Product Liability

In 20 jurisdictions worldwide

Contributing editors
Harvey L Kaplan, Gregory L Fowler and Simon Castley

2015

GETTING THE DEAL THROUGH

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France

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Civil litigation system

1 What is the structure of the civil court system?

The first instance civil courts consist of local magistrates' courts for minor litigation for claims up to the value of €10,000 and the district courts for claims of more than €10,000. In addition to these general jurisdictions, there are specialised jurisdictions whose competences are limited by the legislature, including the commercial courts and the labour courts. The persons in charge of deciding cases in these two jurisdictions are not professional judges; rather, they are judges elected by their peers. Merchants registered with the French Commercial Register are elected for the commercial courts, while employers and employees are elected for the Labour Relations Board.

The majority of cases tried in the first instance may be decided again by a new jurisdiction (court of appeal) (except cases judged 'in the first and last instance', which are only subject to review proceedings on matters of law at the Court of Cassation (Supreme Court)). The court of appeal is responsible for retrying the entire case on matters of fact and law, thus offering each party the possibility that its case may be tried a second time.

A final extraordinary appeal lies to the Court of Cassation for district court decisions of first and last instance or decisions of the court of appeal. The Court of Cassation solely evaluates the law, and verifies whether lower courts observed law and procedure. The Court of Cassation may annul the judgment if the procedural rules were breached or if the law was improperly applied.

2 What is the role of the judge in civil proceedings and what is the role of the jury?

In general, civil proceedings are adversarial, although the power granted to judges has increased over time. Judges in civil court play the role of impartial arbitrators who listen and judge the case. In the 1960s, judges responsible for the preliminary proceedings were introduced. These judges watch over and ensure the progress of proceedings, may summon the parties and rule on a case after a thorough evaluation of the claims asserted by each party.

Judges also:

- may grant extensions (section 3 of the French Civil Process Order (CPC));
- judge the case solely on the facts provided by the parties;
- precisely assess the subject matter (section 12-2 CPC); and
- make decisions in compliance with the legal provisions and not according to his or her discretion (section 12-2 CPC).

The judge's role during preliminary proceedings has been codified in 760-781 CPC. However, the intervention of judges responsible for preliminary proceedings is limited to the most complex cases; summary proceedings are opened following a brief review by the President of the Court (the President) and without any preliminary proceeding.

The parties involved have a strong influence on the proceedings and play a decisive role:

- they initiate the proceedings (section 1 CPC);
- they may suspend or terminate the case (section 1 CPC);
- they determine the subject matter of the proceedings (section 4 CPC, the rule of the 'irreversibility of the subject matter' of the proceedings); and
- it rests with them to submit evidence (sections 6 and 9 CPC).

Juries are not used in civil proceedings.

3 What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

There are some differences between the procedure before the regular superior courts and the commercial courts.

Prior expert opinion
In the context of civil liability for defective products, requesting an expert opinion to establish the accuracy of the facts prior to the proceedings in the main action is recommended and common practice. The expert opinion will play an important role in the proceedings in the main action. In cases of extreme time pressure, it is possible to request the President's authorisation to obtain the determination of an expert at a fixed date. The procedure ends with the filing of a report that will be used in the main action. The value of proof of such an expert opinion is very high; in practice, it is very difficult to challenge the expert opinion after the end of the expertise proceeding.

Summons
The summons to appear in court is served (through a bailiff) by the plaintiff on the defendant. The summons must include a chronological summary and description of the facts on which the allegations are based and the objective of the claim. A summons to appear in the commercial court specifies a fixed date, while a summons to appear in the superior court does not; parties appearing before the superior court must be represented by a lawyer, so the defendant is granted a period to engage a lawyer, which may not be less than a fortnight.

Proceedings in the main action
The main objective of the first-instance hearing is to ensure that both sides are heard. The judge also has to ensure that both parties are represented by a lawyer (should this be obligatory) and that the parties exchange statements and documents. Parties are not obliged to attend hearings if they are represented by their lawyers. This procedure, from the request of an expert opinion until the date the President fixes for the pleadings in the main action, may take from three to seven years.

4 Are there any pre-filing requirements that must be satisfied before a formal lawsuit may be commenced by the product liability claimant?

French law does not specify such pre-filing requirements.

5 Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Mechanisms such as a motion to dismiss or a motion for summary judgment do not exist in French law. The only possible way for the parties to seek a resolution of the case before a full hearing on the merits is codified in the CPC section 384 et seq, and provides either a withdrawing of the plaintiff's claim (that must be accepted by the defendant) or the defendant's acquiescence in the claim. Further, such a mechanism does not entail a resolution of the case, but a resolution of the proceeding.

