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

GRAND CHAMBER

CASE OF MAURICE v. FRANCE

(Application no. 11810/03)

JUDGMENT

STRASBOURG

6 October 2005

In the case of Maurice 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. 11810/03) 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 Didier Maurice and Mrs Sylvia Maurice ("the applicants"), on 28 February 2003. The applicants acted both in their own right and as the legal representatives of their minor children.

2. The applicants were represented by Arnaud Lyon-Caen, Françoise Fabiani, Frédéric Thiriez, a law firm authorised to practise in the *Conseil d'Etat* and the Court of Cassation. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the 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 in particular 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). Within that Section a Chamber composed of Mr A.B. Baka, President, Mr J.-P. Costa, Mr L. Loucaides, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen, Mr M. Ugrekhelidze, judges, and Mrs S. Dollé, Section Registrar, decided on 17 June 2003 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 Chamber declared the application partly admissible.

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. The place of Mr Davíd 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 *Draon v. France* (no. 1513/03), also pending before the Grand Chamber (Rule 42 § 2).

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

10. A hearing in the present case and the above-mentioned *Draon* 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 Affairs 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*
Mr A. LYON-CAEN, of the *Conseil d'Etat* and
Court of Cassation Bar, *Counsel*.

11. The Court heard addresses by 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 1962 and 1965 respectively and live in Bouligny.

13. In 1990 the applicants had their first child, A., who was born with type 1 infantile spinal amyotrophy, a genetic disorder causing atrophy of the muscles.

14. In 1992 Mrs Maurice became pregnant again. A prenatal diagnosis conducted at Nancy University Hospital revealed that there was a risk of the unborn child's being afflicted by the same genetic disorder. The applicants chose to terminate the pregnancy.

15. In 1997 Mrs Maurice, who was pregnant for the third time, again requested a prenatal diagnosis. This was conducted at Briey General Hospital, which sent the sample to the molecular diagnosis laboratory of the Necker Children's Hospital Group, run by Assistance publique-Hôpitaux de Paris ("AP-HP"). In June 1997, in the light of that laboratory's diagnosis, Briey General Hospital assured the applicants that the unborn child was not suffering from infantile spinal amyotrophy and was "healthy".

16. C. was born on 25 September 1997. Less than two years after her birth it became apparent that she too suffered from infantile spinal amyotrophy. On 22 July 1999 a report by the head of the laboratory at the Necker Children's Hospital in Paris revealed that the mistaken prenatal diagnosis was the result of transposing the results of the analyses relating to

the applicants' family and those of another family, caused by the switching of two bottles.

17. According to medical reports, C. presents grave disorders and objective signs of functional deficiency – frequent falls from which she is unable to get up unassisted, unsteady walk, tiredness at any effort. She needs the assistance of another person (particularly at night in order to turn her over so as to prevent her from suffocating, since she is unable to turn over alone). She cannot sit on her own and moves around with an electric scooter. She has to receive treatment several times a week and cannot be admitted to school because the latter is not suitably equipped. Her family doctor has expressed the view that "one must have reservations until the time of puberty both about motor and respiratory functions and about possible orthopaedic deformations". These facts gave rise to several sets of proceedings.

A. Applications under the urgent procedure

18. On 13 November 2000 the applicants submitted a claim to AP-HP seeking compensation for the pecuniary and non-pecuniary damage suffered as a result of C.'s disability.

19. They also submitted to the urgent applications judge at the Paris Administrative Court a request for an interim award and for an expert to be appointed. The latter was appointed by an order issued on 4 December 2000.

20. In an order made on 26 April 2001, the urgent applications judge at the Paris Administrative Court dismissed the request for an interim award on the ground that, as the expert had not yet delivered his report, "AP-HP's obligation to pay [could] not be regarded as indisputable".

21. The expert submitted his report on 11 June 2001, concluding that on the occasion of the prenatal diagnosis conducted at the AP-HP laboratory there had not been medical negligence, because "the techniques employed [had been] consistent with the known scientific facts", but there had been "negligence in the organisation and functioning of the service causing the transposition of results between two families tested at the same time".

