EXTRA-STRICT LIABILITY FOR TRAFFIC ACCIDENTS IN FRANCE

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French law has always been very keen on strict liability, and especially so in the field of traffic accidents. Courts developed specific rules to deal with these accidents, departing from traditional negligence-based liability, during the first half of the twentieth century. The legislature took over in 1985, imposing an extra-strict liability regime known as the loi Badinter, *which remains in effect to this day. At first glance, this regime may seem extremely harsh on drivers and owners of motor vehicles, but it is better understood in the wider context of the different compensation mechanisms that exist in France and result in the cost of traffic accidents being widely spread across the general population. The fact that the liability imposed by the* loi Badinter *is totally independent from the driver's fault or negligence further means that it can apply to accidents in which fully autonomous vehicles are involved.*

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I. INTRODUCTION

French law stands apart from most other legal systems in the field of tort law. While the basic norm enshrined in article 1240 (formerly 1382)[1] of the French *Code Civil* ("Civil Code") sets a general liability for fault principle, the whole history of French tort law since the end of the nineteenth century could be seen as a steady move towards broader and stricter liability.[2] This basic trend can be illustrated in a number of ways, but nowhere has it been more obvious than in the field of traffic accidents.

As in many other countries, road traffic has long been a major source of accidents in France, and the injuries caused by these accidents—along with the innumerate claims for compensation that they have triggered—have likely been the main driving force in the development of tort law. In the past, these accidents have led courts to establish a strict liability regime on their own initiative, even though the legislature normally wields the authority to set liability (and other legal) rules in a civil law system such as that in France. More recently, courts have motivated a legislative intervention in order to create an extra-strict liability regime, which currently applies to traffic accidents.[3] And the reform of French civil liability that is now being contemplated could be an occasion to make the liability regime even stricter.

While many common law jurisdictions still regard negligence as the insuperable norm to deal with road traffic accidents,[4] it is worth

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1. The Civil Code recently underwent a major reform. A regulation entered into force on October 1, 2016 (Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations), and recast the parts of the Civil Code devoted to the general law of contract (i.e., rules applicable to contracts in general, as opposed to rules applicable to specific contracts), to the general law of obligations (i.e., rules applicable to all obligations, regardless of their source) and to the proof of obligations. The reform has also changed the structure of the Civil Code and provisions on tort law, even though their substance has remained the same, have been renumbered. Thus, Article 1382 has become article 1240, article 1383 has become article 1241, and so forth.

2. For an excellent presentation in English of French law in general and of French liability law in particular, see JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW (2d ed. 2008).

3. *See* Olivier Moréteau, *Basic Questions of Tort Law from a French Perspective*, *in* BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE PERSPECTIVE 3, 3, 4, 7–9 (Helmut Koziol ed., 2015).

4. *See* Helmut Koziol, *Comparative Conclusions*, *in* BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE PERSPECTIVE, *supra* note 3, at 685, 787–89.

considering more details concerning the way in which French law (1) departed from fault-based liability and (2) came to impose extra-strict liability in this respect and (3) how this regime might deal with forthcoming challenges, especially accidents caused by autonomous vehicles.

II. Departing from Fault-Based Liability

Article 1240 of the Civil Code, which dates back to the adoption of the Civil Code in 1804, sets out, "Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it."[5] The formulation of the provision is now rather outdated, but the meaning is clear: a person is liable for the harm caused by his fault. The rule is as broad as it seems. Compensable harm, in particular, is any violation of the plaintiff's interest, provided this interest is not outright unlawful. The Civil Code does not define fault, but it is generally accepted that fault consists of any deviation from the type of reasonable conduct that could be expected from the defendant.

Yet, when road traffic and related accidents started to soar during the first decades of the twentieth century,[6] the rule in article 1240 appeared to many as too restrictive in comparison to what fairness seemed to require in terms of compensation for victims—especially nondrivers. In fact, there were many cases where an innocent victim (or his heirs or relatives) was not able to prove fault on the part of the driver whose vehicle had caused the accident and was therefore not entitled to any compensation (at a time when there existed no general social security system).[7] It became a broadly shared opinion that the victim should not be left to bear all the consequences of the accident, considering that he was not responsible for creating the specific risk that had resulted in the accident's occurrence. The idea developed that automobiles created a specific and serious risk of accidents, which, as a matter of principle, should be borne by those who chose to run this risk by using these machines.[8]

French judges, spurred by academic writers, sought various ways to escape the restrictive rule of article 1240 and to develop a rule that more adequately reflected what they thought was a fair apportionment of the specific risk created by automobiles.[9] Courts soon realized that the most efficient tool available was the strict

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5. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1240 ("*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*").

6. *See* Moréteau, *supra* note 3, at 4.

7. *See* Edward A. Tomlinson, *Tort Liability in France for the Acts of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299, 1337–38 (1988).

8. *See* GENEVIÈVE VINEY ET AL., LES RÉGIMES SPÉCIAUX ET L'ASSURANCE DE RESPONSABILITÉ ¶ 79 (4th ed. 2017).

9. *See* Tomlinson, *supra* note 7, at 1309.

liability regime they had started to develop at the end of the nineteenth century, based on the first paragraph of article 1242 (formerly 1384) of the Civil Code.[10]

The various paragraphs of article 1242 list different cases in which someone may be liable for harm caused by someone else[11]: for instance, parents for harm caused by their children, and employers for harm caused by their employees. Only the first paragraph stands apart, as it does not address a specific case. Rather it announces the cases that follow, as well as the special rules on harm caused by an animal or by a building, which are found in articles 1243 (formerly 1385) and 1244 (formerly 1386).[12] It reads, "We are responsible not only for harm caused by our own act, but also for that which is caused by the acts of persons for whom we are responsible, or by things that are in our custody."[13] This first paragraph was thus intended as an introduction to the special liability rules that follow and as a transition from the general liability for fault principle stated in article 1240 (and refined in article 1241, formerly 1383[14]). In a famous 1896 decision, the *Teffaine* case, however, the *Cour de cassation*—France's highest court in civil matters—endorsed the view that the first paragraph of article 1242 was the basis of an autonomous strict liability rule.[15]

The reason behind this bold move was the need to better compensate for industrial accidents. Yet, no sooner had this solution appeared than it apparently lost its raison d'être: less than two years after *Teffaine* had been decided, the French Parliament at last passed legislation on industrial accidents and set up a special compensation

10. *See id.* (discussing, in English, the development of this strict liability regime).

11. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1242. Article 1242 (formerly 1384) was amended in the course of the twentieth century. In particular, two new paragraphs were introduced in 1922, which have nothing to do with liability for others but rather were an attempt by the legislature to limit the field of application of the rule, which the courts had "discovered" in the first paragraph of article 1384. *See* Tomlinson, *supra* note 7, at 1323 n.100, 1334–35.

12. C. CIV. arts. 1243–1244.

13. *"On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."* C. CIV. art. 1242.

14. *"Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence."* C. CIV. art. 1241 ("We are responsible not only for harm occasioned by our own act, but also by our own negligence or imprudence"). This makes clear that the general liability for fault principle enunciated at article 1240 applies not only when the defendant acted with an intention to cause harm, i.e. committed a delict in the Roman sense of the term, but also when he acted in a negligent or imprudent manner, i.e. committed a quasi-delict in the Roman sense of the term.