In any event, the resolution may not be sought on grounds such as the lack of jurisdiction over the person, or the failure of the plaintiff to allege requisite elements of the cause of the action.

6 What is the basic trial structure?

Parties must submit evidence to support their claims so that the judge is able, after ensuring that each piece of evidence has been assessed, to decide the case. In this context the brief containing the pleadings is a decisive factor. The judge relies on this brief to evaluate the allegations of the parties, and to base his or her decision. The brief contains all the documents specified in the summons; a set of all procedural actions (eg, summons, submissions, previous decisions made in the same case); and, as the case may be, copies of the jurisprudence and the doctrine, which were cited in the briefs.

The brief containing the pleadings is transmitted to the other party, who shall be informed about the documents the brief contains as well as the legal arguments made. The judge is not informed in advance about the documents in the brief, which is handed over to the judge at the end of the pleadings. However, it should be noted that the commercial court and the superior court in Paris request the parties to provide them with the brief containing the pleadings several days before the hearing, so that they are able to examine them in advance.

Forms of litigation are differentiated between the summary trials and complex cases). In the summary procedure, the President (following his or her conference) will fix a date for the first hearing if the case can be judged immediately or in the near future. In complex cases, the President will postpone the matter to his or her next conference and grant the lawyers time to inform each other about their documents and exchange their submissions. The President oversees the timetable for the claim and has no judicial powers.

In complex proceedings, the case is sent back to the judge responsible for the preliminary proceedings. Several hearings then take place during which the judge examines possibilities for conciliation and oversees the preliminary proceedings.

One peculiarity of French law is the very weak evidentiary value that is ascribed to the evidence provided by witnesses. The judge primarily bases his or her decision on written and not on verbal statements. Even if the testimony is included in a brief, the judge still ascribes a weak evidentiary value to it.

Parties are not obliged to provide the court with all relevant documents on the matter, and lawyers are even liable professionally if they provide documents to the court or the other party that would disadvantage their client.

7 Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

In March 2014, a new law called the Hamon Law introduced a type of class action in French law. This collective action aims at obtaining the compensation of individual and patrimonial damages resulting from material damage suffered by several consumers placed in an identical or similar situation and having incurred damage as a result of a contractual or legal breach by one or more same professionals. This action only concerns the damages resulting from the sales of goods, service supply or anti-competitive practice. This new type of action is reserved for consumers who are defined in the new law as 'any natural person who is acting for purposes which are outside his or her trade, business, craft or profession'.

The consumers, however, cannot bring the action themselves: only the representative consumers association can file this type of action. The associations have to be representative at national level and approved under article L441.1 of the French consumer code. Only 16 associations are approved under this article as having the authority to file a collective action.

Two types of proceedings for this collective action are foreseen by legislation.

The ordinary procedure is close to the opt-in procedure. It requires an active approach on the part of the consumer, who has to take the initiative to join a consumer group identified by the judge as the group against which the professional is liable. The judge establishes the prerequisites to join the group and the time limit to do so. This deadline has to be between two and six months from the information measures. The judge decides which measures should be taken to inform the consumers of the decision. The information measures can only be taken once the judgment is no longer subject to a further appeal. During this time, the professionals presumed to be liable will not know how many people they will have to indemnify.

The other proceeding is called the simplified procedure and is close to the opt-out system. The judge will make a statement on the professional's liability and order it to indemnify, directly and individually, the consumers whose identity and number are known without any active approach of those consumers. In this procedure, there is no time limit for the consumer to accept the compensation. This procedure is relevant for cases where the company liable has a client file, such as matters concerning insurance or mobile phone contracts. Taking into account the fact that many companies have client files, the simplified procedure is likely to be widely implemented.

This law has entered into force on 1st October 2014. Since then, only four actions have been filed by the representative consumers associations. For now no judgment has been handed down in those proceedings that are only beginning.

8 How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

The preliminary procedure to gather evidence for the product liability claim can take from two to six years. The first judgment of proceedings in the main action, from the summons until the pronouncing of the judgment, can take two to three years.

If an appeal against the decision in the first instance is filed, the average time is approximately two years until the court of appeal renders its judgment. Decisions of the Court of Cassation take approximately two years.

