healthcare provider is covered by insurance but coverage has elapsed, when insurance coverage limits are exceeded, or when no offer was made by the insurer.

Fourth, national solidarity provides for reimbursement of insurers who entered a compensation agreement with the victim in cases where such insurers can demonstrate that their client was not liable for the harm.\textsuperscript{46}

The role and importance of national solidarity has inflated. New specific compensation schemes are occasionally set up on the ground of national solidarity. The latest addition results from a statute of 2010 and relates to the compensation of harm suffered by victims of nuclear tests.\textsuperscript{47}

When victims (or their assignees) have received compensation from the Fund, can they still act in court against the authors of the harm? If the victim was "fully" compensated for his or her losses by the Fund, he or she retains no interest on which to sue. On the other hand, if compensation was not full, he or she retains an interest in seeking further compensation on the basis of civil liability rules. However, the Cour de cassation did not give this answer: it ruled that compensation awarded by the Fund is supposed to be "full" and therefore deprives the victim of any interest to seek additional compensation at law.\textsuperscript{48} This holding was condemned by the European Court of Human Rights. The court held that it deprived the victim of concrete and effective access to court in a situation where such victim could legitimately believe that bringing parallel actions in front of the Fund and the courts was possible.\textsuperscript{49} The highest administrative Court, the Conseil d'\textit{Etat}, had the same approach. In the event the administrative judge makes a decision at a time when compensation by the Fund is not yet finalized, the

\textsuperscript{44} See generally Loi 2002-303, \textit{supra} note 1.
\textsuperscript{45} \textit{Id.} at art. 98.
\textsuperscript{46} \textit{Id.}
administrative court must grant appropriate relief, but the State will then be subrogated in the victim’s rights against the Fund. 50 Nevertheless, the First Civil Chamber of the Cour de cassation adopted, in turn, the restrictive position already adopted by other chambers. 51 Then, in an attempt to put an end to the resistance of trial courts, the plenary chamber also ruled similarly. 52 This solution is questionable: first, as to the right to a fair trial; second, the fact that the victim has the power to refuse the offer of the Fund and to have his or her case judged by the Court of Appeal of Paris is a procedural argument rather than a substantive one. The only limit to the action of the victim is the rule of non-overlapping, which should lead the court to deduct from the assessed compensation all amounts already awarded to the victim by the Fund.

It should be noted that the French supreme court, the Cour de cassation, has recently recognized that national solidarity and the civil liability compensation system could complement each other under certain circumstances. In a case judged on March 11, 2010, the court decided that victims of breach of duty to disclose could be compensated through both regimes. 53 In this specific case, the victim was partially compensated for loss of chance to avoid the suffered harm and was also granted compensation from ONIAM for the rest of the damage. 54 This ruling will enable victims to benefit from full compensation. On a more theoretical level, this important decision appears to make a distinction between the chance of loss on the one hand, and the personal harm resulting from the medical accident, on the other hand. Such distinction can be reflected at the level of triggering events: one is a technical negligence that caused the personal harm; the other is a breach of the duty to disclose that caused the loss of chance. Code of Public Health art. L. 1142-1 I can then be reinterpreted: national solidarity is subsidiary to the liability of healthcare providers only in relations to technical negligence but not in case of any breach of duty to disclose. 55

54. Id.
55. See CODE DE LA SANTE PUBLIQUE art. L. 1142-1 I.
Compensation based on national solidarity may be granted by ONIAM at the outset of proceedings initiated in different channels. First, the victim may have initiated a claim in court and be awarded compensation in this forum. In practice, judges will determine the level of compensation, which will be incurred either by the healthcare provider’s insurer or by ONIAM. Although the Act of March 4, 2002 unified the law of medical malpractice from a substantive perspective, the duality of jurisdiction remains. This means that the action may be filed either in civil or administrative courts. It shall be noted that filing an action in court remains available to victims not only as an original alternative to filing a case with the CRCI, but also in order to challenge the advice given by the CRCI or the offer made either by ONIAM or by liability insurers.

Second, pursuant to the 2002 statutory reform, the victim may initiate a procedure in front of a Commission for conciliation and compensation for medical accidents, iatrogenic complaints, and hospital-acquired infections. Such a Commission has regional jurisdiction and its mission is dual: first, facilitating the amicable settlement of disputes by seeking a conciliation agreement between the victim and the insurer of the liable health professional; and second, settling medical accidents in the scope of national solidarity. If the Commission reaches the conclusion that a provider was at fault, the liable health care provider, or his or her insurer, is informed and is expected to make an offer for compensation. In the event no offer is made within four months, the victim may ask ONIAM in order to obtain an offer for compensation by default, on the basis of the Commission’s assessment. If the Commission reaches the conclusion that there was a medical hazard, a hospital-acquired infection, or any other grounds prompting compensation on the ground of national solidarity, it will inform

