

CHAPTER THREE  
LIABILITY FOR ONE'S OWN CONDUCT

3.3. CONDUCT OF PUBLIC AUTHORITIES

3.3.3. FRENCH LAW

3.3.3.B. STATE LIABILITY NOT BASED ON FAULT

*Introductory Note*

The French administrative courts, much like their civil counterparts,<sup>1</sup> have not hesitated to create regimes of liability not based on fault in their case law. The first excerpt below surveys those developments. It is followed by three cases, dealing with the main areas of State liability not based on fault under French law.

*A. de Laubadère, J.C. Venezia and Y. Gaudemet, Traité de droit administratif*<sup>2</sup>

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“The theory of risk-based liability [in administrative law] differs somewhat from its counterpart in the civil law, primarily in that there is a vast regime of State liability based on risk. However, that regime does not have a general scope and State liability generally remains... based on fault. The Conseil d’État introduced risk-based liability in a number of areas and, it must be underlined, steadily broadened the realm of such liability.

Risk-based liability constitutes an exception from another point of view as well; ...in almost every case where it applies (except for work accidents), case law requires that some *exceptional or abnormal state of fact* be proven including, for instance, an *exceptional injury* or an *exceptional risk* (or sometimes both), or an *exceptional power* on the part of the public authority. Those requirements show that risk-based liability, despite undeniable and constant progress, remains a complementary regime, which requires the presence of some exceptional situation such that the injury ‘can no longer be regarded as a burden that the citizen would normally be expected to bear’. Therein lies ultimately the common thread between the various instances where risk-based liability finds application...

[I]t must be noted that, in order for risk-based liability to be triggered, case law will take... one of the following approaches, depending on the case. Sometimes it will impose a specific

<sup>1</sup> See *infra*, Chapter VI, 6.1.2.

<sup>2</sup> Vol. I, 14<sup>th</sup> edn. (Paris: LGDJ, 1996) at 804-5, para. 1287. Emphasis in original unless otherwise indicated, all references omitted. Translation by P. Larouche.

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*condition for liability...* which may vary (public works, creation of an exceptional risk, contribution to the discharge of a public service, etc.), and sometimes — but more rarely — it will impose liability *directly and unconditionally* on the basis of the very principle of *equality before public burdens.*”

#### Notes

(1) Even if, in the above excerpt, the authors use the expression “risk-based liability” (*responsabilité pour risque*), liability without fault under French administrative law does not rest on the same theoretical basis as under civil law (private law).<sup>3</sup> Under civil law, there is no agreement on the theoretical basis for liability for things pursuant to Article 1384(1) C.civ. — the main regime of liability without fault under the *Code civil*; historically it can be said to have evolved as a reaction to the increasing number of accidents involving machines.<sup>4</sup> By contrast, authors generally agree that liability without fault under French administrative law proceeds from the principle of equality before public burdens (*égalité devant les charges publiques*), namely the view that the disadvantages caused by the activity of public authorities (including the infliction of injury) should be spread equally over all the citizens. As M. Rougevin-Baville writes:<sup>5</sup>

“Accordingly, it appears justified to conclude that all cases of liability without fault are based on the common idea of an exceptional breach of equality before public burdens. Such exceptional breach is generally made out when the victim has suffered grave and specific injury, which cannot be attributed to the hazards [of life], provided that the legislature did not intend to exclude compensation. Finally, in cases where the exceptional breach, while not constituting a fault, is grievous, courts are likely to be less severe as regards the gravity and specificity of injury.”

(2) From that common principle, a series of regimes of liability without fault have been developed in French administrative case law. The main ones are:

- liability for damage caused by public works to third parties (to the exclusion of users);<sup>6</sup>
- liability for damage suffered by public service agents during their work for the public service, which today remains applicable essentially to occasional agents;<sup>7</sup>

<sup>3</sup> M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° “Responsabilité sans faute” at 3, para. 5, would prefer to use “liability without fault” instead of “risk-based liability”, since not all regimes of State liability without fault under French law can be accounted for by theories based on risk.

