

"LOI BADINTER"-- ON TRAFFIC ACCIDENTS AND BEYOND

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In 1982, I was daring enough to write: "France may be on the verge of a rational law of traffic accident compensation."¹ In fact, we now have a law of traffic accident compensation, but it is far from rational. Good Ferd, who knew my passion for the subject, must look upon me from Heaven with the indulgent and humorous smile that reflected his generous personality.

We have a statute: the *Loi du 5 juillet 1985, Tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*.² In common parlance, the statute has been named *Loi Badinter* after the Minister of Justice, Robert Badinter, who persuaded the French Parliament to pass it. It accomplishes a sweeping reform: the subject of Chapter I is the compensation of traffic accident victims; Chapter II, at long last, brings order and clarity to the harmonization of "tort" compensation and collateral benefits, whether in the field of traffic accidents or in any other case of personal injury or death; similarly, Chapter III contains a number of provisions that modernize many points of procedure and substantive law, essentially for the benefit of personal injury victims. Chapter I itself is divided into three parts: the first deals with the right to compensation; the second deals with insurance problems; and the last establishes a procedure that requires the insurer to make a reasonable offer of settlement to the traffic accident victim within a reasonable time. It can hardly be disputed that the new statute is in general highly beneficial to traffic accident victims and to all other personal injury

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1. Tunc, *The French Law of Traffic Victims Compensation: The Present and the Possible*, 31 AM. J. COMP. LAW 489 (1983).

2. This new area has been the subject of a vast literature. The main commentaries are: CHABAS, *LE DROIT DES ACCIDENTS DE LA CIRCULATION APRÈS LA RÉFORME DU 5 JUILLET 1985* (2nd ed. 1988); GROUDEL, *LE DROIT À L'INDEMNISATION DES VICTIMES D'UN ACCIDENT DE LA CIRCULATION* (1987); LEGAIS, *CIRCULATION ROUTIÈRE-L'INDEMNISATION DES VICTIMES D'ACCIDENTS* (1986). Furthermore, excellent treatments of the subject appear in the civil liability or insurance treatises; see in particular: LAMBERT-FAIVRE, *DROIT DES ASSURANCES*, Nos. 707-877 (7th ed. 1990); Dejean de la Bâtie, *Responsabilité délictuelle*, § 448 *ter*, Nos. 144-161 (t.VI-2 of *DROIT FRANÇAIS D'AUBRY ET RAU*, 8th ed., Ponsard and Fadlallah editors, 1989). The present article will refer more

victims. Few statutes, however, have been the target of greater opposition.

In an earlier article, I explained the French law of traffic accidents before the *Loi Badinter*.³ The paragraphs below summarize the pre-Badinter law. Since 1958 its primary feature was the owner's and driver's obligation to carry liability insurance. A second feature was the settlement of property damage resulting from an accident through a general agreement between insurance companies.⁴ If a collision resulted in only property damage, the two parties filled out a summary of the accident, signed it, and sent it to their respective insurers. Their comparative negligence was evaluated on the basis of the insurers' agreement. Each party directly received from his insurer the compensation which he deserved. Of course, the parties were not bound by the insurers' agreement. Each party could go to court and claim greater compensation. As a matter of fact, this last alternative never occurred. (More precisely, according to a recent private statement of an insurer, it happens in one case out of 10,000!)

The law governing personal injury for traffic accidents was more complex. As is well known, the French Civil Code, like its Louisiana counterpart, provides for liability for fault, subject to stricter liability standards for damage caused by animals, falling buildings, minors or servants. However, in response to the problem of traffic accidents, the Cour de Cassation decided in 1930, on the basis of a mere stylistic transitional provision of the French Civil Code without any substantial meaning, that the "keeper" of a thing (usually its owner) bore *prima facie* liability for the damage caused by the thing. This liability was not, however, absolute. The keeper was partly or totally discharged of the liability in a number of circumstances and in particular when a victim's fault had partly or exclusively caused the accident. Of course, the auto insurer, to avoid liability, invoked the

often to these treatises, where all references may be found, than to the huge case law, which most readers would find difficult to consult.

