OVERVIEW FRANCE

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 law applicable depends essentially on the identity of the defendant, whether 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

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[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: www.legifrance.gouv.fr.
[4] See Articles 1641-1648, Civil code.
[5] Cass. com., 24 november 1987, pourvoi n° 86-14.437, *Bull. civ.* IV, n° 250.
[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] See discussion of J. Bell, *French Legal Cultures* (London, Butterworths, 2001) page 79.
[8] For a full English translation of the French Civil Code, see: www.legifrance.gouv.fr.
[4] See Articles 1641-1648, Civil code.
[5] Cass. civ. 1re, 24 November 1954, *JCP* 1955, II, 8555.
[6] S. Taylor, "The harmonisation of European product liability rules: French and English law" 48 (1999)

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 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 rules extends to both manufacturers of a product but also professional reseller (eg a distributor or retailer).

Despite this judicial liberalism, there are weakness 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

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

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 professionels*' 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.'

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

[10] Le 'vendeur professionel' '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 1, 11 June 1991 JCP 1992.I.3572 obs Viney.

[11] See Cass civ 1, 9 March 1983, Bull civ I N° 92; JCP 1984.II.20295.

[12] Cass civ 1, 3 March 1998, Dalloz 1998 IR 96. Cf Cass civ 1, 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.")

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 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

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.'*

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[13] J. Bell, S. Boyron, and S. Whittaker, *Principles of French Law* (Oxford, 1998) page 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).

[14] Cass civ 1 18 July 1972, Bull civ 1 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 incorporated 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).

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.'[16] An employer is thus strictly liable as a *gardien* of factory machinery for the personal injuries which it caused. In these cases, the only defences are if a *gardien* can show *force majeure* or contributory fault of the victim.

The notion of liability for things in one's keeping might seem *prima facie* to exclude product liability, given that the essence of the subject matter is a transfer of the product from the producer or supplier to the consumer. However, the French courts have asserted that *la garde* may be split and have drawn a distinction between the *garde du comportement* and *garde de la structure*. The former is the person who is responsible for harm caused by the thing's behaviour, the latter is the person responsible for harm caused by its defects. In this way, the manufacturer of the product may be considered to have retained control over the structure of a product, even if it lost the *garde du comportement* in favour of the owner. Liability may stem from the responsibility for the structure of the product.

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.

[16] J. Bell, S. Boyron, and S. Whittaker, *Principles of French Law* (Oxford, 1998) pages 371-383.

III. PRODUCT LIABILITY LAW UNDER THE IMPLEMENTED EC DIRECTIVE

A. Scope of application of the Defective Product Liability Regime

1. Products

The applicable article here is article 1386-3 of the Civil code which strictly implement 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 negatively[17], thus adopting a strict understanding of the wording of the Directive**.**

2. Victims

The article 1386-1 does 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.*

They shall apply also to compensation for damage above an amount fixed by decret an item of property other than the defective product itself."

Another precision should be made here: the last sentence of the above article is the result of a statutory modification following the ECJ case of the 25th of April 2002 where the ECJ held against France not to have implemented the 500 euros franchise for the damages caused to items of property.

Respecting the hierarchy of norms, France modified its law through a two-fold approach:

- Law n 2004-1343 of the 9th of December 2004 which modified article 1386-2 of the Civil code
- Decret 11th February 2005 adopted for the application of article 1386-2 of the Civil code stating that the amount referred to is fixed to 500 euros.

[17] ECJ, 4 june 2009, C-285-08, *Moteurs Leroy Somer v. Dalkia France and Ace Europe, spec.* paras. 29-32.

Such a reform has, then, been endorsed by the Cour de cassation[18].
Howver, there is no threshold concerning the personal injuries.

4. Liables

French law does reproduce the text of the directive focusing primarily on the producer's liability.
The actual state of French law on this subject can be found in three articles:

- **Art. 1386-6, Civil code: "**Is a producer, the manufacturer of a finished product, the producer of a raw material, the manufacturer of a component part, where he acts as a professional.

  For the implementation of this Title, shall be treated in the same way as a producer any person acting as a professional:

1. Who presents himself as the producer by putting his name, trade mark or other distinguishing feature on the product;
2. Who imports a product into the European Community for sale, hire, with or without a promise of sale, or any other form of distribution.

   Shall not be deemed producers, within the meaning of this Title, the persons whose liability may be sought on the basis of Articles 1792 to 1792-6 and 1646-1."