<sup>4</sup> See *infra*, Chapter VI, **6.F.4.**, Note (5) and **6.F.5.**, Note (1).

<sup>5</sup> M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° “Responsabilité sans faute” at 45, para. 288.

<sup>6</sup> See *infra*, **3.F.44.**, Note (1).

<sup>7</sup> See *infra*, **3.F.42.**

- liability for damage caused by installations, property or activities which created an exceptional danger,<sup>8</sup> including damage caused by exposure to known and controllable risks in the course of the operation of public hospitals;<sup>9</sup> and
- liability for damage attributable to legislation, international conventions, as well as lawful administrative decisions and actions.<sup>10</sup>

These regimes are dealt with in greater detail in the next three annotated cases.

(3) As the authors point out, all of these regimes are characterized by the requirement that the victim show that he or she was in an exceptional position. That requirement is either more precisely defined, as is the case with the first three regimes listed above (exceptional impact of public works, occasional participation in the public service as an agent, exceptional danger created by public installations), or simply constitutes the direct application of the principle of equality before public burdens (as in the case of the last regime, where exceptional injury must be shown). In that sense, it can be said that liability without fault under administrative law always arises in exceptional cases, and cannot be considered as a general principle.

In any event, as the authors state, liability without fault under French administrative law remains confined to specific regimes. There is no general regime of liability without fault; the Conseil d'État, however, is usually disposed to extend the scope of liability without fault by creating new specific regimes, as it recently did in 1991, in the case of liability for known and controlled risks in the course of the public health service.<sup>11</sup>

*CÉ, 1 July 1977*<sup>12</sup>  
*Commune de Coggia*

**3.F.42.**

#### LIABILITY FOR OCCASIONAL PARTICIPATION IN THE PUBLIC SERVICE

##### **Volunteer lifeguard**

*The State is liable irrespective of fault for injury suffered by persons who at the relevant time were engaged in the provision of a public service.*

*Facts:* The plaintiff, Mrs. Gambin, was swimming with a young cousin, Jacques Serio, at the beach of the

<sup>8</sup> See for instance CÉ, 29 April 1987, *Garde des Sceaux v. Banque populaire*, JCP 1988.II.20920, a case which falls under this category.

<sup>9</sup> See *infra*, **3.F.43**

<sup>10</sup> See *infra*, **3.F.44.**

<sup>11</sup> See *infra*, **3.F.43.**

<sup>12</sup> Leb. 1977.301. Translation by Y.P. Salmon.

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defendant municipality. Serio experienced difficulties because the sea was rough and Mrs. Gambin, who was unable to rescue him, called her husband for help. Mr. Gambin swam to the rescue of Mrs. Gambin and Serio, but he and Serio drowned. Mrs. Gambin sued the defendant municipality for damages, arguing that Mr. Gambin had acted as a voluntary participant in the provision of a public service (in this case, ensuring safety and surveillance at the beach).

*Held:* The court of first instance found that the defendant was liable. The Conseil d'État upheld that decision.

*Judgment:* "Article 97 of the Code de l'administration communale (Municipal Administration Code) provides that 'the role of the municipal police force is to ensure public order, public security and public health. It notably includes... 6° the duty to prevent accidents, through adequate measures, and to stop accidents by providing the necessary help'. With regard to seaside municipalities, these duties include among others the prevention of drownings and first aid to the victims of such accidents.

Although the accident occurred while the young Jacques Serio was swimming in the sea with his cousin Mrs. Gambin, Mr. Gambin participated in the provision of a municipal public service when he attempted to give aid to a swimmer in difficulty. The injury which results from his death should be fully compensated by the municipality of Coggia, given that Mr. Gambin, who was an accomplished swimmer, committed no fault in his rescue attempt."

