# OVERVIEW BELGIUM

## 1. INTRODUCTION

Belgian Law on product liability is considered as very similar to French Law since the Belgium Civil Code reproduces for historical reasons the provisions of the French Civil Code. However, same article may be interpreted in different ways; for instance under the latent defect warranty (article 1641 Civil Code) the Belgian case law has laid down a rebuttable presumption of knowledge of the defect to the detriment of professional sellers while the French case law consider this presumption as non-rebuttable. Moreover, the strict liability enacted by article 1384 in both Civil Codes is more used in Belgium than in France.

Several regimes likely to apply to defective products are available under Belgian Law, the last one being the regime of the Act of 25 February 1991 which implement the Council Directive on liability for defective products (25 July 1985). Due to existence of different regimes of liability, notion of "defect" varies accordingly. Thus, a product will for instance be considered as defective if:

- it is unsuitable for the use for which it is intended (latent defect warranty regime- art. 1641 Civil Code),
- it does not provide the safety which a person is legitimately entitled to expect (Act on product liability, 25 February 1991),
- it does not conform to certain norms (Belgian norms, European standardised norms) or does not meet consumer expectations concerning safety, or presents a risk (Act on product and service safety, 9 February 1994)
- ….

This overview intends to details the different regimes of liability which can apply to defect products.

## 2. PRODUCT LIABILITY REGIMES

### 2.1 CONTRACT

2.1.1 General contractual rules

The Belgian Civil Code sets the two following general principles which may apply to defective product although specific legislations on product liability are more relevant and effective:

- Implied duties: article 1135 provides that "Agreements obligate not only to what is expressed therein but also for the consequences which equity, usage or the law gives to an obligation according its nature." Applied to any contract of sale, the case law deducted from this the obligation of the seller to give to the buyer appropriate information, especially on the risks implied the use of the product. This jurisprudential obligation has been consecrated by article 30 of the Act on commercial practices and information and protection of consumers (14.7.1991) which provides that "at the latest at the time of the signing of the sale, the seller shall provide customers with correct and useful information relating to the product or service features and terms of sale, given

the need of information expressed by the consumer and the use stated by the consumer or the reasonably predictable use"[1].

- Obligation to deliver the thing agreed: article 1604 Civil Code defines the delivery as the "transfer of the thing sold into the power and possession of the buyer". Case law has deducted from this article an obligation for the seller to deliver a product which complies with the contract provisions and especially an obligation to deliver a safe product. However, a product that is not in conformity with the parties' stipulations (express or implied) is not by itself defective and a defective product may perfectly comply with the contract provisions. Under this regime, the buyer may claim for the rescission or the performance of the contract, and can claim compensation if damages arose due to the failure to deliver. The claim must be brought rapidly after the delivery since the claimant could be presumed to have unreservedly accepted the product if the claimant did not raise objection regarding the conformity at the time of the delivery.

2.1.2 Latent defect warranty

Article 1641 of the Belgium Civil Code provides that "*the seller is held to a guaranty against latent defects in the thing sold which render it unsuitable for the use for which it is intended, or which so diminish such use that the buyer would not have purchase it, or would have given only a lesser price for it, had he known of them*".

It should first be noted that this contractual regime of liability only applies to contracts of sale.

The latent defect, as interpreted by judges, can be a "structural" or a "functional" defect. A structural defect can be defined as the one that affects the product intrinsically and a functional defect as the one that renders the product unfit for its expected purpose. An example of what can be considered as a "functional" defect is given by a judgment of the Court of Appeal of Liege[2] which has considered the milometer of a used car that showed a false mileage as defective.

The liability of the seller depends on his knowledge of the defect prior to delivery of the product:

- if the seller did not know the defect, the buyer has in principle the following option: returning the defective product and being refunded (*action rédhibitoire*) or keeping the product and obtaining restitution of a part of the price, which one shall be valued by an expert (*action estimatoire*). He is also entitled to the refunding of the expenses caused by the sale. However, and according to article 1643 terms, the seller can preventively stipulate in the contract that he will not be liable to any warranty.

