

OVERVIEW FRANCE

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I. Introduction

The term 'product liability' refers to the liability of manufacturers and suppliers for personal injury or damage to property caused by a defective product. Damages liability in France is divided into two parallel regimes deriving from public law and private law, both with dual sets of distinct (but slowly converging) sets of liability principles. The applicable law depends upon whether the defendant is a public law or private law entity.

The substantive law of product liability in France is heterogeneous. The traditional approach to product liability derives from an interpretation by the civil courts of the principles of both contract and tort law laid in the Napoleonic Civil Code, promulgated in 1804. In some cases, however, public law liability before the administrative courts may apply. With the implementation of the European Directive, claimants in civil law or public law actions now have an alternative, and to some extent, supplementary cause of action under Articles 1386-1 to 1386-18 of the French Civil Code.

II. The Traditional Product Liability Regime

The French law on product liability has traditionally been developed by the civil courts from the spare principles of contract and tort law laid down in the Civil Code. At this juncture, a word should be said about the principle of *non-cumul des responsabilités* (principle of the non-concurrence of actions). According to this principle, a party to contract may not sue the other party for damages in delict, if facts from which the delictual liability would otherwise arise are governed by one of the contract's obligations.

A. CONTRACT

Liability in contract is the cornerstone of the general product liability system in France. Article 1147 of the Civil Code (CC) lays down that a party to a contract in French law is liable for damages caused by the non-performance of his contractual obligations 'whenever he fails to prove that such non-performance results from an external cause which cannot be imputed to him, even though there is no bad faith on his part.'

In respect of sales contracts, *contrats de ventes*, the Civil Code imposes two principal obligations on the seller: an obligation to deliver and an obligation to guarantee the

goods he sells (Article 1603 CC). The latter obligation is the most important in the context of product liability. It should also be noted that under French law, a party to a contract is not only bound by the provisions stipulated in the said contract, but is also bound by duties developed by the courts. There are a series of such obligations, of which the most important is the *obligation de sécurité*. We will examine in greater depth the *obligation to guarantee against defects* and the *obligation de sécurité*.

1. *Obligation to guarantee against defects*

The case of defective goods which cause either personal injury or property damage to the buyer is governed by several provisions set forth in the Civil Code referred to as the ‘latent defect warranty’ (*garantie contre les vices cache*).¹ The origins of this obligation can be traced back to Roman law.²

With respect to latent defects, Article 1641 CC provides that the seller guarantees the goods sold against hidden defects rendering the goods improper for the use for which it is intended.³

Four conditions must be met for the warranty to apply:⁴ (1) the product is defective; (2) the defect was hidden (3) the defect was present prior to the transfer of property of the goods (4) the defect is material enough to render the product unfit for use or to materially reduce its value.

In principle, contractual product liability requires the existence of a sale contract between the defendant and claimant. Importantly, however, the ‘latent defect warranty’ has been extended by the courts to all buyers and sub-buyers in the distribution chain. A consumer can thus sue the manufacturer directly for latent defects in products sold to him by a retailer.⁵

A variety of remedies are available for the breach of this warranty, including recovery of the purchase price, rescission of sale, and a damages claim. For damages to be

¹ See Articles 1625, 1641-1648, Civil code.

² See discussion of J. Bell, *French Legal Cultures* (London, Butterworths, 2001) page 79.

³ For a full English translation of the French Civil Code, see: <http://www.legifrance.gouv.fr/Traductions/en-English>.

⁴ See Articles 1641-1648, Civil code.

⁵ Cass. com., 24 November 1987, pourvoi n° 86-14.437, *Bull. civ.* IV, n° 250.

awarded, the Civil Code lays down the condition that the seller knew of the defect at the time of sale.⁶ However the French courts have softened the burden of having to prove knowledge by first applying an evidential presumption that professional sellers should, due to their special professional expertise be aware of, at the time of sale, latent defects in the products which they sell.⁷ This has subsequently been transformed into a substantive rule: professional sellers are strictly liable to the buyer for damage caused by hidden defects in the goods.⁸ The broad notion of “professional seller” ensures that this rule extends to both manufacturers of a product but also professional reseller (e.g. a distributor or retailer).

Despite this judicial liberalism, there are weaknesses in basing an action on the ‘latent defect warranty’. The primary problem has been the short limitation period. Article 1648 CC provides that these actions ‘must be brought by the buyer within a short time, depending on the nature of the material defects and the custom of the place where the sale was made.’ This has been interpreted to mean that the buyer must file a claim within a ‘short period’ of the date of discovery of the latent defect, or the date when the defect could reasonable have been discovered.⁹

2. Obligation de sécurité

In a number of cases during the 1990s, the French *Cour de Cassation* reinforced the protection afforded in product liability cases by developing the notion that ‘*vendeurs professionnels*’ undertake an obligation to deliver a safe product over and above the ‘latent defect warranty’ or *garantie des vices caches*. The extent of the obligation, known as an *obligation de sécurité*, is impressive. The *Cour de Cassation* has stated that ‘the seller acting in his professional capacity must deliver products that are free from any defects likely to cause harm to people or goods.’¹⁰ Sellers and manufacturers are thus subject to an ‘*obligation de résultat*’ (strict liability): the products must guarantee ‘the necessary level of security which a consumer expects.’

