Product Liability Cases in Civil Law Countries: A Pro-Plaintiff Approach

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PRODUCT liability claims are one of the fastest-growing types of claims in the European Union. This is due both to the will of the European market surveillance authorities to show that their market is safe and also to the increasing number of consumers' associations and plaintiffs' bar. The influence of case law developed in the United States also plays a role, even if some losses are now well recognized in the European Union while not yet fully compensated in the United States, such as the fear of cancer or "anxiety damage" linked to the exposure to a potentially hazardous product. This article will address new trends and risks that companies doing business in the European Union should bear in mind.

I. An Upcoming Reform of the European Directive on Product Liability in the Pro-Plaintiff Direction

The Court of Justice of the European Union ("CJEU") is the court that provides guidance to all courts of EU Member States on how to interpret European legislation. The main legislation relating to products in Europe is Council Directive 85/374/EEC of July 25, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the "Product Liability

Directive"). It provides for a strict liability regime which has been increasingly interpreted in favor of plaintiffs on both the liability and the causality criteria, forcing manufacturers to demonstrate the absence of defect.

This is an important point that shapes the scope of pending discussions on the reform of the Product Liability Directive. These discussions are likely to trigger legislation that implements the CJEU's approach.

A. The pro-plaintiff approach of the Court of Justice of the European Union

In recent years, the Court of Justice of the European Union has rendered a number of decisions in the product liability field which have been interpreted as being pro-plaintiff. Two of the most emblematic decisions are the *Boston Scientific* case and the *Sanofi Pasteur* case. Both decisions were rendered in the medical device/medicine context and should be limited for now to this industry. Nonetheless, plaintiffs' counsel are trying to have them extended to all consumer products, regardless of industry.

In *Boston Scientific*,[1] the CJEU had been requested to rule in a number of disputes relating to medical devices. During quality inspections, the United States corporation Boston Scientific identified that certain of its heart stimulators and implantable automatic defibrillators sold in Germany were likely to be affected by a defect, creating a hazard to the health of implanted patients. Concerned about the safety of these patients, the manufacturer recommended as a precaution to replace the implanted devices with new devices provided free of charge.

Patients' insurance, which had covered the costs of the replacement surgeries, decided to seek reimbursement from Boston Scientific. However, a difficulty arose, because following the replacement surgeries, the medical devices had been destroyed. The removed devices had not been examined in any way so as to establish whether they had any defects.

The main question submitted by the German Federal Court to the CJEU was whether a product which had not yet shown signs of a defect in a patient could be deemed defective in light of a risk of failure identified by the manufacturer. In other words, the German court wished to know whether the potential risk of failure of a product, not having yet occurred, could constitute a defect within the meaning of the Directive. The

[1] CJEU, *Boston Scientifc Medizintechnik GmbH v. AOK Sachsen-Anhalt – Die Gesundheitskasse* (C-503/13), *Betriebskrankenkasse RWE*, March 5, 2015 (C-504/13).

German court also sought guidance whether the replacement cost of the product could constitute a compensable damage within the meaning of the Directive.

With respect to the first question, the CJEU unambiguously responded in the affirmative. The Court reminded that within the meaning of the Directive, a product is defective when it does not provide the safety that a person is entitled to expect, taking all the circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation. For the CJEU, the safety a person is entitled to expect must be determined in light of the purpose, features, and objective properties of the product in question, as well as the specific nature of the group of users for whom the product is intended.

In *Boston Scientific*, with regard to medical devices in particular, the CJEU noted that the particularly vulnerable nature of the patients using the devices in question implied that the safety requirements which the patients were entitled to expect had to be particularly high.

The CJEU concluded that the defectiveness of a product can result from the mere observation that "such products belonging to the same group or forming part of the same production series have a potential defect, (…) without there being any need to show that the product in question is defective."[2]

The potential failure of a specific device allows courts to legally consider as "defective products" all products resulting from the same batch without it being necessary to demonstrate on a case-by-case basis the existence of the actual defect of each of the products at stake.

With respect to the second question relating to damages, the CJEU confirmed that corresponded to "the costs relating to the replacement of [the medical device], including the costs of the surgical operations."[3]

As a consequence, rather than merely carrying out a concrete examination of the concept of defect (i.e. an effective failure), which would have more clearly met the requirement of a causal link between the defect and the damage required by the applicable legislation, the CJEU abstractively applied the concept more broadly in favor of the victims.

The consequences will be significant should this case law be extended to all types of products; a manufacturer of products that has identified an isolated failure with respect to a given product would have no choice but to recall all the products of the "same group" or "series".