3. Tunc, *supra* n. 1. Cf. Stone, *Liability for Damage Caused by Things*, §§ 24-26, 70 (1972; vol. XI/1, Torts, of the INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW); VON MEHREN AND GORDLEY, *THE CIVIL LAW SYSTEM*, ch. 9 (2nd ed. 1977); Zweigert and Kötz, *An Introduction to Comparative Law*, Vol. 2: THE INSTITUTIONS OF PRIVATE LAW, 353-361 (translated Weir, 2nd ed., 1987); LAWSON AND MARKESINIS, *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* (1982); DUTTY, *Compensation for Personal Injury in France*, in OLDERTZ AND TIDEFELT, *COMPENSATION FOR PERSONAL INJURY IN SWEDEN AND OTHER COUNTRIES*, 319 (1988). See also Viney and Markesinis, *La réparation du dommage corporel*, Essai de comparaison des droits anglais et français (1985); Alt-Maes, *Une résurgence du passé: la présomption d'irresponsabilité de l'art. 3, al. 2 et 3, de la loi du 5 juillet 1985*, D.1990.chr.219.

4. LAMBERT-FAIVRE, *supra* n.2, Nos. 819-822.

victim's fault. In most of the cases, therefore, the victim was judged on the basis of comparative negligence.

A special regime for traffic accident victims' compensation had been proposed a number of times since the beginning of the century. Unlike the philosophy applied every day by the courts,⁵ the philosophy behind these proposals was that accidents resulted most often from an error that every decent citizen might commit (and which, therefore, did not fit the definition of fault currently given), that the consequences of such errors are usually tragically disproportionate to their causes, and that society's task is to alleviate the tragedy rather than to identify the guilty party without any deterrent effect. Furthermore, motorists' liability was then and is now compulsorily covered by insurance. The regime of comparative negligence is thus entirely destabilized: the party who has caused the damage is completely immune from any liability, even if he has behaved recklessly, while any lapse by the victim can deprive him or her of all compensation. Civil liability no longer deters us from killing or maiming someone on the road or in the street; it only deters us from being killed or maimed--which is hardly necessary. If loss is spread to benefit the wrongdoer, why not equally spread the loss to benefit the victim?

Eminent jurists often made such proposals. Neither Parliament nor the Government responded. In 1964, however, the Minister of Justice, Jean Foyer, who was also a law professor, convened a large committee to prepare the reform. Passionate opposition from the bar and the insurance industry forced him to abandon the cause.⁶ At least, the problem had been brought to the attention of both the legal profession and the public.

In 1981, another professor of law, Robert Badinter, became Minister of Justice. One of his first tasks was again to convene a commission to prepare the reform. It was, however, a small commission. Moreover, the insurance industry, the most formidable opponent in 1964 and 1965, was no longer hostile to the reform. In 1964, unprepared for reform, the insurers feared that the reform might lead to socialism. In 1981, they understood that no-fault compensation could be achieved without any structural change and that it could avoid significant administrative costs and public dissatisfaction. Only the bar

5. For broader research into the philosophies of "liability without fault" and "risk control," see Palmer, *Trois principes de la responsabilité sans faute*, 39 REV.INT.DR.COMP. 825 (1987); Priest, *The New Legal Structure of Risk Control*, 207 DAEDALUS (Fall 1990).

6. See von MEHREN AND GORDLEY, *supra* n. 3, at 636-639; Tunc, *Traffic Accident Compensation in France: The Present Law and a Controversial Proposal*, 79 HARV. L. REV. 1409 (1966).

was passionately hostile, for an obvious reason: every day 250 traffic accident cases are filed in the courts, and many of them proceed subsequently to the courts of appeal and a significant number to the Cour de Cassation.

In its fight against the proposed reform, the bar had at its disposal a powerful instrument and powerful allies. The most widely read legal journal among practicing lawyers and judges is *La Gazette du Palais*, owned or at least entirely controlled by a prominent member of the plaintiff bar. Furthermore, for reasons which cannot be explained here, the success of the socialist party at the 1981 elections had created a climate of political tension unknown in the preceding decades. A center-left government took the place of a center-right government, but the most influential center-right newspaper, *Le Figaro*, depicted it as a Marxist government; every day headlines on the front page depicted France as going down the road to catastrophe and called citizens to arms. One cabinet member, Robert Badinter, was the favorite target of the attacks for reasons which, again, cannot be explained here. Traffic accident reform was doomed to be seen in a most unfavorable light thanks to the most widely read professional journal and the most popular and influential newspaper among judges. The fact that the reform had been initiated a few years before by Jean Foyer, who prided himself for being a strong rightist, was completely overlooked.

