The specific regime for the victims of road traffic accidents.

A. Overview

Before the enactment of a specific statute, the regime applicable was the general regime of liability, provided by Article 1382ff C.civ. We have already seen the problems caused by such a fault-based regime, where more often than not, a victim of an injury ended up with no compensation at all.

Subsequently, a specific statute has been enacted to cover liability for motor vehicle incidents, namely Act no 85-677 aiming at the improvement of the position of the victims of traffic accidents and the acceleration of compensation procedures (Loi No 85-677 tendant a l’amélioration de la situation des victimes d’accidents de la circulation et à l’accélération des procédures d’indemnisation) of 5 July 1985, also known as Loi Badinter.¹

It must be noted that the liability regime provided by Article 2 to 6 of the Loi Badinter is essentially concerned with defining the scope of the compensation to be paid by the insurer to the victim. “The focus of the inquiry is moved from the liability of the defendant to the compensation to be received by the victim.”²

As seen above, this statute has been enacted in part to correct certain deficiencies of the regime of liability for things under Article 1384 C.civ as it has been developed by courts. The very essence of the Loi Badinter was to enable victims to obtain efficient and fast compensation. In this respect, it must be noted that the Loi Badinter creates an

¹ Some authors were asking for a legislative reform for more than 20 years. See Professor Tunc: La Sécurité routière, Dalloz, Paris, 1966.
autonomous regime of liability, separate from and independent of Article 1384\(^3\), even though some elements must be seen in the light of the case law under this Article. Therefore, if the *Loi Badinter* applies, then other regimes are excluded.

The *Loi Badinter* establishes the principle full compensation. Compensation is payable if the following criteria are fulfilled:

- A traffic accident occurred
- The plaintiff has suffered an injury
- The insured motor vehicle was involved in the accident\(^4\)
- There is a causal link between the accident and the injury
- The person whose liability is sought is the custodian (*gardien*) or driver of the vehicle involved\(^5\)

The *Loi Badinter* is therefore a regime of liability without fault, since the conduct of the driver or custodian is not relevant; once the above elements are established, the victim has a right to compensation.\(^6\) Here as elsewhere, French Law does not hierarchize the rights that are protected. Injuries to persons, damage to property as well as economic loss are thus recoverable.

Focused on the compensation to be received by the victim, another major aim of the *Loi Badinter* was to limit the grounds available to the defendant and his insurer on which to seek a reduction of, or exoneration from liability.

Thus, Article 2 clearly states that neither *force majeure* nor the conduct of a third party can be invoked against the victim. The only defence left to the driver or custodian is therefore the fault of the victim. In this respect, Article 3 provides that “Victims, apart


\(^4\) It should be noted that the concept of “involvement” is crucial as regards the application of the *Loi Badinter*. A vehicle is always deemed involved where there is a collision between it and the victim or the vehicle which the victim is traveling in or on. In the absence of a collision, it is up to the victim to provide evidence of the causal link between the vehicle's presence and the damage incurred.

\(^5\) It can be noted that the concept of custodian used under the *Loi Badinter* is the same as the one used under liability fort things pursuant Article 1384 C.civ. Persons other than the custodian or the driver can not be made liable under the *Loi Badinter*, therefore, any liability on their parts has to be settled according to the general liability regime, usually Article 1382 C.civ. Furthermore, the insurer is required to cover the damage caused by non-authorized drivers (car thief for instance).

from the drivers of land surface motor vehicles, shall be compensated for the damage resulting from personal injury suffered by them and their own fault on their part may not be pleaded against them, save where inexcusable fault on their part was the sole cause of the accident.”

In this respect, the Loi Badinter may be seen as a significant exception made by a French legislature to the general rules on contributory fault. It abolishes the defence of contributory negligence in respect of certain class of victims who were not drivers: as regards injury to the person, only the inexcusable fault as the sole cause of the injury can be argued against them.