15. Cour de cassation [Cass.] [supreme court for judicial matters] civ., June 16, 1896, 1897 D. Jur. I 433. For the full text of the *Cour de cassation*'s decisions, see LEGIFRANCE, https://www.legifrance.gouv.fr/initRechJuriJudi.do (last visited May 12, 2018).

mechanism, which was independent from tort law and even excluded its application.[16] Liability based on the first paragraph of article 1242 could thus have been short lived, since the reason that had prompted its recognition disappeared just after it was born. Yet, in the two decades that followed the *Teffaine* decision, and despite the fact that the compensation of industrial accidents was now the object of special and distinct rules, French courts did not forget the new interpretation of this provision. Rather, courts used it occasionally in various settings.[17] It appeared as a useful tool for plaintiffs, but not as an indispensable mechanism, answering a crucial social need. Things changed as of the 1920s, with motor vehicles becoming increasingly common and the number of traffic accidents rising accordingly. Since such accidents are not always the consequence of fault, and since fault, if it exists, can be very difficult to prove, the strict liability rule based on the first paragraph of article 1242 became an obvious option for victims seeking compensation. Motor vehicles thus became a decisive factor in the development of *responsabilité du fait des choses*, or liability for the action of things, as this strict liability rule is commonly known in France.[18]

It was actually the massive litigation prompted by traffic accidents that gave the *Cour de cassation* the opportunity to define the precise features of the liability it had created—or discovered—in its *Teffaine* decision. While the wording of article 1242 demanded that liability should rest on the "keeper" (*gardien*) of the thing that had caused harm, it gave no indication on what the exact conditions of this liability should be, and this was a matter of much discussion and debate in the 1920s.[19] Some decisions suggested that article 1242 could only apply if the thing that had caused harm was proven to be defective, while others did not require the existence of a defect but refused to apply the first paragraph of article 1242 to things that could not be regarded as dangerous in the first place.[20] There was also some discussion as to whether consideration should be given to the fact that the thing, i.e., the automobile, had been placed in motion by someone when it caused harm (*choses actionnées par la main de*

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16. This special compensation regime was the first step towards a full-fledged social security system, which was finally established in 1945.

17. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters], req., Jan. 19, 1914, 1914 D. Jur. I 303 (applying article 1242 to a soda siphon that exploded in a café, injuring a client).

18. *See* Jean-Sébastien Borghetti, *La responsabilité du fait des choses, un régime qui a fait son temps* [*Responsibility for Things, a Tort That Has Had Its Day*], REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.], Jan./Mar. 2010, at 1, para. 19.

19. *See* VINEY ET AL., LES CONDITIONS DE LA RESPONSABILITÉ ¶ 629–634 (4th ed. 2013).

20. *See* Cour de cassation [Cass.] [supreme court for judicial matters] civ., Feb. 21, 1927, 1927 D. Jur. I 97; Cour de cassation [Cass.] [supreme court for judicial matters] civ., Feb. 29, 1928, 1928 D. Hebd. I 225.

l'homme)—in which case, some authors argued, only liability for fault should apply.

All these issues were finally settled by the *Cour de cassation* in the famous *Jand'heur* case.[21] This decision made clear that the first paragraph of article 1242 applies to all kinds of things regardless of their (1) being "driven" by someone, (2) being defective, and (3) having been particularly dangerous.[22] The *Jand'heur* case gave *responsabilité du fait des choses* its definitive shape and turned it into an extremely broad strict liability tort regime.[23] Some aspects of this regime were still unclear and had to be settled in the following years or decades,[24] but there was no more doubt as to the generality of liability based on the first paragraph of article 1242. This originally inconspicuous provision had become the basis for an unparalleled judicial construction. One could say that French judges built a cathedral on a pinhead.

In the next fifty years, *responsabilité du fait des choses* was used primarily in the context of traffic accidents. It allowed most victims[25]

21. Cour de cassation [Cass.] [supreme court for judicial matters], ch. réuns., Feb. 13, 1930, 1930 D. Jur. I 57.

22. *Id.* at 57 ("*Vu l'article 1384, alinéa 1er, du Code civil;—Attendu que la présomption de responsabilité établie par cet article à l'encontre de celui qui a sous sa garde la chose inanimée qui a causé un dommage à autrui ne peut être détruite que par la preuve d'un cas fortuit ou de force majeure ou d'une cause étrangère qui ne lui soit pas imputable ; qu'il ne suffit pas de prouver qu'il n'a commis aucune faute ou que la cause du fait dommageable est demeurée inconnue . . . . Mais attendu que la loi, pour l'application de la présomption qu'elle édicte, ne distingue pas suivant que la chose qui a causé le dommage était ou non actionnée par la main de l'homme; qu'il n'est pas nécessaire qu'elle ait un vice inhérent à sa nature et susceptible de causer le dommage, l'article 1384 rattachant la responsabilité à la garde de la chose, non à la chose elle-même.*"). For an English translation of the decision, see Tomlinson, *supra* note 7, at 1367 ("Whereas the presumption of liability established by that article against one who has under his guard an inanimate thing which has caused injury to another may be rebutted only by proof of an unforeseeable event [*cas fortuit*] or of an irresistible force [*force majeure*] or of an external cause not imputable to the guardian; and it does not suffice to prove that he committed no fault or that the cause of the injury remains unknown[.] . . . But whereas the statute, for the application of the presumption which it provides, does not distinguish according to whether the thing which caused the injury was or was not activated by the hand of man; and it is not necessary that the thing have an inherent defect susceptible of causing the injury, as article 1384 attaches liability to the guard of the thing, not to the thing itself.").

23. Tomlinson, *supra* note 7, at 1342. The sole restriction to be found in the *Jand'heur* decision is that article 1242 (formerly 1384) should apply to "inanimate" things only. *Id.* at 1343. Inanimate things should not be understood in opposition to things "driven by man," though. *Id.* This restriction was only intended to exclude animals, which were also regarded as things, but were covered by article 1243 (formerly 1385). *See id.* at 1347.

24. For example, "*gardien*" (i.e., the person having custody of the thing that caused harm) was defined in Cour de cassation [Cass.] [supreme court for judicial matters], ch. réuns., Dec. 2, 1941, Bull. civ., No. 292.

25. Victims who had a contractual relationship to the defendant could not rely on tort law rules and had to bring a claim in contract, however.

to rely on strict liability in tort as against the keeper (usually the driver) of the vehicle that had caused harm to them. The judicial interpretation of article 1242 of the Civil Code made up for the absence of a special traffic accidents liability regime in French law. Yet, even though liability based on this provision was much more favorable to plaintiffs than liability for fault based on article 1240, it was by no means perfect. Defenses, in particular, allowed defendants to escape liability in many cases. They could do so if they proved that the accident was the result of force majeure—that is, an unforeseen and insuperable circumstance whose origin lay outside the thing that had caused harm. Comparative fault was also a defense and often resulted in the reduction or exclusion of the plaintiff's compensation. This defense proved especially problematic for children and mentally disabled adults, as French law developed an objective conception of fault as of the 1970s, whereby any deviation from the behavior of a reasonable person must be regarded as negligence, regardless of the particular faculties of the person whose behavior stands under scrutiny.[26]

These reasons, and others, resulted in growing dissatisfaction regarding *responsabilité du fait des choses*' ability to satisfyingly address the issues raised by traffic accidents.[27] As of the 1960s, a famous law professor, André Tunc, fought to convince the legislature to adopt ad hoc compensation rules for road traffic accidents.[28] After several failed attempts, his efforts were finally repaid when the then-minister of justice, Robert Badinter, also a law professor, decided to endorse the project.[29] A special statute, known as *loi Badinter*, was adopted in 1985,[30] which created an extra-strict liability regime for traffic accidents and has continued to apply to this day.[31]

III. INTRODUCING EXTRA-STRICT LIABILITY

The main features of the extra-strict liability regime introduced by the *loi Badinter* probably seem surprising, and even unreasonable, from an American perspective, but they are better understood as against the general background of French tort law.

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26. *See* Cour de cassation [Cass.] [supreme court for judicial matters] ass. plén., May 9, 1984, No. 80-93031, Bull. ass. plén.

27. *See* VINEY ET AL., *supra* note 8, ¶ 80–83.

28. Andre Tunc, *The 'Loi Badinter,'* 3 MAASTRICHT J. EUR. & COMP. L. 329, 332 (1996).

29. *Id.* at 332.

30. Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584; Tunc, *supra* note 28, at 329.

31. The regime created by the *loi Badinter* applied immediately to all claims that had not yet been definitively adjudicated.