#### *Notes*

(1) One of the first instances where the Conseil d'État applied liability without fault was the relationship between the State and its civil servants. In a line of case law starting as early as 1895, the State was found liable to compensate its servants and employees for damages incurred in the public service, for instance workers injured in public shipyards.<sup>13</sup> As time went by, a number of legislative enactments came to govern the liability of the State towards its servants and employees,<sup>14</sup> thereby excluding the application of the case law of the Conseil d'État. The principles set out by the Conseil d'État remain applicable nowadays in the limited instances where no legislative regime comes into play — mostly cases involving persons who, on a voluntary basis, take part in the discharge of the duties of the State on a particular occasion (so-called *collaborateurs occasionnels*).<sup>15</sup> Such was the case for Mr. Gambin here.

<sup>13</sup> See CÉ, 21 June 1895, *Cames*, Rec. 1897.509, DP 1896.3.65, S 1897.3.33.

<sup>14</sup> See M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° "Responsabilité sans faute" at 10-11, para. 53-56.

<sup>15</sup> For a survey of those instances, see M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° "Responsabilité sans faute" at 11-12, para. 59-63: they include damage to the property of a servant or employee of the State or the failure of an expert appointed by the court to recover his or her fees from the losing party.

(2) The case law on *collaborateurs occasionnels* imposes a series of conditions on the liability of the State, yet they appear to be interpreted relatively liberally:<sup>16</sup>

- The participation of the victim in the discharge of a public service must have been requested, or at least there must have been some form of emergency to justify the involvement of the victim. In *Appert-Collin*, however, the Conseil d'État found that the mayor of a small municipality who undertook to carry out certain municipal works by himself could still qualify as a *collaborateur occasionnel* even in the absence of a request for his services.<sup>17</sup> In the annotated case, there was an emergency which led Mr. Gambin to come to the rescue of persons in danger, but on the other hand Mr. Gambin was related to those persons, so that his intervention was not entirely motivated by the need to fulfil the mandate of the local police in ensuring the safety of the users of the municipal beach.
- The victim must have been taking part in the provision of the public service. Here as well, the annotated case shows how widely that condition is interpreted, since the functions which Mr. Gambin was fulfilling (rescuing swimmers) were found to be part of the general duties of municipal police forces to ensure the safety of the public.
- No external cause should have intervened, such as *force majeure* or the fault of the victim. That condition was met in the annotated case, since as the Conseil d'État noted, Mr. Gambin had not been imprudent or negligent in his rescue attempt.

(3) The case law concerning liability to servants and employees of the State, now focused mainly on *collaborateurs occasionnels*, indirectly rests on the principle of equality before public burdens. Indeed, authors argue that for someone to suffer injury while participating in the discharge of public service is as such an exceptional breach of equality before public burdens.<sup>18</sup>

<sup>16</sup> See Laubadère, Venezia and Gaudemet at 807-9, para. 1291.

<sup>17</sup> CÉ, 27 November 1970, *Appert-Collin*, Leb. 1970.709, AJDA 1971.59, D 1971.Jur.270.

<sup>18</sup> M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° "Responsabilité sans faute" at 12, para. 64.

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*CÉ (plén.), 9 April 1993<sup>19</sup>*  
*Bianchi*

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## LIABILITY OF PUBLIC HOSPITALS

**Vertebral arteriography**

*A public hospital is liable irrespective of fault if a patient suffers extremely serious injury as a direct result of a medical act performed in the hospital if (i) that medical act was necessary for diagnosis or treatment of the patient and (ii) there was associated with the act a known risk which only exceptionally materializes and to which the patient was apparently not more specifically exposed than other patients.*

*Facts:* The plaintiff suffered from various troubles linked to hypotension, and he was admitted to the defendant public hospital for the purposes of investigating his condition. In the course of doing so, it became necessary to conduct a vertebral arteriography. When the plaintiff was reanimated following the operation, he had become quadriplegic. He sued the public hospital, alleging that its personnel had been at fault in conducting the arteriography.