[2] *Id.* at § 41 (emphasis added).

[3] *Id.* at § 52.

In *Sanofi*, the CJEU again ruled in favor of the victims regarding causality on June 21, 2017.[4] The main question submitted to the Court by the French Supreme Court was whether the French court's ruling on the merits, "in the exercise of its exclusive jurisdiction to appraise the facts," could consider that "certain factual evidence relied on by the applicant constitutes serious, specific and consistent evidence enabling it to conclude that there is a defect in the vaccine and that there is a causal link between that defect and that disease", notwithstanding the finding that medical research does not establish a link between the vaccination and the occurrence of the disease.[5]

With its answer, the CJEU confirmed the French approach of authorizing proof of a causal link by presumptions:

> notwithstanding the finding that medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence of the victim's disease, certain factual evidence relied on by the applicant constitutes serious, specific and consistent evidence enabling it to conclude that there is a defect in the vaccine and that there is a causal link between that defect and that disease.[6]

Completely to the benefit of the victims, the CJEU considered that the impossibility in the context of scientific uncertainty for an applicant to prove the causal link between the defect attributed to the vaccine and the occurrence of the disease through presumptions "disregards the requirements resulting from that directive."[7] However, the CJEU reminded that the victim must provide evidence of causality. It is not possible to reverse the burden of proof for the benefit of the applicant.

In *Sanofi*, the CJEU considered that facts like those brought forward in the case that related to "the temporal proximity between the administering of a vaccine and the occurrence of a disease and the lack of personal and familial history of that disease, together with the existence of a significant number of reported cases of the disease occurring following such vaccines being administered" are evidence allowing a court to establish causality.[8]

When faced with diseases the etiology of which is not well known,

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[4] CJEU, *N.W, L.W, C.W v. Sanofi Pasteur MSD SNC, Caisse primaire d'assurance maladie des Hauts-de-Seine, Carpimko*, June 21, 2017 (C- 621/15).

[5] *Id*. at § 43.

[6] *Id.*

[7] *Id.* at § 30.

[8] *Id.* at § 41.

the CJEU considered that it was not necessary to rely on irrefutable scientific elements or to require certainty when a set of sufficient clues offers the conclusion of causality and, therefore, a defect in the product.

Even more surprisingly, the CJEU found that the existence of many similar cases of the same disease following the administering of a vaccine could also establish a causal link.

The second question, submitted as an alternative question, related to whether "evidentiary rules based on presumptions according to which (…) the existence of a causal link between the defect attributed to the vaccine and the damage suffered by the victim will always be considered to be established when certain predetermined causation-related factual evidence is presented" could be admitted. [9] Probably for the purpose of being fair, the CJEU concluded that there cannot be a systematic recognition of causality when certain predetermined factual evidence is presented by the applicant. As a result, the CJEU rejected the possibility of an automatic presumption of causality between defect and damage in the event of scientific uncertainty.

B. Discussions around Reform of the Product Liability Directive

On January 22, 2020, the European Commission's Committee on Internal Market and Consumer Protection met for a public hearing on the topic "Product Liability Directive: protecting consumers in the Digital Single Market."[10]

The Commission's representatives argued that this topic is of the utmost importance in order to "reinforce EU's industrial capacity to allow it to be technologically sovereign" and to offer the right field for producers and even a competitive advantage to producers to innovate and compete with China and the United States.

Various stakeholders provided their views on whether the Product Liability Directive is still relevant in light of new technologies like Artificial Intelligence (AI), self-learning products, and the Internet of Things (IoT). The Commission itself had also previously published a report in May 2018 presenting its evaluation of the Product Liability Directive. The EC's report

[9] *Id*. at § 2.

[10] Committee on the Internal Market and Consumer Protection, Public Hearing,"Product Liability Directive : protecting consumers in the Digital Single Market," (January 22, 2020), available at http://www.europarl.europa.eu/cmsdata/194605/Product%20liability%20hearing%20-%20Programme-original.pdf.

recommended just such an in-depth discussion.[11]

Stakeholders who shared their views included industry representatives like CLEPA (European Association of Automotive Suppliers) and Orgalim (Europe's technology industry); consumer representatives (BEUC (European Consumer Organisation)); members of the Commission; and members of the Expert Group on liability and new technologies.

Only Orgalim argued that the Product Liability Directive does not need to be modified, mainly on the bases that (i) it is technology neutral, (ii) it creates the right balance between the obligations of consumers and producers, and (iii) it creates legal certainty.