⁶ Article 1645, Civil code: “Where the seller knew of the defects of the thing, he is liable, in addition to restitution of the price which he received from him, for all damages towards the buyer.”

⁷ Cass. Civ. 1re, 24 November 1954; *JCP* 1955.II.8565.

⁸ S. Taylor, “The harmonisation of European product liability rules: French and English law” 48 (1999) *International and Comparative Law Quarterly* 419, 425.

⁹ Cass. com., 18 February 1992, *Bull. civ.* IV, n°82; Cass. com., 3 May 1974; *JCP* 1974, II.17798.

¹⁰ Le ‘vendeur professionnel’ ‘est tenu de livrer un produit exempt de tout défaut de nature à créer un danger pour les personnes ou les biens’ (Cass. Civ. 1, 20 March 1989, *Dalloz* 1989.581, note Malaurie). Cf Cass. Civ. 1re, 11 June 1991, *JCP* 1992.I.3572, obs. Viney.

This *obligation de sécurité* also applies equally to sellers and manufacturers. The French case law has developed to provide that the contractual action for failure to deliver safe products passes to the downstream buyer or user, thereby avoiding problems arising from the lack of direct contractual relationship, in common law parlance the problem of the privity of contract.¹¹

This case law was heavily influenced by the European Directive. Indeed, in a decision handed down in 1998, only a few months before the implementation of the Product Liability Directive in France, the *Cour de Cassation* delivered a judgment explicitly following the wording of the Directive and held that the producer is under a ‘safety duty’ when selling a product, such safety being that ‘which a person is legitimately entitled to expect.’¹² Consequently, even before the transposition of the European Directive, its effects were being felt in the case law. The *Cour de Cassation* had to some extent remedied the inaction of the legislator.

B. TORT

1. Article 1382 of the French Civil Code

Article 1382 of the French Civil Code memorably provides that : ‘tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrive, à le réparer.’

Under the wording of Article 1382 CC, proof of fault on the part of the defendant is a prerequisite of liability. However, the notion of fault has a rather different meaning in French law, than in the common law.¹³ This is illustrated in the sphere of product liability. Initially requiring proof of fault on the part of the defendant, the French courts have now shifted the focus of analysis from the producer’s behaviour to the product itself, merely requiring the proof of delivery of a defective product: ‘delivery of a

¹¹ See Cass. Civ. 1re, 9 March 1983, *Bull civ I* n° 92; JCP 1984.II.20295.

¹² Cass. Civ. 1re, 3 March 1998, *Dalloz* 1998 IR 96. Cf Cass. Civ. 1re, 28 April 1998, *Dalloz* 1998 IR 142 (reference to “les articles 1147 et 1384, alinéa premier, du Code civil, interprétés à la lumière de la directive CEE n° 85-374 du 24 juillet 1985.”)

¹³ J. Bell, S. Boyron, and S. Whittaker, *Principles of French Law* (Oxford, 1998) p. 357 *et seq.* For the differences in conception of fault in governmental liability cases, see D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford, 2003).

defective product is sufficient to establish fault on the part of the manufacturer or the distributor.’¹⁴

The claimant has thus practically been exempted from having to prove fault so long as he can demonstrate that the products were defective and that such defective products were the cause of his damage or injury. So, the mere marketing of defective products constitutes proof of the manufacturer’s fault. This is an important development of the law in favour of the victims of the effects of product defects. A strict liability “obligation de sécurité” thus applies under both the law of contract and tort. Manufacturers and suppliers are thus subject to this duty in respect of either a buyer under contract or a third party victim.¹⁵

2. Article 1384 (1) of the French Civil Code

Over and above the obligations enshrined in Article 1382 of the French Civil Code, in cases of product liability, the provisions of Article 1384(1) of the French Civil Code may also apply to impose strict liability. Whilst Article 1384(1) is commonly accepted as having been intended to provide a mere preface to the rules of delict which follow in the Civil Code,¹⁶ Article 1384(1) has nonetheless been given an extensive interpretation by the French courts.

Article 1384 (1) of the French Civil Code provides that ‘[o]n est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde.’

The French courts have broadly interpreted the provisions of Article 1384 (1) CC so as to impose strict liability for the ‘deeds of things within one’s keeping.’¹⁷ In terms of the

¹⁴ Cass. civ. 1re, 18 July 1972, *Bull civ.* I, n°189.

¹⁵ The influence of European law again should be recognised. Taylor summarises this development of the law as follows: “French judges have therefore anticipated the incorporation of the Directive by centring liability on the notion of “defect”, but do not allow a development risks defence.” (S. Taylor, “The harmonisation of European product liability rules: French and English law” 48 (1999) *International and Comparative Law Quarterly* 419, 427).

¹⁶ Providing for *specific* cases of liability for another person’s actions or for things over which one exercised control. See e.g. G. Viney and P. Jourdain, *Les conditions de la responsabilité*, coll. *Traité de droit civil*, 3ème édition, L.G.D.J., 2006, n°628; Ph. Brun, *Responsabilité civile extracontractuelle*, LexisNexis, 2ème édition, 2009, n°342ff.

