COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF DRAON v. FRANCE

(Application no. 1513/03)

JUDGMENT

STRASBOURG

6 October 2005

This judgment is final but may be subject to editorial revision.

In the case of Draon v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr A.B. BAKA,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,
Mr K. HAJIYEV,
Mrs R. JAEGER,
Mrs D. JOČIENĖ, *judges*,

and Mr T. L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 23 March and 31 August 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 1513/03) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Lionel Draon and Mrs Christine Draon ("the applicants"), on 2 January 2003.

2. The applicants were represented by Mr F. Nativi and Ms H. Rousseau-Nativi, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs Edwige Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The application concerns the birth of a child with a disability not detected during pregnancy on account of negligence in establishing a prenatal diagnosis. The applicants claimed compensation, but during the course of the proceedings the action was barred by new legislation applicable to pending cases. The applicants relied on Articles 6 § 1, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1, complaining of

the retrospective nature of the new legislation and challenging its substantive provisions.

4. The application was allocated to the Court's Second Section (Rule 52 § 1 of the Rules of Court). On 9 September 2003 a Chamber of that Section decided to give notice of the application to the respondent Government (Rule 54 § 2 (b)) and to give it priority (Rule 41).

5. On 6 July 2004 the application was declared partly admissible by a Chamber of the Second Section composed of the following judges: Mr A.B. Baka, Mr J.-P. Costa, Mr L. Loucaides, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen and Mr M. Ugrekhelidze, judges, and also of Mrs S. Dollé, Section Registrar.

6. On 19 October 2004 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. The place of Mr David Thór Björgvinsson, who was originally to have been a member of that Grand Chamber, was taken by Mr G. Bonello, substitute judge. Mr B. Zupančič and Mrs E. Steiner, who were unable to take part in the final deliberations, were replaced by Mr L. Caflisch and Mrs D. Jočienė, substitute judges (Rule 24 § 3).

8. After consulting the parties, the President decided that the present case should be examined together with the case of *Maurice v. France* (no. 11810/03), also pending before the Grand Chamber (Rule 42 § 2).

9. The applicants and the Government each filed written observations on the merits.

10. A hearing in the present case and the above-mentioned *Maurice* case took place in public in the Human Rights Building, Strasbourg, on 23 March 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J.-L. FLORENT, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,

Mrs L. NOTARIANNI, administrative court judge, on secondment
to the Legal Department of the Ministry of Foreign
Affairs, Human Rights Section, *Counsel*,

Mr P. DIDIER-COURBIN, Deputy Director responsible for
disabled persons, General Social Action
Department, Ministry of Health,

Mrs J. VILLIGIER, central administrative assistant, General
Social Action Department, Ministry of Health, (Disabled
Children's Office),

Mr S. PICARD and
Mr C. SIMON, legal advisers, General Administration of Personnel and Budget Department, Legal and Litigation Division, Ministry of Health,
Mr F. AMEGADJIE, legal officer, European and International Affairs Service, Ministry of Justice, *Advisers*;

(b) *for the applicants*
Ms H. ROUSSEAU-NATIVI, of the Paris Bar,

Mr A. LYON-CAEN, lawyer with the right of audience in the *Conseil d'Etat* and the Court of Cassation *Counsel.*

Mr L. DRAON, applicant, was also present at the hearing.

11. The Court heard addresses by Ms Rousseau-Nativi, Mr Lyon-Caen and Mr Florent, and their replies to judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicants were born in 1961 and 1962 respectively and live in Rosny-sous-Bois.

13. In the spring of 1996 Mrs Draon began her first pregnancy. The second ultrasound scan, carried out in the fifth month of pregnancy, revealed an anomaly in the development of the foetus.

14. On 20 August 1996 an amniocentesis was carried out at Saint-Antoine hospital, run by Assistance Publique - Hôpitaux de Paris (AP-HP). The amniotic fluid sample was sent for analysis to the establishment's cytogenetics laboratory (headed by Professor T.) with a request for karyotype and digestive enzyme analysis. In September 1996 T. informed the applicants that the amniocentesis showed the foetus had "a male chromosomal pattern with no anomaly detected".

15. R. was born on 10 December 1996. Very soon, multiple anomalies were observed, particularly defective psychomotor development. The examinations carried out led to the conclusion that there was a congenital cardiopathy due to a "chromosomal anomaly".

16. When informed of this T. admitted that his service had made the wrong diagnosis, the anomaly having already been entirely detectable at the time of the amniocentesis. He stated: "Concerning the child Draon R., ... we

regret to have to say that there was indeed an asymmetry between the foetus's two copies of chromosome 11; that anomaly or peculiarity escaped our attention".

17. According to the medical reports, R. presents cerebral malformations causing grave disorders, severe impairment and permanent total invalidity, together with arrested weight gain. This means that it is necessary to make material arrangements for his everyday care, supervision and education, including ongoing specialist and non-specialist treatment.

18. On 10 December 1998 the applicants sent a claim to AP-HP seeking compensation for the damage suffered as a result of R.'s disability.

19. In a letter dated 8 February 1999 AP-HP replied that it "[did] not intend to deny liability in this case" but invited the applicants to "submit an application to the Paris Administrative Court which, in its wisdom, will assess the damage for which compensation should be paid".

20. On 29 March 1999 the applicants submitted to the Paris Administrative Court a statement of their claim against AP-HP, requesting an assessment of the damage suffered.

21. At the same time the applicants submitted to the urgent applications judge at the same court a request for the appointment of an expert and an interim award.

22. In a decision of 10 May 1999 the urgent applications judge of the Paris Administrative Court made a first interim award of FRF 250,000 (EUR 38,112.25) and appointed an expert. He made the following points, among other observations:

> "[AP-HP] does not deny liability for the failure to diagnose the chromosomal anomaly which the boy R. is suffering from; ... having regard to the non-pecuniary damage, the disruption in the conditions of their lives and the special burdens arising for Mr and Mrs Draon from their child's infirmity, AP-HP's liability towards them in the sum of 250,000 francs may be considered, at the current stage of the investigation, not seriously open to challenge".

23. The expert filed his report on 16 July 1999 and confirmed the seriousness of R.'s state of health.

24. On 14 December 1999, in a supplementary memorial on the merits, the applicants requested the Administrative Court to assess the amount of the compensation which AP-HP should be required to pay.

25. AP-HP's memorial in reply was registered on 19 July 2000. The applicants then filed a rejoinder and further documents concerning the modifications to their home and the equipment rendered necessary by R.'s state of health.

26. In addition, the applicants again asked the urgent applications judge to make an interim award. In a decision of 11 August 2001 the urgent applications judge of the Paris Administrative Court made an additional interim award of FRF 750,000 (EUR 114,336.76) to the applicants "in view

of the severity of the disorders from which the boy R. continues to suffer and the high costs of bringing him up and caring for him since 1996".

27. After being prompted several times, verbally and in writing, by the applicants, the Paris Administrative Court informed them that the case had been set down for hearing on 19 March 2002.

28. On 5 March 2002 Law no. 2002-303 of 4 March 2002 was published in the Official Gazette of the French Republic. Section 1 of that Law, being applicable to pending proceedings, affected those brought by the applicants.

29. In a letter of 15 March 2002 the Paris Administrative Court informed the applicants that the hearing had been put back to a later date and that the case was likely to be decided on the basis of a rule over which the court did not have discretion, since it applied to their claim by virtue of section 1 of the Law of 4 March 2002.

30. In a judgment of 3 September 2002 the Paris Administrative Court, acting on a proposal made by the Government Commissioner, deferred its decision and submitted to the *Conseil d'Etat* a request for an opinion on interpretation of the provisions of the Law of 4 March 2002 and their compatibility with international conventions.

31. On 6 December 2002 the *Conseil d'Etat* gave an opinion in the context of the litigation in progress (*avis* contentieux) which is reproduced below (see paragraph 51).

32. On the basis of that opinion, the Paris Administrative Court ruled on the merits of the case on 2 September 2003. It began with the following observations:

"Liability

The provisions of section 1 of the Law of 4 March 2002, in the absence of provisions therein deferring their entry into force, are applicable under the conditions of ordinary law following publication of that Law in the Official Gazette of the French Republic. Since the rules the Law lays down were framed by Parliament on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, they are not incompatible with the requirements of Article 6 of [the Convention], with those of Articles 5, 8, 13 and 14 of [the Convention] or with those of Article 1 of Protocol No. 1 [to the Convention]. The general-interest grounds which Parliament took into consideration when framing the rules set out in the first three paragraphs of section 1 justify their application to situations which arose prior to the commencement of pending proceedings. It follows that those provisions are applicable to the present action, brought on 29 March 1999;

The administrative courts do not have jurisdiction to rule on the constitutionality of legislation; [the applicants'] request that this court review the constitutionality of the Law of 4 March 2002 must therefore be refused;

It appears from the investigation that in the fifth month of Mrs Draon's pregnancy, after an ultrasound scan had shown a manifest problem affecting the growth of the foetus, she and Mr Draon were advised to consider the option of an abortion if

karyotype analysis after an amniocentesis revealed a chromosomal abnormality. Mr and Mrs Draon then decided to have that test performed at Saint-Antoine Hospital. They were informed by the hospital on 13 September 1996 that no anomaly of the foetus's male chromosomal pattern had been detected. However, very soon after the baby's birth on 10 December 1996 magnetic resonance imaging revealed a serious malformation of the brain due to a karyotypic anomaly;

The report of the expert appointed by the court states that this anomaly was entirely detectable; failure to detect it therefore constituted gross negligence on AP-HP's part which deprived Mr and Mrs Draon of the possibility of seeking an abortion on therapeutic grounds and entitles them to compensation under section 1 of the Law of 4 March 2002".