A. *The Main Features of* Loi Badinter

Article 1 of the *loi Badinter* provides, "The provisions [of this statute dealing with the compensation of victims] apply, even where they are transported under a contract, to victims of a road traffic accident in which a motorized vehicle or its trailer or semi-trailer is involved, excluding trains and trams which run on their own tracks."[32] The first characteristic of the *loi Badinter* is that it disregards the traditional divide between liability in tort and liability in contract, which is normally so important in French law.[33] Whether or not there existed a contractual relationship between the plaintiff and the defendant, the former's claim must be based on the *loi Badinter*, whose regime is regarded as being in tort.

While (1) the field of application of the *loi Badinter* is made quite clear by the wording of its provisions, the statute is (2) quite elliptic regarding the identification of the defendants and (3) the conditions of the liability it establishes. Its more characteristic features, however, have to do with (4) the identification of plaintiffs and compensable damage and with (5) the definition of the defenses available to the defendants.

1. *Field of Application*

The *loi Badinter* applies to traffic accidents in which a motor vehicle is involved.[34] The definition of "motor vehicle" is not specified in the text, but it is generally accepted that the notion should be defined in the same way as it is in insurance law. Article L. 211-1 of the French insurance code (fr: *code des assurances*), following European Union legislation,[35] defines a "motor vehicle" as "any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled."[36] A motor vehicle is basically any vehicle aimed at carrying persons or goods, running on the ground, and equipped with an autonomous driving force (i.e., other than a man or a beast). Cars,

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32. Law 85-677 of July 5, 1985, art. 1 ("*Les dispositions du présent chapitre s'appliquent, même lorsqu'elles sont transportées en vertu d'un contrat, aux victimes d'un accident de la circulation dans lequel est impliqué un véhicule terrestre à moteur ainsi que ses remorques ou semi-remorques, à l'exception des chemins de fer et des tramways circulant sur des voies qui leur sont propres.*").

33. *See* Jean-Sébastien Borghetti, *Strict Liability in Tort and the Boundaries of Tort Law*, *in* ESSAYS IN HONOUR OF JAAP SPIER 19, 33 (2016).

34. The statute specifies that the *véhicule à moteur* must be "*terrestre*" (i.e., by land) but this restriction is implicit in the English term "motor vehicle." Law 85-677 of July 5, 1985, art. 1.

35. Council Directive 72/166/EEC, art. 1, 1972 O.J. (L 103).

36. CODE DES ASSURANCES [C. ASSURANCES] [INSURANCE CODE] art. L. 221-1, para. 1 ("*Pour l'application du présent article, on entend par "véhicule" tout véhicule terrestre à moteur, c'est-à-dire tout véhicule automoteur destiné à circuler sur le sol et qui peut être actionné par une force mécanique sans être lié à une voie ferrée, ainsi que toute remorque, même non attelée.*").

trucks, buses, motorcycles, and motorbikes are thus motor vehicles in the sense of the law, but cycles or beast-driven carts, for example, are not. The only motor vehicles that are excluded from the ambit of the regime are trains and trams circulating on ways that are specific for them. There have been some discussions in case law on what are commonly called "tool-vehicles," such as tanker trucks or farm machines. They do qualify as motor vehicles, but the accidents they may cause are not always regarded as traffic accidents.

As a matter of fact, a traffic accident under the *loi Badinter* is any unforeseen and potentially harmful event arising in connection with the circulation of motor vehicles.[37] This is not a definition given by statute or by the *Cour de cassation*, but it results from the various decisions in which the existence of a traffic accident has been denied. Any accident occurring in connection with the operation of a motor vehicle is therefore a traffic accident in the sense of the *loi Badinter*. It is not necessary that there has been physical contact between a motor vehicle and another object or person. For example, if a bicycle leaves the road and runs into an obstacle because its rider was frightened by a motor vehicle coming fast behind him, then this would be considered a traffic accident.[38] It makes no difference if the event occurred on a road open to the public or on private grounds.[39] Case law even accepts that there is a traffic accident when no vehicle was being operated but a harmful event nevertheless occurred in relation with the "traveling function" of a vehicle. Thus, if a fire breaks out in a parked car, this will be regarded as a traffic accident.[40]

On the other hand, there is no traffic accident if the accident is connected to the "tool function" of a vehicle and if the vehicle was not in motion at the time of the accident. For example, the explosion of a fuel truck while it empties fuel is not regarded as a traffic accident in the sense of *loi Badinter*.[41] Case law also considers that there is no accident when one party voluntarily intended to cause or suffer harm.[42] It further refuses to apply the *loi Badinter* for the benefit of

37. Andre Tunc, *Loi Badinter–On Traffic Accidents and Beyond*, 6/7 TUL. EUR. & CIV. L. F. 27, 37 (1992).

38. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., May 15, 1992, No. 90-20322, Bull. civ. II.

39. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Mar. 18, 2004, No. 02-15190, Bull. civ. II (applying the *loi Badinter* to harm caused by the explosion of a motor vehicle parked in a private underground parking deck).

40. *Id.*

41. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Oct. 19, 2006, No. 05-14338, Bull civ. II.

42. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Jan. 22, 2004, No. 01-11665, Bull civ. II (highlighting a vehicle voluntarily running into a police car); Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 21, 1992, No. 91-13186, Bull. civ. II (describing a car running over a person lying on the street at night who attempted to commit suicide).

competitors of motor races, probably because compensating the harm they may suffer lies beyond the *ratio legis* of the statute.[43]

2. Defendants

The *loi Badinter* is surprisingly elliptic regarding the identification of those who must answer for the liability it establishes. However, article 2 suggests,[44] and courts have confirmed,[45] that persons liable under the statute are the driver and/or the keeper of any motor vehicle involved in the accident. This liability is only intended as a way to identify an insurance company that will pay for any harm caused by the accident, though. As a matter of fact, third-party insurance is mandatory for drivers and keepers of motor vehicles, and victims must bring any claim they have directly against the driver's or keeper's insurance.[46] Thus, save in very peculiar circumstances, neither the driver nor the keeper must pay personally for harm caused by an accident in which their motor vehicle was involved and for which they are theoretically liable.

"Driver" and "keeper" receive no definition in the *loi Badinter*, but case law has made clear how they should be understood. The legislature borrowed the notion of keeper from the common liability regime originally built by the courts. Identification of the keeper should thus be made in the same way when applying article 1242 of the Civil Code and when applying the *loi Badinter*: the keeper is the person who had the use, control, and direction (fr: *usage, contrôle, et direction*) of the thing or vehicle.[47] The owner of a thing or vehicle is always presumed to be its keeper, although this presumption is rebuttable.[48]

The *loi Badinter* does not define the driver (fr: *conducteur*), and neither does case law. Courts obviously want to retain some discretion when deciding if a defendant or, even more importantly, a plaintiff, was the driver of a vehicle involved in the accident, as this

43. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 28, 1996, No. 93-17457, Bull. civ. II.

44. Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584, art. 2 ("*Les victimes, y compris les conducteurs, ne peuvent se voir opposer la force majeure ou le fait d'un tiers par le conducteur ou le gardien d'un véhicule mentionné à l'article 1.*" ["Force majeure or the action of a third party may not be set up as a defense against victims, including drivers, by the driver or keeper of a vehicle mentioned in article 1."]).

45. *See* Cour de cassation [Cass.] [supreme court for judicial matters] ch. réuns., Dec. 2, 1941, Bull. civ., No. 292.

46. *See infra* Subpart III.B.1.a.

47. *See* Cass., Dec. 2, 1941, Bull. civ., No 292.

48. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 19, 2003, No. 00-18991, Bull. civ. II.

may have potent consequences for the person concerned. Basically, the driver is the person who was steering the vehicle at the time of the accident or who sat at the wheel if the vehicle was stopped.[49] If the identity of the driver is disputed, it is for the plaintiff to demonstrate who was the driver.[50] This can result in some accidents in which there was officially no driver (e.g., when there were several persons in a vehicle involved in the accident but it is not possible to determine who was driving it). This is not really a problem for plaintiffs, for, if there is no identified driver, they can normally sue the owner of the vehicle (or rather his insurer) in his capacity as the vehicle's keeper. The actual driver can prefer to remain unidentified, especially if he himself suffered harm caused by the accident and wants to benefit from the more enjoyable status of nondriving victim.[51]

Most often, the keeper and the driver of the motor vehicle will be the same person, but this is not always the case. For example, when the driver is an employee driving his employer's vehicle in the course of his profession, case law considers that it was not he but his employer who was the vehicle's keeper.[52]

If several persons are liable for harm caused by the same accident, either because more than one motor vehicle was involved in it or because there was only one vehicle, but the driver and keeper were distinct persons, these persons are jointly liable to the victims (fr: *responsabilité in solidum*)[53] in accordance with the general principle of French law regarding a case of multiple tortfeasors.