¹⁷ J. Bell, S. Boyron, and S. Whittaker, *Principles of French Law* (Oxford, 1998) pp. 371-383.

products in question, the no-fault liability principle encapsulated in Article 1384(1) has a potentially very broad scope, as illustrated by the extraordinary breadth of the notion of “things” caught by it. Article 1384(1) will thus in principle apply to all inanimate objects both movables (and immovable), unless one of the specific liability regimes under French law instead applies.¹⁸ Professor Simon Whittaker gives an indication of the scope of Article 1384(1), in his co-authored text on French law, as follows : “*gases, liquids, electricity and even X-rays as well as motor-vehicles, television sets, tennis balls or supermarket floors are included within its ambit.*”¹⁹

Given the breadth of the concept of a thing, and the fact that fault is not a precondition of liability, the notion of custody or guardianship (“*la garde*”) is one of the key constituent elements of liability under Article 1384(1). The notion of guardianship was defined in the leading case of *Franck v Connot*,²⁰ as “*le pouvoir d’usage, de direction et de contrôle*”,²¹ which entailed that the *gardien* is a person who exercises the “use, direction, and control” over the object in question.²² Following this decision, the French courts rejected a notion of *garde* under Article 1384(1) which simply replicated the conception of title or ownership. Instead, the courts now investigate who—as an essentially practical matter—exercised control over the object in question, with the touchstone of *la garde* being whether the person in question has the power to use, direct or control the thing. The “control” may thus be purely temporarily or even fleeting²³—an example often given is of someone kicking a piece of litter such as a bottle—²⁴ as the momentary control will be sufficient for a finding of *garde* for the purposes of Article 1384(1). Whilst the courts thus adopt a predominantly factual analysis, it should not be thought that the legal concept of ownership has been entirely abandoned. On the contrary, in many cases the legal owner will be found to possess the *garde* over the object in question. Indeed, the courts have created a **legal presumption** in this sense, whereby the owner of an object is presumed to be its *gardien*. In line with the *garde*

¹⁸ Such as animals under Article 1385 Code civil (not an *inanimate* object anyway), or ruins of buildings under Article 1386 Code Civil, or traffic accidents under the *Loi Badinter* of 5 July 1985.

¹⁹ J.Bell, S.Boyron, and S.Whittaker, *Principles of French Law* (2nd ed., Oxford, OUP, 2008) p. 384.

²⁰ Cass. Ch. Réun., 2 December 1941, *Bull. civ.* n°292, p.523 ; S.1941.1.217, rapp. Lagarde, note Mazeaud.

²¹ The formula has been used on many occasions since: see eg Cass. civ.2ème, 11 February 1999, n° 97-15.615

²² J. Bell, S. Boyron, and S. Whittaker, *Principles of French Law* (2nd edn, Oxford, OUP, 2008) p. 383.

²³ Ph. Le Tourneau, *Droit de la responsabilité et des contrats*, 2004/2005, n° 7833.

²⁴ P. Brun, *Responsabilité civile extracontractuelle* (2nd ed., Paris, Litec, 2009) para 369.

matérielle theory, however, this presumption can be rebutted by showing that the *garde* has been transferred to another person.

An additional layer of complication has been added to the notion of *la garde*, by a line of French cases which have held that, despite the physical transfer of the control over an item to another party, liability may still attach to the transferor in respect of defects or internal dangerousness of the object in question. The French courts have thus recognized that, in limited circumstances, the guardianship or custody may be divided between the *gardien du comportement* (in respect of which liability arises for the use and handling of the item in question) and the *gardien de la structure* (liability for inherent defects, despite the transfer of physical control).

According to this approach, in products cases, then despite the transfer of the item from the manufacturer or supplier to the consumer, the French courts have asserted that custody of the product may be split by means of a distinction between the *garde du comportement* and *garde de la structure*. In this way, the manufacturer of the product, who remains responsible for its structure and any defects, may be considered to have retained control over the structure of a product.

However, this doctrine has been criticised by commentators as “discouragingly complex,”²⁵ and the potentially extensive reach of this doctrine has been curbed by the courts due to a restrictive application by reference to the *type* of object concerned.²⁶ The distinction has thus been applied classically in cases of exploding bottles or gas canisters,²⁷ or aerosol canisters.²⁸ On the other hand, the courts have refused to apply the distinction to pharmaceutical products,²⁹ supermarket trolleys³⁰ and most famously in a 2003 decision to cigarettes, in which the *Cour de cassation* again indicated that the application of the notions of *garde du comportement* and *garde de la structure* is **limited** to products which have their own “internal dynamism”, which was not the case

²⁵ Ph. Malaurie and L. Aynès, *Droit Civil : Les Obligations* (3rd ed., Paris, 2007) para 203.

²⁶ J. Bell, S. Boyron, and S. Whittaker, *Principles of French Law* (2nd ed., Oxford, OUP, 2008) p. 385 : “ “[i]n general, this approach is restricted to cases where the thing in question possesses ‘its own dynamism capable of manifesting itself in a dangerous way’ a restriction which in practice has often meant that the injury has been caused by the thing’s explosion or by flammable or corrosive goods.”

²⁷ See e.g. Cass. civ. 2^{ème}, 4 June 1984, *Gaz. Pal.* 1984. 2. 634 (bottle)

²⁸ Cass. civ. 2^{ème}, 19 April 1982, n° 80-11.139; *Gaz. Pal.* 1982.2 Panorama 33.