22. The applicants lodged a further application, asking for the hospital to be ordered to pay them an advance of 594,551 euros (EUR). In an order made on 19 December 2001, the urgent applications judge at the Paris Administrative Court ordered AP-HP to pay an advance of EUR 152,449. He observed in particular:

> "... it is apparent from the investigation that in May 1997, at Briey General Hospital, a sample of amniotic fluid was taken from [Mrs Maurice] ...; that the analysis of that amniotic fluid was carried out by Assistance publique-Hôpitaux de Paris; that while the results given [to the applicants] indicated that the unborn child was not suffering from infantile spinal amyotrophy, they related to a sample taken from another family

tested at the same time and did not mention that, the sample of amniotic fluid having been contaminated by the mother's blood, they were attended by uncertainty; that [the applicants] are therefore entitled to argue that Assistance publique-Hôpitaux de Paris was guilty of negligent acts or omissions; that those negligent acts wrongly led [the applicants] to the certainty that the child conceived was not suffering from infantile spinal amyotrophy and that [Mrs Maurice's] pregnancy could be carried to term in the normal way; that these negligent acts must be regarded as the direct causes of the damage sustained by [the applicants] from the disorder from which C. suffers; and that, this being the case, the existence of the obligation claimed by [the applicants] is not seriously open to challenge."

23. AP-HP appealed. In its submissions it argued that, while the transposition of the analyses had indeed constituted negligence in the organisation and functioning of the public hospital service, the only result of that negligence had been to deprive the applicants of information apt to enlighten their decision to seek a termination of the pregnancy. On the basis of the above-mentioned expert report, AP-HP submitted that even if the samples had not been transposed, the results would have been uncertain, having regard to the presence of the mother's blood in the sample taken. Consequently, the applicants would not in any case have had reliable information available to them.

24. In a judgment of 13 June 2002, the Paris Administrative Court of Appeal varied the order issued by the urgent applications judge, reducing from EUR 152,449 to EUR 15,245 the amount of the interim award to the applicants. In its judgment it observed:

"Liability:

... after the birth [of C.], as the child had been found to be suffering from [infantile spinal amyotrophy], it emerged that the reason incorrect information had been given to the parents was that the results of the analyses carried out on two patients had been switched. It is not contested that the results were switched by the staff of [AP-HP] ...The negligence thus committed, as a result of which [Mrs Maurice] had no reason to request an additional examination with a view to termination of the pregnancy on therapeutic grounds, must be regarded as the direct cause of the prejudice suffered by [the applicants]."

The court went on to say:

"Entitlement to the interim award requested:

... the infantile spinal amyotrophy from which the child C. suffers is not the direct consequence of the above-mentioned negligence ... Accordingly, pursuant to the provisions ... of paragraph I of section 1 of the Law of 4 March 2002 [on patients' rights and the quality of the health service – "the Law of 4 March 2002"], [AP-HP] would only be required to compensate the damage sustained by [the applicants], to the exclusion of the 'special burdens arising throughout the life of the child' from the latter's disability, compensation for disability being a matter for national solidarity according to those same provisions. That being so, [AP-HP]'s plea that, for assessment of [the applicants'] right to compensation, the above-mentioned provisions of the Law of 4 March 2002 should have been applied to the dispute constitutes a serious defence against the applicants' claim at first instance, in the amount awarded

by the court below. If the above-mentioned legislative provisions ... are held to be applicable in the main proceedings now pending in the Paris Administrative Court, the only obligation [on AP-HP] which could be regarded as not seriously open to challenge would be the obligation to compensate [the applicants] for their non-pecuniary damage, which should be fixed, in the circumstances of the case, at 15,245 euros. Consequently, the interim award [AP-HP] is required to pay should be reduced to that sum ..."

25. The applicants and AP-HP appealed on points of law. The applicants submitted only one ground of appeal to the *Conseil d'Etat*. Relying on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, they argued that the immediate applicability of the Law of 4 March 2002 to pending proceedings was contrary to the Convention.

26. Having been seised in the context of a similar case (*Draon*, also submitted to the Court, application no. 1513/03), the *Conseil d'Etat* ruled, in an opinion delivered on 6 December 2002, that the Law of 4 March 2002 was indeed applicable to pending proceedings and was compatible with the provisions of the Convention (see paragraph 52 below).

27. In a judgment of 19 February 2003 the *Conseil d'Etat*, ruling on the above-mentioned appeal on points of law, followed the line set out in that opinion, observing:

"It is not seriously open to challenge that such facts constituting gross negligence [*faute caractérisée*] which deprived [the applicants] of the possibility of terminating the pregnancy on therapeutic grounds, confer entitlement to compensation pursuant to section 1 of the Law of 4 March 2002, which came into force after the ruling of the urgent applications judge at the Paris Administrative Court and is applicable to pending proceedings. It is appropriate, in the particular circumstances of the case, to set at 50,000 euros the amount of the interim award [AP-HP] is required to pay on account of the prejudice sustained by [the applicants] personally."