If a driver or keeper of a motor vehicle involved in a traffic accident suffers harm caused by this accident, he can bring a claim under the *loi Badinter* against any other driver or keeper of a motor vehicle involved in the same accident (or rather against any of the latters' insurers), including his own vehicle's keeper or driver if he did not himself have both qualities.[54] If a driver, who is at the same time the keeper of his vehicle, suffers harm caused by an accident in which only his vehicle was involved, however, nobody is liable for his losses

49. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Mar. 29, 2012, No. 10-28129, Bull. civ. II.

50. *See* Ruth Redmond-Cooper, *The Relevance of Fault in Determining Liability for Road Accidents: The French Experience*, 38 INT'L & COMP. L. Q. 502, 520 (1989) (stating that, when events in an accident are unclear regarding a party in litigation, it is the other party that is required to prove what happened).

51. *See infra* Subpart III.A.4.

52. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Apr. 11, 2002, No. 00-13387, Bull. civ. II.

53. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 6, 2002, No. 00-10187, Bull. civ. II.

54. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ, Feb. 29, 2000, No. 96-22884, Bull. civ. II.

under the *loi Badinter*, and he is not allowed to bring a claim against his own insurer on the basis of third-party insurance.[55]

3. *Conditions of Liability*

When it was adopted, the *loi Badinter* caused some perplexity among French lawyers, as it did not fit into the traditional conceptual framework of liability regimes. One difficulty, besides the ambiguity regarding the defendants, was that the statute did not clearly say what the "triggering factor" (fr: *fait générateur*) of liability was.[56] This caused some discussion, but it is now quite clear that it is the traffic accident alone that triggers liability.[57] In other words, persons liable under the *loi Badinter* are liable for any harm caused by the traffic accident, regardless of any fault on their part, or of any other condition. Liability is thus purely objective.

Another important element, however, is "involvement" (fr: *implication*), as this purely objective liability rests on the driver and/or keeper of any motor vehicle that was "involved" (fr: *impliqué*) in the accident. The notion of involvement is not defined in the *loi Badinter*, but, according to case law, involvement essentially means the intervention of the motor vehicle in the accident in any way whatsoever.[58]

Involvement is always characterized when harm results from a shock in which the motor vehicle has taken part. In such a circumstance, it is irrelevant whether the vehicle behaved

55. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Mar. 15, 2007, No. 06-12680, Bull. civ. II. The driver will often be covered by first-party insurance, though.

56. *See* Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584.

57. This is made clear by the French reform bill on civil liability, which purports to confirm this aspect of existing law. *See* MINISTÈRE DE LA JUSTICE, PROJET DE RÉFORME DE LA RESPONSABILITÉ CIVILE, at art. 1285 (2017) [hereinafter PROJET DE RÉFORME DE LA RESPONSABILITÉ CIVILE], http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf ("*Le conducteur ou le gardien d'un véhicule terrestre à moteur répond de plein droit du dommage causé par un accident dex la circulation dans lequel son véhicule, ou une remorque ou semi-remorque, est impliqué.*"). For an English translation of the bill prepared by Simon Whittaker and Jean-Sébastien Borghetti, see REFORM BILL ON CIVIL LIABILITY, at art. 1285 (2017) [hereinafter REFORM BILL ON CIVIL LIABILITY], http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf ("The driver or the keeper of a motor vehicle is liable strictly for harm caused by a traffic accident in which his vehicle, trailer or articulated trailer, is involved.").

58. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 17, 2010, No. 09-67338, Bull. civ. II ("*est impliqué, au sens de [de l'article 1er de la loi du 5 juillet 1985], tout véhicule qui est intervenu, à quelque titre que ce soit, dans la survenance de l'accident*").

abnormally or was in an abnormal position. For example, if a car is parked normally on the side of the road, even without anybody in it, and if another car runs into it, this constitutes a traffic accident in which the first vehicle is involved (as well as the second one, of course), and for which the keeper of this vehicle will be liable, even though he had parked his car carefully and was by no means at fault.[59]

When there has been no physical shock between a motor vehicle and another vehicle or a person, the former vehicle is nevertheless involved in the accident if it has had a "disturbing effect" on someone or something. For example, if a cyclist runs off of the road and injures himself because he was scared by a motor vehicle turning up the road, this constitutes a traffic accident in which the latter vehicle must be regarded as being involved.[60] In the same way, if a police vehicle runs off of the road while chasing another car, the latter is involved in the accident;[61] if an accident is caused by horses running amok after they have been scared by the alarm ringing in a car, this constitutes a traffic accident in which the car is involved.[62] Even when a fire breaks out in a parked vehicle and causes harm to adjacent property, this is regarded as a traffic accident in which the vehicle is involved.[63] Here again, it is irrelevant whether this "disturbing effect" was the consequence of an abnormal behavior of the vehicle. Thus, in the first example, the driver and/or keeper of the motor vehicle will be liable for the cyclist's personal injury, even if the vehicle was driven carefully and no faster than the speed limit.

French courts have been faced with a difficulty in the hypothesis of "complex accidents," i.e., when several accidents occur at the same place within a short period of time. The typical example for this is a succession of car crashes, where car *A* hits car *B* in the fog and stops, after which car *C* crashes into car *B*, and then car *D* into car *C*, and so on. After some hesitation, the *Cour de cassation* has decided that such closely connected accidents, both in time and space, must be regarded as one unique accident in the sense of the *loi Badinter*.[64] This means that all the vehicles involved in these closely connected accidents are actually involved in one global accident. As a result, any victim of this global accident can claim compensation from the

59. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Mar. 23, 1994, No. 92-14296, Bull. civ. II.

60. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., May 15, 1992, No. 90-20322, Bull. civ. II.

61. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 4, 2007, No. 06-14484, Bull. civ. II.

62. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 13, 2000, No. 98-21530, Bull. civ. II.

63. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Nov. 22, 1995, No. 93-21221, Bull. civ. II.

64. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 17, 2010, No. 09-67338, Bull. civ. II.

driver and/or keeper of any of these vehicles, even if the vehicle of the defendant was not a cause of the plaintiff's harm or injury. For example, if a passenger in car *A* is injured when car *B* runs into it and remains unaffected by all subsequent collisions, he can nevertheless sue the driver of car *D* on the basis of the *loi Badinter*. This makes clear that involvement is not a synonym for causation. Under the *loi Badinter*, any driver or keeper of a vehicle involved in the traffic accident is liable for any harm caused by this accident, regardless of the role, if any, that his vehicle may have played in the harm caused.[65] Such a solution is rather counterintuitive and shows how strict liability is under *loi Badinter*. This liability rests only on the causal connection between the traffic accident in which the defendant's vehicle was involved and the harm, regardless not only of the defendant's fault, but also of his causal contribution to the occurrence of the harm.

4. Plaintiffs and Compensable Loss

Any person suffering harm caused by a traffic accident can claim compensation on the basis of the *loi Badinter*. The statute itself only mentions personal injuries and physical damage to property as compensable sources of damage, but there is no real doubt that other sources of damage can also be compensated, such as pure economic loss, as is generally the case in French law.[66] Besides, the various consequences of the above-mentioned sources of damage, whether they be patrimonial or nonpatrimonial, are also compensable, provided they appear as being sufficiently closely connected to the initial harm, here again in accordance with the general principles of French law. "Indirect victims" (fr: *victimes par ricochet*), i.e., persons suffering a loss (patrimonial or nonpatrimonial) due to the personal injury or death caused to someone else, are allowed to claim compensation for their loss under the *loi Badinter*, as is normally the case in French law. An original feature of the *loi Badinter*, however, is that it provides for different defenses depending on the type of harm.