33. The court then assessed the damage sustained by the applicants as follows:

"... firstly, ... the amounts requested in respect of non-specialist care, the specific costs not borne by social security, the costs of building a house suited to the child's needs with a number of modifications to the home and the purchase of a specially adapted vehicle relate to special burdens arising throughout the life of the child from his disability and cannot therefore be sums for which [AP-HP] is liable;

... secondly, ... Mr and Mrs Draon are suffering non-pecuniary damage and major disruption in their lives, particularly their work, regard being had to the profound and lasting change to their lives brought about by the birth of a seriously disabled child; ... these two heads of damage must be assessed, in the circumstances of the case, at 180,000 euros;

... lastly ..., although Mr and Mrs Draon submitted that they could no longer holiday in a property they had purchased in Spain, they are not deprived of the right to use that property; consequently their claim for compensation for loss of enjoyment of real property must be rejected;..."

34. The court concluded by ordering AP-HP to pay the applicants the sum of EUR 180,000, less the amount of the interim awards, interest being payable on the resulting sum at the statutory rate from the date of receipt of the claim on 14 December 1998, the interest due being capitalised on 14 December 1999 and subsequently on each anniversary from that date onwards. AP-HP was also ordered to pay the applicants the sum of EUR 3,000 in respect of costs not included in the expenses and to bear the cost of the expert opinion ordered by the president of the court.

35. On 3 September 2003 the applicants appealed against the judgment. Their appeal is currently pending before the Paris Administrative Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Before enactment of the Law of 4 March 2002 the legal position was established by the relevant case-law.

A. Relevant case-law before the Law of 4 March 2002

37. An action for damages brought by the parents of a child born disabled and by the child itself may come within the jurisdiction of either the administrative courts or the ordinary courts, depending on the identity of the defendant. If the defendant is a private doctor or a private medical laboratory, the dispute is referred to the ordinary courts. Where, on the other hand, as in the instant case, a public hospital service is involved, the dispute falls within the jurisdiction of the administrative courts.

1. The Conseil d'Etat

38. The *Conseil d'Etat* gave judgment on 14 February 1997 (C.E., Sect., 14 February 1997, Centre hospitalier de Nice v. Quarez, Rec. p.44). Mrs Quarez, then aged 42 years, had undergone an amniocentesis at her own request in order to verify the health of the foetus she was carrying. Although the result of that examination revealed no anomaly, she gave birth to a child suffering from trisomy 21, a condition detectable through the chromosome test carried out. The *Conseil d'Etat* held in the first place that the hospital which had carried out the examination had been guilty of negligence, since Mrs Quarez had not been informed that the results of the amniocentesis might be subject to a higher margin of error than usual on account of the conditions under which the examination had taken place.

39. Secondly, a distinction was drawn between the disabled child's entitlement to compensation and that of its parents.

With regard to the disabled child's right to compensation, the *Conseil d'Etat* ruled: "In deciding that a direct causal link existed between the negligence of the hospital centre ... and the damage incurred by the child M. from the trisomy from which he suffers, when it is not established by the documents in the file submitted to the court which determined the merits that the infirmity from which the child suffers and which is inherent in his genetic make-up was the consequence of an amniocentesis, the Lyon Administrative Court of Appeal made an error of law".

On the other hand, with regard to the parents' right to compensation, the *Conseil d'Etat* noted: "By asking for an amniocentesis, Mrs Quarez had clearly indicated that she wished to avoid the risk of a genetic accident to the child she had conceived, whose probability, given her age at the time, was relatively high." It went on to say that in those conditions the hospital's negligence had "wrongly led Mr and Mrs Quarez to the certainty that the child conceived was not trisomic and that Mrs Quarez's pregnancy could be taken normally to term" and that "this negligence, as a result of which Mrs Quarez had no reason to ask for a second amniocentesis with a view to abortion on therapeutic grounds under Article L.162-12 of the Public Health Code, [should] be regarded as the direct cause of the prejudice caused to Mr and Mrs Quarez by their child's infirmity".

40. With regard to compensation, the *Conseil d'Etat* took into account, under the head of pecuniary damage, the "special burdens, particularly in terms of specialist treatment and education" made necessary by the child's infirmity, and awarded the parents an annuity to be paid throughout the child's life. It also ordered the hospital to pay compensation for their non-pecuniary damage and the disruption to their lives.

41. Thus the *Conseil d'Etat* did not accept that a disabled child was entitled to compensation on the sole ground that the disability had not been detected during the mother's pregnancy. It did accept on the other hand that the parents of the child born with a disability were entitled to compensation and made an award not only in respect of their non-pecuniary damage but also in respect of the prejudice caused by the disruption to their lives and of pecuniary damage, specifying that the latter included the special burdens which would arise for the parents from their child's infirmity (expenditure linked to specialist treatment and education, assistance from a helper, removal to a suitable home or conversion of their present home, etc.).

42. The judgment did not attract particular comment and led to a line of case-law followed thereafter by the administrative courts.

2. The Court of Cassation

43. The case-law of the ordinary courts was laid down by the Court of Cassation on 17 November 2000 (Cass, Ass. Plén., 17 November 2000, Bull. Ass. Plén., no. 9) in a judgment which was widely commented on (the *Perruche* judgment). In the *Perruche* case a woman had been taken ill with rubella at the start of her pregnancy. Having decided to terminate the pregnancy if the foetus was affected, she took tests to establish whether she was immunised against the disease. Because of negligence on the part of both her doctor and the laboratory, she was wrongly informed that she was immunised. She therefore decided not to terminate the pregnancy and gave birth to a child which suffered from grave disabilities resulting from infection with rubella in the womb. The Court of Cassation held: "Since the negligence on the part of the doctor and the laboratory in performing the services for which they had contracted with Mrs X. prevented her from exercising her choice of terminating her pregnancy in order not to give birth to a disabled child, the child may claim compensation for the damage resulting from that disability and caused by the negligence found."

Thus, contrary to the *Conseil d'Etat*, the Court of Cassation accepted that a child born disabled could himself claim compensation for the prejudice resulting from his disability.

In this case therefore account was taken of the pecuniary and non-pecuniary damage suffered by both the child and the parents, including the special burdens arising from the disability throughout the child's life.

44. It thus appears that in the same circumstances both the Court of Cassation and the *Conseil d'Etat* base their approach on a system of liability for negligence. However, the Court of Cassation recognises a direct causal link between the medical negligence and the child's disability, and the prejudice resulting from that disability for the child itself. The *Conseil d'Etat* does not recognise that link but considers that the negligence makes the hospital liable vis-à-vis the parents on account of the existence of a direct causal link between that negligence and the damage they have sustained.

Both lines of case-law allow compensation to be paid in respect of the special burdens arising from the disability throughout the child's life. However, since the *Conseil d'Etat* considers that damage to have been sustained by the parents, whereas the Court of Cassation considers that it is sustained by the child, there may be significant differences in the nature and amount of such compensation, depending on whether the case-law of the former or the latter court is being followed.

45. The judgment of 17 November 2000 was upheld several times by the Court of Cassation, which reaffirmed the principle of compensation for the child born disabled, subject to proof, where appropriate, that the medical conditions for a voluntary termination of pregnancy on therapeutic grounds were satisfied (Cass., Ass. plén., three judgments of 13 July 2001, BICC, no. 542, 1 October 2001; see also Cass., Ass. plén., two judgments of 28 November 2001, BICC, 1 February 2002).

46. The *Perruche* judgment drew numerous reactions from legal theorists, but also from politicians and from associations of disabled persons and practitioners (doctors, obstetrical gynaecologists and echographers). The last-mentioned group interpreted the judgment as obliging them to provide a guarantee, and the insurance companies raised medical insurance premiums.

3. Liability for negligence

47. Both the *Conseil d'Etat* and the Court of Cassation took as their starting point a system of liability for negligence. In French law, under the general rules on the question, the right to compensation for damage can be upheld only if the conditions for liability are first satisfied. That means that there must be prejudice (or damage), negligence and a causal link between the damage and the negligence.

More particularly, with regard to the liability of a public authority, for compensation to be payable the prejudice, which it is for the victim to prove, must be certain. Loss of opportunity constitutes certain prejudice, provided that the opportunity was a serious one.

In the present case the prejudice resulted from a lack of information, or inadequate or incorrect information, about the results of an examination or analysis. In such a case, before the Law of 4 March 2002 was enacted,

negligence falling short of gross negligence was sufficient. As to the relation between cause and effect, a direct causal link was established between the hospital's negligence and the parents' prejudice (see the above-mentioned *Quarez* judgment).