All other stakeholders expressed the view that the EU should adapt the Product Liability Directive and ask itself the following questions when doing so, keeping in mind that consumers and producers should be trusted in digital development and that consumers should be compensated in case of damage:

- **The definition of "product"** should be updated to clarify whether software, digital services and AI are "products" within the meaning of the Directive. The increasing interaction between a product and digital services should also be addressed.

- **The definition of "producer"** should be clarified to identify who should be the producer in case of an update, upgrade, re-use, repair, or modification. CLEPA requested that those who make modifications to the product be themselves considered producers.

- Stakeholders also raised the question whether the **type of damage** to be compensated should be expanded in order to include not just physical and material damage but also damage to data or digital assets.

- CJEU should address whether **strict liability**

[11] European Commission, *Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*, (April 7, 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0157&from=EN .

should apply, with BEUC making the suggestion that all manufacturers involved in the product be jointly liable, together with the question of proof of defect and causation where some stakeholders question the producers' ability to have full transparency on their technology.

- Should there be a reversal of the **burden of proof** so that the onus will lie with producers rather than consumers?

- The future and relevance of the "**development risk defense**" has also been questioned in a market where changes and innovations appear very quickly. BEUC seeks to delete this defense from the text entirely.

- Should products be graded? Should there be a sectorial approach? Or should we remain **product neutral**, noting that the Commission has expressed the view that a sectorial approach does not seem appropriate?

In light of the CJEU's approach to date, there is reason to fear that the answers to all these questions be against the manufacturers' interest. We hope, however, for the sake of innovation that CJEU maintains at least the development risk defense.

II. The Influence of the United States

When it comes to product-related issues, there is no longer any reason to hope that these issues will remain localized in a specific territory or part of a territory. Non-compliance or health and safety allegations remain a national dispute only in very rare circumstances (e.g. local pollution by an international company). This is not just because of social media and the speed with which news spreads today. It is also due to increasing cooperation between regulators around the world; the rise of NGOs with an international reach; and plaintiffs' counsel, who pay close attention to cases pending in jurisdictions other than their own.

The United States influences European practitioners. Indeed, a majority of claims that start in the United States will be replicated in the European Union (and worldwide) as soon as there is a glimpse of a judgment that can be interpreted as unfavorable to the manufacturer, the service provider, or the retailer. This is true even if the product is not exactly the same or if the safety and regulatory

requirements are different between the United States and a European jurisdiction.

The mechanism of discovery exists in the United States but does not exist in civil law countries (the majority of countries in the European Union). The prevalence of discovery in the United States explains why what happens before U.S. courts influences European practitioners. When a dispute starts in the United States, plaintiffs get access to documents that they would not have access to had their claims started in civil law countries. NGOs and plaintiffs' counsel use the knowledge obtained in the scope of proceedings in the United States in proceedings pending in the rest of the world. This mechanism increasingly encourages European plaintiffs to join class actions launched in the United States or even initiate their own class actions (although when this happens, these plaintiffs are usually subject to a motion to dismiss and sent back to their national courts).

Glyphosate-related litigation presents one of the landmark example of litigation that started in the United States but which has quickly spread around the world. Legal activity in the United States has led both to claims and legislation against the substance, which has been classified as a "probable carcinogen" since 2015 by the World Health Organization (WHO). As far as Europe is concerned the chemical has continued to raise issues, despite the renewal of the marketing authorization of glyphosate by a decision of the majority of the Member States on November 27, 2017 extending the authorization until 2022.

Austria banned glyphosate in July 2019, making it the first European country to do so. France tried to follow the same path, but so far only the use of glyphosate-based products by private individuals (banned as of January 1, 2019) and public bodies for the care and maintenance of public green spaces is prohibited. Possibly aware of potential claims, the European Parliament called for the improvement of the system of evaluation and registration of pesticides on January 16, 2019.

French courts have also taken up the issue. On April 11, 2019, the Lyon Court of Appeal held Monsanto liable for "lack of information on the label and failure to exercise due diligence". A similar case was filed on May 31, 2018 and is still pending. Beyond individual cases, on January 15, 2019, the Lyon Administrative Court cancelled the marketing authorization for RoundUp 360. It declared that glyphosate should "be considered as a substance with presumed carcinogenic potential for humans". Without any doubt, glysophate will continue to be in the forefront as the expiration of its marketing authorization on the

European market is again approaching.

When we talk about opioids—defined as products derived from morphine, not classified in the list of narcotics, and used to fight pain—we immediately think of the United States. And for good reason. The flexibility in the marketing of these products in the United States in the 1990s has been identified as the alleged cause of the death of almost 400,000 people between 1999 and 2017. The opioid crisis is reminiscent of the crisis that hit the American tobacco industry in the 1990s.

