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Product Liability & Safety

Belgium: Law & Practice
and
Belgium: Trends & Developments

Annick Mottet Haugaard, Héloïse Fostier, Olivia Santantonio and Lola Stenuit
Lydian CVBA

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BELGIUM

Law and Practice

Contributed by:
Annick Mottet Haugaard, Héloïse Fostier, Olivia Santantonio and Lola Stenuit
Lydian CVBA see p.13

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Contributed by: Annick Mottet Haugaard, Héloïse Fostier, Olivia Santantonio and Lola Stenuit, ***Lydian CVBA***

1. Product Safety

1.1 Product Safety Legal Framework

Belgian consumer law governs relations between professional sellers and consumers with the purpose of ensuring the protection of consumers' rights. Book IX of the Belgian Code of Economic Law (CEL) transposes Directive 2001/95/EC on general product safety, which provides for a fundamental right to safety for consumers. In accordance with Article IX.2 of the CEL, producers and manufacturers must only place safe products on the market.

Public health law regulates the safety of specific products, such as medicine or other health products. For example, food is regulated under a specific law of 24 January 1977.

The UN Convention on Contracts for the International Sale of Goods, 1980 applies to international sales agreements relating movable goods, provided that the contracting parties have not explicitly excluded the application of this Convention. This Convention prohibits the sale of defective products, and serves as basis for claims related to such defective products between the parties to the sale relationship.

1.2 Regulatory Authorities for Product Safety

General Product Safety

In Belgium, the Directorate-General for Economic Inspection (DGEI) of the Federal Public Service Economy (FPS Economy) is generally competent to manage product safety. Whenever the DGEI identifies infringements, it will impose sanctions upon the relevant manufacturers and/or distributors.

The FPS Economy has appointed a Central Contact Point within the DGEI, to handle the co-ordination of product safety matters, and to act as the Belgian contact for the RAPEX-system (the European exchange system for information on dangerous products). If a product (with the exception of food products) does not meet the safety requirements and poses a risk to consumers, the manufacturers and distributors must inform the Central Contact Point of the FPS Economy (*Centraal Meldpunt voor Producten* / *Guichet Central pour les Produits*). Consumers and other parties can also file their claims relating to product safety at the Central Contact Point.

The Consumer Safety Commission, another body of the FPS Economy, was appointed on the same day as the Central Contact Point. It is competent to advise authorities on product safety issues, organise and take part in awareness campaigns on consumer health and safety, and handle claims of consumers relating to product safety.

Sector-Specific

Besides the FPS Economy, there are other several regulators for product safety issues depending on the industry or the type of product at stake.

For instance, the Federal Agency for Medicine and Health Products (FAMHP) is the authority responsible for the quality, safety and efficacy of medicines and health products. The competent authority for safety issues and safety verifications relating to food products is the Federal Agency for Food Chain Security.

1.3 Obligations to Commence Corrective Action

The Central Contact Point has published two corrective procedures applicable to manufacturers and distributors of unsafe products. One procedure applies to market participants who sell products indirectly to end-users (eg, the manufacturer or importer), while the other applies to participants who directly sell these products to end-users.

Indirect Sale

Under the first procedure, any market participant who becomes aware that there is a high risk that a product they have indirectly sold to end-users could be unsafe must immediately, and in any case within 10 days of receiving a warning from the authority (if applicable):

- cease all sales of the relevant product;
- withdraw the relevant products from the market;
- send a list of the customers concerned by the safety issue to the Central Contact Point, as well as the number of goods sold in the last two years; and
- clearly inform their customers (ie, the distributor directly selling the products) of the safety risks, and provide information allowing customers to identify the unlawful product and understand the incurred risks.

When the safety issue is considered serious, additional measures must be taken, such as:

- product recalls;
- immediate information (at latest ten days from receiving warning, if applicable) to the Central Contact Point on intended recall measures;
- advertisement measures to distributors/other market participants selling the relevant products directly to end-users; and
- public advertisement measures for customers.