²⁹ Cass. civ. 2^{ème}, 15 June 1972, n° 70-12.399, *Bull. civ.* II, n°186; Cass. civ. 2^{ème}, 7 December 1977, n°76-13.138, *Bull. civ.* II, 232, p.169.

³⁰ Cass. civ. 2^{ème}, 14 January 1999, n°97-11.727, *Bull. civ.* II, n°13, p.8; *RTD civ.* 1999. 630, obs. P. Jourdain.

of cigarettes.³¹ It is fair to say however that there are indications that, at a high level, that the French courts have become more conservative in applying the doctrine.³² Many academic commentators have concluded that the practical effect of the *garde du comportement* and *garde de la structure* is likely to be limited in the future.³³ In particular, one of the leading French specialists of delict, Professor Jourdain commented in 2007 that “the distinction has practically become obsolete.”³⁴

The application of Article 1384 CC in product liability cases is however limited. There are some cases in which Article 1384 CC has been applied in the product liability field, but these have generally been limited to situations involving products which have exploded, where no other basis for liability was readily apparent.

III. PRODUCT LIABILITY LAW UNDER THE IMPLEMENTED EC DIRECTIVE

A. SCOPE OF APPLICATION OF THE DEFECTIVE PRODUCT LIABILITY REGIME

1. Products

The applicable provision here is article 1386-3 of the Civil code which implements Article 2 of the Directive. The question has been asked to the ECJ whether compensation for damage to an item of property intended for professional use and employed for that use falls under the scope of application of the Directive. The ECJ answered in the negative,³⁵ thus adopting a literal interpretation of the wording of the Directive.

2. Victims

³¹ Cass. civ. 2^{ème}, 20 November 2003, n°01-17.977, *Bull. civ.* II, n°355, p.289, *Consorts Gourlain c/ Seita*; *JCP G* 2004.II.10004; *D.* 2003.2902, conclusions Kessous, note L. Grynbaum.

³² *Ibid.*

³³ S. Bertolaso, « Droit à Réparation. Responsabilité du Fait des Choses. Gardien. Détermination du Gardien », Fasc. 150-20, *JurisClasseur Code Civil* (Paris, 2002) para 69. See also. P. Jourdain, in « Le rejet de la distinction des gardes. A propos de la garde d'une friteuse », *RTD civ.* 2007. 132.

³⁴ See P. Jourdain, in « Le rejet de la distinction des gardes. A propos de la garde d'une friteuse », *RTD civ.* 2007. 132.

³⁵ Case C-285-08, *Moteurs Leroy Somer v. Dalkia France and Ace Europe*, 4 June 2009, *spec.* paras. 29-32.

Article 1386-1 does not distinguish between liabilities based either on tort or contract. Thus, the scope of application on this question is wide.

3. *Damage*

Article 1386-2 of the Civil Code states that the product liability regime applies “*to compensation for damage caused by personal injury.*” In respect of property damage, an evolution has occurred over time. Under Article 9 of the Product Liability Directive, reparation for damage to goods of a type intended for private use is subject to a lower threshold of 500 Euros. However, the original provisions of the French implementation covered, unlike Article 9(b) of the Directive, all property damage. The lower threshold was thus omitted. The European Court held that on this point the implementation was faulty:³⁶ the Directive's strict liability regime was designed to be applicable only to significant injury in order to avoid an excessive number of disputes.

Article 1386-2 of the Civil Code was thus modified, and now states that compensation may also be provided for “*an item of property other than the defective product itself*” in respect of an amount greater than an amount fixed by decree. This threshold has been set by decree at 500 Euros.³⁷ This reform has been endorsed by the Cour de cassation.³⁸ It should be noted however that there is no threshold concerning claims for personal injuries.

4. *Persons who may be liable*

The Product Liability Directive channels liability primarily through to the product manufacturer, and the notion of “producer” is defined in an intentionally wide manner,³⁹ including own-branders and those importing products into the EU, so as to increase the number of defendants from whom recovery can be made.

In this way, the choice had been deliberately taken by EU policymakers made to put the burden of the litigation on the producer. Supplier liability under the Directive is thus somewhat limited. According to Article 3(3), the liability of the supplier is conceived as only subsidiary liability, applicable where the producer is unknown. Suppliers may

³⁶ A similar decision was reached in Case C-154/00, *Commission v Greece*, 25 April 2002 [2002] ECR I-3879.

³⁷ Decree of 11 February 2005.

³⁸ Cass. Civ. Ire, 3 May 2006, pourvoi n° 04-10.994; *RTD civ.* 2007, 137, *obs.* P. Jourdain; *RDC* 2006, p. 1239 *obs.* J.-S. Borghetti.

³⁹ Article 3 of the Directive.

avoid liability by identifying the producer or the person who supplied them with the product.

A very different approach was initially taken in France. Under the provisions of the Civil Code, a professional supplier was ruled to be liable « in the same conditions as the producer. »⁴⁰ A supplier could not avoid liability simply by identifying the producer or upstream supplier. The Civil Code thus equated the position of the supplier with that of the producer, thereby providing more protection for the victim, who will often prefer to pursue in the courts his or her local supplier.

