



XI ASSEMBLEA NAZIONALE DEGLI OSSERVATORI
MILANO 27-29 MAGGIO 2016

VENERDI 27 MAGGIO 2016

DANNO ALLA PERSONA : CONFRONTI E PROSPECTIVE

**Confronto Europeo : danno da morte e ADR in tema di danno
Francia**

I – Death of a personal injury victim

1. Harm caused to the deceased
2. Harm caused to the deceased's relatives

1 – Harm caused to the deceased

First scenario : the victim dies after his/her condition has consolidated

Temporary damages: from the accident to consolidation

Pecuniary loss : expenses for health care + general expenses (assistance for the injured victim + expenses for the adaptation of car or home) + loss of income.

Non pecuniary loss: invalidity + mental or physical suffering + esthetical

Permanent damages: from consolidation (both past and future loss)

Pecuniary loss : mostly the same and more (such as compensation for impossible studies,...)

Non pecuniary loss : invalidity included suffering + esthetical + sexual + normal family life, exceptionnal suffering related to the invalidity

Second scenario : the victim dies before his/her condition has consolidated

Temporary damages

+ **Compensation for distress caused by imminent death** : harm linked to the realisation that death is imminent / sufficient awareness that one may be about to die.

No to compensation for damages linked to loss of life / loss of opportunity to live / loss of life expectancy.

Examples of Compensation for distress caused by imminent death

Cour of Cassation, Criminal Chamber (Crim., 23 Oct. 2012, no. 11-83770) : following a traffic accident, a seriously injured person died some hours after being transported to hospital to undergo surgery.

The Court of Cassation acknowledged that the court of appeal could, in addition to physical or psychological suffering, award compensation for “mental suffering due to sufficient awareness that one may be about to die” which it terms “the distress associated with imminent death”.

Cour of Cassation, 2nd civil Chamber (Civ. 2, 18 April 2013, no. 12-18199) :

This was another traffic accident, the victim of which died two months later from their injuries.

Cour of appeal : “in view of the medical documentation submitted, there is reason to believe that the victim suffered intense physiological pain; she was also aware of the seriousness of her condition and the inevitability of death and thus endured emotional and psychological suffering characterised in particular by loss of life expectancy or distress at her imminent death that she must have experienced during this period; (...) justifies the awarding of overall compensation of 30,000 euros”.

This reasoning was challenged at the Court of Cassation by the insurer of the vehicle that caused the accident. The Court kicked the issue into touch by noting that the court of appeal had not described loss of opportunity to live but harm suffered by the victim.

Thus, for the French Court of Cassation, awareness of the seriousness of one’s condition and of the imminent nature of one’s death can be taken into consideration under pain and suffering.

No to compensation for damages linked to loss of life, loss of opportunity to live, loss of life or shortened life expectancy

Crim., 26 March 2013, no. 12-82600: a 16-year-old girl was the victim of a traffic accident, following which she died. The mother sought compensation for damages due to her premature death equal to that which the victim would have received if she had remained fully incapacitated. Court of first instance : accepted the argument and awarded €200,000 in compensation for the victim's loss of opportunity to live.

Appeal court overturned this decision : “given the countless vicissitudes of everyday life and of everyone's state of health, the right to live to a statistically determined age is not sufficiently certain to be held as a vested right that becomes part of a person's estate and hence transferable to that person's heirs when an event leading to death occurs”.

At the Court of Cassation, the girl's parents argued that: “ (...) while it is effectively difficult to retain a specific life expectancy given the vicissitudes of life, it is also not possible to rule out any compensation for loss of opportunity to live without calling into question the very principle of the right to compensation”. Thus the parents “applied for compensation of this loss based on capitalisation to take the vicissitudes of life into consideration, using the methods retained to calculate compensation for future damages”.

However, the Court of Cassation rejected the parents' argument and judged the appeal court satisfactory “because no damages arising from a victim's own death can accrue to a victim's estate during their own lifetime and hence entitlement to claim compensation for such damages cannot be transmitted to their heirs”.

