

THE *PERRUCHE* CASE AND FRENCH MEDICAL LIABILITY

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INTRODUCTION

In this Symposium on medical liability, I think it is important to devote an Article to a case that raises questions of both liability law and ethics, and to examine how society perceives the birth of a child with disabilities. In France, the *Perruche* case raised these issues and ignited an extremely important debate.

In *Perruche*, heard in 2000,¹ the Court of Cassation (France's highest appellate court) considered the liability of a doctor who failed to

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† Translations are the author's unless otherwise noted. Some of the sources cited in this Article were unavailable for review by the *Drexel Law Review* but have been verified by the author.

1. Cour de cassation [Cass.] [supreme court for judicial matters], Nov. 17, 2000, JCP 2000, II, 10438, concl. Sainte-Rose, rapp. P. Sargos, note F. Chabas; D. 2001 Somm. 332, note D. Mazeaud; D. 2001 Somm. 336, note P. Jourdain; L'action de vie dommageable [The Damaging Action of Life], JCP 2000 II 279, G. Mémeteau; M. Gobert, *La Cour de cassation méritait-elle le pilori?* [Does the Court of Cassation Deserve to Be Ridiculed?], PETITES AFFICHES, Dec. 8, 2000, at 4; D. 2001 Chron. 492, L. Ayries, *Préjudice de l'enfant, né handicapé: la plainte de Job devant la Cour de cassation* [Prejudice to the Child Born with a Disability: Job's Complaint Before the Court of Cassation], D. 2001 Chron. 489, J. L. Aubert, *Indemnisation d'une existence handicapée qui, selon le choix*

detect a serious congenital deformation of a fetus (despite having performed a medical examination to rule out the presence of such a defect). The Court held the doctor liable and ordered him to compensate not only the mother, but also the child (who was born with severe disabilities). This judgment was front-page news.²

Before examining the reactions to this decision, let us first examine the facts.³ In *Perruche*, a doctor ordered examinations to check whether a pregnant Mrs. Perruche was suffering from rubella.⁴ The examination results showed that, not only was she was not suffering from rubella, she was immunized. Unfortunately, this was not the case. Mrs. Perruche gave birth to a boy with severe disabilities that resulted from congenital rubella contracted during his intrauterine life. At trial, the court found the clinical laboratory liable for negligence⁵ (the laboratory did not dispute its error) and also found the doctor liable for failing to provide attentive diligent care and for breaching his duty to inform the patient.⁶

de la mère, n'aurait pas dû être [Compensation for a Life with a Disability: The Choice of the Mother That Should Not Have Been Made]; P. Murat, *L'affaire Perruche: Où l'humanisme cède à l'utilitarisme* [The Case of Perruche: Where Humanism Yields to Utilitarianism], DROIT DE LA FAMILLE 28 (Jan. 2001); D. 2001 aperçu rapide 2267, F. Terré, *Le prix de la vie* [The Price of Life]; F. Dreifuss-Netter, *Observations hétérodoxes sur la question du préjudice de l'enfant victime d'un handicap congénital non décelé pendant la grossesse* [Heterodox Observations on the Issue of Prejudice to the Child Victim of a Congenital Disability Not Disclosed During Pregnancy], REVUE MEDECINE ET DROIT 1 (2001); D. 2001 Chron. 1263, Yves Saint-Jours, *Handicap congénital – Erreur de diagnostic prénatal – Risque thérapeutique sous-jacent* [Congenital Disability – Error of Prenatal Diagnosis – Underlying Treatment Risks]; D. 2001 Chron. 1889, P. Kayser, *Un arrêt de l'Assemblée plénière de la cour de cassation sans fondement juridique?* [A Decision of the Plenary Assembly of the Court of Cassation Without Legal Basis?]; D. Fenouillet, *Pour une humanité autrement fondée* [For a Differently Established Humanity], DROIT DE LA FAMILLE 4 (Apr. 2001).

