

Product Liability 2021

Contributing editors
Rod Freeman, William O'Connor and Matt Howsare



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021

No photocopying without a CLA licence.

First published 2008

Fourteenth edition

ISBN 978-1-83862-703-4

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Product Liability

2021

Contributing editors**Rod Freeman, William O'Connor and Matt Howsare**
Cooley LLP

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Product Liability*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Greece.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Rod Freeman, William O'Connor and Matt Howsare of Cooley LLP, for their continued assistance with this volume.



London

September 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Australia	3	India	51
Colin Loveday and Greg Williams Clayton Utz		Amir Singh Pasrich and Amit Ranjan Singh International Law Affiliates Pasrich & Co	
China	11	Ireland	64
Jan Holthuis, Li Jiao and Jing Wang Buren NV		Michaela Herron, Kevin Power, James Gallagher and Aisling Morrough Mason Hayes & Curran LLP	
England & Wales	19	Italy	73
Rod Freeman, Edward Turtle and Tracey Bischofberger Cooley LLP		Daniele Vecchi, Michela Turra and Alessandra Chimienti Gianni & Origoni	
European Union	27	Japan	84
Rod Freeman, Carol Holley, Julia Maskell and Tracey Bischofberger Cooley LLP		Oki Mori and Akiko Inoue Nagashima Ohno & Tsunematsu	
France	35	Nigeria	91
Florian Endrös and Jessika Da Ponte EBA Endrös-Baum Associés		Babatunde A Sodipo Ajumogobia & Okeke	
Greece	43	United States	101
Nicholas Moussas and Konstantina Theodosaki Moussas and Partners Law Firm		William O'Connor, Matt Howsare, Shawn Skolky, Andrew Barr and Jasmin Motlagh Cooley LLP	

France

Florian Endrös and Jessika Da Ponte

EBA Endrös-Baum Associés

CIVIL LITIGATION SYSTEM

The court system

1 | What is the structure of the civil court system?

The first instance civil courts consist of district courts. In addition to these general jurisdictions, there are specialised jurisdictions whose competencies 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; 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.

Most cases tried in the first instance may be decided again by a new jurisdiction (court of appeal). The court of appeal is responsible for retrying the entire case on matters of fact and law, offering each party the possibility that its case may be tried a second time.

A final extraordinary appeal is given by 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 laws and procedures. The Court of Cassation may annul the judgment if the procedural rules were breached or if the law was improperly applied.

Judges and juries

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, who oversee 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 (the CPC));
- judge the case solely on the facts provided by the parties;
- precisely assess the subject matter (section 12(2) of the CPC); and
- make decisions in compliance with the legal provisions and not according to his or her discretion (section 12(1) of the CPC).

The judge's role during preliminary proceedings has been codified in sections 763 to 781 of the 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 of the CPC);
- they may suspend or terminate the case (section 1 of the CPC);
- they determine the subject matter of the proceedings (section 4 of the CPC); and
- it rests with them to submit evidence (sections 6 and 9 of the CPC).

Juries are not used in civil proceedings.

Pleadings and timing

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 one before 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 and in the main action. The procedure ends with the filing of a report that will be used in the main action. It is very difficult to challenge the expert's opinion after finishing 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. Since 1 July 2021, each summons must specify a fixed date to appear before the court.

Proceedings in the main action

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

Pre-filing requirements

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.

Summary dispositions

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

The only possible way for the parties to seek a resolution of the case before a full hearing on the merits is codified in section 384 et seq of the CPC and provides either the withdrawal of the plaintiff's claim or the defendant's acquiescence in the claim. Such a mechanism does not entail a resolution of the case but a resolution of the proceeding.

Trials

6 | What is the basic trial structure?

The 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. The judge relies on this brief to evaluate the allegations of the parties, and to base his or her decision on. The brief contains all the documents specified in the summons; a set of all procedural actions; and, depending on the case, copies of the case law and the doctrine, which were quoted 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. It should be noted that some commercial and district courts request the parties to provide them with the brief containing the pleadings several days before the hearing, so that they can examine them in advance.