B. The main proceedings (action for damages against AP-HP)

28. Having received no reply from AP-HP two months after submitting their claim on 13 November 2000, and the absence of any reply amounting to implicit rejection, the applicants brought proceedings in the Paris Administrative Court. In their application they requested that the implicit rejection be set aside and AP-HP ordered to pay them, in particular, the following amounts: 2,900,000 French francs (FRF) (EUR 442,102) for the construction of a house and the purchase of a vehicle and a wheelchair; FRF 500,000 (EUR 76,225) in respect of non-pecuniary damage and disruption to their lives; FRF 10,000,000 (EUR 1,524,490) for pecuniary damage; and FRF 30,000 (EUR 4,573) in respect of the non-pecuniary damage suffered by their eldest daughter.

29. Following the opinion given by the *Conseil d'Etat* on 6 December 2002, the applicants submitted supplementary observations to the Administrative Court asking it not to consider itself bound by the Judicial

Assembly's opinion and to declare the Law of 4 March 2002 incompatible with the provisions of the Convention. AP-HP, for its part, again submitted that the prenatal diagnosis communicated to the applicants would have been uncertain even if the results had not been transposed.

30. In a judgment of 25 November 2003, the Paris Administrative Court ordered AP-HP to pay the applicants a total of EUR 224,500 (EUR 220,000 on their own behalf and EUR 4,500 on behalf of their eldest daughter) in respect of non-pecuniary damage and the disruption to their lives. It observed in particular:

> "LIABILITY:
>
> [The applicants] seek to establish [AP-HP's] liability for the damage they suffered on account of the fact that their daughter C. was born with a disability not detected during pregnancy.
>
> ...
>
> The provisions of section 1 of the Law of 4 March 2002, in the absence of any provisions in the Law providing for deferred entry into force, are applicable under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic. The rules which it lays down, as decided by the legislature on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, are not incompatible with the requirements of Article 6 of the Convention ..., with those of Articles 13 and 14 of the Convention or with those of Article 1 of Protocol No. 1 to [the] Convention. ... The general-interest ground which the legislature took into account when laying down the rules contained in the first three sub-paragraphs of paragraph I justifies their application to situations which arose prior to the commencement of pending proceedings. Having regard to the wording of the Law of 4 March 2002, neither the fact that the system of compensation has not yet entered into force nor the fact that the mistaken diagnosis is alleged to have resulted from negligence in the organisation and functioning of the service are such as to bar application of the above-mentioned provisions to the present proceedings brought on 16 March 2001.
>
> The administrative courts do not have jurisdiction to determine the constitutionality of statute law. The appellants cannot therefore validly assert that the above-mentioned Law of 4 March 2002 is unconstitutional.
>
> [The applicants], whose eldest daughter suffers from infantile spinal amyotrophy, and who decided in 1992 to terminate another pregnancy after a prenatal diagnosis had revealed that the unborn child was afflicted by the same pathology, had a daughter named C. in 1997 who was discovered during 1999 to be likewise suffering from that disorder despite the fact that, in view of the results of the amniocentesis conducted on [Mrs Maurice], they had been told that the foetus was healthy. That information proved to have been incorrect because the results from two patients had been transposed. The investigation showed that the switch was imputable to [AP-HP], which runs the Necker Children's Hospital on whose premises the sample had been analysed. The switching of the results constituted gross negligence [*faute caractérisée*] for the purposes of the Law of 4 March 2002. In order to absolve itself

of liability, Assistance publique-Hôpitaux de Paris cannot effectively argue that, even in the absence of negligence, the diagnosis would not have been reliable because of the presence of the mother's blood in the foetal sample, since in such circumstances it was incumbent on the practitioner responsible for the analysis to inform [the applicants] accordingly, so that they would then have been able to have a new sample taken. The gross negligence mentioned above deprived the applicants of the possibility of terminating the pregnancy on therapeutic grounds, for which there is no time-limit. Such negligence entitles them to compensation under the conditions laid down in section 1 of the Law of 4 March 2002 ..."