65. *See* Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584.

66. While there seem to be no examples of pure economic loss being compensated under the *loi Badinter*, such compensation was accepted without problem when article 1242 applied to traffic accidents. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Apr. 28, 1965, No. 63-13624, Bull. civ. II. There is no reason why this solution should no longer apply.

5. Defenses

The extra strict nature of liability under the *loi Badinter* is also made clear by the limited number of defenses available to the defendant (or, in practice, to his insurer). Article 2 of the statute provides that neither force majeure nor the fact of a third party can be relied on to reduce the victim's right to compensation.[67] While the second limb of the rule is a classical solution, the first one stands out, at least in the French context, as force majeure is generally presented as barring the defendant from being made liable.[68] In practice, this means that the defendant cannot escape liability if his car was involved in the accident that caused the harm, even if the accident could not have been avoided.

The only valid defense under the *loi Badinter* is the plaintiff's fault (fr: *faute de la victime*).[69] The impact of this fault, however, depends both on the status of the plaintiff and on the type of harm he suffered. Two distinctions need therefore to be made: between drivers and nondrivers, in the first place, and between personal injuries and physical damage to property, in the second place.

The legislature chose to protect nondrivers to a greater extent than drivers under the *loi Badinter*. A justification for this may be found in the idea that drivers are those who create the specific risk associated to road traffic. The fundamental justification, however, seems to have been a financial one, as the more limited protection offered to drivers limits the global financial cost of the system.

When a nondriver suffers a bodily injury caused by a traffic accident in which a motor vehicle is involved, the only defense that may be raised against him is his own "inexcusable fault" (fr: *faute inexcusable*), on the supplementary condition that this fault was also the "exclusive cause" (fr: *cause exclusive*) of the accident.[70] When such a fault is proven, the victim is deprived of any compensation under the *loi Badinter*.[71] In the absence of such an inexcusable fault—

67. Law 85-677 of July 5, 1985, art. 2.

68. Here again, the classical solution is being confirmed by the Reform Bill on Civil Liability. *See* PROJET DE RÉFORME DE LA RESPONSABILITÉ CIVILE, *supra* note 57, art. 1253, para. 1 ("*Le cas fortuit, le fait du tiers ou de la victime sont totalement exonératoires s'ils revêtent les caractères de la force majeure.*"); REFORM BILL ON CIVIL LIABILITY, *supra* note 57, art. 1253, para. 1 ("A fortuitous event, or an act of a third party or of the victim, provide a total exoneration where they bear the characteristics of force majeure.").

69. *See* Law 85-677 of July 5, 1985, art. 3, para. 1.

70. *Id.* ("*Les victimes, hormis les conducteurs de véhicules terrestres à moteur, sont indemnisées des dommages résultant des atteintes à leur personne qu'elles ont subis, sans que puisse leur être opposée leur propre faute à l'exception de leur faute inexcusable si elle a été la cause exclusive de l'accident.*" ["Full compensation is due to victims who suffer personal injury, except drivers of motor vehicles, even if they themselves have been at fault, unless their fault was inexcusable and was the exclusive cause of the accident."]).

71. *See id.*

exclusive cause of the accident,[72] on the other hand—the plaintiff is entitled to full compensation of his personal injury and of its consequences.[73] There can be no partial compensation, thus: it is all or nothing.

In practice, it is only very seldom that the plaintiff gets nothing. "Inexcusable fault" is not defined in the *loi Badinter*, but the *Cour de cassation* has adopted a very restrictive approach to this notion. Inexcusable fault must be understood as "a voluntarily fault of an exceptional seriousness which exposes without any reason the person who commits it to a danger of which he ought to have been aware" (fr: *une faute volontaire d'une exceptionnelle gravité exposant sans raison valable son auteur à un danger dont il aurait dû avoir conscience*).[74] Accordingly, French courts recognize the existence of such a fault only in rather extreme circumstances, when the defendant was not only (grossly) negligent but also adopted a behavior that a reasonable person would not. Examples of such a fault include a passenger jumping from a car in motion[75] or a pedestrian crossing an unlit motorway by night after having jumped over a safety barrier.[76]

Nondrivers are thus extremely well protected when they suffer personal injuries. The protection is even stronger for victims younger than sixteen, older than seventy, or who suffer from a registered liability of eighty percent or more. Their right to be compensated is excluded only if they "voluntarily sought the harm suffered."[77]

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72. The notion of "exclusive cause of the accident" is somewhat misleading and must be well understood. It does not mean that the plaintiff's fault must have been the only cause of the accident, which is never the case in practice, but that it must have been the only *fault* that contributed to the accident's occurring. For example, the plaintiff's fault is not the exclusive cause of the accident if the latter was caused jointly by the plaintiff's fault and the defendant's negligence.

73. Unless he "voluntarily sought the injury suffered," which in practice means that he committed suicide.

74. Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 20, 1987, No. 86-11275, Bull. civ. II.

75. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., June 28, 1990, No. 88-86996, Bull. crim.

76. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Dec. 6, 1995, No. 94-11481, Bull. civ. II.

77. Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584, art. 3, paras. 2–3 ("*Les victimes désignées à l'alinéa précédent, lorsqu'elles sont âgées de moins de seize ans ou de plus de soixante-dix ans, ou lorsque, quel que soit leur âge, elles sont titulaires, au moment de l'accident, d'un titre leur reconnaissant un taux d'incapacité permanente ou d'invalidité au moins égal à 80 p. 100, sont, dans tous les cas, indemnisées des dommages résultant des atteintes à leur personne qu'elles ont subis. . . . Toutefois, dans les cas visés aux deux alinéas précédents, la victime n'est pas indemnisée par l'auteur de l'accident des dommages résultant des atteintes à sa personne lorsqu'elle a volontairement recherché le dommage qu'elle a subi.*" ["Victims designated in the previous

The protection of drivers who suffer personal injuries caused by a traffic accident stands in sharp contrast to that of nondrivers. Article 4 of the *loi Badinter* simply provides that the fault of a driver limits or excludes his right to compensation.[78] This is the normal rule under French law. As a result, any fault of a driver may reduce his right to damages, even if it was only negligence. The driver's fault, however, may be taken into consideration only if it contributed to causing his own harm and not just the accident.[79] In other words, if a driver caused an accident through his fault, but this fault did not cause his own personal injury, it cannot be raised as a defense against him. The *Cour de cassation* holds that the extent to which the driver's fault reduces, or even excludes, his right to compensation depends on the fault's seriousness and that its assessment is a matter for lower judges' discretion.[80]

In case of physical damage to property, the plaintiff's fault is always a defense, regardless of whether the plaintiff was driving a motor vehicle involved in the accident.[81] The extent to which it reduces or excludes the plaintiff's right to compensation depends on its seriousness, as does the driver's fault in case of a personal injury.

The *loi Badinter* further provides that when the plaintiff is only an indirect victim of the accident (fr: *victime par ricochet*) and suffers a loss as a result of harm caused by a traffic accident to someone else, the plaintiff's right to compensation is subject to the same limitations or exclusions as would apply to the compensation of the direct victim's

paragraph, when aged less than sixteen years or more than seventy years, or when, whatever their age, they bear at the time of the accident an entitlement recognizing them as permanently incapacitated or disabled by at least 80 per cent, are compensated for their personal injuries in all circumstances. . . . However, in the cases referred to in the two previous paragraphs, the victim is not compensated by the perpetrator of the accident for damage resulting from personal injury if he has deliberately sought the harm which he has suffered."]).

78. *Id.* art. 4 ("*La faute commise par le conducteur du véhicule terrestre à moteur a pour effet de limiter ou d'exclure l'indemnisation des dommages qu'il a subis.*" ["Fault on the part of the driver of a motor vehicle has the effect of limiting or excluding compensation of the harm he suffered."]).

79. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 7, 1990, No. 88-18441, Bull. civ. II.

80. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Jan. 14, 1998, No. 96-12513, Bull civ. II.

81. Law 85-677 of July 5, 1985, art. 5, para. 1 ("*La faute, commise par la victime a pour effet de limiter ou d'exclure l'indemnisation des dommages aux biens qu'elle a subis. Toutefois, les fournitures et appareils délivrés sur prescription médicale donnent lieu à indemnisation selon les règles applicables à la réparation des atteintes à la personne.*" ["Fault on the part of the victim has the effect of limiting or excluding compensation for physical damage to property which he suffered. However, harm caused to supplies or apparatus provided on medical prescription are compensated according to the rules governing personal."]).

harm.[82] Besides, when the owner of a vehicle involved in the accident is not its driver, the driver's fault is a defense that can be raised against the owner seeking compensation for physical damage caused to his vehicle, if he brings a claim against the driver or keeper of another vehicle involved in the accident. But the owner of the first vehicle also has an action against the driver of his vehicle.[83]

B. *The Background of* Loi Badinter

One may wonder how the extra-strict liability regime set up by the *loi Badinter* is sustainable, especially if one is concerned with "keeping the floodgates shut," as often seems to be the case in the Anglo-American world and beyond. The French context is very different from the American one,[84] however, and the *loi Badinter* has resulted neither in the skyrocketing of costs nor in an explosion in litigation rates.

It should be remembered, first of all, that strict liability already applied to traffic accidents in France before the adoption and coming into force of the *loi Badinter* in 1985. The new statute therefore did not entail a radical change in the legal rules applicable. It did broaden the scope of liability for traffic accidents but mostly by drastically restricting the defenses that can be raised against nondrivers. This was a significant inflection, admittedly, and actually the main reason behind the *loi Badinter*'s adoption, but it did not turn the economics of traffic accidents' compensation upside down. French insurance companies did actually complain that the new statute posed a mortal threat to them at the time of its adoption,[85] but these complaints never were taken too seriously, and rightly so, since these companies are still alive and well thirty years

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82. *Id.* art. 6 ("*Le préjudice subi par un tiers du fait des dommages causés à la victime directe d'un accident de la circulation est réparé en tenant compte des limitations ou exclusions applicables à l'indemnisation de ces dommages.*" ["Damage suffered by a third party as a consequence of harm caused to the direct victim of a traffic accident is compensated subject to the limitations and exclusions applicable to the latter's compensation."]). The rule reflects a general solution of French law. *See* PROJET DE RÉFORME DE LA RESPONSABILITÉ CIVILE, *supra* note 57, art. 1256; REFORM BILL ON CIVIL LIABILITY, *supra* note 57, art. 1256.

83. Law 85-677 of July 5, 1985, art. 5, para. 2 ("*Lorsque le conducteur d'un véhicule terrestre à moteur n'en est pas le propriétaire, la faute de ce conducteur peut être opposée au propriétaire pour l'indemnisation des dommages causés à son véhicule. Le propriétaire dispose d'un recours contre le conducteur.*" ["When the driver of a motor vehicle is not its owner, any fault in that driver can be set up against the owner as regards the compensation of physical damage caused to his vehicle. The owner has a recourse against the driver."])

84. *See generally* Jean-Sébastien Borghetti, *The Culture of Tort Law in France*, 3 J. EUR. TORT L. 158 (2012) (providing a general presentation of the background of French tort law).

85. Tunc, *supra* note 28, at 332, 339.

later, and nothing suggests that their existence or even their profits have been seriously endangered by the *loi Badinter*.

It is also important to understand that the *loi Badinter* is part of a broader compensation system, which results in the costs of traffic accidents being widely spread throughout the whole French population. Besides, the *loi Badinter* has set up a simplified compensation procedure for traffic accidents, which greatly reduces the cost of running the whole system.

1. The Broader Compensation System

By looking at the *loi Badinter* only, one runs the risk of getting the false impression that the compensation of losses caused by road traffic accidents in France rests first of all on tort law. This is actually not the case, as the liability established by the *loi Badinter* is closely connected to (a) third-party insurance. Other compensation mechanisms also play a role, including (b) first-party insurance, (c) a public compensation fund, and (d) social security.

a. Third-Party Insurance

Article L. 211-1 of the French insurance code provides that anyone putting into circulation a motor vehicle is required to obtain third-party insurance covering personal injuries or physical damage to property caused to third parties in an accident involving the vehicle.[86] This insurance must cover the liability of any person who is the driver or keeper of the vehicle, even if he has not been authorized,[87] as well as the liability of any person carried in the vehicle.[88]

All victims of a traffic accident in which the vehicle is involved are covered by the third-party insurance of the person who puts the vehicle into circulation, except (1) the driver himself;[89] (2) when the vehicle has been stolen, the thief or any accomplice;[90] and, (3) with certain exceptions, the employees of the insured party.[91]

According to a well-established solution applying to civil liability generally that was first established by the courts[92] and has now been confirmed by the legislature,[93] the victim of a traffic accident has a

86. CODE DES ASSURANCES [C. ASSURANCES] [INSURANCE CODE] art. L. 211-1.

87. The only limit is that the insurance need not cover the liability of drivers whose profession consists in repairing, selling, or controlling motor vehicles. *Id.*

88. Only the State is exempted from this obligation, but other public persons are not. *Id.* This is true even though the compensation for harm caused by traffic accidents in which vehicles owned by public entities or driven by public agents are subjected to the *loi Badinter*.

89. *Id.* art. R. 211-8.

90. *Id.* art. L. 211-1.

91. They are protected by the industrial accidents legislation, however.

92. Cour de cassation [Cass.] [supreme court for judicial matters] civ., June 14, 1926, 1926 D. Jur. I 57.

93. C. ASSURANCES art L. 124-3.

direct claim against the third-party insurer of any vehicle involved in the accident.[94] The specificity of the *loi Badinter*, however, is that any plaintiff seeking compensation under it *must* claim damages directly from the insurer and cannot therefore sue the driver or owner of the vehicle himself.

Insurance contracts cannot limit the amount of the insurer's guarantee in cases of personal injury.[95] As far as damage to property is concerned, contractual limitations to the coverage are allowed but cannot be inferior to a certain amount set by the Government and which is necessarily superior to one million euros.[96] The insurance code provides for other admissible contractual limitations of the insurer's guarantee. The two most important ones in practice apply in the case where the insured party or someone authorized by him drives the vehicle without a driver's license[97] and in the case where persons were being carried in the vehicle without the legal security requirements being met.[98] Such limitations do not restrict the victims' right to get full compensation from the car's insurer, however,[99] and only grants the latter a right of recourse against the insured party.

When a third-party insurer compensates a victim who had a right to compensation against a tortfeasor whose liability was covered by the insurer, this right to compensation is automatically transferred to the insurer in application of a legal mechanism called subrogation.[100] The transfer operates within the amount of damages paid by the insurer.

b. First-Party Insurance

First-party insurance for drivers of motor vehicles is not compulsory in France, but it is quite common. It protects drivers and keepers against personal injuries or physical damage to property not covered by the *loi Badinter*, i.e., when such harm is caused by an accident in which no other motor vehicle was involved or when the driver was at fault. Insurance companies offer different types of contracts with more or less comprehensive guarantees.

Any right to compensation that the victim had against a tortfeasor for harm covered by the first-party insurer is transferred to the latter just as it would be to a third-party insurer.

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94. *Id.*

95. *Id.* art. R. 211-13, para. 1, 1°.

96. *Id.* art. R. 211-7, para. 1.

97. *Id.* art. R. 211-10, para. 1, 1°.

98. *Id.* art. R. 211-10, para. 1, 2°. In this case, the limitation in the coverage can only apply to harm caused to the persons being transported. *Id.*

99. *Id.* art. R. 211-13.