Forms of litigation are differentiated between 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 soon. 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.

One peculiarity of French law is the 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.

Group actions

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 law called the Hamon Law (Law No. 2014-344) introduced a type of class action into French law. This collective action aims at obtaining compensation for individual and patrimonial damages resulting from material damage suffered by several consumers placed in an identical or similar situation and having incurred damage because of a contractual or legal breach by one or more of the same professionals. This type of action is reserved for consumers who are defined in the law as 'any natural person who is acting for purposes which are outside his or her trade, business, craft or profession'.

Consumers, however, cannot bring the action themselves: only the representative consumers' association can file this type of action. The associations must 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.

Since the class action procedure was enforced, the Law of 26 September 2016 has allowed the 486 existing health user-approved French associations to take legal action before French courts in health matters.

Further, class actions have been extended to cover employment discrimination.

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 must 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 for doing so. This deadline must be between two and six months from the information campaign. The judge decides which measures should be taken to inform consumers of the decision. The information campaign can only commence 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 to indemnify, directly and individually, the consumers whose identity and number are known without any active approach by 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. Because many companies have client files, the simplified procedure is likely to be widely implemented.

Timing

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 a product liability claim can take two to six years. The first judgment of proceedings in the main action, from the summons until the pronouncement of judgment, can take two to three years.

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

EVIDENTIARY ISSUES AND DAMAGES

Pretrial discovery and disclosure

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

The parties may resort to a preliminary injunction to clarify the facts and to preserve evidence. In urgent cases, the President of the Court (the President) may (ruling in terms of a preliminary injunction) decree any measures if 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 additional legal action. According to the law, it is sufficient that, prior to any proceedings, there is a legitimate reason to preserve or establish any proof of facts on which the outcome of the lawsuit depends if a party wants a preliminary injunction.

The expert is designated by a court order made during the preliminary injunction; the content of the court order will define the expert's role. In general, the expert 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.

Experts may collect oral or written information from any person, pursuant to section 242 of the Civil Process Order (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.

Evidence

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

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. The parties may use bailiffs to prove that a certain situation occurred, preserve the proof regarding consequential damage or even inspect the damage location and take pictures of the damages.

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.

Expert evidence

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 of the CPC stipulates that judges may choose any person whose opinions can enlighten them. The judge will designate experts based on:

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

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

In practice, the parties are requested to suggest some names of experts to be appointed but the final decision remains with the judge. If the parties have indeed agreed on an expert's name before the hearing, the judge will be inclined to nominate this one.

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 expert. The party is entirely free to resort to such expert opinion, but it must bear this 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.

Compensatory damages

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 section 1245-1 of the French Civil Code.

General law

Liability pursuant to the liability law (section 1242 et seq of the 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 (section 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.

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

Special provisions of section 1245-1 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 1245-1 of the Civil Code, all damage deriving from personal injury must be recompensed. The recovery of damage to property is similarly possible, irrespective of the use of the property (namely private or professional).

There is one restriction: section 1245-1 specifies that the damages must exceed the amount provided by a separate regulation. This regulation, dated 11 February 2005, fixes this amount at €500.

Non-compensatory damages

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

The French system does not provide for punitive damages as 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.

Other forms of relief

14 | May a court issue interim and permanent injunctions in product liability cases? What other forms of non-monetary relief are available?

The most common interim measure is the expert's proceedings ordered by the judge. The court-appointed expert can decide to put under seal the product or product series object of the claim to avoid further damage.

The judge may also order the defendant to pay a certain amount as 'provision' to the claimant if the damage is not seriously challenged.

LITIGATION FUNDING, FEES AND COSTS

Legal aid

15 | 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 in court. This financial aid is variable and depends on the income of the requesting party. Aid is directly transferred to the legal professional (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 if the requesting party has legal protection insurance covering the costs of the proceedings or the transaction.