48. Still in the sphere of administrative law, the amount of compensation is governed by the general principle of full compensation for damage (neither impoverishment nor enrichment of the victim). Compensation may take the form of a capital sum or an annuity. According to the principle of the equal validity of claims for all heads of damage, both pecuniary damage and non-pecuniary damage confer entitlement to compensation.

B. Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service, published in the Official Gazette of the French Republic on 5 March 2002

49. The Law of 4 March 2002 put an end to the position established by the case-law mentioned above, of both the *Conseil d'Etat* and the Court of Cassation alike. Its relevant parts provide as follows:

Section 1

"I. No one may claim to have suffered damage by the mere fact of his or her birth.

A person born with a disability on account of medical negligence may obtain compensation for damage where the negligent act directly caused the disability or aggravated it or prevented steps from being taken to attenuate it.

Where the liability of a health-care professional or establishment is established vis-à-vis the parents of a child born with a disability not detected during the pregnancy by reason of gross negligence (*faute caractérisée*), the parents may claim compensation in respect of their damage only. That damage cannot include the special burdens arising from the disability throughout the life of the child. Compensation for the latter is a matter for national solidarity.

The provisions of the present sub-section I shall be applicable to proceedings in progress, except for those in which an irrevocable decision has been taken on the principle of compensation.

II. Every disabled person shall be entitled, whatever the cause of his or her disability, to the solidarity of the national community as a whole.

III. The National Advisory Council for Disabled Persons shall be charged, in a manner laid down by decree, with assessing the material, financial and non-material situation of disabled persons in France, and of disabled persons of French nationality living outside France and receiving assistance by virtue of national solidarity, and with presenting all proposals deemed necessary to Parliament, with the aim of ensuring, through an ongoing pluri-annual programme, that assistance is provided to such persons ..."

50. These provisions entered into force "under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic" (see paragraph 51 below)[1]. Law no. 2002-303 was published in the Official Gazette on 5 March 2002 and it therefore came into force on 7 March 2002.

C. The opinion given by the Judicial Assembly of the *Conseil d'Etat* on 6 December 2002 under the Administrative Disputes (Reform) Act (the Law of 31 December 1987) (extracts)

51. The *Conseil d'Etat* observed in particular:

"...II. The date of the Law's entry into force:

The liability criteria set out in the second sub-paragraph of paragraph I of section 1 were enacted in favour of persons born with disabilities resulting from medical negligence whether that negligence directly caused the disability, aggravated it or made it impossible to take steps to attenuate it. They were laid down with sufficient precision to be applied by the relevant courts without the need for further legislation to clarify their scope.

The different liability criteria defined in the third sub-paragraph of paragraph I of section 1 were enacted in favour of the parents of children born with a disability which, on account of gross negligence on the part of a medical practitioner or health-care establishment, was not detected during pregnancy. They are sufficiently precise to be applied without the need for further legislative provisions or regulations. Admittedly, they bar inclusion of the damage consisting in the special burdens arising from the disability throughout the child's life in the damage for which the parents can obtain compensation, and provide that such damage is to be made good through reliance on national solidarity. But the very terms of the Law, interpreted with the aid of its drafting history, show that Parliament intended to exclude compensation for that head of damage on the ground that, although there was a causal link between negligence and damage, that link was not such as to justify making the person who committed the negligent act liable for the resulting damage. In providing that this type of damage should be made good by reliance on national solidarity, Parliament did not therefore make implementation of the rules on liability for negligence which it had introduced subject to the enactment of subsequent legislation laying down the conditions under which national solidarity would be mobilised to assist disabled persons.

It follows that, since the Law does not contain provisions for the deferred entry into force of section 1, and since in addition Parliament's intention, as revealed by the Law's drafting history, was to make it applicable immediately, the provisions of section 1 came into force under the conditions of ordinary law following the Law's publication in the Official Gazette of the French Republic.

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1. That is, in accordance with Article 2 of the Decree of 5 November 1870 on the promulgation of laws and decrees, then in force: "in Paris, one clear day after promulgation; everywhere else, within the territory of each administrative district (*arrondissement*), one clear day after the copy of the Official Gazette containing them reaches the chief-town of the district".

III. Law no. 2002-303's compatibility with international law

(1) ...

The object of section 1 of the Law of 4 March 2002 is to lay down a new system of compensation for the damage suffered by children born with disabilities and by their parents, differing from the system which had emerged from the case-law of the administrative and ordinary courts. The new system provides for compensation, by means of an award to be assessed by the courts alone, for the damage directly caused to the person born disabled on account of medical negligence and the damage directly caused to the parents of the child born with a disability which, on account of gross medical negligence, was not detected during pregnancy. It prevents children born with a disability which, on account of medical negligence, was not detected during pregnancy from obtaining from the person responsible for the negligent act compensation for the damage consisting in the special burdens arising from the disability throughout their lives, whereas such compensation had previously been possible under the case-law of the ordinary courts. It also prevents the parents from obtaining from the person responsible for the negligent act compensation for the damage consisting in the special burdens arising from their child's disability throughout its life, whereas such compensation had previously been possible under the case-law of the administrative courts. Lastly, it makes compensation for other heads of damage suffered by the child's parents subject to the existence of gross negligence, whereas the case-law of the administrative and ordinary courts had formerly been based on the existence of negligence falling short of gross negligence.

This new system, which was put in place by Parliament on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, is not incompatible with the requirements of Article 6 § 1 of [the Convention], with those of Articles 5, 8, 13 and 14 of [the Convention], with those of Article 1 of Protocol No. 1 [to the Convention] or with those of Articles 14 and 26 of the Covenant on Civil and Political Rights.

(2) The last sub-paragraph of paragraph I of section 1 makes the provisions of paragraph I applicable to pending proceedings "except for those in which an irrevocable decision has been taken on the principle of compensation".

The general-interest grounds taken into account by Parliament when it laid down the rules in the first three sub-paragraphs of paragraph I show, in relation to the points raised in the request for an opinion, that the intention behind the last sub-paragraph of paragraph I was to apply the new provisions to situations which had arisen previously and to pending proceedings, while rightly reserving final judicial decisions."

D. French national solidarity towards disabled persons

1. Situation before February 2005

52. French legislation (see Law no. 75-534 of 30 June 1975 on orientation in favour of disabled persons, which set up the basic framework, and later legislation) provides compensatory advantages to disabled persons based on national solidarity in a number of fields (such as the right to

education for disabled children and adults, technical and human assistance, financial assistance, etc.).

In particular, the families of disabled persons are entitled to a special education allowance (*Allocation d'éducation spéciale* – "the AES"). This is a family benefit paid from the family allowance funds, provided both the child and its parents are resident in France. The AES is granted by decision of the Special Education Board of the *département* in which the claimant lives, after the file has been studied by a multidisciplinary technical team. First the Special Education Board takes formal note of the child's disability and assesses it. For entitlement to the AES, the level of disability found must at least exceed 50%. Where the disability exceeds 80%, entitlement to the AES is automatic; if the disability is assessed at between 50% and 80%, payment of the allowance is not automatic. It is subject to the child's need for pedagogical, psychological, medical, paramedical and other forms of assistance.

The AES is a two-level benefit: the basic allowance plus top-up payments. The first level is automatically payable where the conditions mentioned above are satisfied. The basic rate of AES is EUR 115 per month (the figure supplied by the Government on 16 March 2003). Where the child's state of health requires substantial expenditure or the assistance of a third person, this may then confer entitlement to one of the six levels of AES top-up payments, which are added to the basic rate.

The first five top-up payments depend on the level of expenditure required by the child's state of health, the time for which the assistance of a third person is necessary, or a combination of both. The sixth level of top-up payment is for the most severe cases, where the child's state of health requires the assistance of a third person all through the day and the families have to provide constant supervision and treatment.

2. Changes made by Law no. 2005-102 of 11 February 2005 on equal rights and opportunities, participation and citizenship for disabled persons, published in the Official Gazette of the French Republic on 12 February 2005

53. The Law of 11 February 2005 emerged from a legislative process launched as far back as July 2002 with the intention of reforming the system of disability compensation in France. It was pointed out in particular that following the enactment of the Law of 4 March 2002 it was necessary to legislate again "to give effective substance to national solidarity" (see the Information Report produced on behalf of the Senate's Social Affairs Committee by Senator P. Blanc, containing 75 proposals for amending the Law of 30 June 1975, appended to the record of the Senate's sitting on 24 July 2002, p. 13).

54. The new law makes a number of substantial changes. In particular, it includes for the first time in French law a definition of disability and introduces a new "compensatory benefit" to be added to existing forms of assistance.

55. To that end, the Law of 11 February 2005 amends the Social Action and Family Code. Its relevant provisions are worded as follows:

Title I: General provisions

Section 2

"I. ... A disability, within the meaning of the present Law, is any limitation of activity or restriction on participation in life in society suffered within his or her environment by any person on account of a substantial, lasting or permanent impairment of one or more physical, sensory, mental, cognitive or psychological functions, a multiple disability, or a disabling health disorder. ...