Evidentiary issues and damages

9 What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

Parties may resort to a preliminary injunction to clarify the facts and also to preserve evidence. In urgent cases the President may (ruling in terms of a preliminary injunction) decree any measures as long as they are not seriously contested by the parties or are unlikely to become the subject of a dispute. The President can order an expert opinion ex officio or at the parties' request. This expert opinion allows any of the parties to take an additional legal action. According to the law it is sufficient that, prior to any proceedings, there is a legitimate reason to preserve or to establish any proof of facts on which the outcome of the lawsuit depends, if a party wishes a preliminary injunction.

This expert opinion can be ordered if the President decides that he or she is not sufficiently informed and needs the opinion of a technician ex ante, or the plaintiff may request it in the main action prior to any litigation.

The expert is designated by a court order made in the course of the preliminary injunction; the content of the court order will define the expert's role. In general, the experts will comment on the urgency of the situation; the risk of deterioration of evidence; or the need to collect more information that the plaintiff might need to file an action in the future. The urgency does not change the general contradictory character of this expert opinion, which must be based on the opinion of the parties (this is different from the expert opinion on request, which by definition is non-contradictory).

Experts may collect oral or written information from any person pursuant to section 242 CPC. They may also request the judge's support should he or she intend to question a third party refusing to provide requested information; the judge may order the third party, under threat of a penalty, to provide the expert with the requested information.

Parties are not obliged to provide the expert with documents that would be of disadvantage for them, and lawyers should be extremely careful when providing the expert with evidence on which the latter will base his or her report as lawyers can be held responsible if they hand over any documents that would disadvantage their client.

10 How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

As outlined in question 6, testimony provided by witnesses has virtually no evidentiary value before the French courts. In cases of civil liability for defective products, the expert is very influential. Although the judge should not be bound by it, the content of the expert opinion will largely govern the discussions.

Besides this expert opinion, each party must provide the evidence for its allegations. Evidence must comply with certain formalities, for the court to be able to consider it. Parties may use bailiffs to prove that a certain situation existed, preserve the proof regarding a consequential damage or even inspect the damage location and take pictures of the damages.

Bailiffs may visit a third party's premises to take a statement if the third party has agreed to it explicitly. The bailiff may only intervene at the opposing party's premises with the prior consent of a judge, in the form of an official order made upon request by the interested party. This official order fixes the exact mission of the bailiff in accordance with the request. This procedure permits the bailiff to prepare a report even without the permission of the owner of the premises. Thus, this is a non-contradictory procedure that can be very efficient in the case of an upcoming litigation, especially to motivate the parties to start negotiations immediately to avoid the procedural costs.

11 May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

In civil proceedings, the President may freely choose which experts to nominate; section 232 CPC stipulates that judges may choose any person whose opinions can enlighten them. The judge will designate experts based on their:

- professional qualifications;
- competence in resolving technical questions;
- moral qualities (objectivity, impartiality); and
- intellectual qualities (clarity, diligence).

Since 1975, an expert need no longer be a French national. However, certain restrictions remain with respect to the person (who must be free of convictions) and with respect to the expert's profession (for example, bailiffs, judges or prosecutors are ineligible).

A list of domestic experts created by the office of the court of appeal and the office of each superior court is at the disposal of judges. However, the judge is free to choose experts that are not named on these lists.

Parties cannot influence the choice of the expert, but can object to appointments under section 234 of the CPC before the judge who appointed the expert. Should the judge accept the objection, he or she will choose a replacement. The reasons for objection to a judge (which are likewise applicable in the case of an expert) are listed in section 341 CPC.

It should be noted that besides judicial expert opinions (requested by a judge) and amicable expert opinions (accepted by the parties out of court), there remains expert opinion provided by a party-appointed experts. The party is entirely free to resort to such expert opinion, but it must bear that expert's fees. This expert opinion may be introduced into the procedure, just like any other document, but must have been discussed with the other party.

The opinion of the court-appointed expert is, in practice, predominant.

12 What types of compensatory damages are available to product liability claimants and what limitations apply?

There are some differences between the general law and the special provisions stipulated in sections 1386-2 of the French Civil Code (the Civil Code).

General law

Liability pursuant to the liability law (sections 1384 et seq of the French Civil Code): the damage (proprietary or non-proprietary) may be of any kind without any exceptions. This includes loss of profit, loss of image and loss of opportunity.

Contractual liability (sections 1641 et seq of the Civil Code): both the seller and manufacturer are bound to deliver a compliant good that is free from defects and have an obligation to inform. Both material and moral damages can be claimed. This includes all pure economic loss such as loss of profit, loss of image and loss of chances.

In order to recover damages, the purchaser must prove that the defect existed prior to the sale.