Today, we are witnessing a dramatic increase in cases related to this crisis. Thousands of claims have been brought against opioid manufacturers accused of flooding the market with these products. Million-dollar settlements have already been signed with some companies, even as the legal debate is still pending over whether or not manufacturers should be held liable for providing products at the request of the State.

This crisis is also resonating in Europe. According to a 2015 OECD report, Estonia, Sweden, Norway, Ireland and the United Kingdom are among the countries that have been most affected by opioid overdose deaths. As for France, the National Agency for the Safety of Medicines and Health Products published a report on the consumption of opioids. The report shows that between 2006 and 2017, the prescription of opioids increased by about 150 percent.

Silica-related litigation, benzene litigation, and BPA (Bisphenol A) litigation are also emerging risks in the European Union. We also mention e-cigarettes issues, which were in the headlines in the United States last summer and led to bans and further regulation all around the world. Lead-paint litigation has been pending in the United States for more than a decade. Although not as extensive in the European Union, this litigation has brought many regulatory changes, including the banning of most lead-related products. In France, this debate surfaced again following the fire of Notre Dame de Paris and allegations that the population leaving in the vicinity had been exposed to lead contamination.

III. Fear of Cancer Linked to the Exposure to a Hazardous Product

France is the first EU Member State to recognize compensation for the "worried-well" on the basis of their "anxiety to develop a disease in the future" – the fear of cancer cases. Courts in Italy and Spain are also starting to recognize this basis for liability, and test-cases are being filed in all Member States.

April 5, 2019 and September 11, 2019 were two very important dates for toxic torts in France. On

April 5, 2019, the Plenary Bench of the French Supreme Court handed down a decision in which the most senior judicial officials of the French judicial system held that any employee who has been exposed to asbestos may bring a claim based on anxiety.[12] This decision is particularly noteworthy because the judges seem to have shifted from their previous position in which only employees having worked at a site listed by Ministerial Order as triggering the right to the asbestos workers' early retirement allowance (the "ACAATA")[13] could bring an action for anxiety. This new chapter in asbestos litigation is highly controversial because this cause of action is seen as a deviation from the case law and an example of the courts wanting to make law.

More importantly, on September 11, 2019[14] the same judges ruled that the April 5 ruling extends to the exposure to any "hazardous substance" or product. This marks the starting point of a series of actions which we expect will be launched by former or current employees who will claim to be anxious due to an exposure to any number of substances other than asbestos.

The use of asbestos was banned by decree effective on January 1, 1997. Two decades later, judicial actions related to asbestos represent a major compensatory risk for companies. What about all other substances that are now considered a risk? What will the compensatory risks be for these substances and how will it be possible to avoid them? Are the procedural tools currently available to companies really adapted for future cases that will require advanced scientific and medical debates?

Following a brief summary of the origin and stakes of asbestos litigation, we will discuss the emerging legal risks related to the new substances considered to be a risk, before concluding by identifying the need to find new procedural tools that would allow real scientific discussions to take place and thereby guarantee fair proceedings that would not be exclusively and automatically favorable to those who present themselves as victims.

A. Asbestos litigation: the laboratory of mass litigation

Asbestos litigation provides an example of a field where the case law that pays little attention to the fundamental principles of civil liability—the need to compensate for a health problem that the courts

[12] Plenary Bench, April 5, 2019, no. 18-17.442. *See also* Wolfgang Fraisse, "*Amiante: l'extension de l'indemnisation du préjudice d'anxiété*", DALLOZ ACTUALITÉ (April 9, 2019).

[13] Social Security Financing Law for 1999, no. 98-1194.

[14] Plenary Bench, September 11, 2019, no. 17-24.879 to 17-25.623.

consider has not been managed appropriately by the State. Since the very beginning of these actions, asbestos actions have proven an exception.

In principle, to show civil liability victims must prove fault, damage, and a causal link between fault and damage. However, in the case of asbestos litigation, courts quickly decided to discard these fundamental principles. This trend first appeared in gross negligence cases, when the Judges of the French Supreme Court established a principle of ultra-compensation for the victim's benefit. The decisions handed down by the Social Chamber of the French Supreme Court on February 28, 2002 are noteworthy. The judges considered that "pursuant to the contract binding it to the employee, the employer has, towards him/her, an obligation to achieve a safe result (…), the breach of this obligation is tantamount to gross negligence within the meaning of Article L. 452-1 of the French Social Security Code."[15] In this decision, the Court concluded that the employee no longer had to offer proof of gross misconduct but rather only that the employer was aware of the danger related to the asbestos exposure and failed to take the necessary measures to protect them. With respect to the latter criterion, the French Supreme Court ruled that even if the employer proved that it had complied with its legal obligations, it could still be sentenced.[16]