Every disabled person shall be entitled to solidarity from the whole national community, which, by virtue of that obligation, shall guarantee him or her access to the fundamental rights of all citizens, and the full exercise of citizenship.

The State shall act as the guarantor of equal treatment for disabled persons throughout the national territory and shall lay down objectives for pluriannual action plans. ...

II. – 1. The first three sub-paragraphs of the first paragraph of section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service shall become Article L. 114-5 of the Social Action and Family Code.

2. The provisions of Article L. 114-5 of the Social Action and Family Code, as amended by sub-paragraph 1 of the present paragraph II, shall be applicable to proceedings in progress on the date of the entry into force of the above-mentioned Law no. 2002-303 of 4 March 2002, except for those in which an irrevocable decision has been taken on the principle of compensation." ...

Title III: Compensation and resources

Chapter 1: Compensation for the consequences of disability

Section 11

"... A disabled person shall be entitled to compensation for the consequences of his or her disability whatever the origin or nature of the impairment, or his or her age or lifestyle.

That compensation shall consist in meeting his or her needs, including nursery care in early childhood, schooling, teaching, education, vocational insertion, adaptations of the home or workplace necessary for the full exercise of citizenship and of personal autonomy, developing or improving the supply of services, in particular to enable those around the disabled person to enjoy respite breaks, developing mutual support groups or places in special establishments, assistance of all kinds to the disabled person or institutions to make it possible to live in an ordinary or adapted

environment, or regarding access to the specific procedures and institutions dealing with the disability concerned or the resources and benefits accompanying implementation of the legal protection governed by Title XI of Book 1 of the Civil Code. The above responses, adapted as required, shall take into account the care or accompaniment necessary for disabled persons unable to express their needs alone.

The forms of compensation required shall be recorded in a statement of needs drawn up in the light of the needs and aspirations of the disabled person as expressed in his or her life plan, written by himself or herself or, failing that, where he or she is unable to express an opinion, with or for him or her by his or her legal representative."

Section 12
Compensatory benefit

"... I. – Every disabled person stably and regularly resident in metropolitan France ... above the age at which entitlement to the disabled child's education allowance [formerly the AES] begins ..., whose age is below the cut-off point to be laid down by decree and whose disability matches the criteria to be laid down by decree, taking into account in particular the nature and scale of the forms of compensation required in the light of his or her life plan, shall be entitled to a compensatory benefit which shall take the form of a benefit in kind payable, at the wishes of the beneficiary, either in kind or in money. ...

III. – The element of the benefit mentioned in point 3 of Article L. 245-3 [of the Social Action and Family Code] may also be claimed, under conditions to be laid down by decree, by beneficiaries of the [disabled child's education] allowance [formerly the AES], where on account of their child's disability they are likely to bear burdens of the type covered by that paragraph. ...

Article L. 245-3 [of the Social Action and Family Code] – Compensatory benefit may be used, under conditions to be laid down by decree, for

1. burdens arising from the need for human assistance, including, where necessary, the assistance provided by family helpers;

2. burdens arising from the need for technical assistance, particularly the costs which remain payable by an insured person where such technical assistance forms one of the categories of benefit contemplated in point 1 of Article 321-1 of the Social Security Code;

3. burdens arising from adaptation of the home or vehicle of the disabled person, and any extra expenditure needed for his or her transport;

4. specific or exceptional burdens, such as those arising from the purchase or maintenance of products needed on account of the disability; ...

... – The element of the benefit mentioned in point 1 of Article L. 245-3 shall be granted to any disabled person either where his or her state of health makes necessary the effective assistance of a third person for the essential acts of his or her existence, or requires regular supervision, or where he or she is obliged to incur additional expenditure through carrying on an occupation or holding elective office."

56. The new compensatory benefit is initially payable in full to persons over the age at which entitlement to the AES (renamed "disabled child's allowance" by the new legislation – see section 12 above) begins. With regard to children, section 13 of the Law of 11 February 2005 provides:

> "Within three years from the entry into force of the present Law compensatory benefit shall be extended to disabled children. Within a maximum of five years those provisions of the present Law which distinguish between disabled persons on the ground of age in respect of compensation for the disability and payment of the costs of residence in social and medico-social establishments shall be repealed."

57. The entry into force of the Law of 11 February 2005 is subject to publication of the implementing decrees. Section 101 provides:

> "The regulations implementing the present Law shall be published within six months of its publication, after being referred for opinion to the National Advisory Council for Disabled Persons. ..."

58. According to the information supplied by the Government, the new compensatory benefit should come into force on 1 January 2006. It is expected that it will be payable in full to disabled children by 12 February 2008. In the meantime, children will apparently receive only part of the benefit: only the costs of adapting a disabled child's home or vehicle, or his or her additional transport costs, can already be financed by the new system.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

59. The applicants complained of section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service (see paragraph 49 above). They submitted that that provision had infringed their right to the peaceful enjoyment of their possessions and breached Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Arguments of the parties

1. The applicants

60. The applicants observed that before the enactment of the Law of 4 March 2002 they had brought proceedings seeking full compensation for the damage they had sustained, and in particular for the damage consisting in the special burdens arising from their child's disability throughout his life. They submitted that since the conditions for declaring AP-HP liable on the basis of the above-mentioned *Quarez* judgment (see paragraphs 38 to 42) were satisfied, their claims should have been met in full. They therefore had a possession within the meaning of Article 1 of Protocol No. 1 to the Convention, namely a compensation claim against AP-HP, in respect of which they had a legitimate expectation of obtaining judgment in their favour (see *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332). Since the Law of 4 March 2002 was applicable to pending proceedings, including their case, its effect had been to deprive them of their claim. Its enactment therefore constituted "interference" with their right to the peaceful enjoyment of their possessions, as indeed the Government acknowledged.

As regards the legitimacy of the interference, the applicants submitted that it had not struck a fair balance between the demands of the general interest (regard being had in particular to the reasons for the legislation's enactment, which could not justify making it retrospective) and protection of their fundamental rights, since the effect of the law concerned had been to deprive them of their claim without effective compensation.

They further stressed the enormous and disproportionate impact of the decision to make the new legislation immediately applicable to pending proceedings, bearing in mind in particular the fact that it referred to arrangements for assisting disabled persons through reliance on national solidarity, which they considered inadequate, vague and imprecise. In that connection, they submitted that although the recently enacted Law of 11 February 2005 (see paragraphs 53 to 58 above) had brought in a new benefit to compensate for disability, it could not cancel out the disproportion given the form that this compensatory benefit system was to take, and it still left the applicants to bear an excessive burden.

2. The Government

61. Relying likewise on the Court's above-mentioned *Pressos Compania Naviera S.A. and Others* judgment, the Government submitted that it was not possible to establish as a general rule that before enactment of the Law of 4 March 2002 and in the light of the case-law then applicable the parents of children born with disabilities as a result of a medical error were certain to receive compensation as a matter of course. They did not therefore

systematically have a "legitimate expectation" of having their claims met which could have been frustrated by the Law's enactment.

The Government acknowledged, however, that it was a different matter in the present case in so far as AP-HP had explicitly and unreservedly admitted liability towards the applicants. When the new legislation came into force there had therefore been no doubt about the principle of compensation, which, in accordance with the settled case-law established since the time of the above-mentioned *Quarez* judgment, covered the special burdens arising for the parents from their child's infirmity. Before the entry into force of the Law of 4 March 2002 the applicants could therefore legitimately expect to be compensated for those "special burdens", a head of damage which had been excluded by the new legislation. The Government accordingly accepted that there had been interference with the right to the peaceful enjoyment of a "possession".

62. As regards, on the other hand, the legitimacy of that interference, the Government argued that the partial deprivation of possessions the applicants had suffered could not be declared contrary to Article 1 of Protocol No. 1 to the Convention, given, *inter alia*, the aim of the Law of 4 March 2002, the main object of which had been to clarify a system of liability for medical acts which had been raising legal and ethical problems and which, as the Government stressed at the hearing, had been established by a recent judgment (the *Quarez* judgment not having been delivered until 1997, whereas the applicants' child had been born in 1996). The new legislation had not really been retrospective; after modifying the existing legal situation it had merely made the new rules immediately applicable to pending proceedings – a common practice.

Referring to the opinion given by the *Conseil d'Etat* on 6 December 2002, still with the aim of establishing the legitimacy of the interference, the Government next referred to the general-interest considerations which, they submitted, had justified the enactment of the legislation complained of and its applicability to pending proceedings.

These included, in the first place, ethical reasons, reflected mainly in paragraph I of section 1. In the light of the reactions to the above-mentioned *Perruche* judgment (see paragraphs 43 to 46), Parliament had intervened to provide a coherent solution to a problem that had been the subject of national debate and had raised crucial ethical issues concerning, *inter alia*, human dignity and the status of the unborn child. The main aim had been to exclude recognition of a child's right to complain of being brought into the world with a congenital disability, a matter on which society had been required to make a fundamental decision. That was why there could be no difference in treatment between pending proceedings depending on whether they had been brought before or after the Law's promulgation.

