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PANEL: INSIGHT INTO THE MIND OF A TRIAL LAWYER:AN INTERNATIONAL PERSPECTIVE

Product liability civil trials in France : a general overview

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1. Introduction

Product liability litigation is extremely different in France and in the United States.

First, class actions have been introduced into French law a couple of years ago only and are opened to plaintiffs on a very limited basis. Product liability cases will mainly take the form of individual actions, although several plaintiffs may join in the same action.

Second, in relation to individual actions, French procedure cannot in any way be compared to US procedure, not least because there is no jury system in civil matters.

Product liability litigation is nevertheless existing in France, and benefits in particular from a regime of liability which is, in the main, favorable to victims.

2. Mode of trial

There is no jury trial in civil litigation in France.

In principle, the case is heard by a court made of three judges. More and more frequently, only one of them will actively examine the case and will hear oral arguments, but deliberations remain collegiate.

If the case involves only commercial companies (including insurance companies), it will come before the Commercial Court, which is composed of lay judges who are elected by their peers (tradesmen, artisans, entrepreneurs, …). It is frequent that these judges have no legal background except in bigger cities and this adds uncertainty on the outcome of the first instance trial. However, the Court of appeal is composed of professional judges.

If the case involves both commercial companies and private persons, the competent court at first instance will mainly be the *Tribunal de grande instance*, which is composed of professional judges. One judge will be appointed to manage the pretrial proceedings.

Whichever court is competent, the parties will first exchange their arguments in writing, by filing submissions and their evidence at successive procedural hearings. There is no limit to the number of submissions the parties can file, although generally, each party will file approximately three successive written documents on the merits.

Some issues may be determined during the pretrial phase but they are limited and there is no concept of summary judgment.

Once the parties consider that they have set out all their arguments and evidence, the Court will set a date for a last hearing, at which oral arguments will take place.

The judgment is made in writing and the reasoning of the Court in support of the decision must be set out in the judgment. Failure to state reasons is ground for a reversal of a decision by the French Supreme Court, but reasons can be expressed with concision and brevity.

The Court is bound to examine all the issues raised by the parties in so far as they are relevant to the decision to be made, and may also, on its own initiative, raise an issue of law, in which case the parties must be given the opportunity to present their arguments in relation to that issue before it is determined by the Court.

4. Discovery

There is no discovery in France. There are also no pre-trial depositions, nor interrogatories.

An allegation that is unsupported by any relevant document is likely to fail but each party is free to choose which documents it wishes to disclose, and a party has no obligation to disclose documents which are detrimental to its case.

If a party knows that the other party is in possession of a document that is important to the case but is not disclosed voluntarily by that party, it may request the judge to order the production of that document. The request can also be directed towards a third party, as third parties have a legal duty to cooperate to proceedings if so required.

The scope of legal professional privilege is rather limited as it applies only to correspondence (i) between the lawyer and his client, and (ii) between two outside counsels admitted to the bar but it will apply to any and all correspondence or document, whether prepared in connection with a potential litigation or not. The parties may also invoke the proprietary or confidential nature of certain information or documents to obtain some protection from the Court before disclosing them in the proceedings.

5. Evidence

Testimonial evidence is not much used in French civil litigation. If used at all, it will be made in writing, with a few formal requirements to be met, and it is very unusual that the witness will be present at the trial to testify orally.

There is no specific examination or cross-examination procedure provided for in the Civil procedure code but if a witness is present at the trial, he may be questioned in an informal way.

In almost all product liability cases, the Court will appoint an expert to give an opinion on the technical aspects of the case and, often, on the loss suffered by the claimant. The appointment of the expert is generally requested by the party seeking indemnification, and can be ordered in interlocutory proceedings before any claim on the merits is filed, or by the Court in charge of the case after the filing of a claim on the merits. The Court may also decide on its own volition to appoint an expert.