Robert Badinter therefore worked under very difficult conditions. He took his time and followed a policy of appeasement. Having received in spring 1982 the report of the committee he had established,⁷ Badinter circulated it widely among courts, bars, law schools, and associations, and he devoted more than three years in consultation and discussion with all interested parties. He continued, however, to face a strong opposition. A few weeks before presenting a bill to Parliament, he could not be sure that the practicing lawyers in the socialist party would not oppose the Government's project.

To obtain approval from Parliament, Robert Badinter was obliged to devise a bill full of compromises and, therefore, of contradictions, at least as regards the most controversial provisions: those defining the right to compensation. He was rewarded for this low profile. After a few amendments favorable to victims, the bill received unanimous approval. This was not, however, the end of the story. Opposition to the statute surged again in hostile commentaries and adverse judicial constructions. Only in 1987 did the Cour de Cassation, after a period of self-restraint, intervene with clarity and strength in the debates in order to give the statute its intended meaning.

7. Cf. Tunc, *supra* n. 1, at 494-495.

It is impossible here to give a full account of the "*Loi Badinter*." We must content ourselves with consideration of its provisions defining the right to compensation (I), and giving an idea of the main difficulties of interpretation and their judicial solutions (II). A few remarks will be made by way of conclusion (III).

I. The Right to Compensation Under the "*Loi Badinter*"

The new law is based on a number of distinctions. First, property damage is beyond the law's scope. By placing property damage under the law of comparative negligence, Section 5 of the law practically leaves it to the present insurers' agreement. Only points of detail are slightly modified. Another distinction is much more unfortunate: while the law was intended to provide traffic accident victims with no-fault coverage, Section 4 of the statute still subjects drivers to the law of negligence. It would be an exaggeration to state that they do not benefit from the new legislation: apart from the no-fault coverage, they benefit, as do the other victims, from all the procedural and substantive amendments that the new statute had made to the law. Section 2 even eliminates for their benefit and that of other victims the exception of *vis major*. However, on a basic point, drivers are deprived of the benefit of the law. Why?

Robert Badinter, of course, never labored under the illusion that this elimination would have the slightest bearing on drivers' behavior. His only concern was with the cost of the reform. In France, for everyone concerned--lawyers, courts, victims--public opinion is devoted to the principle of "full compensation," even as regards pain and suffering. Equally untouchable was the political need not to increase insurance premiums. The Minister of Finance and the Parliament would have opposed any reform resulting in a premium increase. Under such circumstances, the insurer-members of the commission created in 1981 easily convinced Robert Badinter that drivers, for the time being, had to be sacrificed for the success of the reform. This was probably true. However, the insurers never concealed that they would offer to the drivers an option of no-fault voluntary coverage. They have done it, and this type of coverage is available for a modest premium.

The right to compensation of nondriver victims (pedestrians, cyclists, passengers) is full of qualifications. Section 3 starts with a principle of no-fault compensation: "Victims who are not drivers . . . receive compensation of their personal injury damage irrespective of their fault . . ." However, the principle was immediately qualified: "with exception for their inexcusable fault if it is the exclusive cause of

the accident." Robert Badinter had felt that such a proviso was necessary in order to obtain the agreement of Parliament. However, before the Parliament, he stated vigorously that the exception should apply legitimately only in the most extraordinary circumstances. Furthermore, the next paragraph of Section 3 provides an exception to the exception: straight no-fault coverage is provided for victims under sixteen years of age, over seventy, or eighty percent incapacitated.

This system, although rather complex, is not too difficult to understand. Clearly, Robert Badinter wanted no-fault coverage of all traffic accident victims. But he had to abandon the drivers to the law of comparative negligence. Even for other victims, he had to accept a slightly less-than-automatic compensation for victims between sixteen and seventy years of age. Robert Badinter had considered that he was politically obliged to yield something to his adversaries, but he knew that it was a dangerous concession.