2. A large number of critical comments have appeared in the press. See Catherine Labrusse-Riou et al., *La vie humaine comme préjudice?* [Human Life as Prejudice?], LE MONDE [THE WORLD], Nov. 24, 2000; Jacques Julliard, *Ne ricanons pas!* [Let Us Not Sneer!], LE NOUVEL OBSERVATEUR, Nov. 22, 2000; Denys de Bechillonnet al., *L'arrêt Perruche, le droit et la part d'arbitraire* [The Perruche Decision, Law and the Arbitrary], LE MONDE, Dec. 21 2000; DENIS SALAS *L'ARRÊT PERRUCHE, UN SCANDALE QUI N'A PAS EU LIEU* [THE PERRUCHE DECISION: A SCANDAL THAT NEVER HAPPENED], Justices, May 14 (2001).

3. There are hardly any articles in English on the *Perruche* case and the surrounding controversy, but for a case analysis, see Julia Field Costich, *The Perruche Case and the Issue of Compensation For the Consequences of Medical Error*, 78 HEALTH POL'Y 8 (2006). For a discussion of the case in terms of legal theory and history, see John Cerullo, *The Legal Subject and the Judicialization of French Civic Culture: Fin de Siècle* [End of Century] *Roots of Contemporary Controversies*, 33 PROC. W. SOC'Y FR. HIST. 433, 433 (2005).

4. The woman had another child who had contracted rubella.

5. The laboratory made an error by excluding the diagnosis of rubella.

6. According to experts, the doctor did not provide the woman with the attentive and diligent care which she had the right to expect, and he did not fulfill his duty to provide information and counseling so as to allow his patient to make an informed decision when she was confronted with a particularly serious situation.

The court required the laboratory and the doctor, *in solidum* with their insurers, to compensate the mother for the harm caused by their negligence. From the start, Mrs. Perruche had informed her doctor that she wanted an abortion if she was suffering from rubella; the court found that the actions of the doctor and the laboratory had deprived her of her right to terminate the pregnancy.

But the Perruches also requested compensation for harm suffered by their severely disabled son. Whereas previous courts had refused to permit compensation to children born with disabilities,⁷ here the Court of Cassation allowed it.

I will first demonstrate how this ruling harmed medical liability rules, and then I will show how it led to two sets of legal standards.

I. HOW THE *PERRUCHE* JURISPRUDENCE HARMED MEDICAL LIABILITY RULES

The amount of criticism leveled against the *Perruche* decision cannot be understood without first appreciating the decision's *adverse effect* on the rules of medical liability and the reasons behind the court's opinion.

A. *How the Perruche Ruling Harmed Medical Liability Rules*

French civil law requires three things before a finding of individual medical liability: (1) the doctor must have committed a fault (i.e., negligence), (2) the plaintiff must have suffered damages, and (3) there must be a causal link between the doctor's fault and the plaintiff's damages.⁸

Although the first two conditions for medical liability were met in *Perruche*,⁹ the third condition was not, as the negligence did not cause the harm. In holding the doctor liable for failing to detect the prenatal child's disability, the Court of Cassation breached the causation requirement. The harm to the child (the disability) was not caused by the doctor's negligent failure to detect it. Rather, the harm

7. Cour d'appel [CA] [regional court of appeal] Paris, B ch., Dec. 17, 1993, D. 1995 Somm. 99, obs. Penneau; RTDCIV Orléans, Feb. 5, 1999, No. 156, obs. J. Hauser.

8. PATRICE JOURDAIN, LES PRINCIPES DE LA RESPONSABILITÉ CIVILE [THE PRINCIPLES OF CIVIL LIABILITY] (Daloz ed., 8th ed. 2010); GENEVIÈVE VINEY & PATRICE JOURDAIN, TRAITÉ DE DROIT CIVIL, LES CONDITIONS DE LA RESPONSABILITÉ [TREATY OF CIVIL LAW: THE TERMS OF THE LIABILITY], LGDJ (3d ed. 2006); MURIEL FABRE-MAGNAN, DROIT DES OBLIGATIONS, TOME 2, RESPONSABILITÉ CIVILE ET QUASI-CONTRAT [2 MURIEL FABRE-MAGNAN, CONTRACT LAW: CIVIL LIABILITY AND QUASI-CONTRACTS], 2010.