Indeed, French courts consider the employer to be bound by an obligation to achieve a safe result for employees. This conclusion is not without consequences; the burden of proof has been reversed to the plaintiff's benefit. As a consequence, damage suffered by an employee is sufficient to suggest the employer's liability, insofar as it presumes the employer's fault, even though the employer did everything in its power to avoid employee harm and complied with the applicable legal and regulatory provisions. Under current case law, the employer can only avoid liability by proving the existence of an extraneous cause. This criterion has led to highly original decisions on the concept of *force majeure*. Not only does the determination of the obligation to achieve a safe result completely interfere with the standard assumption in matters relating to liability, but it also eliminates any distinction between a diligent and cautious employer who implemented the necessary measures to prevent damage and a negligent employer. Only the damage counts, and for the French Supreme Court, this damage must be compensated no matter what. This has led to resignation by employers as, even in good faith,

[15] Social Chamber, February 28, 2002, no. 99-18.389.

[16] 2nd Civil Chamber, July 9, 2009, no. 08-16.934.

they are no longer encouraged to implement the necessary safety measures since they may incur liability regardless.[17]

Even though the legal rules governing compensation awarded to asbestos victims have always favored victims, judges have even further extended this compensatory logic. A telling example is the compensation awarded for anxiety. This category of loss was established by the French Supreme Court in *re Ahlstrom Labelpack.*[18] The Court explained that anxiety is "related to the fear of having caught a disease caused by asbestos and the need to regularly undergo check-ups". The creation of anxiety as a separate category of loss is, in principle, highly questionable because of the subjectivity of the claim and the difficulty in assessing it. Even though feelings have long been taken into account in civil liability matters, in particular with moral damages, compensation should be awarded only if damages are established beforehand. Yet, can one really consider that living in a state of anxiety, without proof or certainty of a real exposure or of the said anxiety, is tantamount to legally cognizable damage?

The *re Ahlstrom Labelpack* decision has been criticized both for establishing the principle of compensating the state of anxiety at all, and also because of the pretorian way the Judges expanded the legal rules to allow compensation for anxiety. Compensation for anxiety must be awarded, in principle, following the rules of standard law; an employee who is not sick within the meaning of social security law should not be able to benefit from the rules governing the presumption of attributability. However, courts have overcome this difficulty by making the rules on evidence more flexible to the benefit of the victim. Under the case law of the French Supreme Court, an employer can claim anxiety without proving that he/she undergoes regular medical exams and check-ups.[19] This procedural change purely and simply relieves the employee from providing any proof of his/her anxiety. The French Supreme Court appears completely comfortable with having implemented a system based on a trio of presumptions: presumption of a breach, of damage, and of a causal link between the two.

Courts have often confused the admissibility of an action with the

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[17] Caroline Blanvillain, "*L'obligation de sécurité (de résultat) est morte! Vive l'obligation de sécurité*", REVUE DE DROIT DU TRAVAIL 173 (ed. Dalloz, 2019).

[18] Social Chamber, May 11, 2010, nos. 09-42.241 to 09-42257.

[19] Social Chamber, March 19, 2014, no. 12-29. IL Comptroller 339. *See also* Christophe Wilmann, "*Faciliter la réparation du préjudice d'anxiété des salariés exposés à l'amiante: une jurisprudence attendue, quoique critiquée*", RECUEIL DALLOZ, at 1312 (April 2, 2014).

determination of the criteria for liability. This confusion is apparent from even a cursory review of the available decisions in this field. As long as the plaintiff had worked at a site listed as eligible for the right to benefit from the ACAATA, the plaintiff has been automatically indemnified. The coherent and accurate method to determine liability would be first to rule that the plaintiff is admissible given that he/she worked at a listed site, then determine whether the employer is guilty of a breach, and if so, whether this breach is justified by a cause likely to exempt them from liability. Courts have preferred instead just to analyze employees' employment histories without looking at the other criteria. Two examples, among many, may be quoted:

> If the employee meets the conditions to benefit from compensation laid down above, the employer can only avoid the presumption of liability lying with it pursuant to the above provisions by proving the existence of a case of force majeure meaning that the absence of fault or the compliance with the regulations, even if they are demonstrated, cannot validly be enforced against the action for compensation of the employee.[20]

> proof of a cause for exoneration from liability … cannot result from one's compliance with the regulations, which is ineffective here.[21]