Special provisions of section 1386-2 of the Civil Code

'The provisions of this Title shall apply to damage resulting from an injury to the person or to a property other than the defective product.'

Under the provisions of section 1386-2 of the Civil Code, all damages (proprietary or non-proprietary) deriving from personal injury must be recompensed. The recovery of damages to property is similarly possible, irrespective of the use of the property (namely, private or professional). As such, economic damages, such as a business interruption, may be recompensed a priori.

There is one restriction: section 1386-2(2) of the Civil Code stipulates that damage to the product itself does not trigger any compensation, while European law obliges domestic legislation to stipulate a threshold. Therefore, section 1386-2 specifies that the damages have to exceed the amount provided by a separate regulation. This regulation, dated 11 February 2005, fixes this amount at €500.

13 Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

The French system does not provide for punitive damages since the legislator refuses to acknowledge the possibility for legal entities to be subject to a 'penalty' under civil law. In practice, however, the judge can, when evaluating the damage, consider the indemnification with respect to the victim's loss of image or reputation. Thus, the judge evaluating the dimension of the damages may increase the amount to be paid in damages and, as a side effect, is free to penalise unacceptable business behaviour.

Litigation funding, fees and costs

14 Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

The state provides legal aid to persons with insufficient funds to protect their rights at court. This financial aid is variable and depends on the income of the requesting party. Aid is directly transferred to the legal professional (for example, lawyer, bailiff) who will assist the party during the trial. A request may be made before either the judiciary or the administrative jurisdiction and the aid will (entirely or partly) cover the lawyer's fees, the bailiff's fees and even the costs for an expert opinion.

Both French nationals and foreign nationals (under certain conditions) may request financial aid, and aid may be granted to individuals and to non-profit legal entities. However, aid is refused should the requesting party have legal protection insurance covering the costs of the proceedings or the transaction.

Should the beneficiary lose the proceedings or have to bear the costs, he or she also has to pay his or her adversary's costs, except for the adversary's lawyer's fee (unless the court decides otherwise). Should the beneficiary win the case and his or her financial resources increase, the state may request him or her to reimburse the financial aid.

Legal aid may only be cancelled in two cases: if the beneficiary has obtained it through a false declaration or has acquired sufficient money during the proceedings. Section 71 of the French Regulation dated 19 December 1991 stipulates that this clawback may be requested ex officio or by any interested party, in particular by the adversarial party or by the lawyer.

15 Is third-party litigation funding permissible?

The use of third-party capital to fund litigation is not permitted in France. Section 11.3 of the National Domestic Regulation stipulates inter alia that lawyers may solely receive their fees from their client or a representative of the latter. Therefore, the French bar is very reluctant regarding a payment by a third party, and recourse to private funds to support proceedings is not explicitly permitted, either by law or by constant practice.

16 Are contingency or conditional fee arrangements permissible?

Professional ethics rules prohibit lawyers from entering into 'no win, no fee' arrangements with clients.

17 Can the successful party recover its legal fees and expenses from the unsuccessful party?

Each party generally must bear the incurred expenses (eg, bailiff's fees and fees for an expert opinion) as defined in section 695 CPC. However, the judge may decide to oblige the other party to bear these costs.

These expenses are solely those incurred in connection with the services of the judicial institutions and do not include all the costs incurred during the proceedings (for example, lawyer's fees, travelling expenses). The legislator relies on the equitable discretion of the judge (section 700 CPC) to determine the party that has to cover these costs. Since such discretion is variable, the judge may decide that the winning party must partly bear the extrajudicial costs of the losing party (or the other way round), or

that each party has to bear the expenses it incurred in connection with the proceedings.

Sources of law

18 Is there a statute that governs product liability litigation?

The statutory provisions governing product liability are found in section 1386-1 et seq of the Civil Code, adopted by the statute on 19 May 1998 (which implemented Directive No. 85/374 of 25 July 1985). This law introduced the strict liability of the producer, which is likewise applicable in the case of a claim ex contractu or ex delicto. Pursuant to this, the victim must prove the existence of a defect and a causal connection between the default and the incurred damages.

Section 1386-18 of the Civil Code leaves the decision regarding the basis for claim to the victim who may choose to rely on several bases for claim, under the condition that the victim respects the general principle of non-accumulation between contractual and tortious liability. However, the provision of sections 1386-1 et seq of the Civil Code do not apply to those products brought into circulation prior to 1998, to which only the provisions of the general law are applicable (contractual or tortious liability).