- if, on the contrary, the buyer knew the defect the seller is not only liable to the restitution of the price as said above, but also to any heads of damages suffered by the buyer. Moreover, the seller can not stipulate a liability exemption clause bearing on this warranty.

These remedies do not allow the buyer to claim for replacement or repair.

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[1] See for example the judgment of the Tribunal of first instance of Bruxelles , 14th section, 23 January 2001, registration number 97/10865 A, unpublished.

[2] Court of appeal of Liege, 14 January 2000, SA Mondial auto vs Jourdain & Consorts.

The burden of the proof of the existence of the defect at the moment of the product delivery bears on the buyer but as the Belgian Supreme Court (*Cour de Cassation*) considers that professional sellers are deemed to have known the defect, professionals sellers has to prove it was totally impossible for them to detect the defect.

To succeed in his claim the buyer shall bring his action within a "brief period" which is determinate by the judges according to the facts of the case. It also remarkable that precedents allows the claimant to sue any party to the contractual chain; for example the buyer of a defective product can bring an action against his direct seller as well as against the previous seller, importer or manufacturer provided that all parties are bound in a chain of sale contracts.

### 2.2 TORT

Article 1382 to 1386 of the Belgian Civil Code set out the general principles of the tort regime.
According to article 1382, "Any act whatever of man which cause damage to another obliges him by whose fault it occurred to make reparation". Under this article, the claimant has to demonstrate the fault, the damage and the causal link between the fault and the damage. The fault will consist in a breach of an obligation of safety.

The fault may also consist in negligence according to the terms of article 1383 which provides that "each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence".

The liability is extended by the article 1384 of the Civil Code to the act of persons for whom one is responsible or by things that one has in his keeping. A case judged by the Court of Brussels[3] gives an example thereof: a manager of a playground was responsible for the bodily injuries of child who felt from an unsafe toboggan while using this one out of the opening hours and in violation of the prohibition to come in as indicated on a board affixed on the fence of the playground. The liability could not have been based on the contractual ground as the parents of the child have not paid the entrance fee. It should be noted that the liability was shared between the manager and the parents of the child, these one having failed to their duty to look after their child.

### 2.3 SPECIFIC REGIMES

2.3.1 The Act of 9 February 1994 on Product and Service Safety (PSSA)

a. Background
The first European Directive[4] on general product safety was implemented by the Act of 9 February 1994 relating to Consumer Safety. This Directive was then repealed as from January 2004 by article 22 of the second European Directive[5] on general product safety. This second directive was

[3] Tribunal de premiere instance of Brussels, 11th section, 2nd march 1999, registration number 96/6839/A.
[4] Directive n° 92/59 EEC dated 29.06.1992
[5] Directive n° 2001/95/EC dated 3.12.2001

implemented by the Act of 18 December 2002, which renamed the Act of 9 February 1994 as the "Product and Safety Act" (instead of "Consumer Safety Act") and made some other changes in this Act. It should be noted that this Act does not only deal with the "products" but also with the "services".

b. Outlines

Article 2 PSSA provides that any producer must only place safe products on the market and must only offer safe services. Products and services are deemed safe if they comply with a set of various norms (Belgian norms, European recommendations, code of good practices…) as well as the current state of the art and technology and reasonable consumer expectations concerning safety. Art. 7 PSSA in particular requires that the producer inform consumers of the risk inherent in their product and place obligation on distributors not to supply products which do not comply with the safety requirements, according to the information in their possession.

It must be stressed that this Act does not allow a consumer to bring an action before court to obtain compensation for damages caused by an unsafe product or service as this Act only aims to enable the King, the Minister in charge of the consumer safety and its civil servants to enforce the Act provisions. Thus, the commercial Court of Mons[6] dismissed a claim (grounded on article 2 PSSA) stating that "unlike the Act of 25 february 1991 on defective product liability, the Act of 9th February 1994 does not establish a regime of direct liability of the producer towards consumers".