31. As regards assessment of the damage suffered, the court ruled as follows:

"... firstly, the amounts sought in respect of treatment, special education costs and the costs of building a new house and purchasing a vehicle and an electric wheelchair relate to special burdens arising throughout the life of the child from her disability and cannot therefore be sums for which [AP-HP] is liable, regard being had to the above-mentioned provisions of section 1 of the Law of 4 March 2002;

... secondly, [the applicants] are suffering non-pecuniary damage and disruptions to their lives, particularly their work, of exceptional gravity, regard being had to the profound and lasting change in their lives resulting from the birth of a second severely disabled child. In the circumstances of the case, these two heads of damage must be assessed at 220,000 euros. Consequently, [AP-HP] is ordered to pay that sum to [the applicants], after deducting the interim award paid;

... thirdly, the above-mentioned provisions of the Law of 4 March 2002 do not bar payment of compensation, under the rules of ordinary law, for the non-pecuniary damage suffered by A. Maurice on account of the fact that her sister was born with a disability. In the circumstances of the case, a fair assessment of that damage requires [AP-HP] to pay the sum of 4,500 euros to [the applicants] acting on behalf of their child;"

32. On 19 January 2004 the applicants appealed against the above judgment. The appeal is at present pending before the Paris Administrative Court of Appeal.

C. Action against the State for damage inflicted by reason of legislation

33. In a complaint submitted to the Prime Minister on 24 February 2003, the applicants requested payment of compensation in the sum of EUR 1,970,593.33 based on the State's liability for damage inflicted by reason of the Law of 4 March 2002.

34. On expiry of the two-month time-limit following the lodging of their complaint, the applicants referred it to the Paris Administrative Court, requesting it to set aside the Prime Minister's implicit decision to reject it and to order the State to compensate them for the damage they considered they had suffered.

35. In a judgment of 25 November 2003, the Paris Administrative Court dismissed the complaint. It observed in particular:

> "It is clear from the drafting history of the Law of 4 March 2002 that this provision is based, firstly, on the desire of the legislature not to require health-care professionals or establishments to pay compensation for the burdens occasioned by a disability not detected during pregnancy, and, secondly, on a fundamental requirement: the rejection of any discrimination between disabled persons whose disability would be compensated for in accordance with the principles of liability and those whose disability would be covered by national solidarity, their mother having refused an abortion or the disability being undetectable at the time of the prenatal diagnosis.
>
> This desire on the part of the legislature to eliminate any discrimination between disabled persons is a bar to the establishment [by the applicants] of the State's liability by reason of the immediate application to pending proceedings of the Law of 4 March 2002, for the purpose of obtaining compensation for the special burdens arising from the disability, not detected during pregnancy, of their child C. Consequently, the [applicants'] submissions seeking the annulment of the contested decision and an order requiring the State to pay damages must be dismissed.
>
> ..."

36. The applicants appealed against this judgment. The appeal is now pending before the Paris Administrative Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

37. Before enactment of the Law of 4 March 2002 on patients' rights and the quality of the health service ("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

38. 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

39. The *Conseil d'Etat* gave judgment on 14 February 1997 (CE, Sect., 14 February 1997, *Centre hospitalier de Nice c. Quarez, Recueil Lebon*, p. 44). Mrs Quarez, then aged 42, 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.

40. 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, the probability of which, 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 carried 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".

41. 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.

42. 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 a 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.).

43. 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

44. 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 who 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 been contracted by 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 itself claim compensation for the prejudice resulting from its 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.

45. 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.

46. The judgment of 17 November 2000 was upheld several times by the Court of Cassation, which reaffirmed the principle of compensation for a

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).

47. 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

48. 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 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).

49. 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

50. 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 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 paragraph 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 pluriannual programme, that assistance is provided to such persons ..."

51. These provisions came into force "under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic" (see paragraph 52 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.

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."

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)

52. 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.

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 a 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 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

53. 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 exceed at least 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 throughout 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

54. This Law 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 seventy-five proposals for amending the Law of 30 June 1975, appended to the record of the Senate's sitting on 24 July 2002, p. 13).

55. 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.

56. To that end, the Law 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
(as amended by the Law of 11 February 2005)

"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 L. 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;

..."

Article L. 245-4 of the Social Action and Family Code
(as amended by the Law of 11 February 2005)

"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."

57. The new compensatory benefit is initially payable in full to persons over the age at which entitlement to the AES (renamed "disabled child's education 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."

58. 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.

..."