100. *Id.* art. L. 121-12, para. 1.

c. Public Compensation Fund

Most victims of road traffic accidents can claim damages from a third-party insurer under the *loi Badinter*. However, if no driver or keeper of a vehicle involved in the accident has been identified,[101] or if none of the involved vehicles was covered by third-party insurance in violation of the insurance obligation set out by the law, or if the insurer is fully or partially insolvent, any victim of the accident who has a right to compensation under the *loi Badinter* can bring a claim for compensation against a special compensation fund, known as the *Fonds de garantie des assurances obligatoires de dommages* ("*FGAO*").[102] The *FGAO* further compensates victims of accidents occurring on public ways and caused by pedestrians and animals, when the victim has no right to compensation under the *loi Badinter* and the pedestrian or the animal's owner or keeper is not insured.[103] The *FGAO* is financed mostly by contributions from insurers and insured persons and by fines imposed on persons who do not abide by the insurance obligation.

No claim can be brought against the *FGAO* for harm that has already been compensated, even if damages were paid by someone other than the third-party insurer of the driver or keeper of a vehicle involved in the accident (for example, the victim's first-party insurer or social security).[104] Besides, those who have compensated the victim and have recourse against the person liable are not allowed to bring a claim against the *FGAO*, even if this person is liable under the *loi Badinter* and was not insured.[105]

d. Social Security Systems

France enjoys a rather well-developed social security system. Despite efforts by the Government and Parliament to curb the steady rise in the system's budget, the medical branch still offers generous coverage of most health costs that may be incurred by individuals.[106] This is especially true for serious medical treatment that may typically follow a traffic accident.[107] When the patient is prevented from working due to his illness or accident, social security will further make up for lost incomes up to a certain amount. The result of this is that most victims of personal injury caused by a traffic accident will get at least partial compensation through social security for the

101. For example, if a pedestrian is hit by a car that does not stop, the driver or keeper of the vehicle cannot be identified.

102. C. ASSURANCES art. L. 421-1.

103. The claim against *FGAO* fully covers any personal injury, but compensation of property damage is subject to some restrictions. *See* MURIEL CHAGNY & LOUIS PERDRIX, DROIT DES ASSURANCES ¶ 844 (3d ed. 2014).

104. C. ASSURANCES art. L. 421-1.

105. *See e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., May 27, 1998, No. 97-85658, Bull. crim.

106. *See* Moréteau, *supra* note 3, at 6.

107. *See id.* at 20.

financial loss resulting from their injury. Social security, on the other hand, does not compensate nonpecuniary losses, such as pain and suffering. Entitlement to social security payments normally results from contribution.[108] There exists, however, a minimum social security coverage (of medical costs) for people who are not in a situation to contribute.[109]

Social security in France is not a monolithic institution, and there are different social security bodies, each one in charge of a different category of persons or workers. Depending on the welfare body on which he depends, a victim might have different rights, but the legal rules applicable to these different bodies are normally quite similar.

If a social security body makes payments to the victim of an accident or takes direct charge of the cost of his medical treatment, any claim the victim may have against a tortfeasor or the latter's insurer is transferred to the social security body by way of subrogation.[110] The transfer of right is limited to the damage that the social security body has taken in charge and do not apply to losses which the law regards as personal (i.e., nonpecuniary losses).

2. *A Simplified Compensation Procedure*

Article 12 of the *loi Badinter*, which is also article L. 211-9 of the insurance code, provides that the insurer covering the liability of the owner, driver, or keeper of a motor vehicle involved in a traffic accident is required to take a number of procedural measures with a view to making a provisional or final offer to the victim of any harm caused by the accident.[111] This offer must be made within the time limits and according to the standards set forth in law.

Where there are several persons liable under the *loi Badinter* and several insurers bound to make this offer, the French insurers have developed a convention-based system enabling immediate designation of the insurer in charge of processing the personal injury case and making the mandatory compensation.

The insurer acting on behalf of the others must send to the victim or his successors a questionnaire whose content is set by the law and aims at obtaining some essential pieces of information, such as the description of the direct victim's injuries, his professional earnings, the contact details of his welfare body, etc.[112] The victim then has six

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108. *See id.* at 6.

109. *See id.* at 19.

110. Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584, arts. 29–30.

111. CODE DES ASSURANCES [C. ASSURANCES] [INSURANCE CODE] art. L. 211-9.

112. LE BUREAU CENTRAL FRANÇAIS ET AL., FRENCH LAW ON COMPENSATION FOR ROAD TRAFFIC ACCIDENTS 33 (2008).

weeks to answer comprehensively this questionnaire after it has been sent.[113] Failure to make a timely answer will result in suspension of the deadline imposed on the insurer to make a compensation offer.[114] The insurer must attach to the questionnaire an information notice describing the victim's rights, such as the right to receive the police report on the accident or the medical expert's report, the victim's obligations, as well as the offer procedure.[115]

The victim of a personal injury can obtain benefits in kind and in cash, primarily paid by social security. These various benefits are considered compensation and entail the transfer of the corresponding right to compensation to the welfare body that provided these benefits. Consequently, the insurer will deduct the claims of this body from the amount of damages it owes to the victim.[116] The insurer must further ensure that an expert physician examines the victim.[117]

Article 12 of the *loi Badinter* requires the insurer to make a compensation offer to the victim of personal injury within eight months from the date of the accident.[118] When the insurer has not been informed of the degree of stabilization within three months of the accident, its offer will be provisional in nature, and it will have five months from the date it was informed of the stabilization to make a final offer.[119] Furthermore, article 12 of the *loi Badinter* requires the insurer to make a reasoned reply or an offer to the victim within three months of his application, whatever the nature of the harm.[120] This time limit of three months concerns only cases where liability is not contested and where harm has been entirely quantified. Failure to meet the time limit is sanctioned by the law[121]: if the victim so requests, the insurer will be ordered to make interest payments at

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113. *Id.*
114. *Id.*
115. *Id.*
116. The insurer must request that the welfare body indicate the amount of its provisional or final claim, depending on whether the victim's state of health has stabilized or not. The welfare body must answer within four months of the insurer's request, on pain of forfeiture (this time limit is extended for an additional month if the victim or its welfare body is domiciled abroad or overseas). *See id.* at 34.
117. *Id.*
118. Loi 85-677 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 [Law 85-677 of July 5, 1985 Improving the Situation of Road Traffic Accident Victims and Speeding Up Compensation Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 5, 1985, p. 7584, art. 12.
119. *Id.*
120. *Id.*
121. *See* CODE DES ASSURANCES [C. ASSURANCES] [INSURANCE CODE] art. L. 211-13.

twice the official interest rate;[122] however, the judge may reduce the amount if the causes of this delay were beyond the insurer's control. When liability is rejected or not clearly established, or when harm has not been entirely quantified, the insurer must, within the same time limit, provide a reasoned response to the elements indicated in the request.[123] Legal action initiated by the victim does not relieve the insurer of its obligation to make an offer.

The offer must cover all elements of compensable damage on an item-by-item basis.[124] If the victim accepts the offer, a contract for compensation is concluded that bars the victim from bringing any new claim for compensation for any item of damage included in the contract.[125] The victim, however, may revoke the contract within fifteen days of its conclusion.[126]

The law also requires that the offer not be "patently inadequate" (fr: *manifestement insuffisante*).[127] This notion is not defined but clearly designates an offer that is excessively low. Such a situation may arise from an inappropriate evaluation of the right to compensation (due to an unjust apportionment of liability enforced against a driver, for example), from a medical underestimation of the seriousness of the personal injury, or from an underestimation of harm with respect to the seriousness of the injury.[128] The sanction of a patently inadequate offer is the payment of a penalty to the *FGAO*, with a maximum amount of fifteen percent of the damages later awarded by the judge.[129]

This compensation procedure is quite efficient and has contributed to significantly limiting litigation related to road traffic accidents. The latest figures available date back to 2010 but indicate that only 8206 claims were brought before first-instance courts in that year in connection with such accidents,[130] while 67,288 road traffic accidents causing personal injuries occurred in that same year,[131]

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122. For the period running from the latest time at which the offer should have been made to the date at which the offer is finally made, or compensation is granted by a judge if no offer was ever made. Law 85-677 of July 5, 1985, art. 16.

123. C. ASSURANCES art. L. 211-9.

124. *See* Law 85-677 of July 5, 1985, art. 12.

