Personal injuries flowing from road traffic accidents: pursuing a claim for damages in France

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It is perhaps self-evident to state at the outset that accidents which come about on French territory are habitually dealt with solely under French Law. Thus, the fact that a road traffic accident may involve an Australian national, or perhaps more unlikely an Australian registered motor vehicle, usually has no bearing on the application of French Law.

French Law is considerably different from Australian, and other Common Law systems, and the manner in which French proceedings are carried out is also very different from that which I understand is adopted in Australia. It is habitually suggested that, prior to envisaging pursuit of a claim and possibly litigation in France, the following questions, as a minimum, should be addressed.

Is there a viable claim?

On the assumption that French law is applicable and that the claim should be pursued in France, the first question to be addressed is the viability of a claim.

It should be noted at the outset that the relevant French legislation concerning road traffic accidents is the Law of 5 July 1985, the main purpose of which is to facilitate the compensation of victims of road traffic accidents by introducing the principle of no-fault liability.

Under this rule, a **passenger** in any motor vehicle, a **pedestrian** or a **cyclist** injured in an accident would automatically be entitled to compensation.

The French Courts have greatly extended the ambit of the compensatory principle to include vehicles which are stationary, vehicles which are not on the road, and indeed vehicles which would not normally be described as a road vehicle.

If only one vehicle was involved and implicated in an accident, then at French Law the insurers of that vehicle would be under an obligation to compensate the passengers, pedestrians etc. who were injured in the accident, whether or not the vehicle was actually the cause of those injuries.

What if more than one driver is involved ?

There are few exceptions to the no-fault principle, principally where more than one driver is involved.

In recent decisions, the French courts have decided that each respective driver would, as a general rule be entitled to a limited degree of compensation from the insurers of the other drivers.

For example, in an accident involving drivers A and B, in which each was 50% responsible, A would be able to recover its losses from Bís insurers but only for 50 % of Aís loss; similarly, B would be able to recover its losses from Aís insurers but for only 50 % of Bís loss. But if A were entirely responsible for the accident, only B would be able to recover from Aís insurers.

Although it is therefore relatively easy to establish a right to compensation in principle, this does not mean that a claim is also necessarily viable.

Nature of injuries

It is necessary to look at the nature of the injuries and the degree of disability which the victim has suffered. A French Law practice would usually be able to come to a prima facie evaluation of quantum, viz. by taking a very rough estimation of the seriousness of the injuries, as well as other grounds of claim such as the extent to which the victim has been prevented from working and has lost earnings.

It is important to reach an initial approximate view of the severity of the injuries, (even though this will not be able to serve as a basis of claim at litigation), for two reasons. ▶

First, a victim may not recover the legal costs of pursuing a claim in France. In an out-of-court settlement with an insurance company, the victim would not recover any legal costs whatsoever. Even before a French Court, the victim is only likely to receive a nominal award under the head of legal costs, often between $A600 and $A1,500.

Second, many travel and legal costs insurance policies contain a clause under which the costs of pursuing a claim on behalf of a victim, including the costs and fees of a French law practice and of sums advanced to French medical experts, would be deducted from any award received by the victim.

How are claims pursued in France?

Today, the majority of claims relating to road traffic accidents which come about in France are settled out-of-court with the insurers of the vehicle(s) implicated in the accident. Liability claims are now rarely taken before the Courts, as the Law of 5 July 1985 imposes a duty on the insurers of the vehicle implicated in the accident to make an offer of settlement to the victim. Indeed, given the fact that the 1985 law is heavily weighted in favour of the victim, litigation as to compensation rarely arises.

The final point to be noted is that, even where two or more drivers are implicated in an accident, the French insurance industry and the Courts now appear to agree on standard guidelines as to liability.

As examples, if there were an accident as a result of two vehicles following one another, the vehicle behind will be considered to be liable; if a vehicle leaving a parking area were involved in an accident it is considered to be liable etc.

Identification of parties thought to be liable

As a general rule, a French law practice, upon receipt of a claim, must first of all identify the insurance company of the driver considered at first sight to be liable for the accident.

The parties to an accident may have completed the standard accident statement forms (in French "Constat Amiable") supplied by many insurance companies. This form will often, but not always, provide details of the insurance companies involved.

Police report

In the absence of the standard accident form setting out the statement of facts, or in circumstances where the police have been called to the scene - such as in more serious accidents were persons have been injured - it would be necessary to obtain a copy of the police report.

The police report usually forms the basis for establishing liability and providing details of the third party insurers involved.

Formal demand and negotiation with insurers

The French Law practice would then send a formal letter of demand (mise en demeure) to the insurers of the vehicle implicated in the accident, or considered to be at fault in the accident if more than two vehicles are implicated.

If, as is often the case, the third party insurers accept liability in principle on the part of their insured, the next stage is to proceed to obtaining an offer of settlement.

Initial medical evaluation

The French law practice usually requests that the victim provide a brief report by his or her GP, or possibly a consultant if same has already been involved, on the injuries resulting from the accident, but it would not be possible for the said law practice to give a formal estimate of quantum under French rules based upon the report in question. This report will nevertheless be forwarded upon receipt to the third party insurers.

Depending on the degree of injuries, the third party insurers sometimes, albeit rarely, make an offer of settlement on the basis of the report or description of injuries emanating from the non-French medical practitioner. However, the third party insurers would more often require that the victim be examined by a French medical expert witness in order to assess the injuries in the light of French scales of compensation.

It is the experience of this practice that, on a number of occasions, French doctors have been sent to Australia to examine the victims of road traffic accidents.

It is important to note that under the French system, even in Court proceedings, only a single expert would normally be appointed whose findings would be effectively binding on both the victim and the third party insurers.