The European Commission considered that the transposition was incorrect, and brought infringement proceedings. In an important decision, the ECJ addressed the action brought by the Commission against France for incorrectly implementing Directive 85/374/EC.⁴¹ On the issues of supplier's liability the ECJ upheld the Commission's complaint. The choice had been deliberately made to put the burden of the litigation on the producer. The supplier is liable only on an ancillary basis. This reduces the likelihood of multiplying proceedings. French law was not in line with this approach.⁴²

Nonetheless, the ECJ upheld the Commission's complaint. The choice had been deliberately made to put the burden of the litigation on the producer. The supplier is liable only on an ancillary basis. This reduces the likelihood of multiplying proceedings. French law was not in line with this approach.⁴³

The wording of the French Civil Code was duly modified. Article 1386-7 now provides that a professional supplier shall be liable for the lack of safety of a product in the same conditions as a producer if the producer cannot be identified. To avoid liability the supplier of the product must identify the product's manufacturer or the party that supplied the product to them with three months of a request made by the injured party.

⁴⁰ Previous wording of Article 1386-7 was : "A seller, a hirer, with the exception of a finance lessor or of a hirer similar to a finance lessor, or any other professional supplier is liable for the lack of safety of a product in the same conditions as a producer."

⁴¹ Case C-52/00, *Commission v France*, 25 April 2002 [2002] ECR I-3827.

⁴² This may also have an impact in Denmark where a similar principle of *action directe* applies. Note that the Danish presidency proposed an amendment of the Directive to make the (equal) liability of suppliers optional for Member States. However, this proposal was watered down by the Council in its resolution of December 2002, in which the Council decided that "there is a need to assess" this point. I am grateful to Stefan Lenz for this point.

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B. CONDITIONS OF THE PRODUCT LIABILITY REGIME

1. *A product put into circulation*

According to Article 1386-5 of the Civil Code, “A product is put into circulation when the producer has voluntarily parted with it. A product is put into circulation only once.”

2. *Defect*

The concept of “*defect*” is defined in Article 6 of the Directive. The kernel of this concept is the question, laid down in the Directive, as to whether a product “does not provide the safety which a person is entitled to expect.” It has been faithfully implemented in French law, and according to Article 1386-4 al 1 of the French Civil Code, a product is defective when “*it does not provide the safety which a person is entitled to expect.*”

The defect of a product is assessed according to “the presentation of the product, the use to which one could reasonably expect that it would be put, and the time when the product was put into circulation.”

The crucial notion of defect underpins the whole Directive, and has thus been subject to a good deal of debate. It is generally accepted to be a very amorphous notion, as confirmed by French doctrinal writers. Viney and Jourdain has thus concluded that the test of defect gives “to the judge rather a large discretion”,⁴⁴ whilst Professor Jamin has added that it allows first-instance judges to “do what they want according to their perception, very largely subjective, of the sociology of the time.”⁴⁵ Taylor has observed that “the inherent subjectivity of the evaluation of the legitimate expectations of the public will allow for continued divergence in the policy of judges in respect of consumers.”⁴⁶

One issue that has been raised in recent pharmaceutical cases is the relevance of the benefit / risk profile of such products in determining whether it is defective. Some previous cases suggested that benefit / risk was of relevance.

⁴⁴ J.Ghestin (dir.), *Traité de droit civil*; G.Viney and P.Jourdain, *Les conditions de la responsabilité* (2nd edn., LGDJ, Paris 1998) 770.

⁴⁵ C. Jamin, *RTD civ.* 1998.763, 765.

⁴⁶ S. Taylor, *L'Harmonisation Communautaire de la Responsabilité du Fait des Produits Défectueux* (LGDJ, Paris, 1999), para. 56.

However, a recent decision of the *Cour de cassation* has taken a different view.⁴⁷ In a case concerning a vaccination for hepatitis B which was alleged to have led to the onset of multiple sclerosis, the Court of Cassation disapproved the Court of Appeal's taking into account off the positive the benefit / risk profile of the vaccine in determining the lack of defect, and overturned the Court of Appeal's judgment to extent that it was based upon "general considerations concerning the benefit / risk profile of the vaccine." Doubt was thus cast on the relevance of the benefit / risk profile in such cases.

What about proof of defect? The Product Liability Directive is based upon the safety of the product not being such as persons generally are entitled to expect (and this does not entail proof of fault),⁴⁸ but a more subtle debate arises as to whether the mere fact of a product not offering the safety which consumers might have expected can **of itself** amount to a defect. The European Commission has contrasted approaches in this respect, pointing to an English case where it was said that it was not enough to show 'merely that the product failed in circumstances which were unsafe and contrary to what persons generally might expect.' The Commission contrasted this with other case law, notably in France, referring to a case before the *Tribunal de Grande Instance* in Aix-en-Provence involving a glass window in a fireplace that exploded in circumstances where the precise cause was unknown. In that case, the Court held that 'a product is defective when it does not provide the safety which a person is entitled to expect' and it was of no importance that the claimant had not proved the precise cause of the accident.⁴⁹ Other similar approaches can be found in the French case law. The Toulouse Court of Appeal held that 'the finding of liability of a professional who has supplied a defective product is not subject to the establishment of the exact origin of the defectiveness of the product.'"⁵⁰

The same reasoning was adopted by the Bastia Court of Appeal which, in a case of a defective life-vest, considered that regardless of the exact causes of the incident, the

⁴⁷ Cass. civ. 1re, 26 September 2012.