56. See Loi 2008-1330, supra note 34: ONIAM will compensate in cases where no liability of a health-care provider can be evidenced, or, e.g., when the damage is the consequence of a hospital-acquired infection, an infection through blood transfusion.
57. See generally Loi 2002-303, supra note 1.
58. CODE DE LA SANTE PUBLIQUE art. L. 1142-5. The Commission is chaired by a magistrate of the judicial or administrative Court. It is composed of twenty persons, divided into six major categories of members representing consumers, healthcare professionals, hospital practitioners, institutions and health facilities, see CODE DE LA SANTE PUBLIQUE art. L1142-6.
59. CODE DE LA SANTE PUBLIQUE art. L. 1142-5.
60. CODE DE LA SANTE PUBLIQUE art. L. 1142-14.
61. Id.
ONIAM and indicate the nature and scope of the losses.\textsuperscript{62} ONIAM is in this case accountable for calculating the amount of compensation due.\textsuperscript{63}

Third, ONIAM may be directly seized by the victim for cases in which it has direct jurisdiction.\textsuperscript{64} Initiating such procedure for compensation does not eliminate the possibility for the victim to take appropriate legal action for damages.\textsuperscript{65} However, the law imposes on the victim an obligation to inform. Pursuant to the Code of Public Health, the victim has to inform ONIAM along with the judge of the referral of ONIAM about pending proceedings.\textsuperscript{66}

\textbf{C. Adjudication Proceedings in Front of ONIAM}

Once ONIAM has seized jurisdiction, the adjudication of the claim is handled as follows: Within three months of receipt of the application, which can be extended at the request of the victim or his or her beneficiaries, ONIAM, through its Compensation Committee, examines whether the conditions for compensation are met.\textsuperscript{67} It searches the circumstances of the contamination and carries out investigations.\textsuperscript{68} The Compensation Committee may conduct hearings, and the plaintiff is allowed to be assisted or represented by a person of his choice. Where the evidence supplied is admissible, ONIAM is required to pay within a month one or more provisions if the request was made.\textsuperscript{69}

ONIAM shall submit to any claimant an offer of compensation within a period, the duration of which is fixed by decree, and which cannot exceed six months from the day ONIAM receives the full justification of harm.\textsuperscript{70} This provision is also applicable in cases of aggravation of damage.\textsuperscript{71} The offer is sent to the applicant by registered letter with return receipt. It indicates the assessment made by ONIAM for each loss and the
amount of damages that accrue to the victim, given the benefits he or she has already received or may receive from other third-party payers.\textsuperscript{72}

Acceptance of the offer by the victim amounts to a settlement.\textsuperscript{73} Any pending legal action is deemed withdrawn.

In the event the victim rejects the offer, civil court judges have jurisdiction to assess the rights of the victim. The rejection of the offer made by ONIAM terminates the rejected offer that may therefore be withdrawn by ONIAM. Such withdrawal may take place before the adjudication of the claim is completed, as was recently confirmed by the Supreme Court.\textsuperscript{74} In any event, the victim is not entitled to any (minimum) compensation on the basis of the rejected offer in front of the civil court. However, the victim will have a right of action against ONIAM if he or she considers the offer insufficient, or if ONIAM does not present the offer within the deadline or if it rejects the application.

Victims are not prevented from filing a concurrent claim on the basis of general rules of civil liability. There is a prior obligation imposed on the victim to inform ONIAM of any judicial proceedings pending.\textsuperscript{75} Where legal action is brought after the referral of ONIAM, the judge must be informed by the victim.\textsuperscript{76} This is why it is crucial to organize mutual information on the status and result of proceedings between the courts and ONIAM administrative or possible judicial seizures.\textsuperscript{77} The action for redress of ONIAM will then take the form of a procedural intervention to the proceedings between the victim and the person responsible before the civil court, criminal court, or administrative tribunal.\textsuperscript{78} ONIAM may also become a party to the proceeding to each of these jurisdictions, even for the first time on appeal.\textsuperscript{79} It can then use all remedies available by law.\textsuperscript{80} If the action of the victim was brought before a civil court, but the facts that

\textsuperscript{72} \textsc{Code de la santé publique} art. L. 3122-5.
\textsuperscript{73} \textsc{Code de la santé publique} art. L. 1142-17.
\textsuperscript{74} Cour de cassation [Cass.] Civ. 1, Jan. 6, 2011, No. 09-71201.
\textsuperscript{75} \textsc{Code de la santé publique} art. L. 1142-17.
\textsuperscript{76} \textit{Id}; \textsc{Code de la santé publique} art. L. 3122-3, para. 1.
\textsuperscript{78} \textit{Id}.
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} \textit{Id}.
caused the damage gave rise to criminal prosecution, civil court is not obliged to freeze proceedings until final determination of criminal jurisdiction.81

D. Regulatory Principles Applying to Rights of Recourse

It should be noted that the acceptance by the victim or his assignees of a compensation offer made by ONIAM does not deprive the third-party payers, e.g., the social security fund, from the right to proceed against the responsible third party.82 Civil liability rules shall apply to that matter, substance and procedure-wise. Provisions articulating general law and special rules were enacted so that victims do not receive greater compensation than the harm they suffer and that the perpetrators of harm do not escape their responsibility. Thus, the victim should inform the Compensation Fund of any judicial proceedings initiated.

