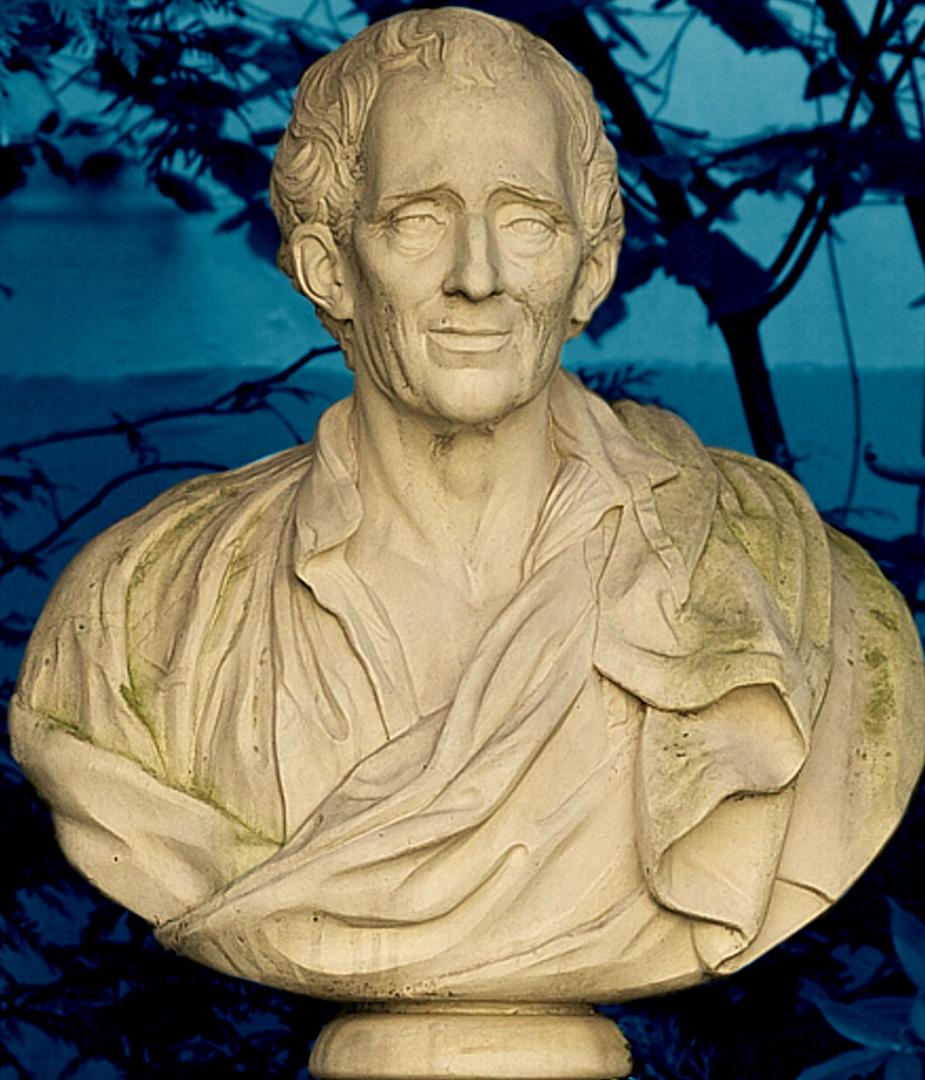


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A leap forward in the footsteps of the ordinary courts
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Damage arising from anxiety, as enshrined by the *Conseil d'Etat* in 2015

A leap forward in the footsteps of the ordinary courts

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It has been observed since the beginning of this century that the uncertainty arising from risk has gained full status in French legal standards and reasoning. The courts attribute to it a number of legal effects, consisting in a duty to act in certain cases, but also the constitution of a debt for those who suffer from the insecurity in which they are held.

It is the latter legal form of uncertainty which will be presented here, on the basis of an examination of a recent decision of the *Conseil d'Etat*. In 2015, the *Conseil* enshrined the concept of specific harm arising from anxiety suffered by a victim of post-transfusion hepatitis C (I).

