

A New Mandatory Rule in the French Law of Torts

The French Supreme Court for private and criminal matters (*Cour de cassation*) has recognised a new mandatory rule in the French law of torts. As a consequence, the Court held that it applied necessarily, and that it was an exception to the applicable choice of law rule, i.e. the law of the place where the tort was committed.

Background

This new mandatory rule is in fact an entire scheme allowing victims of certain criminal offences (basically those resulting in personal injury) to claim compensation from a public fund. The fund compensates victims irrespective of any negligence committed by the tortfeasor. After payment, the fund is subrogated in the rights of the victim and may sue the tortfeasor to recover the monies paid to the victim, but on condition that the tortfeasor was liable to the victim in the first place.

The fund is obviously a French public fund. But it does not only protect French victims. It also protects foreigners when the offence was committed in France. For French victims, however, the statute does not lay down any territorial condition. It seems to follow that French nationals are eligible even when the offence was committed abroad.

The translation of the provisions of the French Code of Criminal Procedure which govern the scheme can be found [here](#).

The case

In this case, the plaintiff was a French national who had suffered a loss in the United States. While jet-skiing, he was hurt by another jet-ski from behind. He sought recovery in France before the special body set up in each first instance court to rule on the eligibility of plaintiffs. What happened before this body is not known, but the Versailles court of appeal denied compensation. It held that the plaintiff had not demonstrated that the conduct which caused him harm could be characterised as a criminal offence under American law. In a judgment of 22

January 2007, the *Cour de cassation* reversed. It ruled that the content of American law was irrelevant, as the French rule was “of necessary application” (*loi d’application nécessaire*) and thus governed.

French conflict lawyers have traditionally used several terms to refer to mandatory rules. The most famous internationally is certainly *lois de police*, but they have also been called rules of necessary application, or of immediate application. The concept, however, has always been the same. *Lois de police* are applied necessarily and immediately, as opposed to after determining whether the applicable choice of law rule provides for the application of French law. *Lois de police* are thus exceptions to the normal operation of the traditional choice of law rule, here the *lex loci delicti*.

The judgment justifies the characterization of the French scheme by stating that the rationale of the scheme is to establish a mechanism of national solidarity for victims of criminal offences, which compensates victims because of the existence of a specific social risk (criminality).

Comment

The characterization of the scheme as a mandatory set of rules is only partly convincing. Under the French theory of mandatory rules, a rule is considered mandatory when it is so important that the French legal order could not tolerate the application of any other rule. Here, it seems that the reason why French law must govern is different. The scheme does not really belong to the law of torts. It is a public scheme playing with French money. As with any public law, it is only for the State which instituted such fund to determine the conditions of its application. The application of French law is no exception to the choice of law rule governing torts. The issue of whether a French public fund should compensate a victim is not an issue of tort in the first place, but rather an issue of public law.