In France, the claim entered by a civil plaintiff comes under several different heads, and thus a French medical examiner will use the same terms in his report as soon as he considers that the condition has stabilised. By stabilised, French medical expert witnesses generally mean that a particular condition is at a stage where it will neither improve nor worsen.

The heads consistently used by the Courts, Medical Experts, Insurance companies and Case Law in order to assess quantum are :

- *Incapacité temporaire totale* - this head habitually relates to the total temporary physical incapacity, usually immediately after the injury was suffered, on the part of victim to attend his normal place of work. The calculation of the quantum of compensation under this head is therefore principally based upon the quantifiable loss of salary actually suffered by the victim and objective documentary evidence would have to be submitted in this regard.
- *Incapacité permanente partielle* - being an assessment based upon the permanent functional reduction in the abilities of the victim and the effect thereof upon the victimis ability to perform his or her occupation and this head is expressed as a percentage.
- *pretium doloris* - the French Case Law head equivalent to pain and suffering is assessed on a scale of 1 - 7.
- *préjudice esthétique* - the French Case Law head equivalent to disfigurement is also assessed on the basis of a scale from 1 - 7.
- *préjudice moral* - a French case law concept relating to emotional distress resulting from the incident.
- *préjudice d'agrément* - the French case law equivalent of loss of amenity. The last head of claim does not relate to a medical condition but seeks to compensate the victim for the effects of the accident on his or her way of life.

Traditionally, although case law has evolved, loss of amenity concentrates on matters such as the inability to pursue particular sports, and once again must be established objectively. The negotiations

towards a transaction can be more or less protracted, depending on the extent to which the victim accepts the offer.

It should be noted that, as a general rule, French insurers will make an offer which is within the compensation band for each head when compared to case law decisions made by the French Courts.

It is also pointed out that given, inter alia, the differences between the French social security systems and those in other countries, levels of compensation in France are not usually as high as might be expected in certain other systems and are somewhat lower than those which I am told obtain in Australia.

Since the change in the system which came about in 1985, it has now become unusual for proceedings to be brought before the Courts.

Criminal proceedings

The only area where this step is frequent and necessary is where criminal proceedings have been instigated against one or other of the drivers implicated in the accident. In such circumstances, French criminal procedure enables victims to be joined to the proceedings brought by the State, in order to have access to the papers, notably the original police report.

An action on behalf of the victim may take the form of a civil action joined to those criminal proceedings, which is heard at the same time and by the same Court as the criminal matter.

The criminal court will first deliver judgement on the issue of criminal liability and then hand down a Judgment on civil liability, (as a general rule reserving its decision in order to assess the quantum of the damages to be awarded to the victim).

Two remarks should be made about criminal prosecutions. First, it is important to note that a victim is not obliged to join a civil action to the criminal prosecution; however any civil claim would be stayed until the criminal action had been tried and final judgement given. Second, although an accident victim may consider that he or she has a claim, the victim may in fact be the defendant in the criminal prosecution which of course would preclude the joining of a civil action.

Stand-alone civil actions

Such actions before the French civil courts are today somewhat rare. The need for such action would only arise if the third party insurers of the vehicle which is presumed to be implicated in the accident were to refuse to make an offer for compensation. Of course, in this particular circumstance the cost-benefit analysis would be of even greater importance in assessing whether or not such a claim should be pursued.

A standard procedure in this area would be to petition the presiding judge of the court in the locality in which the accident occurred in order to appoint a medical expert to examine the victim. The victim would be examined and the medical expert would report on his findings and which would be binding on all parties. The victim would then serve a writ to have the substantive claim heard by the full court on the basis of the medical report.

The full court, again in the locality where the accident took place, would deliver judgement on the issue of liability, and if the court found the defendant liable it would proceed to determine the amount of the award of compensation.

Costs, fees and disbursements

The profession in France is unified, thus an Avocat is the equivalent of a Barrister and a Solicitor, and under French Bar rules Contingency fees per se are not permitted. Charging methods vary and the majority of practices in France currently do not use a notional hourly charging rate. Thus a clear agreement as to fees, and the modalities of their calculation, should be entered into prior to giving substantive instructions to the French lawyer. In the event that a notional hourly rate be applicable, then it is likely to be of the order of between $A225 and $A350 at current exchange rates.

Finally, it is should be noted that French Bar rules require that an initial amount, on account, to be paid by the instructing Solicitor, or lay client, to the French Avocat at the same time as the initial instruction. ■

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Victims of CJD shock win $3m payout

By JENNIFER COOKE

Human hormone recipients who can prove they have been damaged psychiatrically from news that they may contract the human equivalent of mad cow disease will be compensated with up to $3 million in Federal Government funds.

The decision – part of a ground-breaking response to the majority of the 18 recommendations of the Senate Community Affairs References Committee which were tabled in the Senate yesterday – was a change of stance by the Government.

The Minister for Health, Dr Wooldridge, said support must be given to those affected – some of the more than 2,500 official and unofficial recipients of human hormone drugs under the 19-year Australian Human Pituitary Hormone Program (AHPHP).

But the Government refused to accept other key recommendations surrounding the eligibility of legal aid to test cases on issues of public interest.

This was an issue which had led to the Senate inquiry. It followed what had been described as an "unfair" legal settlement forced on a woman who was denied legal aid to sue the Federal Government (which sponsored drugs under the AHPHP) for nervous shock.

Between 1967 and 1985 about 700 children were treated with human growth hormone (hGH) to correct short stature and more than 1,500 adults were given human pituitary gonadotrophin (hPG) to reverse infertility. Those injections, some of them contaminated, have resulted in five deaths from the fatal brain condition Creutzfeldt-Jakob disease (CJD).

National co-ordinator of the CJD Network Inc, Mrs Sue Byrne, welcomed the move.

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