2 - Harm caused to the deceased's relatives

Pecuniary loss

Funeral costs

Loss of relatives' income :

- *) loss of professional resources of the deceased victim
- *) !! Loss of unpaid work provided by the deceased victim
(ex : childcare, housework,...)

Various expenses

Non pecuniary loss

End-of-life damages :

- 1) suffered by the relatives of the direct victim during the traumatic illness until the victim's death (it entails visiting the victim in hospital, with all that implies, the need to accommodate the direct victim during the illness. This complete disruption to the everyday life of the indirect victims results in end-of-life damages.
- 2) compensation of disruptions caused by the death of the direct victim in his or her relatives' day-to-day lives.

Emotional damages (« préjudice d'affection ») : compensation for the emotional loss suffered by some close relatives. Awarded almost automatically to the closest relatives.

Indicative Scale of the FIVA

	Préjudice lié à l'accompagnement
Husband/wife/registered partner	8 700 €
Child under 25 living at home	8 700 €
Child over 25 living at home	5 400 €
Child not living at home	3 300 €
Mother / Father	3 300 €
Grand-child	
Brother / Sister	2 100 €

« Préjudice d'affection » (injury to feelings)

Indicative scales of compensation funds – inter-courts – judiciary references

Deceased victim of a personal injury	Relatives – Family ties	Oniam (medical accidents)	Fiva (Asbestos)	Inter-courts references	Judiciary references based on 181 decisions (2010-2015)
Husband/wife/registered partner/cohabitant	Husband/wife/registered partner/cohabitant	15 000 to 25 000€	23 900 €	20 000 to 40 000 €	Up to 50 000€
Child under 18 Child over 18 at home Child over 18 not at home	Mother/Father	15 000 – 25 000€ 12 000-20 000€ 4 000 – 6 500€	3 300 to 8 700 € (child age 25)	25 000-3 0000€ 15 000-25 000€ 11 000-15 000€	Up to 40 000€
Mother/Father	Child under 18 Child over 18 at home Child over 18 not at home	15 000-2 5000€ 12 000-20 000€ 4 000-6 500 €	8 700 €	20 000- 30 000€	Up to 40 000€
Grand-parent	Grand-child cohabitant Grand-child without cohabitation	4 000-6 500€ 2 000-4 500€		7 000-10 000€ 11 000-14 000€ According to the frequency of relationship	Same amounts as the inter-cour references
Grand-child	Grand-parent (same criteria)	same amounts as above	3 300€	Same amounts as above	Same amounts
Brother/sister	With cohabitation Without cohabitation	12 000-20 000€ 4 000-6 500€	2 100€	9 000-14 000€ 6 000-9 000	Same amounts as inter-cour
Other relatives		No information	0	Up to 5 000€	Up to 20 000€

Concluding remark about harm of the deceased relatives

Close relatives can act as direct victims of personal injury suffered by a close relative who died. This is the scenario where the personal injury suffered by the close relative affects their mental well-being (depression as a direct result of the injury).

- Illustration: Crim., 16 Nov. 2010, no. 09-87211 approved the reasoning of the lower court awarding compensation to the son of a mother who died in a traffic accident under two headings:
 - 1) emotional loss as an indirect victim (son's emotional loss: €50,000)
 - 2) direct and personal loss linked to serious post-traumatic depressive symptoms requiring treatment caused by the mother's accident and death (suffering characterised by the initial trauma and treatments = €3000 and loss of amenity characterised by the disruption to the son's activities caused by the after-effects of depression = €1500).
- Illustration: 2nd civil division, 28 April 2011, n° 10-17380: the father of a young girl who died in a fire was compensated as a direct victim (Mr. Y's depression was the consequence of his psychological state in reaction to the death of his daughter, from which it follows that the depression was the direct result of the trauma caused by the accident. The appeal court, which did not draw the legal consequences of its own findings, was in breach of the above-mentioned text).