Several recent decisions of the French Supreme Court hinted at the Court's intention to limit this type of action, which has put an end to the existence or strongly jeopardized many companies. A recent decision, for example, changed the statute of limitations, which triggers the applicable timeframe from the listing of the site in the Ministerial Orders, such that all sites listed before June 2008 could no longer be targeted by admissible actions after June 2013.[22] Another example is the recent decision in which the Court ruled that all the plaintiffs who had signed a settlement agreement at the time of their departure in which they waived all rights to bring an action related to the performance of their employment contract were inadmissible.[23]

For this reason, the decisions handed down on April 5, 2019 came

[20] Chambéry Court of Appeal, March 27, 2018, no. 17/01075 & others.

[21] Paris Court of Appeal, March 28, 2019, no. 16/04817 & others.

[22] Social Chamber, July 2, 2014, nos. 12-29.788 to 12-29.801; Social Chamber, November 19, 2014, nos. 13-19.263 to 13-19.273.

[23] Social Chamber, January 11, 2017, no. 15-20.040; Social Chamber, February 21, 2017, nos. 15-28.376 & following.

as a surprise. Prior to this decision, for nearly a decade courts had dismissed claims for anxiety made by people who had not worked at a listed site. The Social Chamber of the French Supreme Court had considered that the listing of a site was the decisive criterion that triggered company liability, and thus the right to benefit from the ACAATA. Many believed that this position reflected the Court's desire to continue to limit this type of action. However, the Plenary Bench decided otherwise, offering compensation for this category of intangible damage to all. While the Court required that the standard rules governing liability must now be applied, it is unclear what the reaction of the lower courts will be, given that they have automatically applied fixed amounts of compensation for such a long time. Lower court conduct must be monitored bearing in mind that only one thing is clear: while everyone thought asbestos litigation would soon be over, it is now bound to resume with greater intensity.

Asbestos litigation is characterized by case law that is very favorable to employees, to the detriment of employers. It would be unfortunate to see the legal rules governing the liability of asbestos victims created by the courts applied to other substances. Indeed, asbestos litigation has already had devastating consequences for many companies. It would be reasonable to be concerned about the companies that remain and about the future of the French subsidiaries of foreign groups. Foreign parent companies have been very surprised by the existing case law, since anxiety is not compensated anywhere else in the world, in particular in the United States, even though many believe that the United States is a compensation haven.

B. Risk of propagation of automatic compensation

Pesticides, chromium VI, nuclear power, bitumens, fine particles and others: each of these substances have been deemed harmful and potentially as the cause of various diseases. In this respect, the related legal risks must be borne in mind, particularly the risk of compensation.

The example of pesticides suggests that asbestos case law will expand to other products. In the case of pesticides, the initial efforts of victims' associations focused on having diseases listed as being related to an exposure to pesticides. For this reason, Decree 2012-665 of May 4, 2012 listed Parkinson's Disease as a disease that could be associated with an exposure to pesticides. This listing created a presumption of attributability of the disease to the use of pesticides. Since then, courts have handed down many decisions on this subject. Most recently, the Social Security Court of Maine-et-Loire in a

judgment on April 15, 2019 recognized the occupational origin of Parkinson's Disease in a former employee of an arboricultural company. This case has prompted other employees in the same region to bring legal actions against their employers. According to the *Support Group for the Victims of Pesticides in the West*, the Social Security Courts of the region have handed down fourteen decisions that recognized the occupational nature of diseases over the past four years.

A very large number of regulations followed. For instance, this advocacy led to the *Law on the Future of Agriculture, Food and Forestry*,[24] which banned the use of pesticides in sensitive public areas, such as hospitals, retirement homes, schools, nurseries or activity clubs. The REACH[25] and PIC[26] regulations are also relevant in this field.

All these regulations, while laudable, have led to an increase in the number of cases filed, and potentially have led people who think they have been exposed to be more likely to develop anxiety. The role of the State and the media has played a role in the increase in the number of actions based on asbestos anxiety, because many plaintiffs argue that their anxiety is caused by reports issued by the media. With respect to pesticides, there are also many more applications. Logically, the rules governing liability for defective products[27] are applicable, excluding the possibility for the victim to rely on other rules.[28] However, in some cases the victim can bring forward the standard rules on fault liability; these are circumstances where the victim can prove that the damage was caused by something other than a potential defect in the product. Even though it may be incidental, fault liability may be the source of a significant risk for economic operators, because the courts always have the possibility to create new torts that may lead to the liability of the perpetrator by relying on general duties they discover (e.g.: duty to be vigilant, duty to take precautions).