Direct Sale

Under the second procedure, any market participant who becomes aware that there is a high risk that a product they directly sold to end-users could be unsafe must immediately,

and in any case within 10 days of receiving a warning from the authority (if applicable):

- cease all sales of the relevant product;
- withdraw the relevant products from the market;
- apply any corrective measure imposed by the product manufacturer or the FPS Economy; and
- keep correspondence with the manufacturer and other documents relating to the concerned consumers and/or unsafe products and make them available to the FPS Economy for one year.

When the safety issue is considered serious, additional measures must be taken, such as recalling products and providing information to end-users.

Providing information to end-users can, in principle, be achieved either on an individual-basis or publicly, eg, through press statements. The information provided must, however, make it possible to identify clearly the products concerned by the safety issue (Article IX.8 CEL).

Moreover, in the case of a serious safety risk, the above-mentioned procedures of the Central Contact point impose the following requirements for advertisement measures:

- If the identity of all end-users concerned by the safety issue is known, then all end-users must be informed personally of the safety issue.
- If this is not the case, the manufacturer/distributor must:
  (a) inform all known customers individually;
  (b) display an advertisement at the points of sale of the relevant products for at least three months (only relevant for distributors); and
  (c) display the same advertisement on social media and the company website for at least three months.

Corrective Actions Imposed by the FPS Economy

On top of voluntary corrective actions, the FPS Economy can also impose corrective actions on the manufacturer after receiving information from the Central Contact Point of a dangerous product (Article IX.7 CEL). These corrective actions range from warnings (to the distributors or the users of the products) to product withdrawals and recalls.

If the danger triggered by the products is serious, the competent ministries may also decide to suspend the production, importation, exportation, sale, etc, of the products for a period not exceeding one year, this period being renewable for one year at most. These temporary measures require a ministerial order, and prior consultation of the manufacturer.

When a product breaches the general principle of consumer safety, the authorities can also order permanent measures, including the withdrawal of the product from the market or permanent interdiction of commercialisation (Article IX.6 CEL). Such measures are taken by way of Royal Decrees and require a prior consultation of the Consumer Safety Commission.

1.4 Obligations to Notify Regulatory Authorities

Manufacturers and distributors must notify the Central Contact Point as soon as they become aware – or should reasonably be aware – that one of the products they put on the market does not comply with applicable safety requirements (Article IX.8, Section 4 CEL).

The manufacturer/distributor have to notify regulatory authorities immediately. However, the term "immediately" is not defined and will be assessed by the authorities on a case-by-case basis.

The notification must, at least, include:

- the data necessary for the authority to precisely identify the relevant products or product batches;
- a full description of the relevant safety risk;
- all information necessary for the authority to track the relevant products; and
- a description of the steps already taken to prevent risks. (Article XI.8, Section 4 CEL).

A notification form is available on the Central Contact Point's website. Manufacturers/distributors can also notify the authority through the online form available on the European warning system (RAPEX) website.

1.5 Penalties for Breach of Product Safety Obligations

Manufacturers/distributors that do not comply with these obligations may incur an administrative fine of, at most, EUR200,000 (Article XV.61 CEL).

If this fine is not paid, the FPS Economy may transfer the file to the competent Public Prosecutor's office.

The Public Prosecutor's office has the option of taking the case to the criminal court, which may result in a criminal fine ranging from EUR208 to EUR200,000 (Article XV.102, Section 3 CEL).

In addition, the judge may impose additional penalties such as seizures, publication of the sentence or judgment, and total or partial closure of the manufacturer/distributor's business.

If the control carried out by the competent officer is obstructed or voluntarily prevented, a criminal fine of EUR400,000 may be imposed.

Finally, the costs of any corrective measure ordered by the FPS Economy may be imposed on the manufacturer/distributor (Article IX.6 CEL).

2. Product Liability

2.1 Product Liability Causes of Action and Sources of Law

Belgian law sets forth several causes of action in respect of unsafe products.

PLA 1991

The Product Liability Act of 1991 (PLA 1991), which transposes Directive 85/374/EEC, creates an objective liability regime applicable to defective products.