The victim also has the right to base its claim against the seller or producer on regular contractual liability (section 1147 and section 1641 et seq of the Civil Code). French jurisprudence considers that the contractual action is transmitted as an attachment to the product to the different buyers. The end user is entitled, according to French internal law, to act against each distributor in the distribution chain as well as against the producer directly (Court of Cassation plenary assembly 7 February 1986).

A limit has, however, been established concerning the non-homogeneous chains of contracts, especially for outsourcing. Without contractual links between the owner and the outsourcer, the action is necessarily a tort action, according to the general principle of contract relativity (Cassation plenary assembly 12 July 1991). Nevertheless, it has been judged that even if the claim is based on a tort action, a contractual breach can be claimed since a damage was caused (Court of Cassation plenary assembly 6 October 2006).

19 What other theories of liability are available to product liability claimants?

It is necessary to draw a distinction between the theories stipulated by the legislator and those that have been elaborated by jurisprudence.

Contractual liability pursuant to section 1641 et seq of the Civil Code

This right may solely be applied in a contractual context, therefore the victim must be a contracting party with respect to the person it makes charges against (manufacturer, producer or seller). The victim must produce proof of the latent defect, proof that the defect existed before the purchase and proof of the causal connection between the default and the incurred damages. Nevertheless, the claimant is entitled to base its claim on a different section (for example, section 1384 or section 1386-1 et seq of the Civil Code); however, it has to respect the general principle of non-accumulation between contractual and tortious liability.

Liability in tort pursuant to section 1384 of the Civil Code

These provisions derive from the general law (general liability regarding property). Should this provision be applied, the liable person is the one who had 'the possibilities to use, to direct and to control' (Cass Ch Réunies, 2 December 1941, Franck) the property at the moment the damage occurred. Even if the victim claims the manufacturer's liability since the product was in its custody, the victim still has to prove the structural defect of the product. Thus, if the reason for the damage cannot be determined, a priori the manufacturer's liability does not come into consideration. However, should a doubt remain with respect to the origin of the damage, the jurisprudence tends to presume that the damage can be attributed to the structure of the product.

Jurisprudence

Victims basing their claim on the guarantee of latent defects may refer to the manufacturer's failure to observe its duty of care in accordance with section 1147 of the Civil Code. This duty obliges manufacturers and sellers to provide 'products that are compliant with the security one may legitimately expect' (Cass 1st civ, 3 March 1998).

In a contractual context, the jurisprudence has provided the purchaser who suffered damage in connection with the purchased product with the possibility to refer to the supplier's failure to comply with its duty to inform. Thus, it has become obligatory for the supplier to provide such information (for example, by providing a note). This duty to inform also applies to products that are harmless (Cass 2nd civ, 27 April 1977), but will be applied more strictly as the possibility of danger arising from a product increases (Cass Com, 3 January 1977).

20 Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

Section L221-1 of the French consumer protection statute obliges businesses to observe a general duty of care regarding products and services: 'products and services must, under normal conditions of use or under other conditions of use generally foreseeable by a professional, comply with the safety requirements one may legitimately expect and must not be hazardous to anyone's health'.

Section L221-1-2 obliges the responsible business that brings a product into circulation to provide the consumer with the necessary information to assess the inherent risk of the product if these risks are not perceptible at the moment of purchase. Further, it must adopt the necessary measures to keep the consumer informed of the inherent risks of the product and to take the necessary actions to control the risks (for example, recall the product, warn consumers).

Section L221-1-3 specifies that if a business is aware that its product is not in compliance with the requirements set forth in section L221-1 of the French consumer protection statute, it must inform the competent administrative institutions and specify the measures it intends to take to avoid risks for consumers. This is a duty to inform which is applicable if a risk appears after the product was brought into circulation.

21 Can criminal sanctions be imposed for the sale or distribution of defective products?

The victim may claim ascertainment of the liability under criminal law for the manufacturer, the producer or the seller of the defective product. This parallel criminal claim can be based on several reasons:

- the criminal offence of endangering a third party: section 121-3 of the French Penal Code establishes a criminal liability should a person deliberately endanger any third party. It applies in the case of any producer bringing a product into circulation that it knows to be defective or that it does not retrieve from the market after the defect has emerged. It likewise applies in the case of a failure to act or imprudence or negligence on the part of a party that might have contributed to the distribution of the defective product. The provisions oblige everybody (manufacturers as well as distributors) to immediately stop the sale of the product that appears to be defective and to carry out the necessary measures to recall the defective product;
- criminal assaults: section 221-6 of the Penal Code establishes several unintentional elements of a crime in cases of injury to the life, body or health of a person (for example, bringing toxic comestible goods into circulation);
- fraud: section L213-1 of the French consumer protection statute generally imposes liability on sellers who try to mislead their contracting partner with respect to the qualities and risks of the product; and
- misleading advertising: any seller who does not provide its clients with products complying with the offer for sale it advertised exposes itself to the penalties set forth in sections L121-1 of the French consumer protection statute.