125. *See* C. ASSURANCES art. L. 211-17 (explaining that agreed upon sums for compensation must be paid within one month after the period of termination expires, as set forth in art. L. 211-16).

126. *Id.* art. L. 211-16.

127. *Id.* art. L. 211-14.

128. There are no official standard amounts for the compensation of the various heads of damage, but unofficial standards do apply.

129. *See* C. ASSURANCES art. L. 211-14.

130. MINISTÈRE DE LA JUSTICE, ANNUAIRE STATISTIQUE DE LA JUSTICE, ÉDITION 2011–2012, at 27 (2012), http://www.justice.gouv.fr/art_pix/stat_annuaire_2011-2012.pdf.

131. OBSERVATOIRE NATIONAL INTERMINISTÉRIEL DE SÉCURITÉ ROUTIÈRE, LA SÉCURITÉ ROUTIÈRE EN FRANCE: BILAN DE L'ANNÉE 2010, at 11 (2010), http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/124000210.pdf. The French population in 2010 was sixty-five million. INSTITUT

which is down from 30,394 claims[132] and 191,132 accidents[133] in 1985. This means that, however large the liability established by the *loi Badinter* may be, France is by no means a lawyers' paradise. There is indeed part of the bar that specializes in road traffic accidents, but lawyers who do so need to take a great number of cases to make a living out of it, using paralegals to deal with the paperwork and all nonpurely legal issues.

IV. FACING NEW CHALLENGES

The system put in place by the *loi Badinter* is generally regarded as satisfactory. It has made compensation easier and faster, and it has reduced the number of claims brought before the courts. While no radical transformation is needed, there are a couple of points on which there is room for improvement, from a French perspective at least.

The first one is the compensation of drivers. It is generally agreed among French lawyers that the difference in compensation rules for drivers and for nondrivers under the *loi Badinter* is unjust.[134] While the first civil liability reform draft published by the French Ministry of Justice in April 2016 took the position that all differences between drivers and nondrivers should be removed and that the more favourable rules applicable to nondrivers should be made applicable to drivers as well,[135] the reform bill published in March 2017 takes a slightly less radical stance. It suggests that a driver's right to compensation should be reduced only when he has committed an inexcusable fault.[136] It remains to be seen, however, if the reform bill will be adopted and if Parliament will accept this provision, which would have a significant impact on the economics of motor vehicle third-party insurance.

The second point has to do with the amount of damages paid in case of personal injuries. There are no standard amounts of damages officially applicable in France. The result is that there is no clear reference against which victims of personal injuries caused by road

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NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, BILAN DÉMOGRAPHIQUE 2010, at 1 (2010), https://www.insee.fr/fr/statistiques/fichier/version-html/1280950/ip1332.pdf.

132. MINISTÈRE DE LA JUSTICE, ANNUAIRE STATISTIQUE DE LA JUSTICE, ÉDITION 1986, at 23 (1986).

133. L'OBSERVATOIRE NATIONAL INTERMINISTÉRIEL DE LA SÉCURITÉ ROUTIÈRE, LA SÉCURITÉ ROUTIÈRE EN FRANCE: BILAN DE L'ANNÉE 16 (2000), http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/014000396.pdf.

134. *See, e.g.*, VINEY ET AL., *supra* note 8, ¶ 105; PHILIPPE BRUN, RESPONSABILITÉ CIVILE EXTRACONTRACTUELLE ¶ 368 (4th ed. 2016).

135. MINISTÈRE DE LA JUSTICE, AVANT—PROJET DE LOI DE RÉFORME DE LA RESPONSABILITÉ CIVILE, at art. 1287 (2016), http://www.textes.justice.gouv.fr/art_pix/avpjl-responsabilite-civile.pdf.

136. PROJET DE RÉFORME DE LA RESPONSABILITÉ CIVILE, *supra* note 57, art. 1287; REFORM BILL ON CIVIL LIABILITY, *supra* note 57, art. 1287.

traffic accidents can assess the adequateness of the compensation offer made by the insurers, and, when concluding compensation contracts with victims, insurers tend to impose their own tariffs, which are usually lower than the amount of damages a court would award. The reform bill on civil liability suggests setting a single medical scale to measure the seriousness of personal injuries, as well as an indicative compensation index to assess certain items of nonpatrimonial losses.[137] Some authors and judges are opposed to such changes in the law, however, on the ground that compensation need be made on a case-by-case basis, and it is not clear if the law will change on that count.[138]

Interestingly, the reform bill does not mention autonomous vehicles, even though these are becoming a hot topic among lawyers in France (as elsewhere).[139] This is not only due to the fact that the reform bill generally does not deal with issues raised by new technologies and artificial intelligence. The main reason for this silence, quite apart from the circumstance that self-driving cars are actually not yet allowed on French roads,[140] is that road traffic accidents in which autonomous vehicles might be involved could be dealt with using the *loi Badinter* as it stands now.

As a matter of fact, even if an autonomous vehicle has no driver, it should still have a keeper, in the sense of the *loi Badinter*, who will therefore be liable for any harm caused by a traffic accident in which the vehicle is involved. Admittedly, case law defines the keeper of a vehicle as the person who had the use, control, and direction of the vehicle at the time of the accident,[141] and it could be argued that an autonomous vehicle is not controlled or directed by anybody, and therefore has no keeper, just as it does not have any driver. The

137. *Id.* arts. 1269, 1270.

138. Although this issue is less important, the reform bill on civil liability also provides that trains and trams circulating on their own tracks should be included within the field of application of the special traffic accidents liability regime. *Id.* art. 1285.

139. *See generally* Thibault Verbiest, *Voiture connectée et voiture autonome*, 133 REVUE LAMY DE DROIT DE LA PROPRIÉTÉ INTELLECTUELLE 50 (2017); Cédric Coulon, *Du robot en droit de la responsabilité civile: à propos des dommages causés par les choses intelligentes*, RESPONSABILITÉ CIVILE ET ASSURANCE, Apr. 2016, at 17; Gérard Courtois, *Robots intelligents et responsabilité: quels régimes, quelles perspectives?*, DALLOZ IP/IT, June 2016, at 287; René Josseaume, *La voiture autonome: un défi au Code de la route!*, GAZETTE DU PALAIS, Oct. 1, 2015, at 5; Isabelle Vingiano, *Quel avenir juridique pour le « conducteur » d'une « voiture intelligence » ?*, LES PETITES AFFICHES, Dec. 1, 2014, at 6.

140. This should change soon, however, as the government has recently been authorized to adopt regulations allowing for the experimentation of self-driving cars. *See* Ordonnance 2016-1057 du 3 août 2016 relative à l'expérimentation de véhicules à délégation de conduite sur les voies publiques [Regulation 2016-1057 of August 3rd, 2016 Relating to the Experimentation of Vehicles with Delegation of Driving on Public Roads], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2016.

141. *See supra* Part III.A.2.

owner of the vehicle, however, is presumed to be its keeper,[142] and this presumption could be regarded as irrebuttable in the case of a self-driving car. Since the owner is bound to obtain third-party insurance, this would be a simple way to ensure that victims of traffic accidents in which self-driving cars are involved are compensated, without any need to change existing legislation. Of course, if the accident appears to have been caused by a defect in the car, the keeper's third-party insurer will have recourse against the car's producer on the basis of product liability.

V. CONCLUSION

With the *loi Badinter*, France has thus adopted a system that closely combines tort law and insurance in order to compensate harm caused by road traffic accidents. Such a hybrid might not be as simple or intellectually convincing, on its face, as other systems that rely exclusively on tort law or that are purely no-fault, but it actually does function quite well, and nobody in France suggests that it should be radically changed. Besides its close combination with insurance rules, the *loi Badinter*'s great strength is not only that it establishes a strict liability regime but, even more importantly, that it is very restrictive when it comes to defenses. While this latter feature limits litigation, the former should allow French law to deal with traffic accidents in which autonomous vehicles are involved. Technology might change, but the *loi Badinter* is here to stay!

142. *See supra* Part III.A.2

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