A defective product is defined under Article 5 of the PLA 1991 as a product that "does not provide the safety that a person is entitled to expect" taking into consideration, notably, the product packaging, its normal and foreseeable use and the moment when the product was placed on the market.

Under the objective liability regime set out by the PLA 1991, manufacturers and importers are liable for damage caused by a "defect" in their products, even when they are not in breach of any legal or contractual obligation. Plaintiffs therefore only have to demonstrate the defective nature of the product and prove that they suffered damages as a result of the defect.

It is worth noting that only consumers (ie, individuals who did not purchase the defective product for professional purposes) can benefit from the liability regime of the PLA.

Tortious Liability

Liability in tort may also be claimed for damages caused by defective products pursuant to Articles 1382 and 1383 of the Belgian Civil Code. Under this tort liability regime, a claimant could claim damages if they are able to prove that:

- the defendant behaved in a faulty or negligent manner;
- the claimant suffered a loss; and
- there is a causal relationship between these two elements.

Contractual Liability

Liability may also be incurred for a breach of contractual provisions. If a contracting party can demonstrate that the other party failed to comply with its contractual obligations by delivering, manufacturing, etc, a defective product, they would be entitled to contractual damages.

The legal warranty of Articles 1641 and following of the Belgian Civil Code must be taken into consideration when the relevant agreement is a sale agreement. Under these provisions, sellers are liable for lenient defects in their products.

A lenient defect, within the meaning of these provisions, is any defect that exists prior to delivery, which is not obvious, and which makes the good unsuitable for its intended use, or which significantly diminishes its use.

This liability for hidden defects also applies to business-to-consumer sales but is regulated explicitly in Article 1649bis-quater of the Civil Code.

In B2B contracts, the seller is presumed by law to be aware of the existence of any hidden defects of the goods it sells, and is accordingly liable for all damages caused by the defective goods unless it proves the "undetectable nature" of the defect. The buyer must however be able to prove that the defect existed at the moment of the delivery.

In B2C relationships, a reversal of the burden of proof regarding the "lenient" nature of the defect occurs after six months: if the defect appears in the first six months after purchase, the consumer does not have to prove anything, as there is a legal presumption that the defect already existed at the time of the delivery. If the defect appears more than six months after the delivery, the normal burden of proof on the complainant is applicable and the seller can then ask the consumer to submit evidence.

The consumer is moreover always entitled to obtain compensation for the damage sustained by lenient defects.

The UN Convention on Contracts for the International Sale of Goods, 1980 applies to international sales agreements relating movable goods, provided that the contracting parties have not explicitly excluded the application of this Convention. This Convention prohibits the sale of defective products, and serves as basis for contractual claims related to defective products between the parties to the sale relationship.

Criminal Sanctions

The manufacturer of a defective product could be prosecuted for the crime of unintentionally killing or injuring a person, defined by Articles 418 to 420 of the Belgian Criminal Code. These articles incriminate any act or omission performed without the intention of harming or killing a person but which, owing to a

lack of due care or precaution, results in the death or injury of another person.

2.2 Standing to Bring Product Liability Claims

Any person who has an interest to act has standing to bring a product liability claim (Article 17 of the Belgian Judicial Code). Therefore, anyone who suffers losses because of a defective product is entitled to bring a claim.

Article XVII.36 to 40 CEL set forth the rules applicable to standing in actions on behalf of a group of consumers/SMEs who have been harmed by the unlawful behaviour of an enterprise, eg, the distribution of unsafe or defective products.

Actions for collective redress can only be brought by a representative of this group of consumers/SMEs, who must be among the bodies exhaustively listed in Article XVII.39 CEL.

Article XVII.39, Section 1 CEL provides that only the following bodies can act as representative of a group of consumers:

- specific organisations with legal personality represented in the Council for Consumption, or accredited by the Minister;
- accredited organisations with legal personality, being consumer organisations or other organisations whose purpose is closely linked to the collective damage;
- the Ombudsman in the negotiation phase of the proceedings; or
- a representative body recognised by an EU or EEA member state to act as a representative and meeting the conditions of Point 4 of EU Recommendation 2013/396.