II. The Statute Before the Courts

Section 47 of the statute provided for its immediate application, even to past accidents and to cases already pending before the courts. As traffic accidents constitute a large part of the courts' work (as mentioned earlier, 250 new cases are entertained every day), a great number of decisions immediately had to address the construction of the law. It was soon obvious that a number of courts were hostile to the law for several reasons.

The Reasons for a Hostile Climate.

First, if most of the law professors favored the new law, a small yet hostile minority had been extremely vocal in their opposition to the project, and they immediately published unfavorable commentaries. Practitioners, of course, also did their best, either in commentaries or cases before the courts, to discredit the new law. Unfortunately, other urgent duties overtook the professors who were favorable to the law and who would have preferred to publish positive commentaries on it. Thus, in nearly all legal journals, the law was abandoned to its adversaries.

Second, as earlier mentioned, the project's opponents had unjustifiably placed it in an unflattering political light. Thus, a significant number of judges saw the fight against the law as a fight for a certain conception of society. Liability for fault was considered a pillar of our society. Compulsory liability insurance made fault meaningless for drivers who had damaged others. But that was

overlooked and, in any case, under the pre-reform law, victims (if victims exclusively and not also drivers) had to pay for their faults or errors.

Finally, even for a judge who tried to apply the law with complete objectivity, the task was sometimes a difficult one. The law, besides giving solutions to which the judge is unaccustomed, is based on concepts unfamiliar to him. For instance, victims other than drivers may claim compensation from the insurer of any motor vehicle "involved" (*impliqué*) in the accident. This is incomprehensible to a judge who, for decades, has based his decisions on causation--difficult as that concept may be to handle. For the law's drafters, since all drivers are insured, and as compensation always comes from a pool of drivers united in an insurance company, any link between the accident and one of these pools through a vehicle had to be sufficient to commit the resources of the pool if all victims were to receive compensation. But a judge was not accustomed to this type of reasoning. To make the matter worse, the new philosophy did not prevail throughout the new law. Compromise had obliged the drafters to make room for questions of involvement and causation, side by side.

The "inexcusable fault, exclusive cause of the accident."

One problem was crucial in the application of the law: the interpretation courts would give to the expression "inexcusable fault, exclusive cause of the accident" ("*faute inexcusable si elle a été la cause exclusive de l'accident.*"). As explained earlier, the law conferred on nondriver victims quasi-automatic coverage so long as their inexcusable fault was not the exclusive cause of the accident. Again, before Parliament, Robert Badinter, who was to obtain unanimous approval of the law, had explained that there should be resort to the exception only in the most unusual circumstances. However, if a judge wanted to defeat the law, it was very easy to state, in any particular case, that the victim had committed an inexcusable fault that was the exclusive cause of the accident. Is it not inexcusable, for instance, for a pedestrian to step down from a narrow and crowded sidewalk without looking behind him to see whether a car is coming? If a pedestrian has overlooked this elementary precaution, is not his behavior the only cause of the accident? Even if the judge is not hostile to the law, his frame of mind, shaped by years of decisions made under the law of negligence, makes him reluctant to grant full compensation to the family of a man killed under such circumstances.

Not surprisingly, courts initially resorted to the exception broadly. The exception was a hole in the dam. The number of decisions made on the subject makes it impossible to refer to concrete cases. One can quote from a number of observers. Hubert Groutel

states: "One has the feeling that not much had changed. Any fault which previously exonerated fully the defendant is now baptized 'inexcusable.'"⁸ According to Yvonne Lambert-Faivre:

While the will of the legislator obviously was to limit the cases of exclusion of compensation to exceptional situations where the defendant's behavior had been truly 'asocial,' quite a number of decisions of the courts of first instance and appeal at first based their decisions on 'inexcusable fault,' sometimes in trivial circumstances, and neglected the cumulative condition required by the law, that this fault had been the 'exclusive cause' of the accident.⁹

The last witness whom we shall call is Noël Dejean de la Bâtie:

Many courts, probably considering excessive the favors granted by the law to unmindful victims, had a propensity to call such behavior inexcusable (of pedestrians or cyclists) which, though contrary to elementary rules of the Traffic Code, were nevertheless the result of haste or lapse of attention more than deliberate recklessness.¹⁰