It should be noted that the Loi Badinter has created a fairly complex framework as regards to the notion of fault. It can be summarize as follows:

- **For immediate victims**, as regards personal injury:
  - Concerning victims who were also drivers, fault can be invoked to reduce or eliminate compensation.
  - Concerning non driving victims, young (less than 16), old (more than 70) or invalid (more than 80% incapacity), only the voluntary self infliction of injury (e.g. suicide) can be invoked in order to completely eliminate compensation.
  - Concerning all other non driving victims, against whom in addition to voluntary self infliction of an injury, inexcusable fault can be pleaded, as long as it is the exclusive cause of the accident, in order to eliminate compensation altogether.

- **For immediate victims**, as regards damage property, the defendant’s insurer can invoke the fault (which does not have to be inexcusable) of the victim as a defence (Article 4 and 5) in order to reduce or eliminate compensation.

- **For indirect victims**, the defendant’s insurance can raise the defences available against the immediate victim, taking into account the group to which the victim belongs (Article 6).
The Cour de Cassation has a very restrictive definition of the inexcusable fault\textsuperscript{7}. It has held that the inexcusable fault comprises four elements:

- voluntary fault
- exceptional gravity
- absence of a valid reason
- awareness of the danger\textsuperscript{8}

Therefore, it supposed \textit{in abstracto} considerations, rather than \textit{in concreto}.

It can be noted that the courts of appeal tend to establish in many cases the existence of an inexcusable fault.

On the contrary, the Cour de Cassation seeks to limit the establishment of the inexcusable fault only to exceptional situations where the victim had a very asocial behavior, probably bearing in mind the fact that if the inexcusable fault is proved, then the victim is not entitled to any compensation ("all-or-nothing")\textsuperscript{9}.

Some examples where the inexcusable fault was not established are as follow:

- Civ. 2e, 7 February 1990: Pedestrian under the influence of alcohol, hitch-hiking, in the middle of a highway, by a rainy night, dressed in black, at the entry of a turn.
- Civ. 2e, 5 June 1991: Pedestrian under the influence of alcohol hit by a car whereas trying to force the driver to take him on board of his vehicle.

Case law shows that most of the decisions which held that all the above mentioned criteria were fulfilled, concern pedestrians and cyclists.

- Civ. 2e, 13 February 1991: Pedestrian walking by night in the middle of a motorway
- Civ 2e, 10 December 1998: Pedestrian under the influence of alcohol crossing an expressway forbidden to pedestrians, climbing over the central reservation.

\textsuperscript{7} One may note that the aim of the inexcusable fault is curiously reversed: logically the concept of inexcusable fault is to “moralize” the wrong doer, whereas in the “Loi Badinter”, it is only focused on the victim. This is another point that highlights that the compensation of the victim is the cornerstone of the Law.

\textsuperscript{8} Cass Civ2e, 20 July 1987

\textsuperscript{9} See Y. Lambert-Faivre, Droit du dommage corporel, Systemes d’indemnisation, Precis Dalloz, 5\textsuperscript{th} Edition 2004 p 946.
It should be noted that a key element in the framework of the Loi Badinter lies in the concept of driver: that is, the driver can be made liable, and different compensation rules apply to the victim who was a driver. Case law has generally taken a restrictive approach of the definition of “driver”, in order to minimize the impact of less favorable compensation rules applicable to them. However, most authors agree on the fact that the scheme set up by the Loi Badinter clearly sacrificed drivers, since contributory fault can be raised against them.\(^{10}\) And, one can note that case law presumes that victims were not driving the car involved in the accident, it is therefore up to the defendant to prove that the claimant was actually driving.

**B. Compensation through the Fund of Guarantee of Compulsory Damage Insurances (Fonds de Garantie des Assurances Obligatoires de dommages), or FGAO.**

Since the beginning of the 20\(^{th}\) Century, the evolution of civil liability is deeply linked with the growth of insurance for liability. A statute establishing an obligation of insurance for civil liability for motored vehicles was enacted in February 27, 1958. Then, the Law Badinter has underlined the complementarity of the law of civil liability and insurance.