Article XVII.39, Section 1 CEL provides that only the following bodies can act as group representative of a group of SMEs:

- a professional organisation with legal personality that defends the interests of SMEs, represented in the High Council for the Self-Employed and SMEs, or recognised by the Minister of Economy;
- a non-profit organisation with legal personality recognised by the Minister of Economy, whose corporate purpose is directly related to the collective damage suffered by the group; or
- a representative body recognised by an EU or EEA member state to act as a representative and meeting the conditions of Point 4 of EU Recommendation 2013/396.

Even when a class representative meets the above-mentioned criteria, the court must still assess, on a case-by-case basis, whether the class representative is adequate.

2.3 Time Limits for Product Liability Claims

Actions based on objective liability for defective products become statute-barred:

- within three years of the day on which the party entitled to damages become aware, or should reasonably have become aware, of the damage, the defect and the identity of the manufacturer; and
- in any case, within ten years from the day on which the relevant product was placed on the market.

Claims under tort law become statute-barred:

- within five years from the day following the day on which the claimant becomes aware of the damage, and of the identity of the person liable for this damage; and
- in any case, 20 years and one day after the date of the event which triggered the damage.

As a general rule, a contractual claim may be brought before the courts by any of the parties within ten years after the contractual breach or knowledge of the breach by the party in default. However, B2B buyers invoking the legal warranty for hidden defects must make a formal claim within a short period of discovering the defect. Failure to do so makes the claim inadmissible (Article 1648 of the Belgian Civil Code). This short period is not expressly defined in the Civil Code and is determined based on the concrete circumstances, particularly the length of time required by the seller to inspect the products and discover any defects.

Consumers must bring their actions based on the statutory warranty against hidden defects within one year of the discovery of the defect. This period of one year cannot end within the legal warranty period of two years (Article 1649quater, Section 3 of the Belgian Civil Code).

2.4 Jurisdictional Requirements for Product Liability Claims

Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) sets forth the jurisdiction rules applicable to cross-border product liability cases within the EU.

Under Article 4 of the Brussels I Recast, claims against persons domiciled within the European Union must be brought before the courts of the member state of domicile of that person. However, exceptions to this general rule exist.

First, if the injured party is in a contractual relationship with the manufacturer of the product, Article 7.1(b) of the Brussels I

Recast allows this party to sue before the courts of the member state where the defective product was delivered.

Furthermore, Article 18.1 of the Brussels I Recast allows the injured party, should it be a consumer, to sue the party with which it contracted before the member state of its own domicile, if its counterparty pursues commercial or professional activities in that member state and the contract falls within the scope of those activities.

Second, if the injured party is not in a contractual relationship with the manufacturer of the product, it is possible under Article 7.2 of the Brussels I Recast for that party to lodge a claim in tort before the courts of the member state where the harmful event occurred.

For claims falling outside the scope of the Brussels I Regulation (those against a manufacturer not domiciled within the European Union), the Belgian Code of Private International Law is applicable.

Article 5 of that Code confirms the general rule that a defendant should be sued before the courts of its domicile. However, if a contractual relationship exists between an injured party and the manufacturer of a defective product, the injured party may sue before the Belgian courts if the contractual obligation concerned was created in Belgium or was to be performed in Belgium.

Where no contractual relationship exists between the injured party and the manufacturer, the manufacturer may be sued in tort before the Belgian courts if either the tort was committed, or the damage occurred, in Belgium.

2.5 Pre-action Procedures and Requirements for Product Liability Claims

In general, there is no requirement for pre-action procedures under Belgian product liability law.

Pre-action requirements may however be agreed upon by the parties to a contract. For example, the parties can agree on the sending of a formal notice and/or to attempt first settling disputes amicably through negotiation or conciliation before initiating court litigation. A Belgian court, seized by one of the parties in violation of such an "out-of-court settlement" clause, can decide to stay proceedings until negotiations have proven to be unsuccessful.