In the event the damage compensated through national solidarity relates to medical malpractice,83 ONIAM, national social security, and any other third-party payer has subrogation rights against the healthcare providers recognized civilly liable only pursuant to civil liability rules of recourse.84 No right of recourse is granted when medical hazards are compensated. However, third-party payers have a right of recourse for negligence in cases of hospital-acquired infections and blood transfusions.85 They also have such a right of recourse when payment was made on behalf of a defaulting insurer.

III. AWARDED COMPENSATION

As set forth above, compensation for medical harm may be based on civil liability or national solidarity. In either case, compensation for all damage suffered by a victim is expected.86 And admittedly, compensation should cover the full damage, though statutory law may provide for specific guidelines in the matter.87

Personal damages are computed by reference to standardized assessment scale weighing the different types of harm (i.e. disability, suffering,
esthetic harm, sexual harm). A difference is made between permanent and temporary harms.

Such a scale cannot adequately reflect the richness of human life from a spiritual, intellectual, sensorial, emotional, or professional perspective. Though it is merely indicatory, it is part of French legal culture. A first specific scale for physiological deficiencies was devised in 1980, inspired by the American Medical Association, and was soon followed by competing scales. An official assessment scale was adopted at the national level in 2003. This provides for a diversity of compensable harms as well as corresponding rates (on a sliding scale reflecting the intensity of the harm). A summa division is set between extra-patrimonial loss awards and patrimonial ones. The latter account for expenses incurred (e.g., medical costs, additional costs in housing and transportation, etc.) and lost professional gains.

The growing importance of compensation schemes based on national solidarity may appear to be a double-edged evolution. It has improved the status of victims of medical harms: they are increasingly integrally compensated more quickly and under more flexible conditions thanks in particular to the legally established presumptions. However, compensation by ONIAM, like any other national solidarity fund, may deprive victims of certain procedural safeguards provided by civil liability principles. This is particularly so when the compensation fund assesses the damage and compensates it. Compensations awarded by courts are, on average, more generous for the victims than the ones awarded by compensation funds.

On a more systemic level, the articulation between national solidarity and civil liability principles raises questions. Are the two grounds subsidiary one to the other, complementary, or exclusive one from the other? The answer to this question is all the less satisfactory because a specific fund, like ONIAM, may play different roles depending on the harm that is considered. As mentioned, on the one hand, ONIAM’s main jurisdiction (i.e., on

89. See generally, id.
90. Id.
92. See ANNE GUEGAN-LECUYER, DOMMAGES DE MASSE ET RESPONSABILITE CIVILE, no. 180 s. (LGDJ 2006).
medical hazards and hospital-acquired infections) is subsidiary and can only come into play when no healthcare provider is found liable. However, such main jurisdiction also supplements the insurer’s failure or insufficient coverage. It is also an alternative jurisdiction for hospital-acquired infections leading to the death of the victim or a permanent functional disability rate greater than 25%. It is finally a jurisdiction complementary to civil liability in relation to breach of the duty to inform by the healthcare provider. On the other hand, ONIAM’s accessory jurisdiction (i.e., on infections through blood transfusion or injections, growth hormone harm, and compulsory vaccination harm) is not subsidiary and may be put into play even if conditions to find healthcare providers liable are present. In certain cases (e.g., compulsory vaccination harm), such jurisdiction is alternative: victims may choose to be compensated either by the liable healthcare provider or by ONIAM. Such was also the case for infections through blood transfusion until 2008: since then, compensation by ONIAM has purely and simply been substituted to compensation by the liable blood transfusion center.

Such diversity in applicable schemes and in the relationship between national solidarity and civil liability principles is a factor of complexity for the victims. Harmonization of procedures and awarded compensations as well as clarification of the relationships between national solidarity and civil liability principles would be welcome developments in this dynamic field of the law.

93. CODE DE LA SANTE PUBLIQUE art. L. 1142-1 1/2.
95. CODE DE LA SANTE PUBLIQUE art. L. 1142-1-1.
97. Loi 2008-1330, supra note 34, at art. 67.