- **Art. 1386-7, Civil code: "**If the producer cannot be identified, the seller, the hirer with the exception of a finance lessor or 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, unless he designates his own supplier or producer, within a timescale of three months starting from the date at which the demand of the victim has been notified to him.

  The remedy of a supplier against a producer is subject to the same rules as a claim brought by a direct victim of a defect. However, he must take action within the year following the date of his being summoned."

[18] Civ. 1re, 3 May 2006, pourvoi n° 04-10.994; *RTD civ.* 2007, 137, *obs.* P. Jourdain; *RDC* 2006, p. 1239 *obs.* J.-S. Borghetti.

This article has been modified after two convictions of France by the ECJ[19]. The latest version of this article is the result of a legal modification done by the law 2006-406 of the 5th of April

- **Art. 1386-8, Civil code: "**In case of damage caused by a product incorporated into another, the producer of the component part and the one who has effected the incorporation are jointly and severally liable".

B. Conditions of the Defective 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*."

That understanding seems to be endorsed by the ECJ[20] as well.

2. A default

The Civil code does not provide much information or an explicit definition of the default condition. As such, article 1386-4 reads:

"*A product is defective within the meaning of this Title where it does not provide the safety which a person is entitled to expect.*

In order to appraise the safety which a person is entitled to expect, regard shall be had to all the circumstances and in particular 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.

A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation".

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[19] ECJ, 25 April 2002, *op. cit.* ; ECJ, 10 January 2006, aff. C-402/03, *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* ; *D.* 2006, p.1936, *obs.* Ph. Brun; *JCP G* 2006, I, 166, n°12, *obs.* Ph. Stoffel-Munck; *JCP G* 2006, II, 10082 note L. Grynbaum; *RTD civ.* 2006, p.333, *obs.* P. Jourdain; *RDC* 2006, p. 835, *obs.* J.-S. Borghetti; ECJ, 14 March 2006, C-177/04, *Commission v. France*; *RTD civ.* 2006, p. 265, *obs.* P. Remy-Corlay; *RTD civ.* 2006, p. 335, *obs.* P. Jourdain.

[20] ECJ, 10 May 2001; ECJ, 9 February 2006, aff. C-127/04 ; *D.* 2006, p.1937, *obs.* Ph. Brun ; *RTD civ.* 2006, p. 331, *obs.* P. Jourdain.

However, certain rules stems from the case law:

- The product presentation is a key element for judges. As a matter of fact, the defect will be more easily characterised if the user has not been warned of any potential risks so as, therefore, to expect a certain degree of safety in the use of the product[21]. On the contrary, if the user has been informed of the said risks he is likely to be unsuccessful in claiming for a safe product[22].
- It is the user himself that ought to be informed and not only the one prescribing it or using it over somebody[23].
- The said information must be on the product itself. It is not sufficient that the risk at stake is publicly known or that it is stated in a notorious medical dictionary[24].
- It is not enough to characterise a default only to state the product is dangerous: the default can only, in this case, be charactised if all the necessary precautions given the dangerousness of the product have not been taken[25].

However, in a recent case, the French Cour de cassation has considered that the Court of Appeal should have examined whether the "serious, precise and concordant" presumptions in favour of the existence of a causal link between the vaccination and the illness did not also constitute similar presumptions in favour of the existence of a defect of the vaccine. It was also held that he Court of Appeal should not have based its decision solely on "general considerations concerning the benefit / risk profile of the vaccine."[26]

3. A damage caused by the default

According to article 1386-9 of the Civil code, “The plaintiff is required to prove the damage, the defect and the causal relationship between defect and damage”.

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[21] Civ. 1re, 7 November 2006, pourvoi 05-11.604 ; *RDC* 2006, p. 312, *obs.* J.-S. Borghetti ; *RTD civ.* 2007, p. 140 *obs.* P. Jourdain.
[22] Civ. 1re, 24 January 2006, pourvoi 03-19.534; *RTD civ.* 2006, p. 325, *obs.* P. Jourdain ; RDC 2006, p. 841, *obs.* J.-S. Borghetti.
[23] Civ. 1re, 22 November 2007, pourvoi 06-14.174 ; *JCP G* 2008, I, 125, n° 9, *obs.* Ph. Stoffel-Munck.
[24] Civ. 1re, 22 May 2008, pourvoi n° 06-14.952 ; *JCP G* 2008, I, 186, n° 6, *obs.* Ph. Stoffel-Munck ; Civ. 1re, 9 July 2009, pourvoi 08-11.073.
[25] Civ. 1re, 5 April 2005, pouvois n° 02-11.947 et 02-12.065 ; *JCP G*, I, 149, n° 7, *obs.* G. Viney ; *RTD civ.* 2005, p. 607, *obs.* P. Jourdain.
[26] Civ. 1re, 26 September 2012, pourvoi n° 11-17.738 ; J.-S. Borghetti, “Qu’est-ce qu’un vaccine défectueux?”, *D.* 2012, p.2853.

