OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 November 1989 *

Mr President,
Members of the Court,

1. The preliminary question submitted by the French Cour de cassation, which seeks a clearer definition of the purport of the Court's previous decisions concerning the jurisdiction of courts, will require the Court to determine the scope of its judgment in *Mines de potasse d'Alsace* [1] with respect to the interpretation of Article 5(3) of the Brussels Convention [2] (hereinafter referred to as 'the Convention'), a judgment which almost all the legal literature on the subject describes as definitive. [3]

2. The facts of the main proceedings do not need to be set out in great detail. Two French companies, Sceper and Tracoba, whose rights are now held by the companies Dumez France and Oth Infrastructure, set up subsidiaries in the Federal Republic of Germany for the purposes of a property-development project. In June 1973 the German banks which had granted financing to the German promoter (Hessische Landesbank, Gebrüder Röchling Bank and Lübecker Hypothekenbank) decided to terminate the loan contracts. The promoter was put into receivership under the supervision of the court, as were the two German subsidiaries of Sceper and Tracoba. The two French companies brought an action before the French Commercial Court to establish the liability in delict of the German banks. The defendants alleged that that court lacked jurisdiction, taking the view that the damage suffered by Sceper and Tracoba had occurred in Germany and not in Paris, where their registered offices were located. The Paris Commercial Court upheld their objection by judgment of 14 May 1985, which was confirmed by judgment of the Paris Court of Appeal of 13 December 1985. Dumez and Tracoba lodged an appeal in cassation, claiming that the damage suffered by them had occurred in Paris, the place where they ascertained the financial losses suffered by them when their subsidiaries became insolvent.

3. The Cour de cassation then submitted a question for a preliminary ruling by this Court which essentially seeks to determine whether the solution adopted in its judgment in *Mines de potasse d'Alsace*, which allows a plaintiff seeking to establish liability in tort or delict, to choose between the courts for the place where the event giving rise to the damage occurred and those for the place where the damage took place, can be relied on by the indirect victims of the damage; if that is the case, those victims would, according to the national court, be entitled to commence proceedings before the courts for the place where they are domiciled.

4. In my view there are two aspects to the question. Application of the solution adopted in *Mines de potasse d'Alsace* to damage suffered indirectly does not in my view necessarily mean that the victims of that damage will be entitled to have recourse to the courts for the place where they are domiciled. In other words, must it

* Original language: French.

1 — Judgment of 30 November 1976 in Case 21/76 [1976] ECR 1735.

2 — Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

3 — See however the opinion of J. D. González Campos (Eighth Conference of Professors of International Law and International Relations, Barcelona, July 1984), who considers that judgment to be merely a 'sentencia puente' which may be followed by decisions which represent a departure from previous case-law, cited by Mr Desantes Real in *La competencia judicial en la Comunidad europea*, 1986, p. 295.

be said that the place where 'ricochet' damage occurs is the same as the place of the victim's domicile? In order to answer that question, after considering whether or not the solution adopted in *Mines de potasse d'Alsace* should be applied to 'ricochet' damage, I must consider the separate question of determination of the place where the damage to an indirect victim actually occurs.

5. With regard to the first aspect of the problem, let me say straight away that in my view there is nothing in that judgment to support the view that the solution which it adopts is not to apply to 'ricochet' damage. On the contrary, the Court stated:

'To exclude one option seems all the more undesirable in that, by its comprehensive form of words, Article 5(3) of the Convention covers a wide diversity of kinds of liability'. [4]

6. Academic legal writers have also taken that judgment to be of very general application.

7. In France, Mr Droz points in his commentary to the extent of the risk that the option thus granted is liable to multiply the number of courts before which proceedings might be brought in regard to road accidents, in which there are not infrequently 'secondary' victims. [5] Mr Bourel is of the same opinion but considers that the problem mentioned by Mr Droz could be solved by reference to the exceptions concerning related actions provided for in the Convention itself. [6] Mr Huet associates himself with the latter view and deplores the absence, under the system of the Convention, of a general ground of jurisdiction based on related actions. [7]

8. The United Kingdom commentators have also regarded the Court's decision as being of very general application. [8] However, the fact has not escaped the attention of some commentators that the solution adopted by the Court did not exclude the eventual adoption of specific rules for particular torts, for instance defamation by the press. [9] Attention has also been drawn to the difficulty of determining the place of injury in the case of purely financial losses. [10]

9. The same generality has been attributed to the judgment in Portugal [11] and in Spain. [12] I should point out, however, that according to certain authors, such as Mr Desantes Real and Mrs Jallès, the solution adopted in the judgment is linked above all with the specific problem of determining

4 — Case 21/76, *supra*, paragraph 18.

5 — Dalloz Sirey, 1977, B 54, p. 613.

6 — *Revue critique de droit international privé*, 1977, 'Jurisprudence', p. 563.

7 — *Journal du droit international*, 1977, p. 728: in an article devoted to the decision of the Court, this author, together with J. M. Bischoff, considers that 'one of the major trends in the case-law of the Court in its interpretation of the Convention is its wish to avoid fragmentation of the problems submitted to it (and the segmentation of jurisdiction which might result) and its concern, on the contrary, to pursue a degree of unity by bringing the incidental issues to the main issues, the act or event which is the consequence to the act or event which is the cause' ('Chronique de jurisprudence de la Cour de justice des Communautés européennes', *Journal du droit international*, 1982, p. 463).