59. 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

60. 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 50 above). They submitted that that provision had infringed their

right to peaceful enjoyment of their possessions and breached Article 1 of Protocol No. 1, 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. Whether there was a "possession" within the meaning of Article 1 of Protocol No. 1

1. The parties' submissions

(a) The applicants

61. Relying on the Court's case-law (in particular *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332), the applicants submitted that they had a "possession". In that connection, they did not argue that the possession concerned was already their property but rather that they had had a "legitimate expectation" of obtaining it, within the meaning of the case-law mentioned. They argued that before the enactment of the Law of 4 March 2002 they had a legitimate expectation of obtaining full compensation for the prejudice they had sustained on account of the disability of their daughter C. In their submission, the conditions for establishing AP-HP's liability on the basis of the *Conseil d'Etat*'s judgment in *Quarez* (see paragraphs 39-43 above) were satisfied at the time when they brought their action in the administrative courts. Negligence on AP-HP's part had been proved and the causal link between negligence and damage could not be validly challenged, since the switching of the test results, in the applicants' submission, had led to the incorrect diagnosis which had deprived them of the option of terminating the pregnancy on therapeutic grounds. In accordance with the *Quarez* judgment, the applicants' full claim should therefore have been determined in their favour. But on account of the enactment of the Law of 4 March 2002 the right to compensation for the damage they had suffered, with the exception of their non-pecuniary damage and the damage resulting from disruption to their lives, had become illusory, since the effect of the legislation concerned had been to deprive them of their claim retrospectively.

(b) The Government

62. The Government contended that the applicants had never had a "possession", either in the strict meaning of the term or in the sense of a "legitimate expectation" as defined in the Court's case-law (see *Pressos Compania Naviera S.A. and Others*, cited above). That concept implied the certainty of obtaining judgment in one's favour under the relevant domestic liability rules. But before enactment of the legislation in issue compensation was not awarded as of right merely as a consequence of a finding that damage had been sustained. The liability rules applied by the administrative courts made compensation for the damage sustained by the parents subject to the establishment of negligence, damage and a causal link between the negligence and the damage, those elements being a matter for the assessment of the trial courts alone. Thus, as compensation was far from automatic, the applicants could not assert that enactment of the Law of 4 March 2002 had frustrated a "legitimate expectation" that their claim would succeed.

2. The Court's assessment

63. The Court reiterates that, according to its case-law, an applicant can allege a violation of Article 1 of Protocol No. 1 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.

64. As regards the concept of "legitimate expectation", one aspect of this was illustrated in *Pressos Compania Naviera S.A. and Others*, cited above, 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.

65. The Court did not expressly state in *Pressos Compania Naviera S.A. and Others* that the "legitimate expectation" was a component of, or was 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 *Pressos Compania Naviera S.A. and Others* 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.

66. In a whole series 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 48-52, ECHR 2004-IX).

67. In order to determine whether there was a possession in the present case, the Court may have regard to the domestic law in force at the time of the alleged interference. This was a system of liability for negligence requiring the establishment of prejudice (or damage), negligence, and a causal link between damage and negligence. The Court notes that neither AP-HP nor the Government denied that switching the applicants' test results with those of another family constituted negligence. The only point in dispute is the causal link between the hospital's negligence and the damage suffered by the applicants. In that connection, AP-HP considered that there was no such link because, even if the results had not been switched, the prenatal diagnosis communicated to the applicants would have been uncertain on account of the presence of maternal blood in the sample taken from Mrs Maurice. As AP-HP's liability had not been established, the applicants, in the Government's submission, were not entitled to automatic compensation and could accordingly not plead a "legitimate expectation".

68. The Court cannot accept that argument. It notes that the national courts unambiguously established, both in the proceedings under the urgent procedure and in the main proceedings, and at all stages of those proceedings, the existence of a direct causal link between the negligence and the prejudice sustained. The courts held that in the present case AP-HP's negligence had wrongly led the applicants to the certainty that their unborn child was not affected by infantile spinal amyotrophy and that the pregnancy could be carried normally to term, whereas they had clearly expressed their wish to avoid the risk of a third genetic accident. As a result of the negligence thus committed, there was no reason to request any further examination of Mrs Maurice with a view to termination of the pregnancy on

therapeutic grounds, which would certainly have been the case if the reliability of the diagnosis had been in doubt. In reaching that finding the domestic courts based themselves at first on the above-mentioned *Quarez* judgment and later on the provisions of the Law of 4 March 2002, which had come into force in the meantime, and which did not, moreover, alter the conditions for establishing the causal link between the negligence, even gross negligence, and the damage sustained by the parents of a child born with a disability.