The Cour de Cassation showed no desire promptly to intervene in the problem. Considering the passions of the moment, this reluctance was wise. A few years earlier, the Court had painfully recognized the limits of its power in the matter of traffic accidents. A decision of July 21, 1982, the *Desmares* case, highly favorable to traffic accident victims, was announced on the radio and television and made the front page of most national newspapers, an incident without precedent in France.¹¹ But the coverage of a number of newspapers and the commentaries published by the most widely read (not the best!) legal journals were passionately critical. A revolt occurred among the judges of first instance and of courts of appeal. When Parliament passed the *Loi Badinter*, the courts of appeal were equally divided between those following and those not following the *Desmares* decision. This split also was without precedent. It was, furthermore, a very unfortunate situation. The problem of traffic accident compensation was so important that it was giving rise to 250 lawsuits per day, and French law was no longer unique. Obviously, after the vote of the *Loi Badinter*, the Cour de Cassation was afraid, as long as

8. GROUDEL, *supra* n. 2, at 98.

9. LAMBERT-FAIVRE, *supra* n. 2, at No. 781.

10. Dejean de la Bâtie, *supra* n. 2, at 349.

11. Cf. Tunc, *supra* n. 1, at 495-496.

the passions had not subsided, to make a decision which would have entailed similar reactions. At any rate, the Court wisely chose not to make a hurried pronouncement; instead it waited for a while in order to gain more experience and some perspective.

On July 20, 1987, the situation dramatically changed, and the law recovered its full strength. On that day, the Cour de Cassation made ten comparable decisions and justified them by the same statement: "the only act that is inexcusable, within the meaning of the law of July 5, 1985, is a voluntary fault of exceptional gravity, exposing its author, without valid reason, to a danger of which he should have been aware."¹²

Clearly, the wording had been carefully considered so as to narrow the exception. One may doubt, however, whether the spirit of this ruling would have been fully followed if the Cour de Cassation had not made it in a spectacular manner. In one afternoon, the Court considered eleven cases, originating in different courts of appeal, where compensation of the victim (a pedestrian) had been refused. The Court quashed ten of these decisions and left only one standing. Of course, it is unpleasant for a court of appeal to see one of its decisions quashed. This implies that the court has misunderstood or misapplied the law. When its decisions are frequently quashed, the presiding judge may feel that his superiors will look down upon him and that his chances for promotion in the hierarchy will be reduced. Thus, in one afternoon, ten courts of appeal (roughly a third of them all) received a severe admonition. As for the others, the lesson was clear. The decisions of the Cour de Cassation deserved in such a context a statistical reading: the judgment of the court of appeal that refused to compensate a victim would have only one chance out of eleven to be left standing by the Cour de Cassation. Why then would a court of appeal waste its time considering carefully the victim's behavior and judging it in terms of criteria laid down by the Cour de Cassation? Even considerations of administration of justice were to lead the courts of appeal to automatic compensation of the victims: why favor the insurer if the victim could rely on the Cour de Cassation to quash it? For most courts of appeal, the matter became clear: they would reject the claim of inexcusable fault as an exclusive cause of the accident, except perhaps in the most extraordinary circumstances. A number of insurance companies also considered the matter settled: there was no point in discussing the victim's behavior, except, again, in the most extraordinary circumstances.

12. Civ.2e, July 20, 1987 (11 cases), BULL.CIV. II, No. 160, 161. The decisions are also reproduced as an annex to Bloch, *La faute inexcusable du piéton (Deux ans de jurisprudence et le coup d'arrêt de la Cour de cassation le 20 juillet 1987)*, J.C.P. 1988.I.3328.

The circumstances have to be extraordinary to give an insurer a chance! In most of the ten cases in which the Cour de Cassation had quashed the court of appeal decision for having found an inexcusable fault as an exclusive cause of the accident, it was crystal clear that, under the previous law, the victim would not have received a cent. In one case,¹³ the court of appeal found that the victim, a pedestrian, ignoring a protected pedestrian crossing nearby ("*à proximité*"), had started running across the street with total recklessness ("*sans prendre aucune précaution*"), at the precise moment a car was coming. The driver, even though going slowly, could do nothing to avoid striking the victim. Unquestionably, the victim's behavior had been the exclusive cause of his misfortune. Under the law of comparative negligence, to which the court of appeal was accustomed, the suit had to be dismissed. The Cour de Cassation, however, did not find that the victim's behavior amounted to an inexcusable fault.