*Held:* The court of first instance found that no fault had been committed in the course of treating the plaintiff, and that the hospital was accordingly not liable. In a first decision, the Conseil d'État allowed the appeal of the plaintiff and ordered a new expert report on the incident. The report concluded that no fault had been committed and so the matter came back before the Conseil d'État, which decided that the hospital was liable on a no-fault basis.

*Judgment:* "The previous decision of the Conseil d'État ordered the preparation of a new expert report... According to the expert, the probable cause of the accident was an occlusion (at the level of the artery serving the cervical part of the spinal cord) which followed the arteriography and may have been provoked by a small bubble or a small blood clot released during the exploration or the evacuation of the contrast medium. That occurrence was a risk inherent to this kind of examination. It results from the findings and assessments of the expert... that no fault was committed when the arteriography was carried out.

However, when a medical procedure which is necessary for the diagnosis or treatment of the patient presents a known risk, which however only exceptionally materializes and to which there is no reason to think that the patient may be particularly susceptible, the public hospital is liable if the execution of that medical procedure is the direct cause of the injury suffered by the patient, where that injury is of an extremely grave character and furthermore unrelated to the initial condition of the patient or to the foreseeable evolution of that condition.

<sup>19</sup> Leb. 1993.127. Translation by Y.P. Salmon.

The risk inherent to vertebral arteriographies and the consequences of this medical procedure, which Mr. Bianchi underwent, fulfil those conditions.”

#### Notes

(1) The annotated case marks the most recent extension of one of the central categories of State liability without fault under French law, namely liability for installations, things or activities which present an exceptional risk for the citizen. The main sub-categories within that case law are as follows:

- The State is liable irrespective of fault for the damage caused by a *dangerous installation*, typically a weapons depot, to nearby properties.<sup>20</sup> That line of case law, dating from the interwar years, has had a limited impact, and has been superseded to some extent by legislation.<sup>21</sup>
- Liability without fault also extends to the use of *dangerous things* by the State or its agents. Cases where innocent third parties are hit by police gunfire are covered by this principle.<sup>22</sup> Its application has even been extended to cases where an innocent bystander is hit by gunfire from the suspects in the course of a police raid in a crowded bar.<sup>23</sup> Motor vehicles were previously treated as “dangerous things” as well; but accidents involving motor vehicles belonging to the State are now subject to the jurisdiction of civil courts and to the *Loi Badinter*.<sup>24</sup> As a result, State liability without fault for the use of dangerous things is now less significant than it was formerly.
- By contrast, the number of cases where State liability has been engaged for *dangerous activities*, irrespective of fault, has steadily increased. These cases concern for instance damage caused by minor delinquents who have been placed under a liberal re-education regime that allows them contact with the outside world, damage caused by psychiatric patients during a trial period of release or damage

<sup>20</sup> See the leading case, CÉ, 28 March 1919, *Regnault-Derozier*, Leb. 1919.329, DP 1920.3.1, S 1918-1919.3.25.

<sup>21</sup> See de Laubadère, Venezia and Gaudemet at 810, para. 1293; M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° “Responsabilité sans faute” at 13-4, para. 68-74.

<sup>22</sup> See de Laubadère, Venezia and Gaudemet at 811, para. 1297; Rougevin-Baville, *ibid.* at 15, para. 78-83.

<sup>23</sup> See Cass. civ. 1re, 10 June 1986, JCP 1986.II.20683.

<sup>24</sup> See the Act 57-1424 of 31 December 1957, JO, 5 January 1958, D 1958.Lég.30 and 299, which transferred to the judicial courts the jurisdiction over accidents involving motor vehicles belonging to the administration. These accidents are subject to the general rules of the civil law, ie now the *Loi Badinter*. See Le Tourneau and Cadet at 909, para. 3796. The *Loi Badinter* is discussed *supra*, 6.2.2.