8 — T. Harvey: 'The place of commission of a tort', *European Law Review*, Vol. 2/1977, No 2, p. 143; J. K. Bentil: 'Delictual liability within the EEC', *The Scots Law Times*, 1978, No 2, p. 13; P. M. North and J. J. Fawcett: 'Jurisdiction under the Brussels Convention', in Cheshire and North: *Private International Law*, 1987, p. 301; D. Lasok and P. A. Stone: *Conflict of Laws in the European Community*, 1987, p. 232.

9 — D. Lasok and P. A. Stone in *Conflict of Laws in the European Community*, op. cit., state: '... it is thought that the *Bier* decision does not preclude the eventual adoption of specific rules for particular torts; e.g. a rule that for the purposes of defamation by a single publication, the relevant place is that of the publication to the third person'.

10 — D. Lasok and P. A. Stone, op. cit., consider that '... in the case of purely financial loss, determination of the place of injury is likely to present particular difficulties'.

11 — M. I. Jallès: 'O afloramento de supranacionalidade num caso de poluição transfronteiras', *Revista de direito e economia*, Ano II/1976, No 2, p. 409; see in particular p. 428 *et seq.*

12 — Mr Desantes Real: *La competencia judicial en la Comunidad europea*, pp. 310 and 311.

which criteria should be used to define the 'harmful event' in relation to protection of the environment and more particularly to the prevention of pollution of international waterways. Those authors appear in fact to consider that the Court's judgment in *Mines de potasse d'Alsace* must be confined to the specific facts of that case. [13]

10. Subject to the latter observation, there is no doubt as far as legal writers are concerned that the *Mines de potasse d'Alsace* judgment applies without any exception whatsoever to actions for compensation for indirect damage, even though they feel on occasion the need to point out the disadvantages of that solution.

11. For my part, I consider that such an exclusion would lead, in such a diverse and complex area as that of tortious liability, to unforeseeable consequences — one exception leading to another — which might undermine the simplicity and the consistency of the interpretation arrived at in the Court's judgment in *Mines de potasse d'Alsace.*

12. Let us remember that in that judgment it was stated that:

'the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction'. [14]

13. That statement, which is inspired by the close relationship between the constituent elements of any liability, seems to me to be just as relevant to indirect damage.

14. Accordingly, whilst it seems to me eminently desirable to continue to regard the solution arrived at in that judgment as being of general application, we must nevertheless consider whether the option available to the victim of 'ricochet' damage to bring proceedings before the courts for the place where the damage occurred [15] must necessarily result in the victim's being allowed to commence proceedings before the courts having jurisdiction at the place where the victim is domiciled. This therefore means endeavouring to resolve the difficulty, which I consider to be of essential importance, concerning identification of the *place at which* the damage must be deemed to have occurred.

13 — 'A sentença em apreciação é significativa na medida em que está conexada com una questão que começa a pôr-se com frequência nos nossos dias e relativamente à qual é escassa, senão mesmo nula, a jurisprudência que poderemos encontrar: referimo-nos a questão da responsabilidade civil por danos resultantes da poluição do meio ambiente quando essa poluição assume carácter internacional', M. I. Jallès, op. cit., p. 428; 'Quizá, en fin la utilización de la vía propuesta, aún por explorar, pudiera servirnos de punto de partida para reflexionar sobre el concreto problema planteado al Tribunal comunitario: qué criterios deben presidir la calficación del concepto hecho daûoso en el artículo 5.3, en lo que respecta a la protección general del medio ambiente y, en particular, a la lucha contra la polución fluvial internacional', M. Desantes Real, op. cit., p. 305.

14 — Case 21/76, *supra,* paragraph 15.

15 — It should be noted that the French Cour de cassation, giving judgment on a question of domestic law on 11 January 1984 (JCP 1984, IV. 85), took the view that the damage suffered by the indirect victim occurred at the same place as the harmful event. Although, of course, the *forum actoris* is thus excluded, the judgment may also have rejected an option similar to that adopted in *Mines de potasse d'Alsace*: see, with respect to the question as a whole, G. Legier: *La compétence du tribunal du lieu où le dommage est subi,* Dalloz Sirey, 1979, 'Chronique', p. 161; see also J. Normand: 'Jurisprudence française en matière de droit judiciaire privé', *Revue trimestrielle de droit civil,* 1984, p. 360: 'In fact the solution adopted by the Second Civil Chamber is seen to be necessary by a process of elimination, having regard to the somewhat injudicious results which would follow from an excessively detailed analysis. In this area, in fact, account must be taken of the diversity of the losses, which do not always manifest themselves at the same place, and the plurality of the victims, a factor which adds to the dispersion. The material damage (loss of resources) arises at the place of the death, and the emotional loss at the place where those close to the deceased are informed of it. But both depend on the circumstances of the case. Death is not always instantaneous; it occurs on the way to hospital, to the home of the person concerned .... The relatives are not necessarily at hand. They are notified wherever they happen to be, at different locations determined by the pattern of their lives, their business or leisure trips. Territorial jurisdiction cannot be anchored in such shifting sands.'

15. Let us first consider the factors that militate against the view that the direct victim suffered the damage at the place of his domicile.