This is not genuinely innovative as the decision is part of a trend in case law that was instigated by the ordinary courts with some degree of daring twenty years ago. Private law and, to a lesser extent, public law on civil liability thus recognises, in some scenarios, damage born out of psychological torment – fear, anxiety or worry – that generates the feeling of being threatened by the realisation of a given risk. Although not always separate as yet, the concept of damage arising from anxiety or worry is gaining ground thanks to litigation fuelled by the proliferation of environmental and healthcare accidents.

However, the 2015 decision still marks a significant step in the case law of the *Conseil d'Etat* by defining anxiety and agreeing to order compensation for damage suffered as a consequence regardless of the subsequent disappearance of the danger. The administrative court is in some way following in the footsteps of the ordinary courts; this is a remarkable sign of the influence of the courts and, additionally here, between courts themselves.

We will present the case law of the *Conseil d'Etat* from the 2015 decision enshrining anxiety as damage (I). Next, taking a comparative approach, we will present the pioneering case law of the ordinary courts in matters involving compensation for disorders related to anxiety (II). We shall also examine the prospects for extending this trend in French case law (III).

I. Compensation for specific damage arising from anxiety included in moral damages awarded to victims of post-transfusion hepatitis C

With this decision, the *Conseil d'Etat* made a leap forward in its case law on compensation for anxiety. The ruling is confined to the specific case of transfusions contaminated with hepatitis C, which one cannot necessarily extend immediately to other scenarios. It is a lacklustre enshrinement inasmuch as it is not a new, separate head of damage. It is, however, a significant contribution nonetheless which may signal more sweeping changes.

The *Conseil d'Etat's* decision concerns the case of a victim of a tainted blood transfusion, an especially sensitive area in France since the tainted blood scandal of the 1990s, in which the

legislature and the courts are developing a legal compensation framework that is resolutely favourable to victims. It is therefore not surprising that it should be in this sphere that the *Conseil d'Etat* has agreed that the anxiety experienced by a patient infected with the hepatitis C virus and aware of the serious consequences thereof ought to be taken into consideration.

A brief summary of the decision is required at this juncture in order to grasp its significance.

The applicant discovered in May 2004 that he had been infected with the hepatitis C virus and received the antiviral treatment that cured him in May 2005. The infection being linked to blood transfusions that were administered to him during surgery, it fell to the *Office nationale d'indemnisation d'accidents médicaux* (ONIAM – National Office for compensation for medical accidents) to pay compensation (Article 1221-14 of the *Code de la santé publique* – Public Health Code). However, a dispute arose as to the sum of the compensation payable and, in particular, the taking into account of the moral damage sustained by the victim in his awareness that he was suffering from a serious illness. The *Conseil d'Etat* acknowledged that this form of non-pecuniary damage may be taken into account in the case of hepatitis C, even though the victim was ultimately cured. The *Conseil* stated that the appeal court had committed a procedural error in confining itself to awarding compensation for the temporary disruption suffered by Mr. A in relation to his treatment, *"without ruling on the damages alleged by the applicant, born of moral concerns that he could legitimately have felt, during this period, due to his infection with hepatitis C and the serious consequences that might have resulted"* (the underlining is our emphasis).

Three elements are crucial in forming the basis for compensation for damage arising out of anxiety. First, the awareness of being seriously ill, because it leads anxiety-provoking projections as to the future; next, the seriousness of the risk; and, lastly, anxiety – the court speaks of *"moral concerns"* that the patient could *"legitimately feel"*, that is to say, a rather rational fear – not anxiety – in the face of a clearly identified danger.

The *Conseil d'Etat* decision is innovative in enshrining full damage arising from anxiety, the evocation of this disorder in some precedents being less clear-cut than it is here.