9. In *Perruche*, the doctor had been negligent, and the child had been harmed.

was caused by the rubella contracted by the mother during her pregnancy. The doctor's error did not cause the disability; it caused the child to be born instead of aborted.

Despite attempts by some legal commentators to justify the court's ruling,¹⁰ the court's solution was wrong. In establishing causation,¹¹ one can look to the "immediate and determining cause" of the damage (the "adequate causality" theory)¹² or other, related, causes (the "equivalence of conditions" theory).¹³ Errors are causal as from the moment when, without them, the damage can be avoided. Some legal commentators argue that causation existed here based on the "equivalence of conditions theory": the abortion was possible and even desired by the mother and, if the abortion had taken place, the child would not have been born and would not have suffered from its disability. In the *Perruche* case, however, it was impossible to establish that the doctor's negligence caused the child's disability because the disability was due to the rubella, not the failure of the doctor to detect the presence of the birth defect. Moreover, the Council of State (France's highest administrative court) had refused to compensate children in similar cases.¹⁴

10. Patrice Jourdain, *Reflexions sur un malentendu* [Reflections on a Misunderstanding], JCP 2001 II 336; Jerry Sainte-Rose et al., *Réparatin du préjudice personnel de l'enfant handicapé larsque son handicap a été contracté in utero* [Damages for Personal Injuries of a Child with a Disability Whose Disability Was Contracted in Utero], JCP 2000 II 50-10438; Geneviève Viney, *Brèves remarques à propos d'un Qui affecté l' image de la justice dans L'opinion* [Brief Remarks About a Case Affecting the Image of Justice in the Public Opinion], JCP 2001 II 2-286, 65; Pierre-Yves Gautier, "Les distances du juge" à propos d'un débat éthique sur la responsabilité civile ["The Distance of the Judge": An Ethical Debate on Civil Liability], JCP 2001 II 67, 4; Sanit-Jours, *supra* note 1.

11. The occurrence of damage is often due to multiple causes. Faced with the tangle of possible causes of a fact, the role of the lawyer cannot be neutral, and these commentators had the ambition to define criteria for the causal relationship. Two theories are mainly retained in France: (1) the theory of "adequate causality" and (2) the theory of the "equivalence of conditions." Philippe Le Tourneau, *Droit de la responsabilité et des contrats* [Tort Law and Contracts], 2010, p. 563. VINEY & JOURDAIN, *supra* note 8, at n°333-1 et s.

12. This theory was first set by von Kries (*Die Prinzipien der Wahrscheinlichkeitsrechnung* [Principles of Probability Calculation], 1886). Among the various factors causing the damage, one must be selected that increased the likelihood of the result found.

13. This theory was postulated by Von Bury (*Die kausalität und ihre strafrechtlichen bezi-ehungen* [Proximate Cause and Its Criminal Connections]) in 1885: each element, without which the injury would not have occurred, is the cause of the damage. See also Ouver Gout, *Les avancées de la théorie de l'équivalence des conditions* [Advances in Theory of Equivalence of Conditions], JCP 2002 II 10198.