However, concerning health products the case law has recently evolved accepting to reason by presumptions[27]. Nevertheless, one should not assume that the causality condition has become more theoretical than real. There is still a proper control exercised by judges who sometimes – arguably - do not consider that the conditions to qualify for the application of the presumption rule are not met[28].

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 "excuses" that a producer might raise but which do not constitute an exoneration cause 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 lists the exoneration causes. They prevent the manufacturer from being responsible since according to them, a condition of the liability disappeared. Thus article 1386-11 states:
"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

[27] Civ. 1re, 22 May 2008, pourvois n° 05-20.317, 06-14.952, 06-10.967 ; *RTD civ.* 2008, p. 492 *obs.* P. Jourdain ; P. Sargos, « La certitude du lien de causalité en matière de responsabilité est-elle un leurre dans le contexte d'incertitude de la médecine », *D.* 2008, p. 1935. *Adde*. Civ. 1re, 25 June 2009, pourvoi n° 08-12.781.
[28] Civ. 1re, 24 September 2009, pourvoi n° 08-16.097; Civ. 1re, 25 November 2010, pourvoi n° 09-16.556 ; *D*. 2010, p. 2825, *obs.* F. Rome ; *D.* 2011, p. 316, *obs.* Ph. Brun ; *RTD civ.* 2011, p. 134, *obs.* P. Jourdain.

product into circulation, was not such as to enable the existence of the defect to be discovered[29]; or

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

[29] This article is the basis for the development risk as a cause of exoneration. This is a very disputed causes of exoneration in France, which is moderated by article 1386-12 even if the very writing of this article could have been better thought.

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).

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

D. Prescription and Extinction of actions

1. Prescription of the action in damages

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".

2. Extinction of the producer's liability

The producer is only liable for his product 10 years after its put into circulation and must, thus, be identified within that timeframe[30].

If defaults arise after that timeframe, they cannot be attributed to him at least automatically. A fault would have to be demonstrated.

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 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,[31] the European Court of Justice has recently analysed Article 13 in detail.[32] 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

[30] ECJ, 2 December 2009 ; *D.* 2010, p. 624, *obs.* J.-S. Borghetti.

[31] S. Taylor, "The harmonisation of European product liability rules: French and English law" 48 (1999) *International and Comparative Law Quarterly* 419, 420.

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

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 sécurité* regime with that under the Directive (as this is "founded on the same basis" as the Directive)[33]. 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 leniencies than expected in a recent case where the liability of a service provider who uses, for the performance of a service such as cares provided within the context of a hospital, defective products for which he is not a producer according to the normative 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 fall out of the scope of application of the directive[34].

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.[35] There is also a fund for those who have been disabled as a result of vaccination.[36]

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

[33] The question has recently been asked to the ECJ : Com., 24 juin 2008, pourvoi n° 07-11.744 ; *D.* 2008, p. 1895, *obs.* I. Gallmeister.
[34] ECJ, 21 December 2011, C-495/10, *CHU de Besançon v. Thomas D… CPAM du Jura*.
[35] Law n°91-1406 of 31 December 1991, art. 47.
[36] France: Law of 1st July 1964, now enshrined in art L. 10-1, *Code de la Santé Publique*.

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 recently been introduced by means of a Statute of 4 March 2002.[37] This statute has an ambitious and broad ambit, but the key feature of the law is the new medical compensation system.

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.[38]

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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[37] 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, "La loi n° 2002-303 du 4 mars 2002 relative aux droits des maladies et à la qualité du système de santé: L'indemnisation des accidents médicaux", *Dalloz* 2002, *Chron.* p. 1367, *spec.* p.1371; M. Deguergue, "Droits des Malades et Qualité du Système de Santé", *AJDA* 2002, p.508.

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

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