Furthermore, a defendant domiciled in Belgium may require the foreign plaintiff to post a guarantee, covering the costs of the proceedings and of service before the court hears the claim (cautio iudicatum solvi). This does not apply if the claimant is domiciled in the European Union or in a member state that has concluded a treaty with Belgium exempting claimants from this obligation.

2.6 Rules for Preservation of Evidence in Product Liability Claims

Belgian product liability law does not include any particular rules for preservation of evidence. Each party must preserve materially relevant evidence supporting their claims before submitting them to the court.

There is no liability for spoliation of evidence, nor are there legal remedies in case of destruction of or failure to preserve evidence.

However, it should be noted that:

- it is a standard practice and recommendation to align the retention period of documents or other evidence with all the possible different statutes of limitation;
- depending on the concrete circumstances, it is possible to place the product under seal (before the beginning of a (court-appointed) expert's report, for example) in order to be sure that it will not be modified;
- it may be advisable – once again depending on the concrete circumstances – to verify with an expert how the evidence in question should be preserved in order to avoid its alteration (eg, at a certain temperature, in a dark environment or outside).

2.7 Rules for Disclosure of Documents in Product Liability Cases

Belgian law does not provide for the possibility of discovery or depositions, as they are known in common law jurisdictions. Parties have to adduce those documents that they consider necessary to substantiate their claims themselves, and are not under an obligation to produce any documents that would contradict their claims.

There is one exception to this rule. A Belgian court may order, at its own motion or at the request of one of the parties to the dispute, the production of a document, regardless of whether it is held by a party to the dispute or a third party.

For courts to order the production of a document, there need to be serious, precise and concurring presumptions that that party is in possession of the document and that the document contains evidence of a fact that is relevant to the case (Article 877 of the Belgian Judicial Code).

If the party in question nevertheless refuses to produce the document without a valid reason (eg, that the document is privi-

leged), the court may order this party to pay a non-compliance penalty. In addition, the court may, depending on the circumstances at hand, infer from a party's refusal to submit certain documents that the disputed fact is proven, or make such other inference as the court shall deem reasonable.

2.8 Rules for Expert Evidence in Product Liability Cases

There are three possible scenarios relating to expert evidence in Belgian product liability cases.

Individually Appointed Experts

In order to prove the existence of the defect or to assess the damages, a party may have recourse to an expert on its own motion without involving the other parties in the commissioning of this expert report.

Belgian courts are rather reluctant to rely on the findings of experts who conduct their inquiries at the request of one of the parties, as they are suspected of bias. Additionally, experts appointed by one party will have received only (partial) information from this party.

Strictly speaking, such an expert's report is not enforceable towards other parties, who have the possibility to challenge the expert report, the work done during the compiling of the report and the findings of the expert.

Amicably Appointed Experts

Parties involved in a dispute may also decide to amicably appoint an expert, selected by all the parties.

Parties may also decide to give to this amicably appointed expert's report the value of a court-appointed expert's report.

Such a report is very similar to a court-appointed expert's report (see below). The only difference being that it is not necessary, in this case, to initiate court proceedings.

Court-Appointed Experts

The judge may also appoint one or more judicial experts, this is on its own motion or at the request of one, several or all party(ies) (Article 962 of the Belgian Judicial Code).

Court-appointed experts' reports are always related to pending proceedings.

Belgian courts appoint such judicial experts quite frequently in product liability cases, which by their nature concern technical or specialist issues.

Typically, a judicial expert is appointed for a specific task, such as assessing the damage caused by a defective product or assessing a defect in a product. Parties are entitled to provide the court with their comments on the task of the judicial expert. The task of the judicial expert is determined in the judgment confirming his or her appointment

Court expert proceedings are conducted in an adversarial way and include all parties involved in the proceedings. The court expert will allow the parties to comment on a draft report, adduce evidence they consider necessary and ask additional questions, to ensure that each party's viewpoint is taken into account.

In theory, the expert's report is not binding on the court but is rather an opinion given to the court. In practice however, Belgian courts follow the findings of court appointed experts in the majority of cases.