14. Jacques Moreau, *Responsabilité hospitalière pour défaut d'information du patient* [Hospital Liability for Failure to Inform the Patient], JCP 1997 II 17-22828; Geneviève Viney, *Responsabilité Civile* [Civil Liability], JCP 1997 II, 22-4025; Didier Chauvax and Thierry-Xavier Girardot, *La naissance d'un enfant infirme peut constituer un dommage pour les parents mais non pour l'enfant lui-même* [The Birth of a Disabled Child Can Be a Disgrace for the Parents but Not for the Child Himself], ACTUALITE JURIDIQUE DROIT ADMINISTRATIF [AJDA], 430 (1997); Valérie Pécresse, *Le préju-*

It follows, then, that compensation for the child's disability could be based only on punitive damages that do not require any causal link. But French law disallows punitive damages.¹⁵ The application of the usual rules of liability could not, therefore, result in finding the doctor liable. But the Court of Cassation did.¹⁶

The *Perruche* jurisprudence also undermined the notion that there can only be compensation for harm. Although the negligence did not cause the disability, it nevertheless resulted in a child being born with disabilities. If the doctor had detected the congenital abnormalities and informed the mother, she would have terminated her pregnancy, and the child would never have been born. The only event actually caused by the doctor's negligence was the birth of the child. Because the judges found the doctor liable, it can be inferred that the actual harm or injury was "the birth of a child with disabilities." The legitimacy of such harm was easily contested.¹⁷

Such a solution was unacceptable from an ethical point of view — as it implied that "being born with disabilities" could constitute harm — and it led to the formulation of a systematic link between the presence of a disability and the termination of pregnancy. It was in this manner, then, that the *Perruche* case damaged the rules of medical liability.

B. What Were the Foundations of This Jurisprudence? What Were the Judges' Motivations in This Case?

By holding the physician liable, the judges implied that the birth of the disabled child constituted a harm. But they did not explicitly declare this in their decision. Their finding of liability was based on a weak argument, and some believe that the judges were forced to

dice résultant de la naissance d'un enfant trisomique [The Damaging Result of the Birth of a Child with Down Syndrome], RFDA 374 (1997); Bertrand Mathieu, *Le préjudice résultant de la naissance d'un enfant trisomique* [The Damaging Result of the Birth of a Child with Down Syndrome], RFDA 382 (1997).

15. Viney, *supra* note 10, at 66.

16. Cass., Nov. 17, 2000, JCP 2000 II 10438, concl. Sainte-Rose, rapp. P. Sargos, note F. Chabas.

17. The final court of appeal referred back to the character of the legitimacy of the harm, making a "moral pronouncement" on the right to compensation. Cass. 2e civ., Jan. 24, 2002, JCP 2002 II 10118; Christine Boillot, *Une Victime ne peut Obtenir la Réparation de la Perte de ses Rémunérations que si Elles sont Licites* [A Victim Cannot Obtain Damages for Lost Wages Unless They Are Legitimate], JCP 2002 II 38-10118; Patrice Jourdain, *La Distinction des Responsabilité Délictuelle et Contractuelle: État du Droit Français* [Tort and Contractual Liability], 2 RTD CIV 303 (2002).

come to such a conclusion because they believed the doctor was at fault in this particular set of circumstances.

It is evident that the judges wanted to reach a particular result—compensate a child who was going to live a life punctuated with suffering. How could one deny this? The judges, out of a sense of equity, made a decision to ensure that the child received compensation. Despite their good intentions, this decision was impermissible under French law.¹⁸

C. *Perruche* Has Given Rise to Many Criticisms

The first criticisms of *Perruche* concerned the legal consequences of this jurisprudence. Critics argued that it would increase malpractice suits against doctors (mainly against sonographers), that it would encourage children with disabilities to sue their mothers for not terminating their pregnancies,¹⁹ and that it would raise professional liability insurance premiums.

The primary criticisms, however, were ethical.²⁰ These criticisms focused on the fact that the *Perruche* jurisprudence had introduced the notion that the birth of a child with disabilities could constitute a harm—an idea that threatened a certain kind of eugenics. It is true that French legislation contains a number of provisions that might be construed as eugenics: French law has adopted rules that allow a woman to terminate her pregnancy if she learns that she will give birth to a child with a severe, incurable illness;²¹ and similarly, French law allows a woman undergoing assisted reproduction to destroy, rather than implant, an embryo identified as having a genetic defect.²² To prevent a slippery slope toward eugenics, legisla-

18. Under French law, in principle, it is the role of judges to apply or interpret the law. Hence, they cannot, for equitable reasons, put such regulations to one side. Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1327 (1995).