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, by the adversarial party or by the lawyer.

Third-party litigation funding

16 | 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 French National Bar 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.

Contingency fees

17 | Are contingency or conditional fee arrangements permissible?

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

'Loser pays' rule

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

Each party generally must bear the incurred expenses (bailiff's fees and fees for an expert opinion) as defined in section 695 of the Civil Process Order (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 (lawyer's fees, travelling expenses). The legislator relies on the equitable discretion of the judge (section 700 of the CPC) to determine the party that must cover these costs.

SOURCES OF LAW

Product liability statutes

19 | Is there a statute that governs product liability litigation?

The statutory provisions governing product liability are found in section 1245 et seq of the Civil Code, adopted by Law No. 98/389 of 19 May 1998 (which implemented Directive 85/374/EEC of 25 July 1985 (the Product Liability Directive)). 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 1245-17 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 section 1245 et seq of the Civil Code does 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 (sections 1231-1 and 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.

Traditional theories of liability

20 | 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 case law.

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, 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.

Liability in tort pursuant to section 1242 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 Réunion, 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, he or she still must prove the structural defect of the product.

Case law

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 1231 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 of referring to the supplier's failure to comply with its duty to inform. Thus, it has become obligatory for the supplier to provide such information (by providing a note).

Consumer legislation

21 | 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 take the necessary actions to control the risks (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.

Criminal law

22 | 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 Criminal 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, and also 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 Criminal Code establishes several unintentional elements of a crime in cases of injury to the life, body or health of a person (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 section L121-1 of the French Consumer Protection Statute.

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

Novel theories

23 | 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 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 operating instructions and the characteristics of the product. Further, manufacturers may be held responsible on the grounds of the general law concerning the sale (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 section 1245 of the Civil Code.

Product defect

24 | 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).

Defect standard and burden of proof

25 | 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 the Product Liability Directive and implemented in section 1245-3 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 1245-8 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. However, the judge will not hesitate to base his or her decision on a presumption of facts (section 1382 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. Since the defect is not visible, the victim bearing the burden of proof must prove it by means of inspection.

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 must 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 1242 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 its custody is responsible for the damage. The victim bears the burden of proof.

Possible respondents

26 | Who may be found liable for injuries and damages caused by defective products? Is it possible for respondents to limit or exclude their liability?

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

General law (sections 1242 and 1641 et seq of the Civil Code)

French jurisprudence construes these notions extensively and holds all businesses that intervened at any time liable for defective products. Thus, it concerns the following parties:

- manufacturers;
- producers;
- suppliers;
- importers;
- distributors; and
- retailers.

Special law (section 1245 et seq of the Civil Code)

While the producer is the principal, section 1245-5 of the Civil Code also includes 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 includes the suppliers, as provided under section 1245-6 of the Civil Code. In the 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 of the reception of the request regarding the victim's claim.

Causation

27 | 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 cannot be reversed.

Post-sale duties

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

Sections L221-1-2 and L221-1-3 of the French Consumer Protection Statute stipulate such an obligation once the sale has been performed (recall from the market, information provided to customers and the competent administrative institutions).

LIMITATIONS AND DEFENCES

Limitation periods

29 | 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 and within five years from the sales contract.

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 it is established that the victim's health status is unlikely to be improved by further medical treatment) in the case of an assumed bodily harm (section 2226 of the Civil Code).

Tortious context

With respect to claims based on section 1242 of the Civil Code, the period is five years (general law) and begins at the moment the victim becomes aware of the defect (section 2224 of the Civil Code).

Special provision pursuant to section 1245-16 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.

State-of-the-art and development risk defence

30 | 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?

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 1245-10(4) of the Civil Code). The producer bears the burden of proof.

However, section 1245-11 of the Code civil provides that 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).

Compliance with standards or requirements

31 | 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 following mandatory provisions of statutes or regulations; this is a proper defence in the context of product liability based on defective products (section 1245-10(5) of the Civil Code).