⁴⁸ This is made clear from recital 2 which states : 'Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.

⁴⁹ Decision of 2 October 2001.

⁵⁰ Decision of 7 November 2000, No 1999/03960: available on the BIICL Product Liability Forum Database : www.biicl.org/plf (French case concerning a car accident caused by an allegedly defective tyre in which the Court of Appeal of Toulouse was prepared to presume that a defect had occurred without being concerned to identify the precise cause).

defendants demonstrated that the vest did not provide the safety one can legitimately expect.⁵¹ More recently, the Limoges Court of Appeal held that the fact that the specific cause of the damage was unknown was irrelevant since it was demonstrated that the product in question was inherently defective.⁵²

C. EXONERATION OR LIMITATION OF LIABILITY UNDER THE DEFECTIVE PRODUCT LIABILITY REGIME

1. *Exoneration*

Article 1386-10 of the Civil code starts by stating the “defences” that a producer might raise but which do not constitute an exoneration per se:

- The fact that the product was manufactured in accordance with the rules of the trade;
- The fact that the product was manufactured in accordance with existing standards; or
- The fact that the product was the subject of an administrative authorization.

Article 1386-11 of the Civil Code then goes on to list the **various defences**. Thus it is stated in Article 1386-11 of the Civil Code that:

“A producer is liable as of right unless he proves:

1. That he did not put the product into circulation;
2. That, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards;
3. That the product was not for the purpose of sale or of any other form of distribution;
4. That the state of scientific and technical knowledge, at the time when he put the product into circulation, was not such as to enable the existence of the defect to be discovered⁵³; or

⁵¹ Bastia Court of Appeal, 9 June 2011, n°08/00778

⁵² Limoges Court of Appeal, 10 June 2010, n° 08/00042

⁵³ This article is the basis for the development risk as a cause of exoneration. This is a very disputed cause of exoneration in France, which is moderated by article 1386-12 even if the very writing of this article could have been better thought. In any case, the producer who wishes to plead a developing risk must

5. That the defect is due to compliance with mandatory provisions of statutes or regulations.

The producer of a component part is not liable either where he 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”.

Other causes can be found in the following articles:

- The liability of a producer may be reduced or disallowed where, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or of a person for whom the injured person is responsible (art. 1386-13);
- The liability of a producer towards an injured person shall not be reduced where the act or omission of a third party contributed to the production of the damage (art. 1386-14).

We will examine the aforementioned development risks defence in more detail here. Article 7(e) of the Directive contains the development risks defence. At a European level, the availability of a defence exculpating producers in respect of development risks was highly politically controversial from the outset. There has been particular sensitivity in France.

We will first say a word about the traditional approach of French law to development risks, before examining the position under the implemented Directive. Under the traditional rules of French civil law, development risks which caused loss could give rise to civil liability,⁵⁴ albeit that there is a long-running (and unresolved) academic debate about the position in respect of pharmaceuticals.⁵⁵

prove the impossibility to detect the existence of a default in his product at the time of its put into circulation or its commercialization (Cass. Civ. 1^{re}, 19 mars 2009, pourvoi n° 08-10.143). See generally speaking, *Le risque*, Rapport annuel de la Cour de cassation, 2011.

⁵⁴ See e.g. J.Calais-Auloy, “Le Risque de Développement : Une Exonération Contestable » in *Mélanges Michel Cabrillac* (Paris, Litec, 1999) p. 88 : « When confronted with the problem of defects which are only discoverable after sale, the French case law has for decades adopted an approach which is favourable to victims. The decisions have not expressly stated that development risks lie with the producer, but that is in effect the result which is reached.” See also S.Whittaker, *Liability for Products : English Law, French Law and European Harmonization* (OUP, 2005) pp. 494-495.

⁵⁵ Certain authors suggested that liability does not arise under the pre-existing French provisions for development risks arising from medicines : O.Berg, “La notion de risque de développement en matière de responsabilité du fait des produits défectueux » *JCP.I.3945* ; I. Vézinet, « Le risque de développement en matière de responsabilité du fait des produits défectueux », *Dr. & patr.* June 1997, p. 54, 56. Other

During the legislative process of implementation in France, there was much debate about the issue of development risks. On implementation of the Directive in 1998, infringement proceedings were brought by the European Commission which considered that the implementation was faulty (including the provision concerning the development risks defence), a view which was ultimately upheld by the European Court of Justice.⁵⁶ In respect of the two defences outlined in Article 7 of the Directive (the development risk defence⁵⁷ and the compliance of the product with mandatory regulations), the ECJ held that the French legislature had wrongly imposed an additional obligation upon the producer to monitor the product.⁵⁸ These additional requirements were contrary to EC Law.

A number of key provisions of the French Civil Code were thus in breach of EU Law. In a "Simplification of Law" Act passed on 9 December 2004,⁵⁹ the offending aspects of the French Civil Code were modified to bring it in line with the Product Liability Directive.