19. Even if it could be proved, the mother's fault would be difficult to establish because the mother, by not having an abortion, was simply exercising her liberty to not do so.

20. Sainte-Rose, et al., *supra* note 10. *Contra* SALAS, *supra* note 2; Aline Terrasson de Fougères, *Périssé le jour qui me vît naître* [Perish the Day That Saw Me Born], REV. DROIT SANITAIRE ET SOCIAL 1 (2001); Catherine Labrusse Riou & Bertrand Mathieu, *La vie humaine comme préjudice?* [Human Life as a Detriment?], LE MONDE, Nov. 24, 2000.

21. In authorizing and favoring prenatal diagnoses, the legislature recognized that women might abort their pregnancies if they were informed that their fetuses had genetic defects and that they would give birth to children with grave medical problems if they carried their pregnancies to term.

22. The assisted reproduction procedure for genetic testing of embryos prior to their implantation makes it possible for a physician to destroy the embryo upon finding genetic defects.

tion must reconcile these types of measures with others that provide care for people actually suffering from these illnesses.

The *Perruche* ruling emphasized the inadequacy of French measures to provide funding and care to those suffering from permanent and serious disabilities.²³ Arguably, the Perruches, like many other parents of children with disabilities, would not have begun such an action had there been adequate State support for their child's care.²⁴ The generosity the judges wished to show the Perruches should have come instead from the State. Our society accepts, under certain conditions, the removal of embryos which carry serious and incurable illnesses, but it neglects its duties when it comes to children actually born with these same disabilities; society's beliefs about fetuses carrying serious or incurable disease should be matched by measures to benefit children born with such afflictions. When Parliament enacted the *bioethics laws* of July 29, 1994,²⁵ it envisioned a certain number of provisions designed to forestall the birth of a child carrying a serious illness (notably, by permitting pre-implantation diagnoses). It also foresaw that, in order to compensate for these measures, other measures would need to be taken to benefit people actually suffering from these disabilities. Unfortunately, very few measures of this nature have been implemented.

Despite the many virulent criticisms, the Court of Cassation maintained its jurisprudence²⁶ – until the legislature intervened.

23. Mémeteau, *supra* note 1.

24. Serious shortcomings in the State's care of people with disabilities include difficult access to training and employment for adults with disabilities and inadequate financial support for disabled people. It is critical that the State increase childcare in specific institutions and develop assistance for the disabled. COMITÉ CONSULTATIF NATIONAL D'ÉTHIQUE POUR LES SCIENCES DE LA VIE ET DE LA SANTÉ [THE NATIONAL CONSULTATIVE ETHICS COMMITTEE], *Handicaps congénitaux et préjudice* [Congenital Handicaps and Prejudice], Opinion No. 68, May 29, 2001; Terrasson de Fougères, *supra* note 20.

25. Loi 94-653 du 29 juillet 1994 relative au respect du corps humain [Law 94-653 of July 29, 1994 on Respecting the Human Body], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 30, 1994, p. 11056; Loi 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal [Law 94-654 of July 29, 1994 on the Donation and Use of Elements and Products of the Human Body, Medically Assisted Reproduction, and Prenatal Diagnosis], J.O., July 30, 1994, p. 11060.

26. Jerry Sainte-Rose, *L'enfant né handicapé demander la réparation du préjudice résultant de son handicap* [A Child Born with a Disability May Request Compensation for Damage Resulting from His Disability], JCP 2001 II 10601; P. Murat, *La Cour de cassation et la vie humaine: où va le droit commun?* [The Supreme Court for Judicial Matters and Human Life: Whither the Common Law?], DR. FAM., 2001 Chron. No. 24, 10.