The Council had previously considered, in different terms, the feeling experienced by a patient infected in the same way with the hepatitis C virus. In a 2007 decision (2) the court noted that infection with the hepatitis C virus forced the person to live *"in fear of a sudden and serious change in his condition"* and that it entailed disruption to his living conditions and moral damage. In 2008 (3) the *Conseil d'Etat* admitted that the victim *"legitimately experiences fears of an unfavourable change in the state of her health"* and awarded compensation for the disruption to her living conditions. In 2011 (4), the *Conseil d'Etat* noted that the the victim suffered from *"anxiety related to infection"* linked to personal injury.

Furthermore, the *Conseil d'Etat* ruled on this same disorder in another significant case concerning pathologies – namely multiple sclerosis – occurring after vaccination against hepatitis B, especially in cases where it is mandatory. The *Conseil d'Etat*, which has admitted a causal link between vaccination and disease in certain circumstances since 2007, noted in 2009 in two cases involving the same facts, *"a permanent concern related to the risk of deterioration"* (5). The evolving nature of the pathology serves in identifying the damage as being specific without the court having to isolate or characterise it clearly.

Lastly, in 2011, the Administrative Court of Appeal of Paris (6) dealing with asbestos litigation on the basis of the State's liability, admitted that "*the damage described as "anxiety" does not constitute damage before the administrative court but ought be considered as part of the damage caused by the disruption to living conditions and moral damage*", specifying that this ought to be so "*without a pathological state of anxiety and depression necessarily being characterised*".

It is therefore by explicitly recognising damage arising from anxiety as such that the as the *Conseil d'Etat* hands down an interesting advance in case law, without going so far as to establish a new head of damage distinct from moral damage.

The other – perhaps more remarkable – contribution made by this decision lies in the admission of and compensation for damage arising from anxiety, even though the patient was ultimately cured. This is an instance of audacity highlighting, to the point of compensation, a feeling legitimately experienced at one time regardless of what happened next. In doing so, a temporarily subjective perception of the situation prevails over its objective outcome.

II. The pioneering case law of the ordinary courts awarding compensation for disorders related to anxiety

Under the banner of different wordings, the ordinary courts instigated this case law intended to understand and compensate for disorders linked to the apprehension of future damage.

The Court of Cassation, in 1996 (7), agreed to order compensation for "*anxiety*" related to infection with hepatitis C via blood transfusion, citing the fact that "*evolution of this disease could be insidious*".

It also upheld specific damage arising from infection that includes the psychological dimension of the damage following infection with the HIV virus via blood transfusion (2nd Civ., 1 February 1995 No. 93-06.020, 2nd Civ., 2 April 1996 No. 94-15.676: "*specific damage arising from contamination includes all personal injury suffered (...) both physical and psychological, resulting in particular from the reduction of life expectancy, disruption of social family and sex life ,and the suffering and the fear (...)*"). Then it extended this enshrinement to cases of infection with hepatitis C via blood transfusion (8), the specific damage suffered by the victim as a result of the infection being characterised in particular by "*anxiety about his future*". The latter decision is also significant because, like that of the *Conseil d'Etat* in 2015, it establishes the possibility of damage arising from infection carrying with it an element of anxiety even though the patient was cured.

In a different area, that of asbestos, the ordinary courts have shown the same open-mindedness vis-à-vis this singular kind of damage. Thus, in several judgments in 2010 (9), the Social Chamber of the Court of Cassation held that workers who had been exposed to asbestos dust were "*in a situation of permanent anxiety facing the risk of diagnosis at any time of an illness related to asbestos and were asked to undergo regular checks and tests such as to reignite that anxiety*", these elements characterising the existence of specific damage arising from anxiety.

It should be noted that the Court subsequently abandoned this condition of subsection to regular checks and examinations in 2012 (10). This inflection, favourable as it is to victims, stems from a

desire to treat anxiety precisely in terms of its causes and therefore to accept that the examinations are not in themselves the primary cause of a patient's anxiety.

It seems however that the ordinary courts feared an explosion in litigation, since it reduced the scope of the beneficiaries of this presumption of damage arising from anxiety associated with asbestos in 2015 (11) by reserving it for employees of certain companies on a list compiled by the legislature. The result, already criticised by French jurisprudence (12), leads to obvious discrimination between employees who could also have been exposed to asbestos.

