Fault in French road traffic law

Michael Hagan (Fletchers) & Katherine Deal QC (3 Hare Court)

A recent case that we pursued for an English national, who suffered serious injuries as a result of a road traffic collision in France, gave rise to any interesting question; How is 'fault' assessed under the French Law of 5th July 1985 No. 85-677 (colloquially known, in homage to the politician associated with its introduction, as 'Loi Badinter').

The Claimant was an English national injured during the course of a holiday in France. He was riding his motorcycle along a country road when there was a collision between his motorcycle and a large French registered lorry.

The Claimant, due to the nature of his injuries, had no recollection of the accident or the build up to it. There were no independent witnesses, only the account of the lorry driver, who says he saw the Claimant riding toward him on the wrong side of the road, neither braking nor swerving.

Accident reconstruction evidence commissioned by both parties found that the most likely cause of the accident was that the Claimant was riding on the wrong side of the road and as he came around a bend in the road, collided head on with the lorry.

The forensic evidence suggested the lorry driver had applied his brakes and sought to avoid the collision by pulling over to the right-hand side, however the topography of the road was such that he was only able to move a little to his right.

Safe to say the evidence was such that, had this been a case subject to the laws of England & Wales the Claimant's case would not have met the threshold for CFA funding.

However, as most travel litigation practitioners are aware, Loi Badinter gives rise to a form of qualified strict liability in road traffic cases.

In order to establish a prima facie right to recovery, all a Claimant need show is that he was injured in a road traffic collision and he can then pursue a claim against the driver, keeper or insurer of any vehicle which was 'involved' ('*impliqué')* in the accident.

As the Court of Cassation put it, a vehicle shall be considered to be involved in an accident if it participates 'in any way whatsoever.' (a concept explored by the English High Court by Dingemans J. (as he then was) in *Marshall v MIB and others [2015] EWHC 3421 (QB)).*

The reductio ad absurdum (at least to English eyes) of this principle appeared to have been reached in 2014, when the Court of Cassation found that a parked car, which was struck by a falling kitesurfer was *'impliqué'* for the purposes of Loi Badinter (*Case no.: Cass. Civ. 2ème No. 13-13265 of 6th February 2014).*

Such a wide application of 'impliqué' would seem to give a presumptive right of compensation to anyone involved in a road traffic collision against any other involved vehicles.

This includes drivers, who also have a presumptive right to compensation from any other driver involved in an accident. This would seem to suggest that in French Law, even if you as a driver are at fault for an accident, you can recover compensation from the insurer of the other vehicles involved, even if they were innocent parties.

However, French law tempers these provisions by including exceptions which state that the faults committed by a victim can be invoked against him to limit or exclude his presumptive right to compensation (Articles 3 in respect of non-driver victims & article 4 in respect of driver victims).

The burden of proof is borne by the party asserting that the presumptive right should be reduced/extinguished.

When carrying out the 'article 4 exercise' you look at the driver victim's conduct in isolation, in other words his cause cannot be aided by pointing to faults made by the other driver(s); it is not (as in Spain) a question of exclusive fault, it is about evaluating the responsibility of the driver victim for his own misfortune

The question that arose in our case was how would the French courts (and therefore by extension an English Judge) assess the nature of the fault which our driver was alleged to have committed? This became finessed as the accident reconstruction evidence became clearer (and showed without sensible wiggle room that the Claimant had been on the wrong side of the road for a tolerably protracted period) into one simple question: is it a subjective or an objective test?

If approached subjectively, there was nothing to show any conscious appreciation of risk on the part of the Claimant. It was unlikely he would be found to have deliberately driven into a cement lorry after all. The almost complete lack of response to the lorry's presence suggested that there was very little conscious element in his manoeuvre until right at the end (although unfortunately for him, nor was there anything to support a medical reason for this).

On the other hand, if approached objectively, the Claimant drove into a head on collision with the lorry on the lorry's side of the road, without any justification or possible explanation for his actions. Although he braked right before impact, it was far too late. In short, there was no reason why the vehicles should have come into collision with each other except for the standard of the Claimant's driving.