The PSSA imposes post marketing duties and entitles the public authorities to take preventive actions. The King, upon the Minister proposal, may so prohibit or regulate a category of products or services. The Minister has the same power but limited to the event of serious risk and for a duration of one year only renewable once. Pursuant these prohibition or regulations, the Minister may also order, after consultations with the producer, the withdrawal from the market of an unsafe product or a service which presents a risk. He can also require the recall of products or services already put in circulation with a view to be modified, exchanged, destroyed or partially or totally repaid. The Minister must inform the concerned producer within 15 days after taking these steps.
The PSSA also enable the Minister to ask producers to comply with article 2 (obligation to place only safe products and service on the market) or direct them to subject their product to analysis made by independent laboratories. The PSSA is enforced by civil servant appointed by the King for this purpose; they are in particular entitled to enter premises and warehouses, question producers and distributors, seize documents and samples of product… Judges may also impose fines and confiscate the illicit profits.

At last, article 14 PSSA set up a consultative committee (*Commission de la Sécurité des Consommateurs*) whose function is to give recommendations to public authorities and a central counter (*guichet central*) set up by article 11 acts as intermediary amongst consumers, producers, distributors and public authorities.

2.3.2 The Act 25 February 1991 on liability for defective products (PLA)

[6] Commercial Court of Mons, 28th November 2000, Dennis Poisson vs. SA Cars Export Mons.

This Act implemented the Council Directive on liability for defective products[7]. It applies to the defective product put in circulation after 1st April 1991. Services are excluded from the scope of the Act.

a. Product

Product, as defined in article 2 PLA, means any all movables even if incorporated into another movable, immovable and movable considered as immovable because they are incorporated into immovable ("*immeuble par destination*"). It also includes electricity. Agricultural products and game were originally excluded but are now considered as product as the Directive the provision excluding them from its scope has been repealed.

b. Producer

According to article 3 PLA « producer » means the manufacturer of the product as well as the manufacturer of a component, the producer of any raw material and any person who put a distinguishing feature (e.g. trade mark) on a product.
Article 4 PLA extends the liability to importers (art. 4 §1).Suppliers may also be liable but only if the producer cannot be identified or if they fails to indicate to the injured person the identity of the manufacturer or the importer "within a reasonable time" (art. 4 §2, see for example the example the judgment of Commercial court of Hasselt, 8th November 1999[8] **[LINK]**).

c. Defect

Under the PLA, a product is defective when it does not provide the safety which a person is legitimately entitled to expect. The interpretation of this defination depends on the appraisal of the judges. In the case *S.A. Tabruyn vs. General accident Fire and live assurance P.L.C.*, the Court of Namur[9] **[LINK]** an employee of a bakery has had his fingers cut by blades rotating in a funnel in which he has put his hand. The insurer of the employee reproached the manufacturer with the absence of a safety grating over the funnel and claimed it was defective for this reason. The Court, taking into account the facts that the employee was experienced and qualified and that the funnel was so difficult to reach that he has climbed a chair or a tool to be able to put his hand in it, reaches the conclusion that the rashness of the employees was the exclusive cause of his injuries and that absence of a safety grating was not to be considered as a defect.
In the case *Ets Leone vs R.J. and others*[10] **[LINK]**, the Belgian Supreme court has done a severe interpretation of what can be a defect: it has held liable the producer of a component (a facemask) for the bodily injuries caused by the component although the device was correctly fitted by a dentist, complied with a European directive and was recommended by a University.

d. Damage

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[7] Directive n° 85/374 of 25 July 1985
[8] Commercial Court of Hasselt, 3rd division (*Rechtbank* van Koophandel te Hassel, 3de Kamer) 8th november 1999.
[9] Tribunal de premiere instance of Namur, 6th civil section, 14th November 1997, registration number 643/96.
[10] Cour de Cassation, 1st section, 26 September 2003, registration number C020362F