The criminal assault can concern the company itself and not only the physical person.

22 Are any novel theories available or emerging for product liability claimants?

Such a framework exists with respect to buildings under construction. Section 1792-4 of the Civil Code imposes a warranty on the manufacturer if it has provided a work, a part of a work or an element of equipment designed and produced for meeting precise and predetermined requirements when in working order.

To hold the manufacturer liable, it is necessary that the hiring party made use of the work without modification and in compliance with the directions of the manufacturer. The manufacturer must have clearly enunciated the operation instructions and the characteristics of the product.

(The term 'manufacturer' also applies to persons importing a work, a part of a work or an accessory part produced abroad, and those who offer the product as their own work by selling it under their name, their brand or any other distinctive feature.) Further, manufacturers may be held responsible on the grounds of the general law concerning the sale (eg, guarantee regarding latent defects, application for an exemption and additional duty to provide a caution notice).

The subcontractor's liability is different from the manufacturer's; its liability can only be based on sections 1386-1 of the Civil Code.

23 What breaches of duties or other theories can be used to establish product defect?

The defendant may be confronted with various breaches of duty:
- breach of the manufacturer's or seller's duty to inform;
- where the product does not comply with the stipulations of the agreement;
- in cases of latent defect, if it can be proved that the defect existed before the purchase of the product; and
- if the product does not comply with the safety standards one can lawfully expect (however, if the product was delivered with a notice expressing a warning with respect to the handling of the product and providing precautions to be taken, this argument does not apply).

24 By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

Lack of safety: defined in Regulation No. 85/374 dated 25 July 1985 and implemented in section 1386-4 of the Civil Code, '[a] product is defective within the meaning of this Title where it does not provide the safety which a person is entitled to expect'. The victim bears the burden of proof pursuant to section 1386-9 of the Civil Code; it must prove that the product emerged as atypically dangerous. The manufacturer may discharge itself by proving that the defect did not exist when the product was put into circulation. In addition, the danger emerging from the product itself does not allow the conclusion that the product is defective (eg, tobacco). However, the judge will not hesitate to base his or her decision on a presumption of facts (section 1353 of the Civil Code) to assume an existing defect; this procedure facilitates the victim's burden of proof.

Lack of conformity
This applies when the delivered product does not comply with the characteristics of the product that were stipulated in the agreement. The purchaser bears the burden of proof.

Latent defect
This applies when the product is unfit for the use for which it was intended (section 1641 of the Civil Code). This is often an inner defect of the product (for example, a manufacturing defect in a machine). Since the defect is not visible, the victim bearing the burden of proof has to prove it by means of inspection. In the case of damage due to an unknown reason, it is assumed that the product that is the origin of the damage is necessarily flawed (Cass 2nd civ, 2 December 1992).

Duty to inform
This is a collateral obligation of the seller. The jurisprudence of the Court of Cassation obliges the manufacturer or seller to provide the proof that they have discharged their duty to inform. Therefore, the manufacturer has to produce an instruction label as well as a warning regarding the dangers of the product.

Safety obligation
The manufacturer must deliver a product free from defects and fulfil its safety obligation. Thus, in the case of a defect, its liability is assumed. However, the safety obligation is not unlimited; it is limited to the delivery of the products that, used in compliance with the recommendations provided by the distributor, do not normally present any danger when used.

Section 1384 of the Civil Code sets out liability for damage or injury caused by objects in one's care. Should damage be caused by objects, the person who has these in his or her custody is responsible for the damage. The victim bears the burden of proof.

25 Who may be found liable for injuries and damages caused by defective products?

Distinctions have to be drawn between general and specific legislation in this regard.

General law (sections 1641 et seq and 1384 Civil Code)
French jurisprudence construes these notions extensively and holds all businesses that intervened at any time (namely, from the design and development of the product, through to the bringing of the product into circulation, until the retail sale) liable for defective products. Thus, it concerns the following parties:
- manufacturers;
- producers;
- suppliers;
- importers;
- distributors; and
- retailers.

Special law (sections 1386-1 et seq of the Civil Code)
While the producer is the principal, section 1386-6 of the Civil Code also catches those who present themselves as the producer by putting their name, trademark or other distinguishing feature on the product, and those who import a product into the European Union for sale, hire (with or without a promise of sale) or any other form of distribution. The following are considered to be producers:
- manufacturers of industrial products;
- companies providing power supplies;
- farmers; and
- subcontractors.