II – Alternative Dispute Resolution

1 – When the legislator impose a procedure for offering compensation on insurers

2 – When the legislator organise compensation for personal injury *via* a compensation fund

1 - When the legislator impose a procedure for offering compensation on insurers

- **Best example : legislation on car accidents (L. 5 juillet 1985, knowed as Loi Badinter, to improve the position of traffic accident victims ans speed up compensation procedures).**

Scheme :

1) Extremely stringent offer deadlines

- 3 months once the insurer is contacted by the victim
- max. 8 months from the date of the accident
- « the deadline most favourable to the victim applies »

2) the insurer's offer must cover all heads of damage.

3) Sanctions

- if an offer is late or manifestly insufficient
- if the compensation is paid out late

Statistics : Fichier des indemnités allouées aux victimes d'accidents de la circulation pour 2014 (dossiers réglés en 2014) – File of inemnified car accident victims for 2014 (cases solved in 2014)

Car accidents

Percentage of injured victims according to gravity impairment rates and type of settlement source AGIRA – File of indemnified victims (cases solved in 2014)

- As a result of the process of legislated transaction, in global, 96,7 % of the victims with AIPP accept the insurers' or funds' offer (FGAO who is in charge when the liable on is unknown or uninsured) offer.

Rates of AIPP	Transactions	Judicial settlements (First degree)	Judicial settlements (second degree)
1	99,1 %	0,8%	0,1%
2	98,4%	1,5%	0,1%
3	97,9%	2%	0,1%
4	97,6%	2,1%	0,3%
5	96,4%	3,4%	0,2%
6 to 9	90,9%	8,4%	0,7%
10 to 14	88,1%	10,1%	1,8%
15 to 19	86%	11,1%	2,9%
20 to 29	82,4%	12%	5,6%
30 to 49	73,3%	15,5%	11,2%
50 and more	76,5%	13,2%	10,3%
Global	96,4%	2,9%	0,4%

Car accidents
Percentage of transactions or judicial settlements
according to duration between the accident and the settlement
and according to the type of victims (deceased or injured)
source AGIRA – File of indemnified victims (solved cases en 2014)

Duration between the accident and the settlement	Injured with AIPP		Deceased	
	Transaction	Court decisions	Transaction	Court decisions
Less than 6 months	1%	0	7,4%	2,2%
6 months to 1 years	20,1%	0,9%	16,7%	9,9%
1 years to 2 years	53,3%	13%	33,3%	24,1%
2 years to 3 years	15,2%	18,3%	15,9%	17,6%
3 years to 4 years	4,5%	18,2%	9,6%	19,8%
4 years to 5 years	2,2%	12,3%	6,3%	12,1%
5 years and more	3,7%	37,3%	10,8%	14,3%
Global	100%	100%	100%	100%

Car accidents

Average duration of different type of settlements for injured victims according to impairment rates

Source AGIRA – File of indemnified victims (solved cases en 2014)

Impairment rates (% AIPP)	Duration between accident and consolidation	Duration between accident and consolidation	Duration between consolidation and settlement	Duration between consolidation and settlement
	Transactions	Court decisions	Transactions	Court decisions
1	6,4 months	11,8 months	10,3 months	26,7 months
2	6,7 months	10 months	10,8 months	27,4 months
3	7,8 months	14,8 months	12,3 months	27,6 months
4	11,3 months	13,7 months	11,7 months	31,5 months
5	13 months	17,9 months	13,3 months	33,8 months
6 to 9	14,8 months	17,3 months	17,2 months	41,6 months
10 to 14	18,9 months	28 months	19,3 months	41,5 months
15 to 19	21,9 months	31,8 months	21,8 months	39,6 months
20 to 29	27,6 months	36,6 months	22 months	45,4 months
30 to 49	46,1 months	47,7 months	29,2 months	56,6 months
50 and more	34,9 months	-	51,4 months	-
Global	9,3 months	20,8 months	12,5 months	37 months

**Other example : legislation on medical liability
(L. 4 mars 2002, known as Loi Kouchner, on patients' rights).**

- * This legislation promotes the amicable settlement of personal injury caused by medical activity.
- * Commissions for arbitration and indemnification (CCIs) are created to facilitate the amicable settlement of disputes relating to medical accidents and hospital-acquired infections for injuries above a certain level of impairment (e.g. 24%).
They examine whether the application of the victim is admissible and determine which compensation regime is applicable according to whether it considers the case to involve liability or compensation cover under the national solidarity scheme.
- * In addition to this amicable procedure, the legislators set up a mandatory civil liability insurance scheme for private health professionals working in healthcare facilities.
- * If the commission determines that the victim's injury is due to medical liability, the victim is directed towards the insurer of the health professional concerned.