Within the context of technical court expertise, parties are assisted by their lawyers but also by their own technical advisors.

2.9 Burden of Proof in Product Liability Cases

Each party has the burden of proof as regards the facts they allege (Article 870 of the Belgian Judicial Code). As a general rule, this means that the party bringing the product liability claim bears the burden of proving that its claim is well-founded.

Article 7 of the PLA 1991 confirms this general principle, as it provides that the injured party must provide proof of the defect, the damage and the causal link between these elements to successfully claim damages.

There is no exception to this principle either in tort liability, or in criminal liability.

As regards contractual liability, the buyer availing him or herself of a latent defect in the product must prove not only that latent defect, but also establish that this defect existed when he or she bought the product.

However, Belgian case law gives some support to the person who buys a product from a professional seller. The Belgian Supreme Court (*Cour de Cassation* / *Hof of Cassatie*) has ruled that, in such circumstances, the professional seller must fully compensate the buyer's damages if the existence of the defect is established, but this does not apply if the seller demonstrates that the defect could not be detected at the time of sale.

This case law is strict; the circumstance that the defect could not be detected, or could only be detected by a destructive investi-

gation after the manufacturing of the product or of one its elements, does not exclude the manufacturer from being presumed to be aware of the existence of the defect.

As regards sales to consumers, the Civil Code presumes that any lack of conformity, which appears within a six-month period, calculated as from the delivery of the product, existed at the moment of delivery unless there is proof to the contrary (Article 1649quater, Section 4 of the Belgian Civil Code).

2.10 Courts in which Product Liability Claims Are Brought

Product liability cases are tried before the general civil court system. There is no special jurisdiction for such cases, neither do any specific procedural requirements exist.

The relevant civil court will thus depend on the value of the claim and on the qualification of the parties.

The Justice of the Peace Courts are the lowest civil courts. Since they only have jurisdiction over local matters and claims below EUR5,000, they will only deal with minor product liability cases.

The Courts of First Instance are Belgium's general courts, and have general jurisdiction over all civil claims not exclusively attributed by law to other courts.

The Enterprise Courts only deal with disputes between or against merchants (ie, persons who conduct acts of commerce, and make that activity their profession).

In Belgium, there is no jury for civil matters; the cases are submitted to civil courts, which are composed of professional judges. However, some first instance courts, such as the Enterprise Courts, are partially composed of non-professional elected judges.

2.11 Appeal Mechanisms for Product Liability Claims

Again, there are no specific rules in respect of product liability cases with regard to applicable rules for appeal.

Appeals against rulings of the Justice of the Peace Courts are heard by the Courts of First Instance. Appeals against decisions by the Courts of First Instance and the Enterprise Courts are heard by the courts of appeal, unless the value of the claim concerned does not exceed EUR2,500, in which case the judgment becomes final immediately (Article 617 of the Belgian Judicial Code).

An appeal may be brought as soon as the judgment is rendered, even if it is a preliminary decision or if it is a judgment by default unless it relates to competence or if the judge has decided otherwise or if the decision is an interim one. The appeal must be lodged no later than one month from the notification of the judgment (Article 1051 of the Belgian Judicial Code). The defendant may form an incidental appeal at any time against all the parties before the appeal judge.

The appeal judge may, within the limits of the appeal lodged by the appellant, re-examine the facts, and is thus not bound by the interpretations made by lower courts.

Against a judgment in second instance, a party may commence proceedings before the Belgian Supreme Court (*Cour de Cassation* / *Hof van Cassatie*), the highest court in civil and criminal matters. The Supreme Court's scope of review is limited to procedural issues and the application of substantive law.

As such, the Supreme Court must accept the facts it is presented with as they are set out in the appeal judgment. If the Supreme Court quashes a judgment, the case is referred back to a court at the same level as the court that rendered the appealed judgment.

2.12 Defences to Product Liability Claims

Defences against product liability claims will vary depending on the nature of the claim filed.