This provision can be construed extensively and thus includes the suppliers as provided under section 1386-7 of the Civil Code. In the (hypothetical) case that the manufacturer cannot be identified, it is stipulated that the seller or the hirer are liable for the lack of safety of a product, unless they identify the supplier or the producer within three months beginning with the reception of the request regarding the victim's claim.

26 What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The purchaser bears the burden of proof regarding the causal relationship between defect and damage. This onus of proof cannot be reversed.

27 What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

As described in question 20, sections L221-1-2 and L221-1-3 of the French consumer protection statute stipulate such an obligation once the sale has been effected (for example, recall from the market, information provided to customers and the competent administrative institutions).

Limitations and defences

28 What are the applicable limitation periods?

General law
Contractual context
Latent defects: pursuant to section 1648 of the Civil Code, the victim must file an action within two years of the detection of the defect.

Failure to observe the duty of care: the victim must file an action within five years. This period extends to 10 years (beginning on the date the damage healed at the best) in the case of an assumed bodily harm (section 2226 of the Civil Code).

Failure to observe duty of care: the victim must file an action within five years (limitation period set forth by general law), unless a bodily harm can be assumed, in which case within a period of 10 years (section 2226 of the Civil Code).

Tortious context
With respect to claims based on section 1384 of the Civil Code, the period is five years (general law); the period begins at the moment the victim becomes aware of the defect (section 2224 of the Civil Code).

Update and trends

On 17 February 2015, a new law (No. 2015-177) was published providing, inter alia, that the French government can proceed to reform contract law as well as the law of obligations by way of decree. This reform will not directly affect product liability rules (latent defect, liability in tort and special law regarding product liability), yet, it may have an effect on certain rules regarding the formation, interpretation and the execution of a contract, which in turn should have an influence on product liability in general.

A reform of the law of obligations or contract law has been under discussion since 2005. Indeed, various reform drafts have been submitted during the past 10 years without any significant change in the French Civil Code, which has remained quite the same since 1804.

The law provides that the bill ratifying the reform has to be submitted before 17 February 2016, leaving relatively little time to devise the reform.

Yet, the passing of the reform by decree should avoid endless debates before the representatives' chambers and allow for more immediate modifications of contract law. For instance, the reform would grant more power to the judge to verify the balance between the parties' duties. The judge will have the right to delete a contract clause if he or she estimates that this clause creates a significant imbalance to the detriment of a party. This new rule may affect product liability in the sense that the binding power of a contract becomes subject to judiciary control: a manufacturer or seller may find certain protective clauses contained in the general conditions of its contract deleted by the judge, if the latter considers that this clause results in a significant disadvantage for the buyer.

Special provision pursuant to section 1386-17 of the Civil Code

An action for the recovery of damages based on the provisions of the title is time-barred after a period of three years from the date on which the claimant knew or ought to have known the damage, the defect and the identity of the producer. Should the defective product have been brought into circulation prior to the entry into force of the Act dated 19 May 1998, the period during which the victim may file an action against the seller begins with the purchase (Com, 24 January 2006).

29 Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

In order to release itself from liability, the producer may refer to the argument that the product defect was not discoverable within the limitations of science and technology at the time it put the product into circulation (article 1386-11 No. 4 of the Civil Code). The producer bears the burden of proof.

Nevertheless, a special provision stipulated in section 1386-12 of the Civil Code applies in the case of exoneration; where damage was caused by an element of the human body or by products thereof, a producer may not invoke the exonerating circumstance provided for.

In the context of a guarantee of latent defects (general law), the risk that the defect develops in the course of time does not allow the seller or the manufacturer to escape liability (Cass 3rd civ, 17 July 1972).

30 Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

The producer may refer to the argument that the defect is caused by the product being in compliance with mandatory provisions of statutes or regulations; this is a proper defence in the context of product liability based on defective products (section 1386-1 et seq of the Civil Code). This is stipulated in section 1386-11 No. 5 of the Civil Code.

However, this reason for exoneration must be counterbalanced by section 1386-10 of the Civil Code, which stipulates that 'a producer may be liable for a defect although the product was manufactured in accordance with the rules of the trade or of existing standards or although it was the subject of an administrative authorisation'. Therefore, the judge decides the question.

31 What other defences may be available to a product liability defendant?

There are differences between general and special law.