➡ Restrictive offer procedure for the insurer :

- 4 months to make a compensation offer
- the offer contains all heads of damage
- 1 month to pay from the acceptance of the offer by the victim

➡ Sanctions if late or manifestly insufficient offer and if late payment

2 - When the legislator organise compensation for personal injury *via* a compensation fund

- **specific need to provide compensation for catastrophic harm relating to a health tragedy (contaminated blood, asbestos, etc.) or damage caused by mass accidents relating to social risk (medical accidents without liability, offences and terrorism).**
- **Legislator guided by the concern to speed up compensation procedures**
- **The compensation fund :**
 - 1) centralises claims (victims may opt for litigation),**
 - 2) examines whether the compensation claims are admissible and well-founded,**
 - 3) pays out compensation amounts in a strictly formalised procedure.**
 - 4) The compensation fund then seeks recourse against any potential responsible parties involved.**

Procedure in front of the compensation funds

Deadlines for presenting the offer

Compensation fund for asbestos victims (FIVA): in principle within 6 months from the date the application is deemed admissible

Compensation fund for terrorist acts (FGTI): within 3 months from receipt of evidence of damages

Compensation fund for medical accidents ONIAM: within 4 months from receipt of the CCI decision on who is in charge of the compensation.

Contents of compensation offer: all heads of compensable damage.

Time limit for payment of advance

FGTI: initial advance paid no later than one month after receipt of the victim's application to meet initial costs

Time limit for payment of offer

FIVA: 2 months from receipt of offer acceptance

FGTI: within 15 days from acceptance of the offer by the victim

ONIAM: 1 month from acceptance of the offer by the victim

Damages due to medical activity (included liability and non liability cases)
Distribution of cases by type of settlement according to their origin
Source ORM 2014 (2008-2013)

	Transactions	Transactions	Court decisions	Courts decisions	Global	Global
Public Hospital	138 cases	72%	54 cases	28 %	192 cases	2%
<i>Insurers</i>	<i>2759 cases</i>	<i>46%</i>	<i>3194 cases</i>	<i>54%</i>	<i>5953 cases</i>	<i>69%</i>
Oniam (Compensation Fund)	2236 cases	92%	206 cases	8%	2442 cases	28%
Total	5133 cases	60%	3454 cases	40%	8587 cases	100%

ORM = Observatory on Medical Risks

Damages due to medical activity (included liability and non liability cases)
Distribution of cases by type of settlement according to their origine
and the role of the Commission of Conciliation and Indemnisation
Source ORM 2014 (2008-2013)

	Settlement	Public Hospital	Insurers	Oniam (fund)	Global	%
Transactions	Outside CCI	78 cases	1902 cases	10 cases	1990 cases	24%
	Inside CCI	60 cases	703 cases	2226 cases	2989 cases	37%
	Sub total	138 cases	2605 cases	2236 cases	4979 cases	61%
Court decisions	Ouside CCI	50 cases	2437 cases	17 cases	2504 cases	31%
	Inside CCI	4 cases	460 cases	176 cases	640 cases	8%
	Sub total	54 cases	2897 cases	193 cases	3144 cases	39%
Total		192 cases	5502 cases	2429 cases	8123 cases	100%

CCI = Commission of Conciliation and Indemnisation
ORM = Observatory on Medical Risks

45 % of the cases are involving the Commission of Conciliation and Indemnisation :



37% of the cases at last settled by a transaction and 8% of the cases at last settled in front of courts.

55% of the cases remain outside the CCI way :



with a higher percentage of cases solved in front of courts (31%) rather than 24% by transactions