For the Claimant we obtained French law advice from a French Lawyer who advised, *inter alia* that;

> Based on the likely circumstances, a French court deciding the case would likely not fully extinguish the claimant's right to compensation, but would in fact just reduce it (albeit significantly).
>
> This was because the claimant, in driving on the wrong side of the road had really only committed 'one' fault and there had been ''no intentional assumption of risk''. He was not for example, over the drink drive limit, or speeding, or carrying out a reckless overtaking manoeuvre.
>
> The French lawyer put significant stock in the fact that it appeared likely that, <u>from the Claimant's perspective</u>, at the time of the collision he was not subjectively doing anything wrong i.e. for whatever reason he didn't appreciate he was on the wrong side of the road at the time.

At first blush this may seem an outrageous conclusion, but when one considers the alternative, that he consciously decided to ride on the wrong side and play a game of chicken with an oncoming heavy goods vehicle, it seems to, in fact, be the most likely explanation for his driving that day.

These factors i.e. that the claimant only committed 'one fault' (albeit a big one) and that he (likely) did not have the 'mens rea' for the fault, led the claimant's expert to conclude that the French courts would (if it reached the same conclusions) only apply a reduction.

In support of this 'subjective' approach, the Claimant's expert quoted a Court of Appeal of Paris decision of 7th October 2019, no. 17/15956. In this case the Court approved the decision of the lower court not to extinguish the right to compensation (and in fact increased the % recovery for the Claimant driver on appeal) on the grounds that *'this fault, which did not reflect **intentionall**y dangerous or hazardous conduct and was not particularly serious…' (emphasis added)*

This subjective approach seems to make sense when you consider that conduct could be objectively extremely dangerous but subjectively not (for example a driver who suffers a seizure causing his vehicle to swerve onto the wrong side of the road). Compensating such unfortunate individuals would appear to consistent with the guiding principle of Loi Badinter (i.e. that of full compensation for victims).

However, there is also considerable force in the counter argument especially when one looks at the wording (in English translation below) of Articles 3 & 4 of Loi Badinter, which concern, respectively the potential liability of non-driver & driver victims

Article 3

*The victims, apart from the drivers of motorized land vehicles, are compensated for the damage… …that they have suffered, without their own fault being able to be invoked against them, **except for their inexcusable fault if it was the sole cause of the accident.** (emphasis added)*

Article 4

*A **fault** committed by the vehicle's driver shall bring about a reduction or exclusion of his right to compensation. (emphasis added).*

The fact that there appears to be a deliberate distinction between 'inexcusable fault' in the context of non-drivers and merely 'fault' in the context of drivers, suggest that in the case of driver victims their conduct is much more likely to be assessed objectively (i.e. through the eyes of the man on the Paris Omnibus…)

Further support for this view comes when one considers the definition of 'inexcusable fault' that was provided by the Court of Cassation in 1987;

Inexcusable within the meaning of Article 3 of the Act of 5 July 1985 is <u>intentional</u> misconduct of an unusual degree of severity which <u>without an acceptable reason exposed its originator to a danger which he must have known.</u> (emphasis added)

Ultimately it seems that the test is nuanced, with both subjective and objective elements coming into play to enable the court properly to evaluate the 'blameworthiness' of the victim driver claiming compensation. Given the extreme discretion given to French courts to take into account virtually

whatever they consider relevant and appropriate in deciding cases at first instance (the so-called sovereign power of appreciation) this is probably right. Accordingly, there may well be cases where the lack of subjective fault is particularly relevant (and others where it simply does not come into play).

Our case was settled just over a week before a high court trial, with both sides appreciating the substantial litigation risks posed to each of them, so the issue was not ventilated before the Courts, however it remains (at least in the eyes of your humble servants) an interesting and arguable point that does not appear to have been finally settled in French law.

About the authors

Mike Hagan is a senior solicitor and head of the travel team within the flagship Serious Injuries Unit at Fletchers Solicitors. He is cited in the Legal 500 for his work, and his cases have been frequently covered by both the local and national press.

Katherine Deal QC specialise in all aspects of high value personal injury claims, with a particular expertise dealing with claims arising from overseas accident. She is also a Recorder (Crime and Civil) for the London and SE Circuit