Art. 11 PLA defines "damage" as damage caused to person including pain and suffering, and damages to property (if used for private purposes) except the damage to the product itself. It covers in particular bodily injuries, loss of income, esthetical damages. Relatives may also claim for their suffer created in reaction to the damaged caused to the primary injured person. Damages to property are subject to a lower threshold of 500 Euros. The PLA does not make use of the possibility left by the Council Directive on liability for defective products to set a minimum amount of 70 millions ECU for damages resulting from death or personal injury and caused by identical items with the same defect.

e. Proof of defect, damage and causation

Under the LPA (article 7), the injured person must prove the defect, the damage and the causal relationship between defect and damage. It has been held (*Alain R. vs S.A. Schweppes Belgium*, Court of Namur[11]) **[LINK]** that the claimant did not have to prove "the exact nature of the defect regarding in particular its technical aspects" but that the defect can be inferred from the "abnormal behaviour of the thing". However, damage is not by itself the proof of the defect as the damage can come from the misuse of the product (see for example the case of a wallpaper stripper which burnt its user[12]).

f. Defences

- Statutory defences

Article 8 PLA reproduces the cases of exemption from liability listed in article 7 of the Directive which are basically the following:

- the product was not put into circulation,
- the defect did not exist at the time when it was put into circulation or appeared afterwards,
- the product was neither manufactured by him for sale or distribution nor manufactured or distributed by him in the course of his business,
- the defect is due to compliance of the product with mandatory regulations issued by the public authorities,
- the state of the art and technology the time when the product was put into circulation do not enable the producer to detect the defect,
- regarding a manufacturer of a component or a producer of raw material, the defect is attributable to the design of the product in which the component or the raw material has been incorporated into or to the instructions given by the manufacturer (note that the PLA as extended the exemption to the producer of *raw material* although the Directive only mention the component).

In the case *Alain R. vs S.A. Schweppes Belgium*[13] **[LINK]**, the Schweppes Company was sued by a person injured by the explosion of a glass bottle of "Schweppes Indian tonic". Schweppes tried to demonstrate that the explosion was attributable to a defect of the glass but not of its drink. As

11 Tribunal de premiere instance of Namur, 5th civil section, 21st November 1996, registration number 1931/95.
12 Commercial Court of Verviers, 2nd section, 17th June 1997, registration number 96.1751
13 Tribunal de premiere instance of Namur, 5th civil section, 21st November 1996, registration number 1931/95.

Schweppes was not the manufacturer of the glass but only the producer of the drink, it claimed not to be responsible for the damages according to the exemption of liability applicable to the manufacturer of a component (see above the art.8, last paragraph). However, the judge held that Schweppes had the duty to ensure that its drinks put into circulation were free from defect, even if it was not the producer of the defective part of the product. Moreover, the judge considered that the controls of quality operated by Schweppes were insufficient to prove it was totally impossible for it to detect the existence of the defect and thus to benefit from the liability exemption based on the "state of the art and technology" (article 8, 5th paragraph).

Another case of statutory defence is set by article 10 §2 of the PLA which allows the judges to exclude or reduce the producer liability when the damage is caused both by the defect and the fault of the injured person (or the fault of a person for whom the injured person is responsible).

- contractual defences

Unlike the latent defect regime (article 1643 of the Code Civil), article 10 §1 of the PLA prohibits contractual provisions reducing or exempting the producer from its liability.