II. HOW THIS JURISPRUDENCE WAS THWARTED BY THE PARLIAMENT AND CULMINATED IN A HYBRID SYSTEM

Though the *Perruche* jurisprudence was ultimately limited by the French legislature,²⁷ the case had lasting, albeit restricted, effects on medical liability law.

A. The French Parliament Overrules the Perruche Jurisprudence That Imposed Liability on a Physician for Failing to Detect a Child's Disability Before Birth

The Act of March 4, 2002, which I will refer to as the Kouchner Act,²⁸ put an end to the *Perruche* jurisprudence. The first article of the Kouchner Act states that “[n]o one can avail themselves of a harm from the fact of their birth alone.”²⁹ The following rules now apply to children born with disabilities that went undetected during pregnancy due to negligently performed prenatal clinical tests.

Children born with disabilities can no longer recover damages from their physicians. Compensation for the disabilities is now borne by the State in the name of national social solidarity.³⁰ A law passed in 2005 provides financial support in the event of certain disabilities, but it only covers the most basic needs.³¹

Note, however, that some children born with disabilities are still compensated. Except for cases in which the doctor does not detect the disability, medical liability principles continue to apply. When the disability is directly caused by the doctor's negligence (i.e., by a medical act performed during pregnancy), the child is entitled to compensation for the harm.

Harmed parents can continue to request compensation, but with two restrictions. First, the monetary damages cannot include lifetime care for their child's disability; parents can only claim compen-

27. Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law 2002-303 of March 2002 on the Rights of the Sick and the Quality of the Health System], J.O., Mar. 5, 2002, p. 4118.

28. *Id.*

29. CODE DE L'ACTION SOCIALE ET DES FAMILLES art. L114-5.

30. For a discussion of the French concept of solidarity, see Dominique Thouvenin, *French Medical Malpractice Compensation Since the Act of March 4, 2002: Liability Rules Combined with Indemnification Rules and Correlated with Several Kinds of Proceedings*, 4 DREXEL L. REV. 165, 192-93 (2011).

31. Loi 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées [Law 2005-102 of Feb. 11, 2005 for the Equal Rights and Opportunities, the Participation, and the Citizenship of Persons with Disabilities], J.O., Feb. 12, 2005, p. 2353.

sation for non-pecuniary damages. Second, the parents must establish that the doctor's negligence meets the severity threshold.³²

The Kouchner Act therefore puts an end to the *Perruche* jurisprudence for future cases. The effects of this case, however, continue to linger, within a limited scope, because of France's adoption of a hybrid system.

B. The Perruche Jurisprudence Is Partly Maintained Within the Framework of Medical Liability

Parliament wanted to crush the *Perruche* jurisprudence, but the courts have allowed it to continue in a defined and limited field.

After its passing, questions quickly arose about whether the Kouchner Act applied to legal proceedings already in progress. Parents who had given birth children with disabilities before the Kouchner Act considered its application to them prejudicial because it prevented them from obtaining the higher level of compensation they would have received under the *Perruche* standard. This sense of injustice was exacerbated by the fact that the Public Guarantee Fund that Parliament created to compensate such disabilities as a substitute for tort liability did not begin operation until 2005.³³ As a result, these parents filed suit against France before the European Court of Human Rights (ECHR) which, through two judgments dated October 6, 2005, ruled in their favor.³⁴ The ECHR held that the *Perruche* case had created a legitimate expectation of full compensation for a child's disability and that this expectation constituted a debt or property interest which was retroactively infringed upon by the Kouchner Act.³⁵

Thus, the ECHR created a breach in the new system, and the Court of Cassation rushed in to breathe life back into *Perruche*. In successive rulings, the court maintained the *Perruche* jurisprudence within the framework of all legal decisions before the Kouchner

32. Examples of errors that meet this threshold include a doctor failing to fully disclose to a mother the existence of a margin of error on ultrasound scan results and the reversal of results in analyses carried out on two patients (CE Sect., Feb. 19, 2003, Rec. Lebon 247908).