The fees of the expert are normally payable, at least initially, by the party requesting his appointment but the Court may exercise discretion in this respect.

The survey proceedings are fully adversarial and each party is generally assisted by a lawyer and by its own expert (or a competent employee of the company).

The expert appointed by the Court will file a written report. The opinion of the expert is not legally binding on the Court but it will generally be followed by the judges who tend to trust the expert they have appointed, although parties to the proceedings commonly criticize the report and try to convince the Court that the expert erred in his opinion.

The expert appointed by the Court is generally not present at the final hearing, but the Court may request his presence if it wishes some clarification on his opinion. The experts appointed by the parties are not present at the final hearing except in very exceptional circumstances.

It will therefore generally fall only on the parties' lawyers to explain the technical position to the Court.

Apart from the report of the expert appointed by the Court, the parties will submit to the Court the documents on which they rely in support of their allegations. This may include reports by private experts hired to challenged the opinion of the court appointed surveyor.

Each party must send its evidence to the other parties before the last hearing, and no document can be remitted to the Court if it has not been sent to the other parties sufficiently in advance of the last hearing to enable them to comment on it.

6. Oral argument

At the last hearing in the proceedings, the lawyers of the parties have the opportunity to present orally their arguments (they may not present an argument that has not been set out in the written submissions filed before the last hearing).

The hearing for oral arguments can go two ways:

- either the lawyers of the parties simply set out their arguments and choose on which arguments they wish to insist;

- or the hearing is more interactive, with the Court indicating on which issues it wants the lawyers of the parties to explain their position and/or asking questions.

In any case, hearings for oral arguments are very short by American standards: each party will generally be allowed between 10 minutes and one hour...

7. Damages

Damages awarded to a successful plaintiff are much lower than those awarded in the US. Damages are compensatory only and, for the moment, there is no possibility to obtain an award of punitive or exemplary damages.

8. Costs

The Court has discretion in deciding how to treat the costs of the successful party.

The unsuccessful party may thus be ordered to pay an indemnity to the successful party as compensation for its legal costs. Traditionally, the amount awarded by the Court is low and, in complex cases, will often seem symbolic compared to the actual amount of legal costs which have been incurred, but Courts tend to be more attentive to this actual amount if it is duly supported by fee invoices for example.

Disbursements (bailiff costs, translation costs, …) are to be reimbursed by the unsuccessful party. They include the fees of the expert appointed by the Court, which are paid by the party on whose request the expert was appointed, who is generally the claimant.

9. "Class Actions" Litigation

There was no mechanism akin to class actions in French law until 2014.

The type of class action introduced in 2014 is quite different from the American system in that, first, a potential class can only be represented by consumer rights associations, and not by an individual lead plaintiff.

The consumer association will file a claim on behalf of all the consumers placed in the same or similar situation and will obtain a judgment:

- imposing liability on a professional
- defining the group of consumers towards which the professional is liable and the criteria which must be met to join that group
- listing the type of losses which can be indemnified
- assessing the amount of the losses or setting the criteria for their assessment

The decision will then be published to enable potential victims to join the group, whereafter the professional has a certain period, set by the judge, to indemnify the consumers who have chosen to join the group.

A simplified procedure is available when all the members of a group can be identified beforehand and each has suffered a loss in the same amount.

Class actions are available only for certain categories of losses or products. Initially, only a breach by a professional of its legal or contractual obligations in the sale of goods or provision of services

to consumers (amounting to deceptive or unfair commercial practices) or losses caused by antitrust behaviors could give rise to a group action. In January and November 2016, the scope of group actions was extended to losses suffered by users of the health care system because of a defect in a health or cosmetic product; losses suffered as a result of a damage to the environment; discrimination at work; losses suffered as a result of a breach of data protection laws.

There is therefore no available class action mechanism for product liability litigation except in relation to health products. The first group action in relation to such products was launched in December 2016 against Sanofi and it remains to be seen whether it will be followed by many others…