16. In his Opinion in *Rüffer*,[16] Mr Advocate General Warner had occasion to express his views on the matter. After pointing out that, in the circumstances of *Mines de potasse d'Alsace*, the place of the harmful event and the place where the damage occurred were separate, he stated:

'It was never suggested . . . , much less held by the Court, that the place where the harmful event occurred could be the place where the plaintiff company had its seat or the place where the amount of the damage to its business was quantified.'

Mr Warner continued:

'to hold here that the place where the State[17] has its seat could be regarded as being "the place where the harmful event occurred" would be tantamount to holding that, under the Convention, a plaintiff in tort had the option of suing in the courts of his own domicile, which would be quite inconsistent with the scheme of Article 2 *et seq.* of the Convention'.[18]

17. For reasons which are not relevant here, the Court did not have to express a view on that point in *Rüffer*.

18. Messrs Bischoff and Huet, in a commentary on the judgment in that case, approved the solution proposed by the Advocate General, and stated that 'to distinguish between the immediate material damage which, being confined to the locality where the event giving rise to the damage occurred, constitutes therewith the "harmful event" referred to in Article 5(3), and the subsequent costs or loss of profit which, unless they occurred at the same place, would of themselves justify a further jurisdiction, would go precisely in the opposite direction to the policy followed in the cases decided to date'.[19]

19. Although this Court has not yet had to make an express pronouncement on this point, numerous national courts have, since the *Mines de potasse d'Alsace* judgment, expressed their opinion on the matter.

20. Thus, the Gerechtshof, s'Hertogenbosch, in a judgment of 31 October 1978,[20] took the view that the Netherlands courts had no jurisdiction to hear an action for compensation for damage suffered by a Netherlands company through a German company's refusal to conclude a contract, since the only factor arising in the Netherlands was the ascertainment of the financial losses caused by the refusal to enter into a contract. The national court distinguished between the causal event, the damage and the assets specifically affected by the adverse financial consequences thereof and held, first, that this Court, in its judgment in *Mines de potasse d'Alsace*, was

16 — Judgment of 16 December 1980 in Case 814/79 [1980] ECR 3807

17 — The plaintiff in the main proceedings.

18 — Case 814/79, *supra*, Opinion, p. 3836.

19 — 'Chronique de jurisprudence de la Cour de justice des Communautées européennes', *Journal du droit international*, 1982, pp. 463 and 472.

20 — *Mecoma BV* v *Stahlhandel GmbH*, *Répertoire de jurisprudence de droit communautaire*, I-5.3-B7.

referring only to the first two elements and, secondly, that the assets affected might be located anywhere in the world.

21. The Oberlandesgericht, Hamm, took the same approach in a judgment of 3 October 1978. The case concerned a German company which, having allegedly acted in breach of the competition rules in Belgium, was prohibited by a Belgian company from buying motor vehicles. The German company considered that the German courts had jurisdiction to hear its action in damages. The Oberlandesgericht found that any infringement of the competition rules had occurred in Belgium and the refusal to supply the plaintiff, which gave rise to the damage suffered by it, also took place in Belgium. Consequently, it considered that it could not be inferred from *Mines de potasse d'Alsace* that a court which had no connection with the materialization of the tort and happened to be situated at a place where financial loss was suffered had jurisdiction. [21]

22. The Italian courts have taken a similar line. Thus, it was held in a judgment of the tribunale di Roma of 15 March 1978 [22] that the Italian courts had no jurisdiction to hear an action to establish liability in tort concerning a transfer of shares between two companies which was regarded as contrary to certain prior agreements and took place on British territory. In the tribunale's view, the place where the damage occurred was the place where the infringement of the protected right took place.

23. Similarly, the tribunale di Monza, in a judgment of 28 September 1979, having stated that the dilemma concerning the place of the harmful event and the place where the damage occurred had been resolved by this Court by a 'judgment of Solomon', refused to treat the place where the damage arose and the place where the damage was suffered as the same. The case concerned an action by an Italian company which considered itself the victim of conduct contrary to the competition rules on the part of German companies in the Federal Republic of Germany, the effect was of that conduct having been to reduce the number of sales which it achieved in that country. The Monza court stated that 'il danno insorge lì dove si è realizzato quel fatto che si assume avere la caratteristica di esserne la causa, rimanendo del tutto ininfluente il luogo, coincidente o diverso, ove tale danno ha causato la diminuzione patrimoniale subita dal soggetto'. [23]

24. The distinction to which the Monza court drew attention between the place where the damage occurred and the place where it was suffered seems to me to be entirely pertinent. Indeed, it seems to me that the view that the court at the place where a body corporate's seat is situated has jurisdiction, as being the court of the place where the damage occurred, in so far as that is the place where the financial losses were ascertained, is indicative of a confusion between the *place of occurrence of the damage* and the *place where the damage was suffered.*

25. A similar distinction had already given rise to a controversy in France which throws

21 — *Répertoire de jurisprudence de droit communautaire*, I-5.3-B9.

22 — *AGIP SpA* v *British Petroleum Company Ltd (BP) and Oil Chemical and Transport Finance Corporation (OCT) SA*, *Répertoire de jurisprudence de droit communautaire*, I-5.3-B6, *Rivista di diritto internazionale privato e processuale*, 1979, p. 96.