The relevant provisions of the French Civil Code are now as follows:

Article 1386-11 Code Civil:

A producer is liable as of right unless he proves:

[...]

however have contested this view, Larroumet has argued as follows : “It is true that in respect of medicines, certain authors have claimed that the case law is nuanced. However, this is not certain. The two cases referred to, one in 1973 and the other in 1986, do not seem to establish the principle that a pharmaceutical laboratory is not liable in case of development risks.” (C. Larroumet, « La Notion de Risque de Développement, Risque du XXI Siècle » in *Clés pour le siècle* (Paris, Dalloz, 2000) para. 1624). See nuanced view of Borghetti : S.Borghetti, *La Responsabilité du Fait des Produits: Etude de Droit Comparé* (Paris, LGDJ, 2004) para. 418

⁵⁶ Case C-52/00, *Commission v France*, 25 April 2002 [2002] ECR I-3827, para 24.

⁵⁷ Note that in French Law, the development risk defence does not apply “where damage was caused by an element of the human body or by products thereof.” (Article 1386-12 Code Civil).

⁵⁸ The implemented French provisions lay down that a producer is unable to invoke either of these two defences where the defect in the product was discovered with ten years of putting the product into circulation, and during that period the producer did not take the appropriate measures to avoid the damaging consequences.

⁵⁹ Loi n° 2004-1343 du 9 décembre 2004 art. 29 Journal Officiel du 10 décembre 2004.

4° That the state of scientific and technical knowledge, at the time when he put the product into circulation, was not such as to enable the existence of the defect to be discovered;

Article 1386-12 Code Civil:

A producer may not invoke the exonerating circumstance provided for in Article 1386-11(4), where damage was caused by an element of the human body or by products thereof.

The wording of the development risk defence gives rise to a number of potential problems. One obvious issue is the exact meaning of ‘scientific and technical knowledge.’ The ECJ has indicated that a manufacturer “*must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered.*”⁶⁰ The state of the scientific knowledge is not limited to the knowledge available in the manufacturer’s industrial sector.⁶¹ Questions of ‘practicability and expense of measures’ are irrelevant: the state of scientific and technical knowledge is that of the most advanced level.

The court also held that it was implicit in the Directive that the knowledge must have been accessible.⁶²

2. Limitation or exemption clauses

Under Article 1386-15 of the Civil Code, any exemption clause is forbidden. However, the Article also states that:

“Nevertheless, as to damages caused to property not used by the injured party mainly for his own private use or consumption, the clauses stipulated between professionals are valid”.

Thus, two conditions are required:

- A term stipulated between professionals; and

⁶⁰ Case C-300/95, *Commission v United Kingdom*, 29 May 1997

⁶¹ Case C-300/95, *Commission v United Kingdom*, 29 May 1997

⁶² Judgment para. 28

- A damage caused to property not used by the professional injured party mainly for his own private use or consumption.

D. LIMITATION PERIOD AND EXTINCTION OF ACTIONS

1. Limitation period

Article 1386-17 allows the victim a timeframe of three years “from the date on which the plaintiff knew or ought to have known the damage, the defect and the identity of the producer”.

The question has been raised as to the applicable limitation period for products that have been put into circulation before the implementing law of 1998 and concerning a damage that appeared after the granted delay for implementation but before the entry into force of the law of 1998. The Cour de cassation has recently held that:

“When a tort action directed towards a producer of a defective product put into circulation before the law n° 98—389 of the 19th of May 1998 implementing the directive of the 24th of July 1985, considering a damage that occurred between the expiration of the implementation delay of the directive and before the entry into force of the said implementing law, is prescribed, according to the domestic legal dispositions applicable at the time, by a 10 years delay starting from the manifestation of the damage”⁶³.

2. Extinction of the producer’s liability

The producer is only liable for his product for a period of 10 years after it is put into circulation and must, thus, be identified within that timeframe⁶⁴.

If defects arise after that timeframe, they cannot be attributed the producer under the Product Liability regime (a claim may be available under the fault-based regime) Article 1386-16, thus, states that:

“Except for fault of the producer, the liability of the latter, based on the provisions of this Title, shall be extinguished on the expiry of a period of ten years after the actual

⁶³ Cass. Civ. 1^{re}, 26 September 2012, pourvoi n° 11-18.117 ; *RTD civ.* 2013, p. 134, *obs.* P. Jourdain ; *D.* 2013, p. 40, *obs.* Ph. Brun et O. Gout.

⁶⁴ Case C-358/08, *Aventis Pasteur SA v OB*, 2 December 2009 ; *D.* 2010, p. 624, *obs.* J.-S. Borghetti.

product which caused the damage was put into circulation, unless the injured person has in the meantime instituted proceedings”.

IV. CO-EXISTENCE OF THE PREVIOUS TWO RÉGIMES

Following the implementation of the 1985 European Directive into the French Civil Code in Article 1386-1 to 1386-18, the question has arisen as to the continuing vitality of the traditional case law developed by the courts in product liability cases. Can the French courts continue to apply their traditional case law in parallel to the protection afforded by the 1985 European Directive as implemented in the French Civil Code? Despite the principle of harmonisation enshrined in the European Directive, recent decisions at international and national level suggest that the French courts will continue to apply a certain amount of their traditional case law, thereby maintaining a rich tapestry of legal provisions in this area.

In the Directive, the continued application of pre-existing systems of liability is covered by Article 13, which provides that: ‘This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.’