In reality, the risk for companies results particularly from the leniency with which courts examine the causal link between the harmful event and the damage in cases relating to supposedly toxic substances. Indeed, since *Sanofi*

[24] *Law on the Future of Agriculture, Food and Forestry,* no. 2014-1170 from October 13, 2014; Article L. 253-7-1 of the French Rural Code.

[25] Regulation (EC) 1907/2006 of the European Parliament and of the Council of December 18, 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals.

[26] Regulation (EC) 649/2012 of the European Parliament and of the Council of July 4, 2012 concerning the export and import of hazardous chemicals Text with EEA relevance.

[27] Articles 1245 and following of the French Civil Code.

[28] French Supreme Court, Mixed Chamber, July 7, 2017, no. 15-25.651.

Pasteur,[29] courts consider that in the absence of any scientific consensus, proof of the defect of a vaccine and of a causal link between the defect and the disease can be demonstrated by way of serious, specific and consistent clues. This significantly simplifies the demonstration of causality for the victim. The victim will not have to prove this causal link with scientific elements, but will be able to rely on a set of factual elements, such as chronological proximity between the exposure to the substance and the development of the disease, or the absence of previous medical and family history.

Far from being merely theoretical, this compensatory risk is real and has been encouraged and strengthened by case law favoring the victims. This is particularly demonstrated by the famous Lasso litigation. In 2004, Paul François, a farmer, inhaled fumes of the herbicide Lasso, manufactured by Monsanto, when opening a tank. He alleged that this inhalation triggered serious neurological disorders and that he suffered from recurring headaches and memory loss. The Lyon Civil Court ruled Monsanto liable on the ground of standard law[30] and this decision was confirmed by the Lyon Court of Appeal.[31] However, the French Supreme Court quashed the decision on the grounds that the Civil Court should have automatically ordered the application of the rules governing liability for defective products and referred the case to a different bench of the Lyon Court of Appeal. It handed down its decision on April 11, 2019 that held Monsanto liable on the basis of the rules governing product liability. The court notably criticized Monsanto "for not having added information on the labeling and/or packaging of the product, on the specific dangerousness of the works in tanks and reservoirs". According to it, "his [the farmer's] technical knowledge, assuming it is established, could not overcome the lack of information on the product and its harmful effects, a farmer not being a chemist". Yet, the State had granted the product marketing authorization, which should have represented an effective defense for the company.

For some years now, fine particles have been considered harmful to health. Fine particles are dangerous to the respiratory system; not only do they represent an aggravating factor for people suffering from a respiratory illness such as asthma, but they could also cause cancer, if humans are exposed to them for too long. As such, they have been classified as "probably carcinogenic to humans" by the

[29] CJEU, June 21, 2017, C-621/15.
[30] Lyon Civil Court, 4th Chamber, February 13, 2012, no. 07/07363.
[31] Lyon Court of Appeal, September 10, 2015, no. 12/02717.

International Agency for Research on Cancer (IARC). Similarly, diesel engine exhaust has been classified as "carcinogenic to humans". For each, the compensatory risk may arise even when scientific uncertainties and the difficulty identifying the cause of alleged diseases should make any action fruitless, in our opinion and at least for now.

The Senator for Paris, Marie-Noëlle Lienemann, recently questioned the Minister for Ecological and Inclusive Transition about "the measures to be taken regarding fine particle pollution and the exposure of employees to this pollution," in particular for those employees working in the railway sector. The Minister issued a ministerial answer, published in the Official Journal of the Senate on December 21, 2017, in which he indicated that "in an opinion published in 2015, ANSES [French Agency for Food, Environmental and Occupational Health & Safety] concluded that there is a respiratory and cardiovascular health risk related to the chronic exposure of some workers to air particles in underground railway areas. The scientific data are, however, still not sufficient to recommend a long-term exposure threshold based on strict health criteria."[32]

Actions do exist, similar to numerical data, that could justify an increase based on anxiety. Several complaints have been filed against unknown persons on the ground of endangerment. The first one was filed in 2014 on the initiative of the associations *Ecologie sans frontière*, *Respire* and *Rassemblement pour la Planète*. The most recent one was filed on February 10, 2018 by the group called *Coll'air pur* representing 200 residents of the Arve Valley (Haute-Savoie). France is also one of the countries against which the European Commission has launched an action before the Court of Justice of the European Union for the violation of air quality rules. At the same time, the concept of eco-anxiety has appeared due to active engagement from the media. Eco-anxiety is anxiety related to global warming. It is difficult to understand how such an action could lead to compensation and against whom it would be brought. Nonetheless, the use of the word "anxiety" by the associations is far from insignificant.