23 — Tribunale di Monza, 28 September 1979, *Candy SpA* v *Schell und Stoecker Reinshagen GmbH*, *Il foro padano*, 1979, I, p. 225, note by S. Magelli, 'Concorrenza sleale e competenza internazionale', which contains the following comment on the decision: 'L'evento dannoso, infatti, allo scopo di stabilire la competenza giurisdizionale, consiste nelle perdite subite della concorrente nella sua attività (cosi per esempio nel diminuito giro di affari) ma non può coincidere con il danno patrimoniale misurabile nei fondi della sede dell'impresa.'

light on the question before us today. The third indent of Article 46 of the new French Code of Civil Procedure referred originally to the court 'within whose judicial district the damage *is* suffered'. Certain courts, having regard to the element of continuity inherent in the words 'is suffered', inferred that the victim of physical injury suffered damage at his domicile and that the court within whose judicial district the victim resided therefore had jurisdiction.[24] Other courts, however, took the opposite view.[25]

26. A decree of 12 May 1981 removed the ambiguity entirely by amending the third indent of Article 46, which now refers to the court 'within whose judicial district the damage *was* suffered', which confers on the provision in question an undeniable character of instantaneity.[26]

27. It will also be noted that certain types of damage which are particularly difficult to appraise, having regard to the rules of jurisdiction, have given rise to solutions which have prompted the national courts to decline to treat the place of the damage as the same as the place of the victim's domicile. That has happened in actions for damages for defamatory publications.[27]

28. Similarly, there are instances of refusal to take account of the place where the materiality of the damage was merely *ascertained.*[28]

29. Legal writers in the United Kingdom appear to take the same view. Thus, Mr Collins, in his work entitled *The Civil Jurisdiction and Judgments Act 1982*, states: 'Even though in one sense a plaintiff may suffer economic loss at the place of its business, that is not sufficient to confer jurisdiction on that place, for otherwise the place of business of the plaintiff would almost automatically become another basis of jurisdiction'.[29]

30. The position taken by German writers is similar. Mr Kropholler, in his work on European procedural law, stresses that

24 — Toulouse, 20 December 1976, *Gazette du Palais*, 1977.2.607; tribunal de grande instance de Rouen, 8 December 1977, JCP 1978, II. 18861; Aix-en-Provence, 12 January 1979, Dalloz Sirey, 1980.70, note by Y. Lobin; 5 October 1979, *Gazette du Palais*, 1979.2.633.

25 — In particular, Paris, 9 June 1978, *Gazette du Palais*, 1978.2.347, note by F. Dubois; Rouen, 28 February 1978, *Gazette du Palais*, 1978.1.238; Versailles, 6 November 1978, *Gazette du Palais*, 1979.1, summary, p. 547.

26 — In a judgment of 27 January 1982 (*Gazette du Palais*, 1982, 'Jurisprudence', p. 365), the French Cour de cassation, giving judgment on the old wording of Article 46 of the New Code of Civil Procedure, also held that the place where the damage is suffered is that where the victim is injured and not that of his domicile where he may, perhaps, continue to suffer from his injuries.

27 — For example, the cour d'appel, Paris, held that the French courts had no jurisdiction 'to adjudicate on a [person's] claim for compensation for all the damage suffered by him where his domicile in Paris cannot be regarded as the place where he suffered the damage caused by the distribution of the weekly publication in question abroad' (Paris, 19 March 1984, *Revue critique de droit international privé*, 1985, 'Jurisprudence', p. 141, note by H. Gaudemet-Tallon). The tribunal de Paris adopted the same solution (29 September 1982 and 27 April 1983, *Revue critique de droit international privé*, 1983, 'Jurisprudence', p. 670; 30 June 1984, *idem*, 1985, 'Jurisprudence', p. 141). H Gaudemet-Tallon, in two notes both on the judgments cited above and on the judgment of the cour d'appel, criticized that solution and expressed his preference for the view that the damage is personal to the victim, where he is legally established, that is to say at his domicile. However, that author acknowledges that that reasoning leads to recognition of the *forum actoris*

28 — Thus, in relation to a dispute between a French artist who had lent pictures for an exhibition in Italy and complained of the condition in which they were returned to him, the tribunal de grande instance, Paris, refused to declare that it had jurisdiction solely on the ground that the damage had been ascertained in Paris (18 October 1978, *Vasarely, dit 'Yvaral'* v *Caramel and Ratti, Répertoire de jurisprudence de droit communautaire*, I-5.3-B10)

29 — *The Civil Jurisdiction and Judgments Act 1982*, 1983, Chapter 4, p. 60.

concentration on the place where the damage occurs subsequently would lead to a move towards the *forum actoris.* [30]

31. In other words, the solution which opts for the *forum actoris* finds little favour. Moreover, the very nature of the action by a 'ricochet' victim suggested that we should be even firmer in excluding, in this case, the jurisdiction of the courts of the victim's domicile. [31]

32. I will not, however, conceal the fact that this touches upon one of the most delicate and polemical questions of the law of liability: the nature of 'ricochet' damage. Is it, to use the definition adopted by certain authors, merely 'the projection on to an indirect victim of damage suffered by an initial [32] victim' or is it, on the contrary, entirely separate damage? [33]

33. Furthermore, that question does not of course arise in the many Member States which do not give victims who suffer damage indirectly a right to compensation and thus are not familiar with the concept of 'ricochet' damage. [34]

34. Thus in the Netherlands a remedy is available against a third party only to insurers and social security authorities, [35] not to private persons.