Classically viewed as permitting the co-existence of parallel contractual and extra-contractual actions,⁶⁵ the European Court of Justice has recently analysed Article 13 in detail.⁶⁶ The following principles flow from its decisions. Article 13 *does not mean* that a Member State can maintain a *general* system of product liability different from that provided for in the Directive. Rather Article 13 posited the co-existence of product liability systems *of a different type*, “based on other grounds, such as fault or a warranty in respect of latent defects” or with special liability systems relating to specific types of products.

As a consequence of the ECJ’s interpretation of Article 13, the French courts will probably no longer be able to continue to invoke the co-existence of the *obligation de*

⁶⁵ S. Taylor, “The harmonisation of European product liability rules: French and English law” 48 (1999) *International and Comparative Law Quarterly* 419, 420.

⁶⁶ Case C-183/00, *Gonzalez Sanchez v. Medicina Asturiana SA*, 25 April 2002; Case C-52/00, *Commission v. France*, 25 April 2002 [2002] ECR I-3827.

sécurité regime with that under the Directive (as this is “founded on the same basis” as the Directive)⁶⁷. However, there is nothing to prevent the continued application of the traditional French rules of delict or the contractual warranty in respect of latent defects. In this sense, the parallel regimes will prevail. Some authors have even pointed out that the *obligation de sécurité* may enjoy a continued vitality by means of the application of Article 1382 of the Civil Code, a regime explicitly allowed to co-exist and one in respect of which it is increasingly accepted that liability is satisfied by a breach of the *obligation de sécurité*.

Nevertheless, the ECJ has demonstrated more leniency than expected in a recent case where the liability of a service provider who uses, for the performance of a service such as care provided within the context of a hospital, defective products for which he is not a producer according to the texts applicable and that products cause damages to the beneficiary of the service provided. As a matter of fact, the ECJ considered that that case falls beyond the scope of application of the Directive.⁶⁸

V. STATE COMPENSATION SCHEMES

In France, a fund has been set up to compensate those infected with HIV as a result of having received contaminated blood products.⁶⁹ There is also a fund for those who have been disabled as a result of vaccination.⁷⁰

A fund has also been established to compensate victims of asbestos-related diseases, known as the *Fonds d’Indemnisation de Victimes de l’Amiante* (Law of 23 December 2000). Claims may be brought by person (or next-of-kin) who have suffered asbestos-related health problems, whether work-acquired or environmental.

A new and radical medical compensation system has been introduced by means of a Statute of 4 March 2002⁷¹. This statute has an ambitious and broad ambit, but the key

⁶⁷ The question has recently been asked to the ECJ : Cass. com., 24 June 2008, pourvoi n° 07-11.744 ; *D.* 2008, p. 1895, *obs.* I. Gallmeister.

⁶⁸ Case C-495/10, *CHU de Besançon v. Thomas D... CPAM du Jura*, 21 December 2011.

⁶⁹ Law n°91-1406 of 31 December 1991, art. 47.

⁷⁰ France: Law of 1st July 1964, now enshrined in art L. 10-1, *Code de la Santé Publique*.

⁷¹ Law n° 2002-303 of 4th of March 2002, *Gazette du Palais*, 4 April 2002, *Bulletin Législatif* 2002, p. 113 (*Loi relative aux droits des malades et à la qualité du système de soins*). See generally : C. Rade, “La Réforme de la Responsabilité Médicale après la loi du 4 Mars 2002 relative aux droits des maladies et à la qualité du système de santé”, *Responsabilité Civile et Assurances* 2002, p. 4; Y. Lambert-Faivre,

feature of the law is the new medical compensation system. Likewise, article 57 of the Law n° 2011-900 of the 29th of July 2011 entrust the ONIAM (Office National d'Indemnisation des Accidents Médicaux) with the mission "to facilitate, and if necessary, to proceed to an out-of-court settlement of the disputes related to the damages caused by the benfluorex" (i.e. the Mediator saga). In order to do this mission, a decree n° 2011-932 of the 1st of august 2011 has been published.

VI. STATE LIABILITY

There is a separate jurisdiction for determining damages cases against the state as actions go before the administrative courts. Public law liability before the public law courts is essentially a case-law development, based upon an extensive notion of administrative fault (*faute de service*), and a number of heads of no-fault liability.

There have been a series of cases concerning regulatory liability of the state, some of these concerning products-related cases.

In one case, the State was found liable for failure to supervise adequately the blood provision service and to implement measures to avoid contamination of the blood.⁷²

In a recent decision of 3 March 2004, the *Conseil d'Etat* held the State liable for failing adequately to undertake its responsibilities to prevent risks at work from asbestos. The court noted that the toxic nature of asbestos was known since the mid-50s, but that measures were implemented to reduce risks only in 1977, and no in-depth study undertaken by authorities until 1995. The omission of state to take preventive measures to reduce risks of asbestos constituted a fault: "whilst the employer is obliged to protect the health of the employees under his control, it is beholden upon the public authorities who are charged with the prevention of risks at work to inform themselves of the dangers which workers can encounter during their professional activity."

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⁷² CE, 9 April 1993, *Monsieur G*, *Recueil des Décisions du Conseil d'Etat* 1993, p.110.

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