The list of examples remains long. Bitumens have been recognized as carcinogenic: oxidized bitumens are classified by IARC as "probably carcinogenic to humans (Group 2A)" and hard bitumens and straight-run bitumens are classified as "possibly carcinogenic to humans (Group 2B)". Pursuant to social security law, courts have already recognized the

[32] Written question no. 0605 from Mrs. Marie-Noëlle Lienemann.

cancer of a bitumen worker as an occupational disease: in *in re Eurovia* the Lyon Court of Appeal, in a decision from November 13, 2012, considered that the employer had been guilty of gross negligence relating to exposure, automatically triggering liability.[33]

Finally, one cannot talk about mass litigation without mentioning the litigation related to electromagnetic waves or the litigation related to Enedis' Linky meters. These cases were launched by people claiming they suffer from electrosensitivity. On September 27, 2018, the Versailles Social Security Court awarded 1,600 Euros as compensation for an occupational accident to a technician who had been deemed electrosensitive. Many press articles were published on this subject, which as with the case of asbestos, will encourage people to bring legal actions even though they have no scientific data enabling them to confirm the plaintiffs' theory.

IV. Conclusion

When looking at how product liability cases have evolved in civil law countries, there is reason for concern that these countries are not equipped to address product liability actions. In my view, the procedural tools that have been developed in civil law countries have not adapted to trigger the scientific and medical debates necessary to address the criterion of causality.

Unlike in U.S. courtroom dramas where attorneys for both parties participate in direct or cross examinations of witnesses, civil law countries' procedure is characterized by the predominance of written submissions: the arguments of both parties are explained in writing; testimony is rare (written affidavits being preferred); the trial hearing is still important but appears to be incidental; and above all, the technical debate is dealt with through private expert operations requested by each party, to which the courts grant relative importance, or through court-ordered expert operations, in which the courts do not participate.

The technical nature of the scientific debate requires a certain level of clarity that might be provided by written submissions, but proceedings that mainly rely on written elements and expert operations are poorly adapted to assess liability. Indeed, the traditional route of a liability action is the following: the victim and the perpetrator each submit arguments relying on their own private expert operations, which were naturally conducted with the involvement of the parties. As a consequence, the

[33] Lyon Court of Appeal, November 13, 2012, no. 10/04205.

differences resulting from the expert operations carried out by the parties cannot efficiently be examined by the judges, who lack the scientific knowledge inherent in the dispute. It seems rather difficult to determine how judges should distinguish between these competing theories, leaving everyone perplexed about the validity of the solution applied to the dispute.

Introducing oral arguments into the proceedings would, in our opinion, help the judge understand the scientific stakes. Conducting oral proceedings allows for truly open debates. The court really and concretely will be able to hear the explanations of the expert and the attorneys will be able to challenge the expert's observations.

This initiative, far from being new, has already been supported by the International Chambers of the Paris Commercial Court and of the Paris Court of Appeal. These two courts will from now on hear all the disputes involving an extraneous element in commercial matters. This policy change is pioneering both for the language used in the scope of the debates and the specific procedural rules that apply. Article 2.1 of the protocol on proceedings before the International Chamber of the Paris Commercial Court provides that "[t]he proceedings before the Commercial Court are oral": it can be noted, orality is relevant during proceedings. Above all, the protocol dedicates an entire section to the hearing of judicial specialists. Article 4.5.1 of the protocol provides that "[t]he judge assigned to the supervision of the case or the court, as the case may be, orders the examination of judicial specialists and experts, at their own initiative or upon request of the parties."

This solution seems pioneering in comparison with the traditional written submissions found in civil proceedings. In reality, it is far from new. The protocol itself relies on the provisions of the French Code of Civil Procedure. Indeed, Article 4.5 is entitled "Examination of Specialists and Experts (article 245 and 283 of the Civil Procedure Code)". Nothing prohibits a Civil Court from applying these provisions and hearing experts and judicial specialists, in particular to ask for clarifications on their reports.

Hearing witnesses is also addressed in the protocol. Just like hearing experts, the protocol directly quotes the provisions of the French Code of Civil Procedure, in this case Articles 199 and following, which also apply to all courts.

In France, the procedural rules allowing for a better management of scientific disputes already exist and are available for courts and attorneys. At a time when economic operators are facing the discovery of new dangerous substances every single day, whether these are included in the products they manufacture or contaminate the

work environment of their employees, better use of the available procedural tools would be welcome.