35. Greece and Denmark also seem unaware of the concept of 'ricochet' damage in so far as their legal systems do not, in principle, grant the right to obtain compensation for indirect damage, except, in certain instances, against the State and employers. [33]

36. Under German law, victims of 'ricochet' damage cannot as a general rule obtain compensation. [36] On the other hand, Paragraphs 844 and 845 of the Civil Code make an exception to that rule by granting a right to compensation to those whom the direct victim had an obligation to maintain, unless that obligation was created by contract, and to those for whom the direct victim was under a statutory obligation to provide.

37. In the United Kingdom, although the victim of a severe psychological shock caused by the death of or injuries sustained by a member of his family, or even by a person unrelated by kinship, [37] may obtain compensation from the author of the harmful event, the courts take a strict line concerning the need for an objectively identifiable physical or mental consequence and refuse to award any compensation for ordinary non-material damage ('grief or

30 — *Europäisches Zivilprozessrecht, Kommentar zum EuGVÜ*, Hamburg, 1987, Article 5, paragraph 45, in particular: 'Es spricht viel dafür, den Ort des [weiteren] Schadenseintritts nach erfolgter Rechtgutverletzung für die Zustandigkeitsbegründung nicht ausreichen zu lassen. Denn sonst würde die Deliktzuständigkeit auf Kosten des in Art. 2 verankerten Grundsatzes des Beklagtenwohnsitzes stark ausgedehnt und einem Klägergerichtsstand angenähert.'

31 — See, however, G. Droz who, in his commentary on this Court's judgment in *Mines de potasse d'Alsace*, appears to take it as settled that a 'secondary' victim's damage is suffered at his domicile (op. cit., p. 613).

32 — Y. Lambert-Faivre: *Commentaire sous Cass. 2e Civ.*, 27 January 1965, D. 1965, 619.

33 — G. Viney: 'L'autonomie du droit à réparation de la victime par ricochet par rapport à celui de la victime initiale', D. 1974, *Chronique*, II, pp. 3 to 6.

34 — See colloque à la cour d'appel, Paris, 'L'évaluation du préjudice corporel dans les pays de la Communauté', preliminary report by A. Dessertine, October 1988.

35 — Ziektewet, Wet op de Arbeidsongeschiktheidsverzekering.

36 — Staudinger, Komm. sub § 844 BGB, p. 1357: 'Das Recht der unerlaubten Handlungen ist von dem Grundsatz beherrscht, daß nur der unmittelbar Verletzte Ansprüche auf Ersatz des daraus entstandenen Schadens hat . . .'; see also BGH NJW 1979, 1501.

37 — *Chadwick* v *British Railway Board* [1967] 1 WLR, 912, 914.

sorrow') which is not accompanied by any appreciable physical consequence.[38] However, since the Fatal Accidents Act 1846 and subsequent statutes, the members of a victim's family have been able to seek compensation for damage caused by his death, by way of exception to the common-law principle that 'in a civil court the death of a human being could not be complained of as an injury'.[39] It must be added that, under section 5 of the Fatal Accidents Act 1976,[40] where a person dies partly through his own fault and partly through that of a third party, the damages which can be awarded under the Fatal Accidents Act must be reduced proportionately.[41]

38. Let us now consider the laws of the Member States which unreservedly subscribe to the concept of 'ricochet' damage.

39. Under Portuguese law, all those who could require to be maintained by the victim are entitled to compensation if, by reason of the bodily injury suffered, the latter is not in a position to provide for their needs.[42] On the other hand, in the case of non-financial damage, only the direct victim and his heirs can seek compensation.[43] It must be observed that Articles 494 and 496 of the Portuguese Civil Code provide that the fault of the initial victim can be set up against the secondary victims.[44]

40. Under Italian law, Article 1227 of the Civil Code provides for reduction of the compensation if 'il fatto colposo del creditore ha concorso a cagionare il danno'. Legal writers are divided on the question whether a fault committed by the initial victim of the harmful event can be set up against secondary victims. Some consider that the wrongful act referred to in Article 1227 is only that of the initial victim and not that of a 'ricochet' victim who has committed no fault that contributed to the damage.[45] Others take the opposite view.[46] Italian case-law itself appears to be divided regarding the autonomy or otherwise of 'ricochet' damage.[47]

41. In Spain, the very existence of 'ricochet' damage is the subject of divergences in the case-law. Whilst the Criminal Chamber of the Tribunal Supremo insists on passing on to the heirs of the victim any rights to compensation, the First Chamber of the same court grants the right to compensation to all those persons who, by virtue of being

38 — J. Paull, in *Schneider* v *Eisovitch* [1960] 2 QB 430, 441; *Hinz* v *Berry* [1970] 2 QB 40, 42: 'In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognizable psychiatric illness caused by the breach of duty by the defendant.' We should also mention the compensation for bereavement introduced by the Administration of Justice Act 1982, fixed at the flat rate of UKL 3 500 — see G. Viney and B. Markesinis: *La réparation du dommage corporel, essai de comparaison des droits anglais et français*, 1985, p. 78.

39 — *Backer* v *Bolton* [1808], 1 Camp. 493.

40 — Amended by Article 3(2) of the Administration of Justice Act 1982.

41 — See on this point G. Viney and B. Markesinis, op. cit., p. 74 *et seq.*

42 — Article 495.3 of the Civil Code (indemnizaßão a terceiros em caso de morte ou lesão corporal).