Secondly, there were questions of natural justice. It was argued that the legislation in issue reflected the need to ensure fair treatment for all disabled

persons whatever the severity and cause of their disability. Such intervention had been all the more necessary because, following the *Quarez* and *Perruche* judgments, the system of compensation for disabled persons had become unsatisfactory. That concern for fair treatment, it was submitted, was the reason why the legislation had been made immediately applicable, so that no distinction would be drawn between disabled persons in accordance with the date on which their applications had been lodged, whether before or after the Law's promulgation. Natural justice had also prompted the decision to abolish the rule requiring health-care workers and establishments to pay compensation for disabilities not detected during pregnancy, which was perceived as deeply unfair by obstetricians and doctors performing prenatal ultrasound scans.

Lastly and above all, Parliament had intervened for reasons having to do with the proper organisation of the health service, which was under threat as a result of the discontent expressed by health-care practitioners in the wake of the above-mentioned *Perruche* judgment. In the face of strikes, resignations and refusals to carry out ultrasound scans, the legislature had acted to ensure that there would continue to be sufficiently well-staffed medical services in the fields of obstetrics and ultrasound scanning and that pregnant women and unborn children would receive medical attention in satisfactory conditions.

63. The Government further argued that there had been a fair balance between the objective pursued by the legislature and the means it had employed. They submitted in that connection that neither the parents of disabled children nor the children themselves had been deprived of all forms of assistance and that there was still statutory liability for negligence by health-care workers. Parliament had been obliged to give the need to preserve the health service priority over the hopes of a few parents for additional compensation. In view of the large number of doctors on strike, the immediate application of the new legislation had been necessary in order to limit the flight of private practitioners out of the prenatal diagnosis sector. The Government further emphasised that at first instance, after the entry into force of the legislation in issue, the applicants had obtained compensation which, while it might not have been as much as they had hoped to receive, was far from a token payment, since it amounted to EUR 180,000. That amount had equalled the compensation paid in the above-mentioned *Quarez* case. Consequently, although the applicants had not obtained compensation for all the heads of damage they claimed, they had received a considerable sum of money.

64. In addition, the Government contended, the level of assistance provided by way of national solidarity should not be disregarded. Measures had already been in place before the Law of 4 March 2002 and these had been supplemented by those provided for in the recently enacted Law of 11 February 2005. Thus disabled persons and their families had not suffered

excessive consequences as a result of application of the Law of 4 March 2002. They had not been deprived of financial support, the difference being that this would no longer be provided by health-care workers only but also by the State.

B. The Court's assessment

1. *Whether there was a "possession" and interference with the right to peaceful enjoyment of that "possession"*

65. The Court reiterates that, according to its case-law, an applicant can allege a violation of Article 1 of Protocol No. 1 to the Convention only in so far as the impugned decisions relate to his "possessions" within the meaning of that provision. "Possessions" can be "existing possessions" or assets, including, in certain well-defined situations, claims. For a claim to be capable of being considered an "asset" falling within the scope of Article 1 of Protocol No. 1, the claimant must establish that it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. Where that has been done, the concept of "legitimate expectation" can come into play.

66. As regards the concept of "legitimate expectation", one aspect of this was illustrated in the above-mentioned case of *Pressos Compañía Naviera S.A. and Others*, which concerned claims for damages arising from accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the Belgian law of tort, claims came into being as soon as damage had occurred. The Court classified these claims as "assets" attracting the protection of Article 1 of Protocol No. 1. It went on to note that, on the basis of a series of judgments of the Court of Cassation, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.

67. The Court did not expressly state in the *Pressos Compañía Naviera S.A. and Others* case that the "legitimate expectation" was a component of, or attached to, the property right claimed. However, it was implicit in the judgment that no such expectation could come into play in the absence of an "asset" falling within the ambit of Article 1 of Protocol No. 1, which in that case was a compensation claim. The "legitimate expectation" identified in the *Pressos Compañía Naviera S.A. and Others* case did not in itself constitute a proprietary interest; it related to the way in which the claim qualifying as an "asset" would be treated under domestic law, and in particular to the reliance on the fact that the established case-law of the national courts would continue to be applied in respect of damage which had already occurred.

68. In a line of cases the Court has found that the applicants did not have a "legitimate expectation" where it could not be said that they had a currently enforceable claim that was reasonably established. ... The Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. ... The Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (see *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35 and 48 to 52, ECHR 2004-IX).

69. Moreover, Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, among other authorities, *Pressos Compania Naviera S.A. and Others*, cited above, § 33).

70. In the present case it is not disputed that there was an interference with the right to peaceful enjoyment of a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. The parties accept that, regard being had to the position regarding liability which obtained under French law at the time of the enactment of the Law of 4 March 2002, and particularly to the settled case-law of the administrative courts, which had been established by the *Quarez* judgment mentioned above, the applicants had suffered prejudice caused directly by negligence on the part of AP-HP and had a claim in respect of which they could legitimately expect to obtain compensation for damage, including the special burdens arising from their child's disability.

71. The Law of 4 March 2002, which came into force on 7 March 2002, deprived the applicants of the possibility of obtaining compensation in respect of those special burdens by virtue of the precedent set by the *Quarez* judgment of 14 February 1997, whereas they had lodged their claim with the Paris Administrative Court as early as 29 March 1999, and the domestic courts, in two orders made by the judge responsible for urgent applications, on 10 May 1999 and 11 August 2001, had made interim awards which together amounted to a substantial sum, the liability of AP-HP towards them not being seriously contestable. The law complained of therefore entailed

interference with the exercise of the right to compensation which could have been asserted under the domestic law applicable until then, and consequently of the applicants' right to peaceful enjoyment of their possessions.

72. The Court notes that in the present case, in so far as the impugned law applied to proceedings brought before 7 March 2002 which were still pending on that date, such as those brought by the applicants, the interference amounted to a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention. It must therefore determine whether the interference complained of was justified under that provision.

2. Whether the interference was justified

(a) "Provided for by law"

73. It is not disputed that the interference complained of was "provided for by law", as required by Article 1 of Protocol No. 1 to the Convention.

74. On the other hand, the parties disagreed about the legitimacy of that interference. The Court must accordingly determine whether it pursued a legitimate aim, in other words whether there was a "public interest", and whether it complied with the principle of proportionality for the purposes of the second rule laid down in Article 1 of Protocol No. 1 to the Convention.

(b) "In the public interest"

75. The Court considers that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

76. Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues.The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *Pressos Compania Naviera S.A. and Others*, cited above, § 37, and *Broniowski v. Poland* [GC], no. 31443/96, § 149, ECHR 2004-V).

77. In the present case the Government submitted that section 1 of the Law of 4 March 2002 was prompted by general-interest considerations of

three kinds: ethical concerns, and in particular the need to legislate on a fundamental choice of society; fairness; and the proper organisation of the health service (see paragraph 62 above). In that connection, the Court has no reason to doubt that the French parliament's determination to put an end to a line of case-law of which it disapproved and to change the legal position on medical liability, even by making the new rules applicable to existing cases, was "in the public interest". Whether this public-interest aim was of sufficient weight for the Court to be able to find the interference proportionate is another matter.

(c) Proportionality of the interference

78. An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others*, cited above, § 38).

79. Compensation terms under the relevant domestic legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 35, § 71; *The Former King of Greece and Others v. Greece*, [GC], no. 25701/94, § 89, ECHR 2000-XII; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005).

80. The Court observes that the *Conseil d'Etat* acknowledged in its *Quarez* judgment of 14 February 1997 that the State and public-law bodies such as AP-HP, a public health institution providing the public hospital service, were subject to the rules of ordinary law on liability for negligence. It notes that that case-law, although relatively recent, was settled and consistently applied by the administrative courts. As the *Quarez* judgment antedated the discovery of R.'s disability and above all the commencement of the applicants' action in the French courts, the latter could legitimately expect to rely on it to their advantage.

81. By cancelling the effects of the *Quarez* judgment, and those of the Court of Cassation's *Perruche* judgment, on pending proceedings, the law complained of applied a new liability rule to facts forming the basis for an actionable claim which had occurred before its entry into force and which had given rise to legal proceedings which were still pending at that time, so that it had retrospective scope. Admittedly, the applicability of legislation to pending proceedings does not necessarily in itself upset the requisite fair balance, since the legislature is not in principle precluded in civil matters from intervening to alter the current legal position through a statute which is immediately applicable (see, *mutatis mutandis*, *Zielinski and Pradal & Gonzalez and Others v. France* [GC], nos. 24864/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII).

82. In the present case, however, section 1 of the Law of 4 March 2002 abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money, in respect of which the parents of children whose disabilities had not been detected before birth, like the applicants, could have claimed compensation from the hospital held to be liable. The French legislature thereby deprived the applicants of an existing "asset" which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case-law of the highest courts of the land.