General law

Latent defects

The manufacturer or seller may not refer to the case of exoneration in order to escape liability. However, the judge may pronounce a split liability in a case where he or she finds both parties to be guilty and if the victim has badly followed the instructions for use of the product (or has not followed them at all) or has used it in a wrong way (Cass 1st civ 16 June 1992).

Liability in tort

The manufacturer's liability (pursuant to 1384-1 of the Civil Code) may be overruled if it successfully proves the existence of an external reason for the defect caused by force majeure. However, as soon as the victim has demonstrated the existence of a structural defect of the product that was the origin of its damage, such exoneration seems difficult to obtain. Sometimes judges are willing to deny the manufacturer's liability in cases where the latter lost effective control over the product's structure (for example, if the product has been repaired by another professional after the manufacturer gave it away) (Cass 2nd civ, 14 November 1979). Furthermore, judges tend to limit the manufacturer's product liability in the course of time; thus it was decided that a manufacturer could not be held liable 12 years after the product was sold (Cass 2nd civ, 5 June 1971). Finally, as soon as the victim became aware of the defective structure of the product, yet continued to use the product after it was informed about the possible risks, the judges denied the manufacturer's product liability (Cass 2nd civ, 13 December 1989).

Special law

Section 1386-11 of the Civil Code lists other cases of exoneration the manufacturer may refer to in the case that it is able to provide the proof. These are, among others, that: 'he did not put the product into circulation'; 'the defect that caused the damage did not exist at the time when the product was put into circulation by him or her or that this defect came into being afterwards'; or 'the product was not for the purpose of sale or any other form of distribution'.

There exist other cases of exoneration stipulated by law, such as the action of a third party (including section 1386-11 No. 5 of the Civil Code, which stipulates that the producer of a component part is not liable either where it proves that the defect is attributable to the design of the product in which the component has been fitted or to the directions given by the producer of that product), and furthermore if the victim is responsible (according to section 1386-13 of the Civil Code, the liability of a producer may be reduced or disallowed if the damage is caused by both (ie, by a defect in the product and by the fault of the injured person).

32 What appeals are available to the unsuccessful party in the trial court?

Before civil jurisdictions: the party wishing to lodge an appeal against a judgment rendered in the first instance may do so within a period of one month beginning with the announcement of the judgment.

Before criminal jurisdictions: the appeal has to be lodged within 10 days beginning with the announcement of the judgment (section 498 CCP).

In this case of appeal, the civil claim and the criminal matter will be re-examined by the court of appeal.

Jurisdiction analysis

33 Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

The French product liability law was introduced into the Civil Code by the Law of 19 May 1998, which transposes the European directive into national law.

French product liability creates a high risk for the seller, manufacturer of goods or the construction company, especially because this liability is not conditional on the proof of a fault. More and more, judges consider that a company can easily manage the risk with appropriate insurance coverage. This coverage is very important, especially for financial damages.

The scope of the law of 19 May 1998 allows the compensation for personal injury and material damages as mentioned above. Consequently, regarding liability, this law is commonly used each time a product is involved in the damage.

Apart from these considerations, the special product liability law does not entitle to punitive damages or contingency fees, which still do not exist in French law.

34 Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

French product liability law continues to become more and more strict for the seller or the producer or both, even if some recent decisions underline some very important basics.

In an interesting decision from 2010, the Supreme Court pointed out that the claimant has to prove the concrete defect of the product; it is not sufficient that the product was implicated in the accident. For the product to qualify as defective, the judge must be able, based on the evidence as an expert report, to exclude alternative technical causes (Cass 2 civ 4 February 2010, No. 08-70373).

35 Describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

The level of consumerism in France is quite high and consumers are well informed about their rights. Very often, claims are filed from the insurance company of the consumer to seek redress against the manufacturer or seller of the presumed defective product. In the case of an accident, the victim and its insurance company quite automatically sue all producers and suppliers of components when the amount of the claim justifies the action.

This 'reflex' to start a proceeding is not restricted to consumers; it is the 'normal' French reaction to any event, even between business partners or in the industrial field. The incidence of this kind of proceeding is increasing, especially in this period of economic crisis, when it seems easier to the claimant to earn money by legal actions than by its normal business.

36 Describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

As explained in question 7, a new law on collective actions has been passed. In the simplified procedure, no active approach is required on the part of the consumers in order to be indemnified. In theory, this type of procedure is claimant-friendly insofar as the consumers do not have to join a group, being listed in a client file is sufficient to be indemnified if the professional is recognised liable. However, to date, there is no case law to confirm the consequences of this new law and the proceedings introduced by it.

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