69. The conditions for establishing AP-HP's liability on the basis of the *Quarez* judgment were therefore indeed satisfied, and the applicants accordingly had a claim amounting to an "asset". As to the way in which that claim would have been treated in domestic law had it not been for the enactment of the law complained of, the Court considers that, account being taken of the *Quarez* judgment given by the *Conseil d'Etat* on 14 February 1997 and the settled case-law on the question established since then by the administrative courts, the applicants could legitimately expect to be able to obtain compensation for the prejudice they had sustained, including the special burdens arising from their child's disability throughout her life.

70. In the Court's opinion, before the enactment of the law complained of, the applicants had a claim which they could legitimately expect to be determined in accordance with the ordinary law of liability for negligence, and therefore a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1, which is accordingly applicable in the case.

B. Compliance with Article 1 of Protocol No. 1

1. The parties' submissions

(a) The applicants

71. The applicants submitted that the enactment of the Law of 4 March 2002 constituted "interference" with their right to the peaceful enjoyment of their possessions, since they had been deprived of the possibility of obtaining full compensation for their prejudice, by virtue of the *Quarez* judgment.

72. 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.

73. 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 54-59 above) had brought in a new benefit to compensate for disability, it could not cancel out the alleged disproportion given the form that this compensatory benefit system was to take, and it still left the applicants to bear an excessive burden.

(b) The Government

74. The Government submitted that, if the Court were to take the view that the applicants had a possession, the partial deprivation of possessions they had suffered could not be declared contrary to Article 1 of Protocol No. 1, 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, the year the applicants' child had been born). 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.

75. 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 44-47 above), 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 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 *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.

76. 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 220,000. That amount had equalled the compensation paid in the *Quarez* case and it covered, the Government emphasised, not only the parents' non-pecuniary damage but also all the disruption to their lives for which they had claimed. Consequently, although the applicants had not obtained compensation for all the heads of damage they had claimed, they had received a considerable sum of money.

77. 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 the 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.

2. The Court's assessment

(a) Whether there was interference with the right to peaceful enjoyment of a "possession"

78. According to the Court's case-law, 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, pp. 21-22, § 33).

79. The Law of 4 March 2002, which came into force on 7 March 2002, deprived the applicants of the possibility of obtaining compensation for "special burdens" in accordance with the precedent set by the *Quarez* judgment of 14 February 1997, whereas they had already brought an action in the Paris Administrative Court on 16 March 2001 and, in a decision of 19 December 2001, the judge at that court responsible for urgent applications had granted them a substantial interim award, given that AP-HP's liability towards them was not seriously open to challenge. 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.

80. 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 amounts to a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. It must therefore determine whether the interference complained of was justified under that provision.

(b) Whether the interference was justified

(i) "Provided for by law"

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

82. 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.

(ii) "In the public interest"

83. 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.

84. 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, pp. 22-23, § 37, and *Broniowski v. Poland* [GC], no. 31443/96, § 149, ECHR 2004-V).

85. 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 75 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.

(iii) Proportionality of the interference

86. 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, p. 23, § 38).

87. 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-VI).

88. 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 a 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 C.'s disability and above all the commencement of the applicants' actions in the French courts, the latter could legitimately expect to rely on it to their advantage.

89. 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 and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII).

90. 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.

91. 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 57-59 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 Law of 11 February 2005 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.

92. 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 her 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.

93. 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.

94. 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.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

95. 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. The parties' submissions

1. The applicants

96. The applicants referred to the argument they had previously put forward before the Court to the effect that before the Law of 4 March 2002 came into force they had had a compensation claim which amounted to a "possession". The Law of 4 March 2002 had infringed their right to the peaceful enjoyment of that possession by creating an unjustified inequality of treatment between the parents of children whose disabilities had not been detected before birth on account of negligence, like the applicants, 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. Such a difference in treatment was unjustified in the applicants' submission since

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

97. The Government maintained that, as previously submitted, the applicants did not have a "possession" within the meaning of Article 1 of Protocol No. 1, and therefore that provision was not applicable in the case. Consequently, since the alleged discrimination did not affect a right protected by the Convention, Article 14 could not be relied on.

98. The Government submitted, in the alternative, 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.

99. Lastly, the Government argued that reliance on national solidarity to provide assistance with the special burdens arising from the disability of children in C.'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

100. Regard being had to its finding of a violation concerning the applicants' right to the peaceful enjoyment of their possessions (see paragraph 94 above), the Court does not consider it necessary to examine the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

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

101. 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. The parties' submissions

1. The applicants

102. Relying on the Court's case-law (*Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, 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 general interest. They argued that no compelling grounds of 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 to 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, and therefore exercised delegated State power. 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

103. 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 and 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 to 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 75 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

104. 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 (see paragraphs 78-94 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

105. 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."