The decision is striking for a judge who, during his whole career, had dismissed suits made under circumstances more favorable to the plaintiff. It is, however, entirely justified. Of course, a pedestrian "should not" cross the street under such circumstances. Anyone, however, may happen to do it one day or the other. It is an oversight, which may be fatal, and which is no more than an oversight, and it does not deserve the death penalty, even if that is the consequence. As a matter of fact, an important politician was killed in Paris, a few weeks ago, exactly in the circumstances found by the court of appeal in the case related above.

One cannot say, however, that the Cour de Cassation disregarded the exception contained in the statute. While it quashed ten decisions, it left one undisturbed. In that case, the pedestrian, at night, neglecting a protected crossing 75 meters away, had decided to cross by himself a four-lane road. The lanes going in the opposite direction were separated by an embankment on top of which there was a small wall. The pedestrian had climbed these obstacles and, from his high position, had jumped onto the road at the precise moment when a car was approaching. The Cour de Cassation probably felt that his behavior could not be considered as a mere oversight. He had deliberately crossed the road as he did. When one behaves that way, he should at least look out for oncoming cars. The Cour de Cassation, therefore, restored the law's full significance. Since July 20, 1987, it has never wavered.¹⁴ The matter is solidly settled, and it is difficult to

13. REV.GEN.ASS.TERR. 1987.584 n. Chapuisat.

14. For the last account of the case law on this problem, see LAMBERT-FAIVRE, *supra* n. 2, at No. 781. See also RAPPORT DE LA COUR DE CASSATION 1989, at 52-54 (1990).

see how it could be reopened. Many other problems, however, have arisen.

The Problem of Implication.

According to the new law, when a victim is entitled to compensation, he or she can recover from the insurer of any car involved (*impliqué*) in the accident. If many cars are involved, the various insurers are jointly liable, subject to any settlement among them.

As already mentioned, the philosophical basis of traffic accident law (as indeed any law of accidents, whatever may be their cause) is entirely foreign to the core of the traditional law of torts, especially in France. The philosophy of accidents is premised on loss spreading, for either the society, a pool of risk creators, or potential victims. If the choice is made for compensation through pools of insured car owners, the only question which arises after an accident is which pool should pay. The answer is that payment must be made only from the pool to which a car involved in the accident belongs. But the nature of its involvement in the accident is irrelevant in a no-fault context. For a judge trained in negligence philosophy, this result is not only strange, but unjust. "Causation," notwithstanding all the difficulties it creates, is a condition of liability. "Implication" was a notion unknown to French law. Still, because the concept appears in the law, the courts have had to use it.

Here again, in the beginning some courts, either by intellectual habit or through hostility toward the law, took a narrow view of implication and refused to recognize it when causation was absent. Their discussions, however, were much less passionate than those about inexcusable fault. In any case, three decisions of the Cour de Cassation on July 21, 1986, clarified the law. From these and later decisions, three principles emerge.¹⁵

First, when a motor vehicle is moving, if it is in any manner involved in an accident, it is *impliqué*. If, for instance, as a result of a collision between two automobiles one of them is thrown against a

15. See CHABAS, *supra* n. 2, at Nos. 135-141; LAMBERT-FAIVRE, *supra* n.2, at Nos. 734-738; Dejean de la Bâtie, *supra* n. 2, at No. 153; GROUDEL, *supra* n. 2, at Nos. 160-173; Groutel, *L'extension du rôle de l'implication du véhicule*, D. 1990.chr.263; Conte, *Le Législateur, le juge, la faute et l'implication (la fable édifiante de l'autonomie de la loi du 5 juillet 1985)*, J.C.P. 1990.I.3471; Montanier, note J.C.P. 1990.II.21508; Béhar-Touchais, *Observations sur l'exigence d'imputabilité du dommage à l'accident de la circulation*, J.C.P. 1991.I.3492; Aubert, n. D .1991.123.