43 — Article 496.2 (danos não patrimoniais).

44 — Article 496.3 (danos não patrimoniais).

45 — A. De Cupis: '*Il danno*', *teoria generale della responsabilità civile*, Vol. I, p. 255, 'In tema di concorso del fatto colposo del danneggiato', *Foro it.*, 1959, I, 966 and 967, *Teoria e pratica del diritto civile*, p. 544 *et seq.*; Forchelli: *Il rapporto di causalità nell'illecito civile*, p. 151, note 51.

46 — Andrioli: *Colpa della vittima e risarcimento del danno dovuto ai congiunti iure proprio*, Milan, 1964, Scritti giuridici in memoria di M. Barberio Corsetti; Duni: 'Responsabilità da fatti illeciti', *Giust. civ.*, 1966, IV, p. 57 *et seq.*

47 — For: tribunale di Livorno, 12 December 1961, *Giur. it.*, 1962, I, 2, 610, note by M. Berti; corte d'appello di Milano, 28 November 1961, *Giust. civ.*, 1962, I. p. 974; tribunale d'Udine, 12 April 1963, *Giur. it.*, 1964, I. 2, 224; tribunale di Genova, 22 May 1974, Rep. *Giur. it.*, 1974, Resp. civ. 127. Against: Corte di cassazione, 20 March 1959, *Foro it.*, 1959, I, 966.

immediately related to the direct victim, suffer non-material or material damage, without its being necessary for them to prove their status as heirs of the deceased. [48]

42. Legal writers are divided between the two differing trends in the case-law. [49] The question of the extent to which 'ricochet' damage is separate and whether the fault of the initial victim can be set up against the indirect victims appears still be to open. Legal writers seem to favour the view that the degree of the liability attributed to the author of the harmful event should be reflected in the compensation awarded to the 'ricochet' victims. [50]

43. The question of 'ricochet' damage raised numerous questions in Belgium both in legal literature and in the case-law, until the Cour de cassation delivered a series of definitive judgments which determined that the extent of the compensation due from the author of an infringement should vary pro rata to the seriousness of the fault of a victim with whom the person seeking compensation had family and affective links. The Cour de cassation emphasized that the damage in question is damage 'by repercussion or by ricochet' deriving exclusively from the links between the initial victim and the person seeking compensation. [51] The theory that 'ricochet' damage is separate is thus not accepted in Belgian law.

44. In Luxembourg the Cour de cassation, by judgment of 22 December 1988, [52] contested that a fault committed by the direct victim of damage could be relied on as against third-party 'ricochet' victims stating that 'although that third party's action is distinct — by virtue of its subject-matter, even where the third party is also the victim's heir — from any action which the said victim might have been able to bring, it nevertheless derives from the same originating event, having regard to all the circumstances'. That judgment brings an end to a degree of vacillation in the case-law, although a reading of the Luxembourg cases on that point shows that most courts were already ruling that 'ricochet' damage was not separate and consequently that any fault on the part of the direct victim of the damage could be set up as a defence. [53]

48 — Tribunal Supremo, Sala I, 20 December 1930, 8 April 1936, 27 April 1953, 9 June 1969, 26 January 1972, cited by L. Díez-Picazo and A. Gullon: *Sistema de derecho civil*, Vol. II, Madrid, 1985, p. 625; see also R. de Ángel Yágüez: *La responsabilidad civil*, Bilbao, 1988, pp. 317 and 318; L. Díez-Picazo: *Estudios sobre la jurisprudencia civil*, Vol. I, Madrid, 1979, No 123, p. 296.

49 — Some commentators see in the Spanish Law of 6 October 1980 on insurance contracts a condemnation of the decisions of the First Chamber of the Tribunal Supremo, in so far as Article 73 allows a direct action against the insurer to be brought only by the victim and his heirs (see, for a more detailed analysis, L. Díez-Picazo and A. Gullon: *Sistema de derecho civil*, Vol. II, Madrid, 1985, p. 625).

50 — L. Díez-Picazo: *Estudios sobre la jurisprudencia civil*, op. cit., p 300, states, 'Así como en el caso de demanda del heredero hay una relación directa conducta-daño (muerte), en el caso de demanda de un no heredero la relación es ya indirecta conducta-muerte-repercusión de la muerte en el actor, lo cual nos debe llevar a valorar decisivamente la participación del agente en el hecho, pues si fue doloso (homicidio) debe responder de todas sus consecuencias (see Arts 1107, 2, del CC y 104 del Código penal), mientras que si fue debido a culpa o negligencia sólo debe responder del daño que sea "consecuencia necesaria" (see 1107, 1, del CC).'

51 — Judgment of the combined Chambers, 19 December 1962, Opinion of Mr Advocate General M. Dumon, *Revue de droit pénal*, 1962, 63, p. 568; J. T. 1963, p. 673; RGAR 1963, Nos 7105 and 7092, note by Dalcq; judgment of 17 June 1963, J. T. 1963, p. 710, RCJB 1964, 446, note by Kirkpatrick; judgment of 19 December 1967, Pas. 1968, 537; judgments of 19 October 1976 (*Pas.* 1977, 213), 15 April 1980 (*Pas.* 1004, RGAR 1982, 10499), 6 January 1981 (RGAR 1983, 10682), 10 February 1981 (*Pas.* 623) and 14 April 1981 (*Pas.* 915), judgments cited by R. André: *La réparation du préjudice corporel*, p. 301.

