FINANCIER WORLDWIDE corporatefinanceintelligence

EBA | Endrös-Baum Associés
Avocats / Rechtsanwälte

The French Supreme Court's controversy in tightening liability for industrial risks

BY DR FLORIAN ENDRÖS

Traditionally, civil liability can only be asserted if the victim can prove: (i) damage; (ii) that the damage is a result of the violation of an obligation; and (iii) the causal link between the first two aspects. Having analysed recent decisions of the French Supreme Court concerning different cases of civil liability, there is an impression that these legal conditions seem to disappearing step by step. One recent court decision concerning the safety obligations a lift maintenance firm illustrates a jurisdiction exercised contra legem.

In two decisions from 1 April 2009 (Cass. Civ. 3e, April, 1, 2009, Bulletin civil 2009 III N° 71), the third Chamber of the French Supreme Court had to decide a case concerning the security obligation of a lift maintenance company. In both decisions, a person was hit on the step due to displacement between the lift and the ground level. The victim brought an action against the lift owner, who summoned on his part the lift maintenance company. The question of the liability of maintenance companies, and especially lift maintenance companies, is particularly problematic.

If for example the lift had been repaired and subsequently caused an accident, it would have been a relatively simple to establish liability on the part of the repairman. With regard to the reparations, the French Supreme Court is of course relying on former jurisdiction and a judgement of the First Civil Chamber which says: "The company which is charged with the reparation of a lift has a duty to achieve a specific result relating to the security of the machine" (Cass. 1ère civ., July, 15, 1999, bul. Civ. I N° 238).

This obligation to achieve a specific result is a logical consequence of the repairs carried out by the lift company, as it is a duty of every repairman executing a work contract. Of course, according to the obligation to achieve a specific result, the repairman has to insure the safety of the part he has repaired. Concerning a complex machine with many technical pieces, the court of first instance and the French Supreme Court had to decide whether the accident results from a safety defect caused by the repaired part in connection with the reparation contract. Therefore, it is appropriate to examine if there is a causal connection between the repair and the defective part of the lift.

However, the situation is much more difficult in the case of a pure maintenance contract, whose characteristics are very different. The contract in this case contained an obligation to change worn-out parts of the lift and to intervene within a set period of time after being advised of a failure. A standard maintenance contract never guarantees that a failure won't occur, especially if the machine is old, unless there is a special contractual clause.

The Attorney General's assistant of the French Supreme Court suggested qualifying the obligation of the lift manufacturer, who is in charge of the maintenance contract, as an obligation to achieve a specific result. To stress his proposition, he mentioned the 'precedent' of the First Civil Chamber concerning the duty of a garage owner. However, he does not draw the consequences that should normally be obvious. As a matter of fact, the First Civil Chamber reached the decision that a garage owner only has a duty of safety towards his clients who have entrusted him with a car for reparation, but he can discharge himself by proving that he did not commit any fault (Cass. Civ. 1ère, June, 9, 1993, bul. Civ. I n° 209).

The Attorney General's assistant also defended the opinion that the duty of the lift manufacturer was already extended by judgement of 15 July 1999, also issued by the First Civil Chamber (Cass. Civ. 1ère, July 1999, bul. Civ. I N° 238), in a case where a lift maintenance company had repaired the swing door of a company's lift and three hours later an employee had fallen into the cage because the recently-repaired doors opened even though the cage was not at the landing. Here, repairs were made to the defective element presumed repaired and the accident happened only three hours later.

We consider it problematic that the French Supreme Court intended to underline the lift manufacturer's obligation of safety in this legal matter with regard to his reparations compared to the case of the garage owner – that if the damage has occurred soon after the time of repair, it seems to indicate fault. Moreover, this judgement of 15 July 1999 does not seem to exclude by any terms the possibility for a lift maintenance company to prove the absence of fault. Despite this, the French Supreme Court abolished the condition of fault for the liability of the lift maintenance company.

According to the opinion of the Attorney General's assistant, the French Supreme Court seems to believe that the obligation to achieve a specific result in terms of security is justified by the danger associated with a particular machine, since its users have no autonomy nor have they committed any fault which is comparable with the obligation to achieve a specific result of safety for products with a potentially dangerous defect (Cass. Civ. 1ère, January, 17, 1995, bul. civ. I n° 43).