83. The Court cannot accept the Government's argument that the principle of proportionality was respected, provision having been made for an appropriate amount of compensation, which would thus constitute a satisfactory alternative, to be paid to the applicants. It does not consider that what the applicants could receive by virtue of the Law of 4 March 2002 as the sole form of compensation for the special burdens arising from the disability of their child was, or is, capable of providing them with payment of an amount reasonably related to the value of their lost asset. The applicants are admittedly entitled to benefits under the system now in force, but the amount concerned is considerably less than the sum payable under the previous liability rules and is clearly inadequate, as the Government and the legislature themselves admit, since these benefits were extended recently by new provisions introduced for that purpose by the Law of 11 February 2005. Moreover, neither the sums to be paid to the applicants under that law nor the date of its entry into force for disabled children have been definitively fixed (see paragraphs 56 to 58 above). That situation leaves the applicants, even now, in considerable uncertainty, and in any event prevents them from obtaining sufficient compensation for the damage they have already sustained since the birth of their child.

Thus, both the very limited nature of the existing compensation payable by way of national solidarity and the uncertainty surrounding the compensation which might result from application of the 2005 Act rule out

the conclusion that this important head of damage may be regarded as having been reasonably compensated in the period since enactment of the Law of 4 March 2002.

84. As regards the compensation awarded to the applicants by the Paris Administrative Court to date, the Court notes that it covers non-pecuniary damage and disruption to the applicants' lives, but not the special burdens arising from the child's disability throughout his life. On this point, the Court is led to the inescapable conclusion that the amount of compensation awarded by the Paris Administrative Court was very much lower than the applicants could legitimately have expected and that, in any case, it cannot be considered to have been definitively secured, since the award was made in a first-instance judgment against which an appeal is pending. The compensation thus awarded to the applicants cannot therefore compensate for the claims now lost.

85. Lastly, the Court considers that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service mentioned by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government could not, in the instant case, legitimise retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden.

Such a radical interference with the applicants' rights upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other.

86. In so far as it concerned proceedings pending on 7 March 2002, the date of its entry into force, section 1 of the Law of 4 March 2002 therefore breached Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

87. The applicants complained that the Law of 4 March 2002, by setting up a specific liability system, had created an unjustified inequality of treatment between the parents of children whose disabilities were not detected before birth on account of negligence and the parents of children disabled on account of some other form of negligence, to whom the principles of ordinary law would continue to apply. They relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Arguments of the parties

1. The applicants

88. The applicants complained that the Law of 4 March 2002 had created an unjustified inequality of treatment between the parents of children whose disabilities had not been detected before birth on account of negligence, for whom compensation for the special burdens arising from the disability throughout the child's life was a matter of national solidarity alone, and the victims of other negligent acts which had caused disability, to whom the principles of the ordinary law of tort would continue to apply. They pointed out that there was no longer any dispute as to whether they had a "possession". The Law of 4 March 2002 had infringed their right to the peaceful enjoyment of their possessions by creating inequality of treatment between them and the other category of parents, whereas, in their submission, the two situations were essentially similar, both being concerned with compensation for prejudice resulting from a disability caused by negligence. In addition, the applicants submitted that no general-interest or public-interest considerations could justify the discriminatory treatment resulting from the new legislation.

2. The Government

89. The Government submitted, as their main argument, that the two categories were not in the same situation. Where the disability had been directly caused by medical negligence, the negligence preceded the disability, was the cause of it and was therefore the original source of the prejudice sustained by the parents through the birth of a disabled child. In the applicants' case, the negligence had not been the direct cause of the disability, which already existed. The only prejudice it had occasioned lay in not having an abortion, or in not having the possibility of aborting. As the causal links between the medical negligence and the disability were different in the two cases, they – rightly, in the Government's opinion – formed the rationale for two different sets of liability rules. It could not therefore be concluded that there had been discrimination since the situations were not the same.

90. In the alternative, the Government argued that reliance on national solidarity to provide assistance with the special burdens arising from the disability of children in R.'s situation was not discriminatory since, like the others, they had the benefit of extensive support measures. In addition, the Government considered that the difference in treatment between the two situations was reasonably proportionate to the legitimate objectives of the Law of 4 March 2002.

B. The Court's assessment

91. Regard being had to its finding of a violation concerning the applicants' right to the peaceful enjoyment of their possessions (see paragraph 86 above), the Court does not consider it necessary to examine the applicants' complaint under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

92. The applicants alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings, including their case, infringed their right to a fair trial. They relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Arguments of the parties

1. The applicants

93. Relying on the Court's case-law (particularly *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, and *Zielinski and Pradal* and *Gonzalez and Others*, cited above), the applicants alleged that the provisions of the Law of 4 March 2002 disregarded the rule that the principle of the rule of law and the notion of fair trial (in particular the principle of the equality of arms) precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, save on compelling grounds of the general interest. They argued that no compelling grounds of the general interest justified the retrospective provisions complained of. They submitted that there was no need to define the precise nature of the Law of 4 March 2002 since it did constitute retrospective legislative intervention of the type regularly criticised by the Court in its case-law. The presence of the State as a party in the dispute was not required for that case-law to apply. In any event, in the present case, the State was a party at one remove, since AP-HP was a public administrative establishment under State control. Lastly, the applicants contested the argument that national solidarity made good the prejudice for which they had not been compensated, since the existing provisions for the assistance of disabled persons were inadequate and future measures uncertain, and in any case belated and ineffective as regards compensating for the special burdens arising from their child's disability.

2. The Government

94. The Government submitted that the present case was to be distinguished from those previously examined by the Court in connection with the question of "legislative validations", and particularly from the cases of *Stran Greek Refineries and Stratis Andreadis* and *Zielinski and Pradal & Gonzalez and Others*, cited above. The law complained of was different in nature and could not be classified as "validating" legislation nor be compared to those previously criticised by the Court. The object of the Law of 4 March 2002 had not been to frustrate actions going through the courts but rather, following the debate on the *Perruche* judgment, to clarify liability rules which were causing difficulties. Intervening independently of any particular dispute, in a field which was appropriate for legislative intervention, and without interfering either in pre-existing contractual relations or with the proper administration of justice, Parliament had enacted a law which was not really retrospective but essentially interpretative. Moreover, the State was not in any way a party in the dispute which had given rise to the present case, nor was it defending its own interests. It followed that the legislature's intervention did not amount to interference and had not been intended to influence the outcome of the dispute. Furthermore, even if it were accepted that there had been such interference, it was justified since the Law of 4 March 2002 pursued several legitimate objectives, to which the *Conseil d'Etat* had drawn attention in its opinion of 6 December 2002 (set out in paragraph 62 above). Lastly, the Government repeated their argument that there was a "reasonable relationship of proportionality" between the objective pursued by the legislature and the means it had employed. It emphasised the level of assistance provided by way of national solidarity, referring not only to the measures already taken domestically but also to those planned for the future.

B. The Court's assessment

95. Regard being had to the particular circumstances of the present case and to the reasoning which led it to find a violation of Article 1 of Protocol No. 1 to the Convention (see paragraphs 65 to 86 above), the Court does not consider it necessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

96. The applicants further alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings deprived them of an effective remedy, since they could no longer obtain compensation, from the person

responsible, for the special burdens arising from their child's disability. They relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

97. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an "arguable" complaint under the Convention and to grant appropriate relief (see, among other authorities, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95).

98. As the Court concluded above that there has been a violation of Article 1 of Protocol No. 1 to the Convention, there is no doubt that the complaint relating to that provision is arguable for the purposes of Article 13 of the Convention. However, according to the Court's case-law, Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority (see, for example, *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports* 1996-II, § 70). Consequently, the applicants' complaint falls foul of that principle in so far as they complained of the lack of a remedy after 7 March 2002, the date of the entry into force of section 1 of the Law of 4 March 2002 on patients' rights and the quality of the health service (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 113, ECHR 2002-VI).

99. Accordingly, the Court finds no violation of Article 13 of the Convention in the present case.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, AND OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 8

100. The applicants submitted that the fact that section 1 of the Law of 4 March 2002 was applied in their case while it was still pending constituted arbitrary interference by the State which infringed their right to respect for their family life. They relied on Article 8 of the Convention, the relevant parts of which provide as follows:

> "1. Everyone has the right to respect for his private and family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the

country, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Arguments of the parties

1. The applicants

101. At the hearing before the Court the applicants asserted that Article 8 of the Convention was applicable to the present case in that it proclaimed the right to a normal family life. They argued that the Law of 4 March 2002 had infringed that right and constituted interference with its exercise. But none of the conditions required for such interference to be compatible with the Convention, namely that it should be in accordance with the law, in pursuit of a legitimate aim and necessary, had been satisfied. In the first place, the legislation was neither clear nor precise, contrary to the requirements established by the Court's case-law, in that the reference to national solidarity remained vague and imprecise. Secondly, and above all, the interference did not pursue a legitimate and compelling objective. In that connection, the applicants submitted, among other arguments, that the considerations linked to improving the organisation of the health service, chief among which was the concern to avoid increases in insurance premiums for doctors and health-care establishments, could not justify giving these immunity in respect of their negligent acts or omissions. Moreover, the State had not guaranteed the exercise of the applicants' right to a family life, since by depriving them of a remedy whereby they might seek compensation for the prejudice consisting in the special burdens arising from their child's disability the legislature had blocked protection of the family's interests.