## 3. PRACTICE AND PROCEDURAL ASPECTS

### 3.1 Right to institute proceedings

3.1.1 General provisions

According to article 17 Judicial Code, a claim is not allowed if the claimant has not capacity and interest to bring its claim. In other words, the claimant shall have a direct and personal interest to bring an action. As a result, an association is not entitled to bring an action before a court to defend a general interest or the interest it intends to protect, except if specific acts entitled an association to do so (see point 3.1.2 below). A "class action" is thus not allowed in Belgium.
However, two or more persons may jointly bring a claim before the same court if the claim of each person are related (article 701 Judicial Code); this will be so the case when several person has been injured by the *same* and *unique* product. On the contrary, if several persons have been injured by identical products manufactured by the same manufacturer, these ones can't sue this manufacturer jointly but only separately**.**

3.1.2 Specific provisions

Notwithstanding the provisions of article 17 of the Judicial Code, article 98 §1 of the Act on fair trading[14] allows certain associations "to take proceedings for the defence of their collective interests as defined in their Articles of Association". Associations to which article 98 refers must have a legal personality, be represented at the Belgian council for protection of consumers (*Conseil de la consommation*) or approved by the Ministry of Economical Affairs. Such association are also entitled to ask the President of a Commercial Court to order cessation of a practice infringing the provisions of the fair trading Act (article 98 §1 and 95 fair trading Act).

[14] Act on commercial practices and information and protection of consumer, 14 July 1991 published in the Moniteur Belge of 29 August 1991 and amended several times afterwards.

**3.2 Time limits for each regime:**

The LPA regime (art.12 §1 and §2) lays down two limitation periods provided by the Council directive. The first limitation concerns the right to obtain compensation for damage and is set at 10 years as from the date when the defective product which caused the damage was put into circulation. It means that if the defect appears after 10 years, no claim brought under the PLA regime will be accepted. The second limitation is 3 years from the date on which the claimant became aware or should have been aware of the damage, the defect and the identity of the producer. This 3 years period applies to the action of the plaintiff.

In principle, claims based on a contractual ground are barred after 10 years (article 2262 bis §1). However, under the specific regime of latent defect (article 1641 et seq. Civil Code) claims must be brought within a "brief period". As previously said, the Civil Code does not lay down the length of time of this period nor the starting point; these matters are left to the judge's discretion. For example it has so been held by the Court of Appeal of Liege[15] that a period of 57 days complies with the "brief period". Case law sometimes accepts to consider that the passing of the brief period is suspended when parties are negotiating to settle their dispute, and start again if these negotiations fail; the Commercial Court of Hasselt[16] has so held that a period of 7 months after the failure of negotiation exceeded the "brief period".

Under the tort regime (articles 1382 & 1383 Civil Code) actions in compensation for damage are subject to two time limits: first, the action must be brought within 5 years from the day following the day on which the aggrieved person became aware of the damage (or its worsening) and the identity of the responsible person, and second, the right of action is extinguish 20 years from the day following the day on which occurred the fact that cased the damage (article 2262 bis § 2 & §3 Civil Code).

**3.1 Expert opinions**

In order to prove the defect or to assess the damages, a party may on his own motion have recourse to an expert. The judge may also appoint one or more judicial experts (article 962 Judicial Code). Obviously, the report made by a judicial expert will tend to be considered as more objective. The cost of expertise are recoverable by the claimant if the judge so decided.

**3.2 Disclosure of documents and evidences**

The judge may order to any party to proceedings to produce evidences in its possession (article 871 Judicial Code). Moreover, the judge may make an order for disclosure of a document held by a party or a third party where there are "serious, precise and concordant presumptions" that this document contains evidence of a pertinent fact (article 877). If the party to proceedings or the third party fail to provide this document, the judge may sentence them to pay damages (article 882).

**3.3 Post-marketing duties**

Post-marketing duties such as recall and withdrawal are laid down by the Act of 9 February 1994 on Product and Service Safety (see point 2.3.1).

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[15] Court d'appel of Liege, 14 January 2000, SA Mondial auto vs Jourdain & consorts.

[16] Commercial Court of Hasselt (Rechtbank van Koophandel of Hasselt) 1st December 2000 KBC Verzekerringen NV