Compulsory insurance is the best way for victims to obtain compensation. However, it appears that the person liable for the damage can sometimes remain unknown or not insured. Therefore, the ultimate solution lies in the intervention of a specific Fund of Guarantee, namely the Fund of Guarantee for Cars which was created in France in 1951. The Financial Security Act of 2003 has extended the role of this Fund which has been renamed and is today known as the Fund of Guarantee of Compulsory Damage Insurance, or FGAO.

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\(^{10}\) It seems that the complex framework put in place by the Loi Badinter, including the introduction of the inexcusable fault as a defence and the status of drivers results from a political compromise required to ensure the passing of the Statute. G. Viney W. Van Gerven, J.Lever, P. Larouche, Cases, Materials and Text on National, Supranational and International Tort Law, Hart Publishing 2000, p591.
The FGAO instituted by Article L. 421-1 of the Insurance Code is entrusted to protect insured persons, underwriters, members or beneficiaries of insurance contracts services whose underwriting is made compulsory by a law or regulation, against the consequences of the failure of insurance firms accredited in France and subjected to the supervision of the State\textsuperscript{11}.

One of the most distinctive feature of the FGAO is its subsidiary role.

**Principle of subsidiarity**

- The FGAO intervenes only if there is no/insufficient insurance. Therefore, victims must provide evidence of the fact that either the party liable for the damage cannot be identified, or that this party is not insured or its insurer is insolvent. They must also be able to demonstrate that the accident cannot give rise to compensation in another capacity. It appears that in case of a car accident involving several vehicles, the fact that only one is insured is enough for the FGAO not to pay.

Furthermore, the principle of subsidiarity commands that the FGAO can not be held liable \textit{in solidum}\textsuperscript{12}. Recent case law shows the difficulties encountered by the victims in case of a criminal lawsuit where a non insured driver has been held liable.

- The FGAO can make lawsuits, but according to the principle of subsidiarity, it can not be sued. However, Article L.421-1(1) provides that “The payments carried out in favor of the victims or their assigns and which may not give rise to a recourse action against the person liable of the damage shall not be regarded as a compensation for another reason.” In this situation, the payments allocated by the Fund add up to any other payment of this kind.

Furthermore, the principle of subsidiarity commands that one can not sue the FGAO. Especially, a third party involved in a car accident can not go before a

\begin{footnotesize}
\begin{enumerate}
\item Article L 421-9 Insurance Code.
\item Civ. 21 January 1976, R.G.A.T 1976.545.
\end{enumerate}
\end{footnotesize}
court to ask the reimbursement of the damage he had to pay whereas he was not liable.

**Compensation Bases**

As regards bodily harm, there is no ceiling.
As regards property damage:
- Allowance of 300 Euros per victim
- Ceiling of 460,000 Euros per incident
- Objects considered precious: no compensation

**Procedure**

Article R.421-12 of the Insurance Code provides that the victim has 3 years from the day of the accident to make a demand to the FGAO; frequently, it is the insurer who makes the demand. In this respect, it should be noted that small and medium files represented in 2003 95% of bodily harm files, 90% of which being settled out of court.\(^{13}\)
When the victim receives the compensation offer, he can accept it, discuss it, or refuse it, in which case the compensation is determined judicially.

\(^{13}\) www.fga.fr
Annexes

Road Traffic Accidents - FGAO Statistics

EvoLution of the number of files on road traFic accident opened and compenSation paid

EvoLution in Collections from those responsible for road traffic accidents (in million of euros)

14 www.fga.fr
Repartition of victims according to the way of settlement\textsuperscript{15}

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<td></td>
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<td>- Insurance</td>
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<td>- Insurance</td>
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\textsuperscript{16} Permanent Partial Disability: It corresponds to the definitive reduction of the psycho-sensorial or intellectual physical potential resulting from an impairment of the anatomo-physiological integrity, medically observable; it is evaluated on a percentage scale from 0 to 100 according to a medical scale recognized by the courts and insurers.
Repartition of victims according to the total length of the proceedings in 2002\(^{17}\) (%)

<table>
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<th>Length of the proceedings</th>
<th>Injured with P.P.D</th>
<th>Dead</th>
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<td>3 to 4 years</td>
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<td>5 years and more</td>
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<tr>
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