106. The Court reiterates that Article 13 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 of Judgments and Decisions* 1996-VI, p. 2286, § 95).

107. As the Court concluded above that there has been a violation of Article 1 of Protocol No. 1, 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, p. 660, § 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).

108. 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 IN CONJUNCTION WITH ARTICLE 8

109. Lastly, the applicants complained that the legal rules introduced by the Law of 4 March 2002 constituted arbitrary interference by the State in their private and family life, in that it prevented them from meeting their child's needs. They further submitted that the State had failed to discharge its obligation to protect the interests of the family. 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. The parties' submissions

1. The applicants

110. The applicants asserted that Article 8 of the Convention guaranteed the right to a normal family life and was therefore applicable to the present case, regard being had in particular to the Court's extensive view of the question. They argued that the Law of 4 March 2002 had infringed that right and constituted interference with its exercise, but that none of the conditions required for such interference to be compatible with the Convention, namely that it should be in accordance with the law, pursue a legitimate aim and be 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 particular, 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 the latter immunity in respect of their negligent acts or omissions. As regards the State's positive obligation, this could not be considered to have been discharged since, by depriving C. and her parents of a remedy whereby they could obtain compensation for the damage consisting of the special burdens arising from her disability, the legislature had prevented the family's interests from being protected practically and effectively.

111. At the hearing the applicants also relied, for the first time, on Article 14 of the Convention taken in conjunction 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

112. As their main argument, the Government contested the applicability of Article 8 of the Convention in the present case. Relying on the Court's case-law (*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 C.'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.

113. Even if the Court were to take the view that Article 8 was applicable in the present 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

114. 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, § 127, ECHR 2000-VIII, and *Kutzner v. Germany*, no. 46544/99, §§ 61 and 62, ECHR 2002-I). 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, p. 18, § 41).

115. "Respect" for family life implies an obligation on the State to act in a manner calculated to allow ties between close relatives to develop normally (see *Marckx*, cited above, p. 21, § 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, p. 17, § 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, p. 423, § 35; and *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

116. 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, pp. 33-34, § 67, and *Zehnalová and Zehnal*, cited above).

117. 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

118. In the present case, the applicants complained both of unjustified interference and of inaction on the part of the State, in that it had not set up machinery to provide effective compensation for the special burdens occasioned by their child's disability.

119. 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.

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

121. 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 child'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 85 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.

122. 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 86-94 above).

123. 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 54-59 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*, cited above, p. 19, § 44).

124. 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.

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

126. 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 111 above). It is

therefore not covered by the admissibility decision 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-II). 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

127. 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

128. 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) 115,200 euros (EUR) for prejudice sustained by Mr Maurice in his working life;

(b) EUR 11,004 for the installation of an internal lift, EUR 5,647 for a wheelchair (balance of the purchase price after reimbursement by social security), EUR 50,550 for the successive purchase of two vehicles (the first of which had proved unsuitable for transporting the children), and EUR 505,603 for conversion work on their home to provide improved access and special adaptations, amounting to EUR 688,004 (for items (a) and (b)) which, together with the statutory interest which would have been taken into account by the administrative courts, made a total of EUR 790,010.63;

(c) for the prejudice consisting in the special financial burdens arising from their child's disability, either in the form of an annuity payable in monthly instalments of EUR 5,800 for the duration of the child's life, with a fixed coefficient of enhancement in the event of a worsening of her condition, or as a capital sum of EUR 5,421,144 (calculated on the basis of mean life expectancy). These sums had been established by a method which took into account, among other factors, C.'s age and the progressive nature of her illness.

129. As regards in particular the sums corresponding to "special burdens" (listed under (b) and (c) 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 C.'s birth. In addition, the benefit provided for in that law would not allow full compensation for the burdens arising from their child's disability.

130. The applicants' claim for pecuniary damage amounted in total to EUR 6,211,154.63.

131. They did not submit a claim in respect of non-pecuniary damage, a fact which the Government formally noted.

132. On the other hand, the Government contested the applicants' claims for pecuniary damage, which they considered unreasonable. They submitted in particular that the damage for disruption to Mr Maurice's working life had already been made good by the Paris Administrative Court in its judgment of 25 November 2003. As this compensation had not been affected by the enactment of the Law of 4 March 2002, the Government considered that no just satisfaction should be awarded under that head. As to the sums corresponding to the "special burdens" arising from C.'s disability (itemised under (b) and (c) 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 if the Court were to find a violation that finding would constitute sufficient just satisfaction.