Claims Under the PLA 1991

Article 8 of the PLA states that a manufacturer cannot be held liable when it proves that:

- it did not place the product on the market;
- having regard to the circumstances, the defect which caused the damage did not exist at the time when the product was placed on the market, or that the defect came into being afterwards;
- the product was not manufactured to be sold or distributed for profit;
- the defect results from compliance with mandatory regulations issued by public authorities; or
- the state of scientific and technical knowledge at the time when it put the product into circulation was not such as to enable the existence of the defect to be discovered (development risk defence).

Article 10, Section 2 of the PLA adds that the liability of the manufacturer may be reduced or disallowed when the damage is caused not only by a defect in the product but also by the fault of a person for whom the injured person is responsible (contributory negligence).

Other Liability Systems

In other liability systems, the manufacturer or the seller may avoid or limit its liability while putting forward a case of absolute necessity (force majeure), a fault of the injured party or an act of a third party.

Clauses that disclaim or limit liability are in principle valid but have been held unenforceable towards consumers, and each time the manufacturer or the seller was found to be dishonest (for instance, a seller who was aware, or should have been aware, of the latent defect and did not reveal it).

2.13 The Impact of Regulatory Compliance on Product Liability Claims

In principle, a manufacturer may not be exonerated from its liability solely by proving that it complied with applicable regulatory and/or statutory requirements.

However, these requirements may be considered by the court in order to determine the level of legitimate safety expectation, the relevant state of the art processes and the applicable standard of care to be applied.

2.14 Rules for Payment of Costs in Product Liability Claims

Any final decision by a Belgian court, including on product liability claims, orders the payment of the judicial costs by the losing party (Article 1017 of the Belgian Judicial Code).

The proceedings costs include judicial costs such as investigation measures (judicial expert costs) and the "proceedings indemnity", a fixed intervention in the fees and lawyer's costs of the successful party (Article 1022 of the Belgian Judicial Code).

The proceedings indemnities are determined by Royal Decree, mainly according to the value of the claim. Upon the request of one party, and by a justified decision, the judge may reduce or increase the proceedings indemnity within the minimum and maximum amounts fixed by the Royal Decree (currently between EUR90 and EUR 36,000 depending on the value of the claim at stake, the complexity of the case, the magnitude of the exhibits, etc).

The proceedings costs can be compensated by a decision of the judge if each party loses on one or another claim.

2.15 Available Funding in Product Liability Claims

State aid is made available in Belgium to persons of insufficient income and consists of direct payment to the bailiff, to the appointed counsel or to the exoneration of procedural taxes.

As for private third-party funding, it is not regulated by any laws and is not currently commonly used in Belgian litigation.

Belgian Bar authorities are usually sceptical of the ability of Belgian lawyers to act in the best interests of their client (and to stay completely independent) when a third party is involved in the funding of the client's litigation. In addition, the Bar rules impose strict obligations of confidentiality on client-lawyer communications, which may hinder prospective funders from proactively investigating cases for funding.

Finally, Belgian lawyers are not allowed to accept work on a "no win, no fee" basis, or to accept a contingency fee, even if success fees are allowed as part of lawyers' costs.

2.16 Existence of Class Actions, Representative Proceedings or Co-ordinated Proceedings in Product Liability Claims

Class actions for consumers became available under Belgian law by the entry into force, on 1 September 2014, of the Act of 28 March 2014, which inserted new provisions in Book XVII of the CEL. In addition to the above, class actions on behalf of SMEs were very recently made possible under Belgian law.

The class action procedure is only available to plaintiffs whose claims are based on specific statutes (Article XVII.36 CEL). The Product Liability Act is included in this list of specific statutes on which a class action may be based (Article XVII.37, °7 CEL).

Whether the class action requires plaintiffs to opt in or opt out is, for Belgian plaintiffs, left up to the discretion of the court; however, foreign plaintiffs always have to opt in.

A class action can only be brought by a class representative, which must be one of the authorised bodies listed in Article XVII.39 CEL (see **2.2 Standing to Bring Product Liability Claims** for more information on authorised bodies).