III. Prospects for extending this trend in case law

This overview of existing case law reveals a common trend on the part of the French courts towards a specific recognition of this unique disorder that causes human consciousness to be exposed, depending on a varying probability, to the occurrence of damage of a certain severity. The very idea of the damage is, under certain conditions, already harmful. The prospects for extending this trend already appear to have been delineated in light of decisions that evoke this type of damage in various scenarios quite removed from those described above.

The issue was raised in a decision of 2014 (13) regarding the victims of *in utero* exposure to Distibene, in which the Court of Cassation identified moral damage linked to the fear of the consequences of such exposure and was able more objectively to set down a concept of damage arising from anxiety for women but also for their mothers. It was also discussed in the context of patients with defective pacemakers (14). It can now be seen in the *Mediator* case (15), and above all in the decision of the *Tribunal de Grande Instance* (regional court) at Nanterre of 28 January 2016, handed down in summary proceedings, ordering Laboratoires Servier to pay €1,500 in provision for compensation for damage arising from anxiety to 12 or the 50 claimants, who had their anxiety acknowledged by the court as they had proven the "reality" in light of restrictive medical monitoring in the two years following the withdrawal of the medication or its discontinuation and, beyond this, in light of the risk which cannot currently be excluded of developing pulmonary arterial hypertension, or even the decision in the case involving defective breast implants.

However, the issue may also arise in very different scenarios, such as the enshrinement of the disruption – moral damage in this instance – caused by a prevailing sense of insecurity in a workplace (16) or abnormal neighbourhood disturbance resulting from the "*legitimate fear*" of a health risk experienced by residents, in spite of compliance with the exposure limit values on the part of the installation concerned (17).

The future of this anxiety disorder is wide open without yet being clearly delineated. This is because, firstly, its treatment by the courts is far from uniform, and this is undoubtedly the main problem. It is not designated by a separate head of damage common to all courts, but instead appears under different names and classifications; compensation consequently varies considerably. Secondly, it is already feared that it will lead to excessive use and therefore lead to somewhat arbitrary restrictions – as is already happening in asbestos cases.

What is certain at this stage is a profound change in the reasoning and categories in tort law: uncertainty is no longer ignored or diminished but instead set down as such and understood as a legal matter in itself, as well as providing raw material for new rights.

Notes:

- (1) CE, 27 May 2015 req. no. 371697, note H-B. Pouillaude, AJ 20152340; D. Cristol, RDSS2015.734.
- (2) CE, 19 December 2007, req. no. 289922.
- (3) CE, 25 June 2008, req. no. 286910.
- (4) CE, 18 May 2011, req. no. 326416.
- (5) CE, 18 February 2009, req. no. 305810; CE, 10 April 2009, req. no. 296630.
- (6) CAA Paris, 13 December 2011, no. 11MA00739.
- (7) 1st Civ July 9, 1996 No. 94-12868.
- (8) 1st Civ., 1 April 2003, No. 01-00575; 2nd Civ., 19th November 2009, No. 08-15853.
- (9) Soc, May 11, 2010 No. 09-42241.
- (10) Soc, 4 December 2012, No. 11-26294, subsequently confirmed by Soc, 25 September 2013 No. 11-20.948; Soc, 19 March 2014, No. 12-29.339.
- (11) Several decisions, including Soc, 3 March 2015, No. 13-20.486.
- (12) P. Jourdain, Préjudices d'anxiété des travailleurs de l'amiante : d'étranges disparités, RTDC 2015.393.
- (13) 1st Civ., 2 July 2014, No. 10-19.2006.
- (14) 1st Civ., 19th December 2006, No. 05-15719.
- (15) CAA Paris, 2 July 2015, No 14PA04137, the application for compensation for damage arising from anxiety having been dismissed in this case.
- (16) TA Melun, 13 July 2012, No. 1004142/11.
- (17) CA Versailles, 4 February 2009, No. 08-08775.