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caused by convicts on day release, “semi-liberty” or parole.<sup>25</sup> The rationale behind these cases is that, while progressive treatment or detention methods may be beneficial to society as a whole, they create certain exceptional risks for citizens (since the convicts, patients, etc. in question would otherwise be removed from social interaction), and accordingly the State should assume liability for injury caused by persons set at liberty pursuant to such methods.

(2) In the annotated case, the Conseil d'État was faced with the issue of whether and if so, under what conditions, State liability without fault should be extended to injury suffered by patients in a public hospital. Until then, the Conseil d'État had been reluctant to allow liability without fault in the “public health service” (i.e. public hospitals): the liability of public hospitals was based on fault or even on gross negligence, although in some cases a presumption of fault reversed the burden of proof to the benefit of the victim.<sup>26</sup> The few instances of liability without fault had been introduced by legislation, for instance for injury resulting from compulsory vaccination.<sup>27</sup>

(3) The Conseil d'État is aware that the situation of patients in hospitals does not quite fit the pattern set out in the above paragraph. As *Commissaire du gouvernement S. Daël* pointed out in his Opinion in the annotated case:<sup>28</sup>

“...Nothing forbids or dictates that new instances of liability without fault be set out. Yet, in order to avoid arbitrariness, the court must, on the one hand, refrain from reaching the point where every injury would be shouldered by society collectively, since the distributive nature of the law of civil liability would thereby be denied, and on the other hand, give to the principle of equality a scope which reflects the current state of collective awareness, so that case law remains consistent...”

In relation to the recognized categories of liability without fault, therapeutic risk appears quite atypical.

It is nevertheless possible to see some form of similarity with two regimes [namely those concerning liability for lawful administrative acts<sup>29</sup> and liability for dangerous things]... ..In fact, the hospital patient directly bears in his or her self the cause of the risks which he or she will take in the hope of recovery, in contrast with the [categories of liability mentioned above]. And if this court should take a step [towards extending the scope of liability without fault], it can only be on the basis of a distinction between the risks which, in all fairness, the patient must bear in view of the specificity of individual fates, and those which must be borne by society.”

<sup>25</sup> For an example of such a case, see CÉ, 29 April 1987, *Garde des Sceaux v. Banque populaire*, JCP 1988.II.20920. See de Laubadère, Venezia and Gaudemet at 811-2, para. 1298; M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° “Responsabilité sans faute” at 15-7, para. 84-81.

<sup>26</sup> See Truchet at 6, 9, para. 42-43, 73-79.

<sup>27</sup> See Truchet at 14-15, para. 145-54.

<sup>28</sup> Leb. 1993.127 at 132.

<sup>29</sup> See the next annotated case below.

It was thus a matter for the Conseil d'État, should it agree with the *Commissaire du gouvernement* that it was desirable to introduce liability without fault in the public health service, to outline carefully the conditions under which such liability was to arise. In the key paragraph of the annotated case, the Conseil d'État found that public hospitals were liable irrespective of fault under the following conditions:

- The injury suffered by the patient was *extremely serious*, an indication that the situation is exceptional, in conformity with the general principle that only exceptional breaches of the equality of citizens before public burdens will give rise to liability.
- The injury was *caused directly by a medical act* performed in the public hospital, and cannot be explained either by the initial condition of the patient or the foreseeable development of that condition. In other terms, there must be no other possible cause that would be external to the medical act (the only source of risk for which the State is made liable).
- The medical act in question was *necessary for diagnosis or treatment* of the patient.
- The medical act in question created a *known risk* that only *exceptionally materializes* and to which the patient was apparently not more specifically exposed than other patients. Here again, this condition is intended to ensure that it is only exceptional breaches of the principle of equality that will give rise to liability.