102. At the hearing the applicants also invoked, for the first time, Article 14 of the Convention taken together with Article 8, in connection with the right to a normal family life. They asserted that the law complained of introduced unjustified discrimination between the parents of children born disabled as a result of negligence by a doctor who had failed to detect the disability during the mother's pregnancy, who could not obtain full reparation for the consequences of such negligence, like the applicants, and the parents of disabled children who were able to impute the damage to a third party and obtain full reparation.

2. The Government

103. As their main argument, the Government contested the applicability of Article 8 of the Convention. Relying on the Court's case-law (citing *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31), they distinguished between patrimonial rights which, by their nature, had a

connection with family life (such as successions and voluntary dispositions) and those which had only an indirect link with family life, like the right to compensation for medical negligence. Accepting that Article 8 applied to the latter, and in particular to the present case, would bring within the scope of that provision any material claim a family might have, even one having nothing to do with the family structure. Even though, as the Government accepted, the question whether or not the costs arising from R.'s disability would be reimbursed was likely to affect the life of the applicants' family, it did not have any bearing on the patrimonial relations between parents and children.

104. Even if the Court were to take the view that Article 8 was applicable in the case, the Government further submitted that no interference had been established. Even if that were so, the interference would be in pursuit of a legitimate aim and necessary in a democratic society, regard being had in particular to the legitimate objectives pursued by the Law of 4 March 2002.

B. The Court's assessment

1. General principles

105. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see, for example, *Nuutinen v. Finland*, no. 32842/96, 27 June 2000, § 127, and *Kutzner v. Germany*, no. 46544/99, 26 February 2002, §§ 61 and 62). Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph may be of a certain relevance" (see *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, § 41).

106. "Respect" for family life ... implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally (see *Marckx*, cited above, § 45). The Court has held that a State is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 32; *X and Y v. the Netherlands*,

judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55; *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 227, § 58; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, § 35; and *Zehnalova and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

107. However, since the concept of respect is not precisely defined, States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Zehnalova and Zehnal*, cited above).

108. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one").

2. Application of the above principles

109. In the present case, in so far as the complaints submitted to the Court may be distinguished from those already examined under Article 1 of Protocol No. 1 to the Convention, the applicants complained of an unjustified interference, but also, in substance, of inaction by the State, which had not set up an effective system to provide compensation for the special burdens arising from their child's disability.

110. The first question to arise is whether Article 8 of the Convention is applicable, that is to say whether the measures taken by the respondent State in relation to disabled persons have anything to do with the applicants' right to lead a normal family life.

111. However, the Court does not consider it necessary in the present case to determine that issue since, even supposing that Article 8 of the Convention may be considered applicable, it considers that the situation complained of by the applicants did not constitute a breach of that provision.

112. It notes that section 1 of the Law of 4 March 2002 altered the existing legal position on the question of medical liability. In response to the *Perruche* judgment and the stormy nation-wide debate which ensued, reflecting the major differences of opinion on the question within French society, the French parliament, after consulting the various persons and interest groups concerned, decided to intervene to establish a new system of compensation for the prejudice sustained by children born with disabilities and their parents, different from the one resulting from the case-law of the administrative and civil courts. One of the main effects of the new rules established in consequence, spelled out by the *Conseil d'Etat* in its opinion of 6 December 2002, is that parents may no longer obtain compensation from the negligent party for damage in the form of the special burdens arising from their children's disabilities throughout their lives. These rules were the result of comprehensive debate in Parliament, in the course of which account was taken of legal, ethical and social considerations, and concerns relating to the proper organisation of the health service and the need for fair treatment for all disabled persons. As the *Conseil d'Etat* pointed out in the opinion already mentioned, Parliament based its decision on general-interest grounds, and the validity of those grounds cannot be called into question by the Court (see paragraph 77 above). In doing so it was pursuing at least one of the legitimate aims set out in the second paragraph of Article 8 of the Convention, namely protection of health or morals.

113. Admittedly, being immediately applicable, the provisions in issue retrospectively deprived the applicants of an essential part of the compensation to which they could lay claim, and the Court can only repeat that finding (see paragraphs 78 to 86 above).

114. However, in deciding that the costs of caring for disabled children should be borne by reliance on national solidarity, the French legislature took the view that it was better to deal with the matter through the legislation laying down the conditions for obtaining compensation for disability than to leave to the courts the task of ruling on actions under the ordinary law of liability. Moreover, the Court notes that the previous legal dispensation, which had obtained since 1975, was thoroughly overhauled by the Law of 11 February 2005 (see paragraphs 53 to 58 above). It is certainly not for the Court to take the place of the national authorities in assessing the advisability of such a system or in determining what might be the best policy in this difficult social sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation (see, *mutatis mutandis*, *Powell and Rayner v. the United Kingdom*, cited above, § 44).

115. Consequently, there is no serious reason for the Court to declare contrary to Article 8, in either its positive or its negative aspect, the way in which the French legislature dealt with the problem or the content of the

specific measures taken to that end. It cannot reasonably be claimed that the French parliament, by deciding to reorganise the system of compensation for disability in France, overstepped the wide margin of appreciation left to it on the question or upset the fair balance that must be maintained.

116. There has accordingly been no violation of Article 8 of the Convention.

117. As regards the complaint under Article 14 of the Convention taken together with Article 8, the Court notes that it was raised for the first time before it at the hearing on 23 March 2005 (see paragraph 102 above). It is therefore not covered by the decision on admissibility of 6 July 2004 which delimits the scope of the Court's jurisdiction (see, among other authorities, *Göç v. Turkey* [GC], no. 36590/97, § 36, ECHR 2002-V, and *Assanidze v. Georgia* [GC], no. 71503/01, § 162, ECHR 2004). It follows that this complaint falls outside the scope of the case as submitted to the Grand Chamber.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary and non-pecuniary damage

119. The applicants alleged that they had sustained pecuniary damage corresponding to the sums they would have received if the legal situation prior to the Law of 4 March 2002 had continued to obtain. Supplying the relevant vouchers, they claimed the following sums:

a. EUR 38,701.32 and EUR 6,922.40 for the disruption to their working lives suffered by Mrs and Mr Draon respectively;

b. EUR 22,867.35 for the loss of enjoyment of a piece of real property;

c. EUR 91,469.40 for their non-pecuniary damage;

d. EUR 45,734.70 for disruption to their lives;

e. EUR 365,499 for the additional costs of constructing a purpose-built house;

f. EUR 42,779 for indispensable adaptations within the home;

g. EUR 5,092,588 for non-specialist care (assistance of a third person) ;

h. EUR 52,567.47 for specific outlays remaining at their expense (non-reimbursable purchases);

i. EUR 35,940.99 for a specially equipped motor vehicle.

120. As regards in particular the sums corresponding to "special burdens" (listed under e. to i. above), the applicants emphasised that the law enacted on 11 February 2005 would not be immediately applicable to children and that it would not ensure compensation for the prejudice they had already sustained since R.'s birth. In addition, in their submission, the benefits provided for in that law were inadequate.

From the amounts indicated above, the applicants deducted the sum of EUR 180,000 awarded by the Paris Administrative Court. Their claim for pecuniary damage therefore amounted in total to EUR 5,615,069.63.

The applicants requested a further EUR 12,000 as compensation for the non-pecuniary damage resulting from the violations of the Convention they complained of.

121. The Government contested all of the above claims, considering them to be unreasonable. As regards the claims under the head of pecuniary damage, they submitted in particular that the sums claimed under a. to d. above related to damage already made good by the domestic courts. As to the sums corresponding to the "special burdens" arising from R.'s disability (itemised under e. to i. above), these were already partly covered by the allowances paid by way of national solidarity, which were later to be supplemented by the provisions of the Law of 11 February 2005. It followed, in the Government's submission, that the applicants should not be awarded a specific sum for pecuniary damage.

The Government likewise considered that, in respect of the alleged non-pecuniary damage, if the Court were to find a violation that finding would constitute sufficient just satisfaction.

122. The Court considers that, in the circumstances of the case, and regard being had in particular to the state of the proceedings in the national courts, the question of the application of Article 41 is not yet ready for decision in respect of pecuniary and non-pecuniary damage. It should therefore be reserved, account being taken of the possibility of an agreement between the respondent State and the applicants (Rule 75 §§ 1 and 4).

B. Costs and expenses

123. With supporting vouchers, the applicants claimed EUR 15,244 for costs and expenses incurred before the Court.

124. The Government acknowledged that the applicants had used the services of a lawyer and that the case was of a certain complexity. They left assessment of the amount to be awarded under this head to the Court's discretion, while submitting that it should not exceed EUR 7,500.

125. The Court notes that the applicants supported their claims by supplying a bill of costs containing an itemised breakdown of work done. Considering that the amounts claimed are not excessive in the light of the nature of the dispute, which was incontestably of a certain complexity, the

Court allows the applicants' claims in full and awards them the sum of EUR 15,244, including all taxes.