52 — 34/88 *SNCFL* v *Gillet, Burg and Trasolux.*

53 — In favour: cour d'appel, 18 February 1987, No 8582; cour d'appel, 1 February 1984; tribunal d'arrondissement, Luxembourg, 21 June 1972, *Pasicrisie* L.22, 299; cour d'appel, 6 December 1983, *P* v *Reckinger*; tribunal d'arrondissement, Luxembourg, 9 October 1984, *Baltes* v *Thinnes*; cour d'appel, 10 July 1985, No 8109, *Bulletin St Yves*, No 65, p. 50; cour d'appel, 5 January 1987, No 7660; cour d'appel, 1 February 1985, *Pasicrisie* 26, 147; cour d'appel, 19 December 1984, *Pasicrisie* 26, 241; tribunal d'arrondissement, Luxembourg, 30 October 1987, No 1775/87; cour d'appel, 14 July 1987, No 266/87; cour d'appel, 17 February 1989, No 45/89 U. Against: tribunal d'arrondissement, Diekirch, 11 February 1988, No 50/88; cour d'appel, 22 November 1984, No 6347.

45. In French law, after many differences of opinion in the case-law and amongst legal writers, a judgment of the Cour de cassation sitting in plenary session of 19 June 1981 held that whilst the action of a 'ricochet' victim is distinct as regards its subject-matter from any which the direct victim might have been able to bring, 'it nevertheless derives from the same originating event, having regard to all the circumstances'. [54]

46. It will be observed therefore that in the Member States of the Community which accept the concept of indirect damage it has never been accepted that that damage is separate — so as to provide a ground for justifying separate bases of jurisdiction — from that suffered by the initial victim.

47. The general philosophy of the Convention prompts me to advocate rejection of a concept according to which jurisdiction attaches to the court of the place where the 'ricochet' victim suffers damage, that is to say the court of his domicile.

48. Even though a move in that direction appears attractive, in so far as it would be beneficial to the victim, it must be observed that, within the general scheme of the Convention, the concern to preclude the *forum actoris* and consequently — since it is so easy to change one's domicile — 'forum shopping' is much further to the fore than the idea of favouring the victim. [55] Moreover, the judgment in *Mines de potasse d'Alsace* is based essentially on the requirements of the sound administration of justice. [56]

49. In addition, the disadvantages of such a solution seem to me to be too great for it to be adopted. Where there are a number of indirect victims there would be as many competent courts as different domiciles. Admittedly, the claims would be connected but the fact is, as Mr Huet points out, the Brussels Convention 'does not use the fact that actions are related as the basis for a general head of secondary jurisdiction allowing related actions to be concentrated in a single court'. [57] As Mr Droz also emphasizes, 'the court of the domicile, of the wrongful act or the materialization of the damage will be reluctant to stay the

54 — Cour de cassation, assemblée plénière, 19 June 1981, JCP 1982, No 19712, report by conseiller Ponsard.

55 — See J. M. Bischoff and A. Huet: *Chronique de jurisprudence de la Cour de justice des Communautés européennes*, op. cit., p. 472, in which the authors state: 'Even if it is admitted that the idea of favouring the victim was not entirely absent in the special jurisdiction established by Article 5(3) . . . the fundamental rule [of the Convention] despite everything is that the jurisdiction of the *forum rei* prevails'. See also P. Gothot and D. Holleaux: *La convention de Bruxelles du 27 septembre 1968*, paragraph 89, p. 50, where it is observed that 'although, during the oral argument in *Mines de potasse d'Alsace* before the Court of Justice some presented Article 5(3) as being inspired by the idea of favouring the victim . . . , the judgment makes no reference to that view and is based essentially on the requirements of the sound administration of justice'. See also the opinion of Mr Desantes Real, who states that: 'Este objetivo general de protección a la víctima de "poluciones transfronterizas" no aparece claramente reflejado ni en la letra ni en el espíritu del artículo 5.3, precepto que, a mi modo de ver, se explica únicamente por consideraciones de buena administración de justicia, "para facilitar la instrucción de la causa por el juez más próximo a los hechos del litigio": nada impide que, por ejemplo, esta parte "débil" perjudicada sea una poderosa multinacional o incluso un Estado', in *La competencia judicial en la Comunidad europea*, 1986, p. 297. For an opposing view, see P. Bourel: *Revue critique de droit international privé*, 1977, p. 571, who considers that the concern to ensure sound administration of justice would have prompted the authors of the Convention, if they had taken account only of that aspect, to provide for compulsory and exclusive jurisdiction in this area.

56 — See, on this point, T C Hartley: *Civil jurisdiction and judgments*; he considers whether or not the victim is favoured and concludes 'The two main areas in which this problem is likely to arise are pollution and product liability: in both cases modern opinion tends to favour the plaintiff', 1984, Chapter 4, p. 52

57 — *Journal de droit international*, 1977, p 728, note p. 733.

proceedings or decline jurisdiction in favour of the courts of another country where jurisdiction is justified only by the occurrence of damage suffered by a third party and confined to that country'.[58] Moveover, the exception concerning related actions provided for in Article 22 of the Convention presupposes that the courts seised have concurrent jurisdiction, which then raises the problem of determining whether the jurisdiction of the court before which an action is brought by reason of the place where the damage occurred will be limited to the matter of reparation for the damage occurring within its judicial district. Certain authors have analysed that question.[59] That delicate problem is not before the Court today, but it may reasonably be concluded that the seeds of that difficulty were present in the solution adopted in the judgment in *Mines de potasse d'Alsace* and that sooner or later it will be submitted for consideration by the Court.[60]

50. This multiplicity of courts of competent jurisdiction does not seem to me to be without consequences for the other aspect of the Convention, namely the recognition and enforcement of judgments. From that point of view, a solution whereby each 'secondary' victim could bring proceedings before the courts of his domicile encourages the dispersion of actions and thereby accentuates the risks of irreconcilable decisions, a ground for refusing recognition or an order for enforcement under Article 27(3) of the Convention.