In the annotated case, these conditions were met.<sup>30</sup>

(4) The decision in the annotated case has been followed in subsequent cases. In CÉ, 3 November 1997, *Hôpital Joseph Imbert d'Arles*, for instance, a young boy had died after sinking into coma during a ritual circumcision performed under total anaesthesia in a public hospital.<sup>31</sup> The Conseil d'État found the State liable on the basis of the criteria outlined in the annotated case, even though the operation had not been performed for medical purposes and the medical act that led to the injury (the anaesthesia) was an everyday act, as opposed to the less frequent vertebral arteriography that caused the injury in the annotated case.<sup>32</sup> In the light of the decision of 3 November 1997, it seems that the regime of liability without fault for medical acts performed in public hospitals, as outlined in the annotated case, is designed to have a broad scope of application, even though the relatively restrictive conditions should not give rise to a flood of claims.

It will also be recalled that, in three judgments that were handed down on 26 May 1995, the Conseil d'État made public hospitals liable without fault for defects in products

<sup>30</sup> See for more details the Opinion of the *Commissaire du gouvernement* at Leb. 1993.127.

<sup>31</sup> CÉ, 3 November 1997, *Hôpital Joseph Imbert d'Arles*, JCP 1998.II.10016, D 1998.Jur.146, with annotation by P. Chrestia, AJDA 1997.1016, RFDA 1998.82, with the conclusions of V. Péresse.

<sup>32</sup> See the comments of J. Moreau on that case, *ibid.*

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(in the cases in question, contaminated blood products) that they used in treating patients, provided that the products had been prepared within the hospital's own organization and under its control.<sup>33</sup>

(5) Finally, it should be pointed out that in the realm of liability without fault as in other areas of tort law, the evolution of State liability in administrative law and civil liability under the *Code civil* are increasingly linked, even if they are based on different theoretical foundations.<sup>34</sup> With the decision of the Conseil d'État in the annotated case, an imbalance between the liability regimes applicable to public and private hospitals was created.<sup>35</sup> While both public and private hospitals may be in a similar situation as regards liability for products used in the course of treatment,<sup>36</sup> liability for injury in the course of medical treatment differs. Private hospitals are liable only, on the basis of Article 1384(5) C.civ., if a salaried physician or other member of the personnel commits a fault in the treatment of the patient,<sup>37</sup> while public hospitals, in addition to their liability for *faute de service* by hospital personnel, which is broadly coterminous with the liability of private hospitals under Article 1384(5) C.civ.,<sup>38</sup> are also liable without fault under the conditions set out in the annotated case. The victim would thus be in a different legal position according to whether the injury occurred at a private or public hospital. Since such differences of treatment between liability under civil and administrative law appear increasingly arbitrary and are less and less tolerated under French law,<sup>39</sup> it is possible that the civil law will evolve so as to meet the "challenge" of the annotated case.<sup>40</sup>

<sup>33</sup> CÉ (plén.), 26 May 1995, *N'Guyen, Jouan and Pavan*, Leb. 1995.221 and 222, JCP 1995.II.22468, discussed *infra*, Chapter VI, **6.F.29-30.**, Note (3).

<sup>34</sup> See *supra*, Chapter I, **1.F.10.** and notes thereafter.

<sup>35</sup> See on this point C. Esper, "Le dernier état de la responsabilité des hôpitaux publics" *Gaz.Pal.* 1995.Doctrine.911.

<sup>36</sup> See *infra*, Chapter VI, **6.F.29.-30.**, Note (3).

<sup>37</sup> See *supra*, Chapter V, **5.F.4.** and notes thereafter.

<sup>38</sup> *Ibid.*

<sup>39</sup> For examples where differences between the two legal orders have been removed or reduced out of such a concern, see *supra*, Chapter V, 5.1.1.A. under d) (introduction of *faute personnelle* in the regime of Article 1384(5) C.civ.), **5.F.4.** and notes thereafter (acknowledgement that a physician can be a *préposé* of a private hospital) as well as **5.F.23.**, Note (2) (creation of a general regime of liability for others under Article 1384(1) C.civ.).

<sup>40</sup> See the debate surrounding the compensation for injury resulting from "therapeutic risk" (*aléa thérapeutique*) under civil law: *supra*, **3.F.10.**, Note (4).