133. 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 of the Rules of Court).

B. Costs and expenses

134. In respect of costs and expenses incurred before the French courts, the applicants claimed, with the relevant supporting documents, EUR 17,600 (EUR 6,400 for two applications for an interim award, a request for an expert opinion and a compensation claim against AP-HP, EUR 2,800 for a compensation claim against the State for damage inflicted by reason of legislation, EUR 2,800 for the appeal in the interim award proceedings, EUR 2,800 for the appeals on points of law in the interim award proceedings and EUR 2,800 for the two appeals currently pending in the proceedings against AP-HP and the State). From that amount they deducted EUR 5,762 which they had received in compensation pursuant to the various domestic decisions. The total sum claimed was therefore EUR 11,838. In respect of the costs and expenses incurred before the Court, the

applicants claimed EUR 15,000, for which they supplied the relevant bill of costs.

135. The Government submitted that where the Court found a violation it could award only the costs and expenses incurred before the national courts for the prevention or redress of the violation. In the present case, even if the Law of 4 March 2002 had not been enacted, the costs of the proceedings under the urgent procedure and the main proceedings at first instance would still have been incurred. The Government therefore contended that only the costs incurred on appeal in the main proceedings and against the State for damage inflicted by reason of legislation should be awarded to the applicants, a sum of EUR 5,600.

136. As to the costs incurred before the Court, 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.

137. With regard to the proceedings in the domestic courts, the Court reiterates that, where it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts "for the prevention or redress of the violation" (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63, and *Carabasse v. France*, no. 59765/00, § 68, 18 January 2005).

In the present case, since the violation found concerned the enactment of the Law of 4 March 2002, the Court considers that the applicants are entitled to claim reimbursement of the costs of the proceedings in which they had to contest the effects of that legislation. That applies to the proceedings brought in the Paris Administrative Court against AP-HP and the State, the appeals lodged and currently pending in the Paris Administrative Court of Appeal and the appeals on points of law in the interim award proceedings. As regards the ordinary appeal in the interim award proceedings, the Court notes that, although this was lodged by AP-HP before 4 March 2002, the law complained of was enacted during the course of the proceedings, and the applicants, moreover, contested its applicability in one of their memorials. Part of the applicants' costs in those proceedings was therefore incurred to prevent the violation of the Convention found by the Court.

138. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court, having regard to the foregoing, awards the applicants the sum of EUR 11,400 which, less EUR 5,000 already received in compensation pursuant to the various relevant domestic decisions, makes EUR 6,400, all taxes included.

139. As regards the costs incurred in the proceedings before it, the Court notes that the applicants supported their claims by supplying a bill of costs.

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 15,000, including all taxes.

C. Default interest

140. 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;

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

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 were applicable, there has been no violation of that provision;

6. *Holds* unanimously that the complaint under Article 14 of the Convention taken in conjunction 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 21,400 (twenty-one thousand four hundred euros) in respect of the costs and expenses incurred up to the present stage of the proceedings before the domestic courts and 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.

9. *Dismisses* unanimously the remainder of the claim for costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 October 2005.

Luzius WILDHABER
President

Lawrence EARLY
Deputy 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 JOČIENĖ

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, consistent with the approach of the Court in *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). 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 of Protocol No. 1 has been violated is such as to relieve the Court of the duty of examining the applicants' complaint under Article 6 of the Convention.

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 general interest – with the administration of justice designed to influence the judicial determination of a dispute (see *Zielinski and Pradal and Gonzales and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII, and, among other authorities, *Anagnostopoulos and Others v. Greece*, no. 39374/98, §§ 20 and 21, ECHR 2000-XI).

3. In the present case, the Law of 4 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 79 of the judgment).

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 *Stran Greek Refineries and Stratis Andreadis*, 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 case in *Stran Greek Refineries and Stratis Andreadis*, 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 Protocol No. 1, 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 of the judgment), can be regarded as

affording sufficiently compelling general-interest grounds 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 came 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 ("the 2002 Act") 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 Act 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 Act, those who practise prenatal 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 Act 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 2002 Act has protected the latter 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 Act 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 twenty-first century, a new immunity tailored to the comfort of one handpicked class of one handpicked profession is, 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 Act 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 scrutinised all the more stringently the emergence of this "parvenu" immunity.