According to the first judgement, quoted by the Attorney General's assistant, this jurisdiction has created an obligation to achieve a specific result for product seller and for the product manufacturer. This judgement was invalidated by the judgement of 15 May 2007 (Cass. Civ. 1e, May, 15, 2007, n° 05-17947, Bulletin, 2007, I N° 186), in the matter of a salesman.

It is worth noting that this jurisdiction has been developed to repair the deficiency of the legislator with the adoption of the directive 85/374/CEE of 25 July 1985, on product liability. According to this directive, the manufacturer of a defected product will be liable if the victim can prove a defect in the product's security, the damage, and the causal link between these two aspects. The French jurisdiction extends the field of ▸▸

the liability to sellers of such products, while the directive had foreseen only liability for the manufacturer. The idea of the European legislator has been quite simple though: the liability has to be incumbent to the one who can fix the inherent risks of its product, which means the manufacturer and not the salesman.

The comparison of the Attorney General's assistant between the product liability and the liability of the lift maintenance company is unproductive. The jurisdiction which has been quoted by the Attorney General's assistant in his conclusions, on which the reflection of the French Supreme Court was based, is stained by an error. It doesn't distinguish between the spheres of risk and their imputations.

In addition, while the Directive concerning defective products stipulates the definition of a product's defective character and thus the establishment of the manufacturers' liability with regard to the security the users are entitled to expect, it seems that in this case, the French Supreme Court abandons this criterion. The obligation to safety imposed on the manufacturer or service provider should be subordinate to the users' legitimate expectations. However, within the framework of the orders issued by the French Supreme Court on 1 April 2009, this relative character of safety does not seem to be taken into account.

The decision is also contrary to the French legislator's intention. By charging the elevator maintenance firm with a duty to achieve a specific result, the French Supreme Court assumes a position that is contrary to the legislator's position. As a matter of fact, the legislator has granted the proprietors a certain time-limit to accomplish the works necessary for adaptation. In consequence, it seems impossible for the elevator maintenance firms to guarantee maximum security, as the elevators' proprietors don't consider themselves obliged to accomplish the necessary renovations. In exercising this jurisdiction, the French Supreme Court consequently imposes upon the elevator maintenance firms to undertake safety measures that the legislator has not yet demanded from the elevators' proprietors.

Finally, the proposal for an EU Directive on the liability of service providers has recommended a system of liability for fault by instituting the principle of reversal of the burden of proof. We believe the elevator maintenance firm has the possibility of exemption by showing proof of the absence of a breach of duty, given that he has granted the lessor and the owner the permission to delay the heavy investments required for the renewal of the out of date elevator fleets. It is indispensable to re-establish a liability system that leaves space for the concept of fault, even if this implies a reversal of the burden of proof, which results in an application of a reduced duty to achieve a specific result, also called a reinforced duty of best efforts. ■

Dr Florian Endrös is a founder of Endrös-Baum Associés.
He can be contacted on +33 (0) 1 53 85 81 81 or by email: florian.endros@eba-avocats.com.

Dr Florian Endrös
Founder
T: +33 (0) 1 53 85 81 81
E: florian.endros@eba-avocats.com
www.eba-avocats.com

Following a full double university degree at Munich University and Paris 1 Panthéon-Sorbonne University, Dr. Florian Endrös completed his training as an avocat of the Paris Chamber of Lawyers. After passing the examination to be admitted as a German Rechtsanwalt, Florian Endrös completed his doctorate on European product liability law, with an emphasis on French law.

He is admitted as a Rechtsanwalt in Munich and as an avocat in Paris.

Dr. Endrös practised in an international commercial law firm for several years. He was the founding partner and for ten years practised at a law firm specialising in industrial risk, before he founded the new firm Endrös-Baum Associés / EBA together with his team of lawyers. He also worked for ten years as an assistant professor at Cergy-Pontoise University (Paris). Here he was in charge of a European university project that enabled French lawyers to study German law.
The main emphasis of his practice is on complex international cases and proceedings, particularly in the fields of industrial risk, plant construction, product liability and product safety, and also on general contract and commercial law.

Dr. Endrös has many years of experience of French expedited expert report proceedings in a wide variety of industrial risk cases, and he is also the author of a number of books, essays and other publications on this subject.

Dr. Florian Endrös's working languages are German, French and English.