However, this reason for exoneration must be counterbalanced by section 1245-9 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'.

Other defences

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

General law

Latent defects

The manufacturer or seller may not refer to the case of exoneration 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 incorrectly followed the instructions for use of the product (or has not followed them at all) or has used the product incorrectly (Cass 1st civ, 16 June 1992).

Liability in tort

The manufacturer's liability (pursuant to section 1242(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 (repair by another professional after the manufacturer gave it away).

Special law

Section 1245-10 of the Civil Code lists other cases of exoneration that the manufacturer may refer to in the case that it is able to provide the proof. These are the following, among other things:

- he or she did not put the product into circulation;
- the defect that caused the damage did not exist at the time the product was put into circulation or this defect came into being afterwards; and
- 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, and if the victim is responsible (according to section 1245-12 of the Civil Code, the liability of a producer may be reduced or disallowed if the damage is caused by both (by a defect in the product and by the fault of the injured person)).

Appeals

33 | 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 of the judgment notification through a bailiff.

Before criminal jurisdictions: the appeal must be lodged within 10 days of the announcement of the judgment (section 498 of the Civil Process Order). In this case of appeal, the civil claim and the criminal matter will be re-examined by the court of appeal.

SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

Settlement

34 | What rules and procedures govern the settlement of product liability cases?

There is no specific rule and procedure for settlements in product liability cases. The rules are the same as in general law. To be valid, the settlement must contain mutual concessions from the parties and in

case of bodily injury, the social security fund must be invited to sign the settlement and present its own expenses.

Alternative dispute resolution

35 | Is alternative dispute resolution required or advisable before or instead of proceeding with litigation? How commonly is ADR and arbitration used to resolve claims?

According to general procedural rules, it is mandatory for the parties to try to find an out of court settlement before bringing the case before the court.

When the parties to the case are professionals, it is more and more common to find an arbitration clause in the contract. The case is then brought before an arbitration tribunal.

When the claimant is a physical person arbitration is rare, but an out of court settlement may be preferred to shorten the procedure.

JURISDICTION ANALYSIS

Status of product liability law and development

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

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

This law is commonly used each time a product is involved in the damage.

Apart from these considerations, the Product Liability Law does not entitle victims to punitive damages or contingency fees, which still do not exist in French law.

Product liability litigation milestones and trends

37 | 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 increasingly 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 must prove the concrete defect of the product; it is not sufficient that the product was implicated in the accident (Cass 2 civ, 4 February 2010, No. 08-70373).

Climate for litigation

38 | 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 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 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.

Efforts to expand product liability or ease claimants' burdens

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

A law on collective actions was passed in 2014. In the simplified procedure, no active approach is required on the part of the consumers to be indemnified. In theory, this type of procedure is claimant-friendly insofar as the consumers do not have to join a group, as being listed in a client file is sufficient to be indemnified if the professional is recognised as liable. However, to date, there have only been a few cases in the field of anticompetitive practice, which does not allow an evaluation of the consequences of this law and the proceedings introduced by it.

UPDATE AND TRENDS

Emerging trends

40 | Are there any emerging trends or hot topics in product liability litigation in your jurisdiction?

No updates at this time.

EBA | **Endrös-Baum Associés**
Avocats / Rechtsanwälte

Florian Endrös

florian.endros@eba-avocats.com

Jessika Da Ponte

jessika.da.ponte@eba-avocats.com

63 rue de Varenne
75007 Paris
France
Tel: +33 1 53 85 8181
Fax: +33 1 53 85 8180
www.eba-avocats.com

Other titles available in this series

Acquisition Finance	Dispute Resolution	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Distribution & Agency	Islamic Finance & Markets	Public Procurement
Agribusiness	Domains & Domain Names	Joint Ventures	Public-Private Partnerships
Air Transport	Dominance	Labour & Employment	Rail Transport
Anti-Corruption Regulation	Drone Regulation	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Digital Business			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)