*CÉ, 13 May 1987<sup>41</sup>  
Aldebert*

**3.F.44.**

## LIABILITY FOR LAWFUL ADMINISTRATIVE ACT

**Roadside lay-by**

*Lawful measures taken by public authorities in the general interest give a right to compensation to persons who suffer abnormal and special injury due to those measures.*

*Facts:* The plaintiff operated a commercial roadside lay-by for lorries on National Road 23, which passed through the territory of the defendant, a nearby municipality. In order to protect the centre of the municipality, the mayor of the defendant municipality issued an order (the validity of which was not questioned) prohibiting lorries, as well as vehicles carrying dangerous substances, from crossing the municipality on National Road 23, sending them instead to Motorway 11. The effect of the order was to stop the flow of lorry traffic to the plaintiff's establishment. The plaintiff sued the municipality for the resulting damage.

*Held:* The court of first instance rejected the claim. The Conseil d'État reversed that decision and allowed the claim.

*Judgment:* "On the basis of the principle of equality before public burdens [*l'égalité devant les charges publiques*], lawful measures taken by police authorities, in the general interest, may give rise to a duty to compensate persons who suffer abnormal and special injury as a result of the measures..."

The enforcement of the order of the mayor of Saint-Georges-sur-Loire caused the roadside restaurant operated by Mr. Aldebert at Ingrandes to lose almost all of its clientele. That restaurant had been specially equipped to welcome the drivers of heavy vehicles, notably with a large car park adapted to the dimensions of those vehicles. The owner had been authorized by the prefectural authority to keep the restaurant open according to the schedule required to cater to such a clientele. [Thus], under the circumstances of the case, the loss sustained by Mr. Aldebert was abnormal and special, so as to entitle him to compensation..."

*Notes*

(1) Had a similar case arisen at the beginning of the century, it could have come under the most ancient category of State liability without fault, namely public works cases. There the case law had introduced a distinction between damage caused to the *users of public works*, which was governed by the traditional fault-based regime

<sup>41</sup> JCP 1988.II.20960. Translation by Y.P. Salmon.

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(albeit with a presumption of fault against public authorities), and damage suffered by *others*, for which a regime of liability without fault was developed.<sup>42</sup> Under the latter regime, compensation for personal injury or damage to property inflicted upon third parties in the course of public works can be recovered; other damage, in particular economic loss, is recoverable only if the victim can show that the damage is *abnormal* (i.e. exceptionally serious) and *specific* (it touches the victim more than others).<sup>43</sup>

A line of case law developed concerning economic loss arising as a result of public works that divert the flow of traffic away from a commercial establishment: while the operator of such an establishment is entitled to compensation if the public works prevent potential customers from gaining access to its place of business altogether (e.g. if the street is closed), no compensation will be awarded when, as a result of changes to the road system, access to the establishment, though still practicable, is less extensive or less convenient than previously.<sup>44</sup> In the latter case, the Conseil d'État considers that changes in traffic flows are part of the normal hazards of business, so that any economic loss resulting thereof would not be abnormal.

As B. Pacteau points out in his comment on the annotated case, the Conseil d'État could have relied on the case law relating to public works, and in particular to modifications of traffic flows, in order to dismiss the claim of the plaintiff.<sup>45</sup>

(2) Instead, the Conseil d'État chose to approach the problem from the angle of liability for lawful administrative decisions, in line with the case law on liability for failure to exercise public authority.<sup>46</sup> The flow of traffic had indeed been disrupted as a result of a police order of the mayor of the defendant municipality. In comparison with previous case law, the Conseil d'État in the annotated case framed its ruling in broad language: "On the basis of the principle of equality before public burdens, lawful measures taken by police authorities, in the general interest, may give rise to a duty to compensate persons who suffer abnormal and special injury as a result of the measures".