33. Law 2005-102 of Feb. 11, 2005.

34. See, e.g., *Maurice v. France*, 20051-x Eur. Ct. H.R. (2005); *Draon v. France*, 20061-x Eur. Ct. H.R. (2005) (holding that the parents of a disabled child had a legitimate expectation of full compensation after *Perruche* for damages arising from their child's disability).

35. Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law 2002-303 of March 4, 2002 on the Rights of the Sick to the Quality of the Health System], J.O., Mar. 5, 2002, p. 4118.

Act³⁶ and then extended the *Perruche* jurisprudence to all prior court decisions for wrongful birth or misdiagnosis of an unborn child's disabilities.³⁷ The Court of Cassation, and subsequently the Council of State, ruled that the Kouchner Act only applied to cases involving a child born after the Act went into effect.³⁸

This jurisprudence was partially maintained by a judgment of the Constitutional Council in June 2010 when it reviewed whether the Kouchner Act complied with the French Constitution.³⁹ It confirmed that the Kouchner Act, which restricted tort liability for disabilities undetected during pregnancy, was constitutional, but it struck down provisions of the law that applied the new standard retroactively.⁴⁰

Thus, when faced with identical situations (disabilities undetected during pregnancy), medical liability rules differ depending on whether the lawsuit was filed before or after March 7, 2002 (the date the Kouchner Act took effect).

III. CONCLUSION

In this Article, I have tried to share observations on a judgment that affected French public opinion about the notion of justice (to paraphrase the title of a piece by Professor Geneviève Viney, one of France's best specialists in civil liability law).⁴¹

When all is said and done, the *Perruche* case should not be reviled. The one unfortunate result of *Perruche* is that it suggested the ethically impermissible idea that the birth of a disabled child can constitute a harm. By themselves, payments to severely disabled children shock no one. If the State had done its duty and provided assistance to people with disabilities, the courts would not have had to over-

36. Cass. 1e civ., Jan. 24, 2006, Bull. civ. I, No. 136; Cass. 1e civ., Jan. 24, 2006, Bull. civ. I, No. 195; Cass. 1e civ., Jan. 24, 2006, Bull. civ. I, No. 196. The State council chose to adhere to this jurisprudence. CE Sect., Feb. 24, 2006, JCP 2006 II 10061, note A. Gouttenoire & S. Porchy-Simon.

37. Cass. 1e civ., July 8, 2008, No. 07-12-159, JCP 2008 II 10166, note Pierre Sargos.

38. See Cass. 1e civ., July 8, 2008, Bull. civ. I, No. 796; CE Sect., Feb. 19, 2003, Rec. Lebon 41.

39. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-2QPC, June 11, 2010, J.O. 10847; Valérie Bernaud & Laurence Gay, *Le Conseil constitutionnel face au contentieux du handicap non décelé au cours de la grossesse* [The Constitutional Council to Rule on Litigation for Disability Not Disclosed During Pregnancy], 30 RECUEIL DALLOZ 1980, 1980 (2010); Francis Hamon, *Le droit de ne pas naître devant le Conseil constitutionnel* [The "Right Not to Be Born" Before the Constitutional Council], 150 PETITES AFFICHES 4, 4 (2010).

40. CC decision No. 2010-2 QPC, June 11, 2010, J.O. 10847.

41. Viney, *supra* note 10, at 65.

step their bounds by using liability law to provide such assistance.⁴² Let us hope that the legislature has learned its lesson and in the future will offer additional financial support for people with disabilities.⁴³

42. Jean-Sébastien Borghetti, *Note de Jean-Sébastien Borghetti*, 7 RECUEIL DALLOZ 420, 423 (2010).

43. Notably, with the adoption of the law of April 2005, the legislature has already taken steps in this direction by offering additional support.