51. In addition, many of the problems which certain commentators believe they perceive in the *Mines de potasse d'Alsace* judgment derive from those authors' — in my opinion incorrect[61] — view that the solution adopted in that judgment leads to the possibility of jurisdiction being attributed to the court in whose judicial district the victim has his domicile. Here again, that view — which appears to reveal confusion between the place where the damage occurs (the very words used in the judgment) and the place where the damage is suffered — would have the disadvantage of conflicting with the line of authority usually followed on that point by the courts of the Member States.

52. Accordingly, the foregoing considerations lead me to consider that the place where the damage occurs is, for indirect victims, the place where the *initial* damage manifested itself, in other words, the place where the damage to the *direct* victim occurred. The need to avoid a large number of possible jurisdictions, with all the disadvantages to which I have referred, makes it necessary to use as a reference an element which can be *common* to all the indirect victims, that is to say either the place of the event giving rise to the damage or the place where the initial damage occurred. Such a solution also has the advantage of not overturning the solutions usually adopted in the

58 — Note in 'Tribunal de grande instance de Paris', 19 June 1974, Dalloz Sirey, 1975, p. 638; on the more general problem of related actions and that of *lis alibi pendens*, see F. Pontonio: *Problemi di competenza e di litispendenza nel diritto processuale internazionale con riferimento alla Convenzione di Bruxelles del 27 settembre 1968*, Giuffrè, 1978, Vol. XLIII, No 6, p. 811; M. Desantes Real: 'La litispendencia internacional: consideraciones sobre su regulación convencional y futura aplicación en España', *Justicia*, 1983, No IV, p. 845; E. Blackburn: '*Lis alibi pendens* and *forum non conveniens* in collision actions after the Civil Instruction and Judgments Act 1982', *Maritime and Commercial Law Quarterly*, 1988; P. W. L. Bogaert: '*Ius vigilantibus:* tactics of forum shopping under the EEC Judgments Convention', *European Competition Law Review*, 1988, Vol. 9, editorial.

59 — H. Gaudemet-Tallon: *Revue critique de droit international privé*, 1983, 'Jurisprudence', p. 670.

60 — See also, on this point, in favour of jurisdiction limited to damage occurring within the court's district, G. Droz, Dalloz Sirey, 1977, p. 613, and, in favour of general jurisdiction of the court where the damage is suffered, P. Bourel: *Revue critique de droit international privé*, 1977, p. 563.

61 — G. Droz, *supra*, H. Gaudemet-Tallon, *supra*; as I have already pointed out, there appears to be nothing in the Court's judgment in *Mines de potasse d'Alsace* to indicate such a consequence. As far as legal persons are concerned, such an approach would result in attributing jurisdiction to the courts for the locality of the registered office in all proceedings concerned with tortious liability in so far as a legal person can always claim that that is the place where it ascertained its financial losses and, consequently, suffered the damage. It is unnecessary to demonstrate the extent to which the *forum actoris* would then prevail to a very considerable extent.

Member States which recognize the concept of 'ricochet' damage and which consider that such damage is not separate from the direct damage. In that regard, Messrs Geimer and Schütze, in their commentary on the Convention, state that the rights to compensation of indirect victims are *incidental* to those of the initial victim, a fact which must be taken into account as far as the rules concerning jurisdiction of the courts are concerned. [62]

53. Furthermore, the place where the initial damage manifested itself is usually closely related to the other constituent elements of any liability, but the same cannot be said, in most cases, of the domicile of the 'ricochet' victim. It was the existence of that relationship which prompted this Court, in the *Mines de potasse d'Alsace* judgment, to opt for both the place of the event giving rise to the damage and the place where it occurred. [63]

54. Finally — and most importantly — that solution seems to me to be in much greater harmony with the general objectives of the Convention since it does not contribute to the creation of a *forum actoris*, something which its authors, subject to specific exceptions, sought to exclude.

55. In conclusion, I propose that the Court should rule as follows:

'(1) The rule on jurisdiction which allows a plaintiff, under Article 5(3) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, to choose between the court for the place of the event giving rise to the damage and the court for the place where the damage occurs is applicable to indirect victims of damage.

(2) The place where the damage is suffered by such victims must be deemed to be the place where the damage suffered by the initial victim occurred.'

62 — *Das EWG-Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen*, Systematischer Kommentar von Dr R. Geimer und Prof. Dr R. A. Schütze, Munich, 1983, XVI, p. 633: 'Gleiches gilt für Ersatzansprüche mittelbar Geschädigter. Deren Ansprüche sind akzessorisch zu denen der unmittelbar Geschädigten. Dies wirkt sich auch zuständigkeitrechtlich aus.'

63 — Paragraph 17.