The nature of the injury suffered is thus key to the assessment. In the annotated case, the Conseil d'État found that the victim had sustained *abnormal* damage, inasmuch as he had invested large amounts in fitting his restaurant for the needs of lorry traffic (including the creation of a large parking area). The damage was also *specific* to the plaintiff, since nothing indicates that other establishments saw their goodwill

<sup>42</sup> See de Laubadère, Venezia and Gaudemet at 806-7, para. 1288; M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v<sup>o</sup> "Responsabilité sans faute" at 4-7, para. 11-29.

<sup>43</sup> See Rougevin-Baville, *ibid.* at 7-9, para. 31-9.

<sup>44</sup> Rougevin-Baville, *ibid.* reviews that case law in detail at 8 and 9, para. 35-6, 43-5.

<sup>45</sup> B. Pacteau, Comment, JCP 1988.II.20960.

<sup>46</sup> See for instance CÉ, 3 June 1938, *Sté La Cartonnerie et Imprimerie de St-Charles*, DP 1938.3.65.

evaporate with the redirection of lorry traffic.

(3) It might seem logical to apply the principles governing State liability without fault for lawful administrative acts, in all their generality, to the other branches of the State as well as to executive bodies, namely the judiciary and the legislature. However, the situation is not so simple. The actions of the judiciary remain subject exclusively to fault-based liability.<sup>47</sup>

As for legislation, the classical position was that the legislature could do no wrong; in the absence of any express provision for compensation, persons who suffered a loss as a result of the enactment of legislation had no remedy.<sup>48</sup> That position was abandoned in the famous *La Fleurette* decision of 14 January 1938.<sup>49</sup> In that case, a food manufacturer was almost forced to close because its main product, a cream substitute, had been prohibited by legislation (it seems that the aim of the legislation was precisely to remove the product from the market, in order to protect the dairy industry). The manufacturer then sued the State for damages. The Conseil d'État found that, even in the absence of any provision in the legislation in question providing for compensation, the loss simply could not be left to be borne by the claimant, since the prohibition of its main product had been enacted in the general interest and society accordingly had to assume liability for the resulting loss. The principle of equality before public burdens underlies the reasoning of the Conseil d'État here as well.<sup>50</sup>

In the light of subsequent case law, the conditions for engaging State liability on a no-fault basis for legislative acts are quite stringent: in addition to the requirement that the injury be *abnormal* and *specific* to the claimant, the legislative measure in question must not have *excluded compensation* (explicitly or implicitly) and finally the *objectives* of the legislation and the *nature of the activities* which it affects must be such as to leave room for compensation.<sup>51</sup> It should then come as no surprise that since *La Fleurette*, the Conseil d'État has, to date, found the State liable in only a handful of cases out of the thirty in which such a claim has been advanced.<sup>52</sup>

<sup>47</sup> State liability for the judiciary is governed by Art. L.781-1. of the *Code de l'organisation judiciaire*, *supra*, **3.F.40**.

<sup>48</sup> See de Laubadère, Venezia and Gaudemet at 823, para. 1320-1; M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° "Responsabilité sans faute" at 21, para. 117-8.

<sup>49</sup> CÉ, 14 January 1938, *La Fleurette*, Leb. 1938.25, DP 1938.3.41, S 1938.3.25.

<sup>50</sup> de Laubadère, Venezia and Gaudemet at 823-4, para. 1322.

<sup>51</sup> See de Laubadère, Venezia and Gaudemet at 824-5, para. 1323.

<sup>52</sup> Namely CÉ, 21 January 1944, *Caucheteux and Desmots*, Leb. 1944.22; CÉ, 25 January 1963, *Bovero*, Leb. 1963.53 and CÉ, 18 December 1981, *CAPRI*, Leb. 1981.478, AJDA 1982.261. For an overview of the case law, see M. Rougevin-Baville in *Juris-Classeur Responsabilité de la puissance publique*, v° "Responsabilité sans faute" at 21-4, para. 121-41. For a recent case in which compensation was denied, see CÉ, 21 January 1998, *Plan*, JCP 1998.II.10164.