C. Default interest

126. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

2. *Holds* unanimously that it is not necessary to examine the complaint relating to Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention;

3. *Holds* by twelve votes to five that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention;

4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;

5. *Holds* unanimously that, even supposing that Article 8 of the Convention is applicable, there has been no violation of that provision;

6. *Holds* unanimously that the complaint under Article 14 of the Convention taken together with Article 8 falls outside the scope of its examination;

7. *Holds* unanimously that, as regards the sum to be awarded to the applicants in respect of any pecuniary and non-pecuniary damage resulting from the violation found, the question of the application of Article 41 is not ready for decision and accordingly
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicants to submit, within six months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be;

8. *Holds* unanimously
(a) that the respondent State is to pay the applicants, within three months, EUR 15,244 (fifteen thousand two hundred and forty-four euros) in respect of the costs and expenses incurred up to the present stage of the proceedings before the Court, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in French and in English, and delivered at a public hearing in the

Luzius WILDHABER
President

T.L. EARLY
Deputy to the Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:
(a) joint partly dissenting opinion of Mr Rozakis, Sir Nicolas Bratza, Mr Bonello, Mr Loucaides and Mrs Jočienė;
(b) separate opinion of Mr Bonello.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, Sir Nicolas BRATZA, BONELLO, LOUCAIDES AND JOČIENÉ

1. We are in agreement with the conclusion and reasoning of the majority on all aspects of the case, save as to their conclusion that it is unnecessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention. In our view such an examination is called for in the present case, consistently with the approach of the Court in the cases of *Stran Greek Refineries and Stratis Andreadis v. Greece* (judgment of 9 December 1994, Series A no. 301-B) and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (judgment of 23 October 1997, *Reports of Judgments and Decisions*, 1997-VII, p. 2326). Article 6 of the Convention and Article 1 of Protocol No. 1 reflect two separate and distinct Convention values, both of fundamental importance – the rule of law and the fair administration of justice on the one hand and the peaceful enjoyment of possessions, on the other. While the facts at the basis of the complaints under the two articles are the same, the issues raised and the relevant governing principles are not and, unlike the majority, we do not consider that the Court's conclusion that Article 1 has been violated is such as to relieve the Court of the duty of examining the applicants' complaint under Article 6.

2. The Court has previously held that the legislature is not in principle precluded in civil matters from regulating rights arising from legislation in force through new retrospective provisions. However, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute (see *Zielinski and Pradal & Gonzales and Others v. France* [GC], nos. 24864/94 and 34165/96 to 34173/96, ECHR 1999-VII and, among other authorities, *Anagnostopoulos and Others v. Greece*, judgment of 7 November 2000, *Reports of Judgments and Decisions* 2000-XI, §§ 20 and 21).

3. In the present case, the Law of March 2002, which introduced a new system of compensation for the prejudice sustained by a person born with a disability, provided, in paragraph I *in fine* of section 1, that its provisions were to be applicable to pending proceedings, with the exception of those in which there had been an irrevocable decision on the principle of compensation. As a result of the application of that provision, the parents of children whose disability had not been detected before birth on account of negligence, like the applicants, were deprived of a considerable part of the compensation they could previously have claimed by virtue of the precedent set in the *Quarez* case. Thus the law complained of, being applicable to the judicial proceedings which the applicants had brought and which were still

in progress, had the effect of changing their outcome once and for all by retrospectively limiting the damages potentially recoverable in the proceedings to the applicants' disadvantage (see paragraph 78 above).

4. The Government submitted that the Law of 4 March 2002 was not directed specifically at the dispute which gave rise to the present case, or any particular dispute. While it is true that, unlike the situation in the *Stran Greek* case, the impugned legislation in the present case did not target particular litigation, this is not in our view decisive. Of greater significance is the fact that the contested provisions manifestly had the aim, and the effect, of radically altering the applicable compensation rules and were, by their express terms, designed to apply to all pending judicial proceedings, including those of the applicants, in which no irrevocable decision had been taken on the principle of compensation.

5. The Government further relied on the fact that, in further contrast to the *Stran Greek* case, the State was not itself directly party to the dispute which gave rise to the present case. This fact, again, is not in our view of central importance, the principle which precludes intervention by the legislature in pending legal proceedings being founded not only the requirement of equality of arms between the parties to the proceedings but also on more general requirements of Article 6 of the Convention relating to the rule of law and the separation of powers. In any event, while the State was not as such a party to the proceedings in question in the present case, we note that the participation of AP-HP, a public administrative establishment under the supervision of four Ministers, necessarily had major implications for the public finances and that the State was, accordingly, directly affected by the outcome of the proceedings to which the legislation expressly related.

6. While, as in the case of the complaint under Article 1 of the Protocol, we do not seek to question the validity of the general-interest considerations which motivated the introduction of the Law of 4 March 2002, the question remains whether those reasons were, individually or collectively, sufficiently cogent to justify the legislature in extending the measures to legal proceedings which were already in progress. In our view, neither the parliamentary proceedings which preceded the enactment of the provisions in question - in which the main concern raised was the need to end the effects of the *Perruche* judgment - nor the considerations set out by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government (see paragraphs 51 and 62 above), can be regarded as affording sufficiently compelling grounds of the general interest to justify making the provisions of the first paragraph of section 1 applicable to pending proceedings.

7. Consequently, we consider that the application of section 1 of the Law of 4 March 2002 to the proceedings brought by the applicants, and pending at the time the Law entered into force, violated the applicants' rights under Article 6 § 1 of the Convention

SEPARATE OPINION OF JUDGE BONELLO

1. I voted for the minority's finding that in the present case there has been a violation of both Article 6 § 1 and of Article 1 of Protocol No. 1, for the reasons set out in the joint dissenting opinion which I fully endorse.

2. While agreeing with the reasons of the Court for finding a violation of Article 1 of Protocol No. 1, and with the minority in finding a violation of Article 6 § 1, I would add another set of considerations which influenced my resolution to vote for a double breach.

3. Law no. 303 of 4 March 2002 (hereinafter "the 2002 Law") bred two consequences which, in my view, were both equally unacceptable. Firstly, it interfered in a manipulative manner with the outcome of an already pending court case, with highly adverse results for the applicants' Convention rights. Secondly, it did this by spawning a new, privileged, immune class of culpable doctors.

4. The 2002 Law peremptorily introduced the novelty of exempting some health professionals or establishments retroactively from the consequences of proved medical error. *All* other medical practitioners and establishments were previously answerable, and still are fully answerable, for the moral and material damage arising from their deficiencies. Professionals and establishments which fail in their function to detect disabilities in the foetus before birth have now been rewarded with a blanket exemption from liability for any material damage arising from their negligence.

5. Before 2002 all doctors in France were equal before the law. Like all other professionals (lawyers, architects etc.) they were fully liable in negligence. By virtue of the 2002 Law, those who practice pre-natal detection are now less equal than others. Their negligence carries a considerably lighter price tag than that of all other professionals. In my book, unequal disposal of equal guilt is no less pernicious than equal disposal of unequal guilt.

6. The internationally accepted norm remains the principle of liability. Every person who has, through malice or negligence, caused harm to others is bound to make good all damage occasioned. The 2002 Law has derogated from this principle. All medical practitioners remain subject to the principle and consequences of liability, except those working in one particular branch of medicine. The latter the 2002 Law has protected in an eminently privileged fortress, totally immune from suits in material damages. I see this discriminatory immunity not so much in the light of Article 14, but rather as another element to factor in when assessing the proportionality of the interference.

7. The 2002 Law not only improperly thwarted the applicants' Convention rights, but did this through the medium of an improper agency: the creation of a total immunity from the risk of material damages. Immunity, detestable by nature, appears doubly so when wielded to maim fundamental rights.

8. Some immunities, like diplomatic immunity, judicial immunity and partial parliamentary immunity, are the result of historical imperatives and functional necessities. They enjoy the legitimation of long-standing acceptance and tradition, and a proven advantageousness that somehow neutralises the odium of a protection that is unequal between the immune and the non-immune.

9. But to ring in, *pace* the 21st century, a new immunity tailored to the comfort of one handpicked class of one handpicked profession was, to my way of thinking, the most efficient way of achieving a disagreeable disturbance of Convention rights.

10. The creation of brand-new immunities from suit, as in the present case, automatically brings into play a new suspect classification, which should have had the double effect of shifting the onus of justification onto the Government and of burdening the Court with a duty of more stringent scrutiny.

11. The impunity engineered by the 2002 Law was intended to salvage some medical practitioners from the consequences of their own deficit of diligence, while abandoning all others to full responsibility in negligence and tort. This has nothing to do with other so-called acceptable "immunities", like the capping of the liability of air carriers. That limitation comes into being by prior international agreement and is contractually accepted beforehand by the eventual victim of damage through the mere purchase of an air ticket publicising that limitation.

12. The Government, which lost no opportunity of re-crafting the law to their own financial advantage, have lost the opportunity of justifying, by compelling reasons, the creation of a suspect unequal protection; and the Court has not scrutinized all the more stringently the emergence of this "parvenu" immunity.