Before the court assesses the class' claim on its merits, it must first set a time period during which the class representative and the defendant must negotiate on a collective settlement. If a settlement is reached and receives court approval, it becomes binding on the entire class. Only when no such settlement can be reached will the court hear the case on its merits. In addition to the possibility of a class action, actions brought separately by different persons but having the same object may be joined where the court considers it beneficial.

Since class actions were introduced in September 2014, only a handful have been instigated. Almost all of them were brought by *Test-Achats* / *Test-Aankoop*, the main Belgian consumer protection organisation.

Only one of these actions, brought against the Volkswagen Group within the context of the so-called "Dieselgate" scandal, related to unfit products. This action was judged admissible by the Belgian court, and is currently in its mandatory settlement phase.

2.17 Summary of Significant Recent Product Liability Claims

As mentioned above, in **2.16 Existence of Class Actions, Representative Proceedings or Co-ordinated Proceedings in Product Liability Claims**, a key decision was taken in the context of the Dieselgate scandal class action, which related to unfit vehicles distributed by the Volkswagen Group. *Test Achats / Test Aankoop* launched a collective redress action against the VW Group Belgium and the international VW Group in June 2016. More than 10,000 consumers expressed interest in joining the action at that time. The collective action was declared admissible by the court in December 2017.

Importantly, the judge decided that the procedure should be based on an opt-out procedure, which means that the interests of all affected consumers are automatically represented in the action even if they have not actively joined (thus individual consumers must declare their wish to drop out).

The merits of this collective action must still be analysed by the court. The hearing has already been fixed in February 2022.

In a recent decision of 25 April 2018, the Antwerp Court of Appeal ruled that, for product liability to be established under the PLA, it is not sufficient for a claimant to prove the existence of a causal relationship between the damage they suffered and their lawful use of an allegedly defective product. They must also prove with sufficient certainty that the product was defective, in casu that the product's composition was faulty, at the moment of its purchase.

By a decision of 22 March 2016, the Antwerp police court specified that it is not sufficient to prove that a product is defective within the meaning of the PLA 1991 to establish that the manufacturer behaved in a faulty or negligent manner within the meaning of tort law liability (in casu, under Article 1382 of the Belgian Civil Code). The claimant in this case unsuccessfully tried to argue that placing defective products on the market was in itself a fault within the meaning of tort law.

Other significant case law has mostly occurred at the EU level, such as in the Boston Scientific case (C-503/13), in which the European Court of Justice introduced the concept of "batch liability"; or in the Sanofi case law (C-621/15), in which the Court of Justice considered the requirement for the claimant to prove a causal link under the Product Liability Directive.

3. Recent Policy Changes and Outlook

3.1 Trends in Product Liability and Product Safety Policy

Current developments of product liability and safety law, and Belgian law in general, tend towards the digitalisation, simplification and harmonisation of procedures.

Belgium is notably reforming its Civil Code, with the intent of adopting rules that are simpler and more suited to contemporary times.

The new "Book 8", relating to evidence in civil matters, was adopted in March 2019 and will come into force on 1 November 2020. It adapts the Belgian rules on evidence, notably relaxing formalities in relation to evidence in civil matters, and making room for e-signatures.

"Book 5" relating to civil obligations, was submitted to the Chamber of Representatives as a legislative proposal, but has not yet been approved. This legislative proposal contains a number of extrajudicial and even anticipatory contractual sanctions. For example, the new anticipatory breach sanction allows a contracting party to already rescind the contract based on expected non-compliance by the other party, even where the obligation of this other party is not yet demandable at the moment of rescission.

This new Civil Code will however not significantly affect the rules applicable to product liability. It notably does not affect the scope of the PLA 1991.

3.2 Future Policy in Product Liability and Product Safety

The Consumer Safety Commission recently published joint advice, with the help of other competent public bodies, on the liability rules applicable to connected goods. In this joint advice, the relevant authorities indicated that they deemed the regulation of connected-objects liability to be a priority. So far, however, no concrete legislative work has been made on the basis of this advice.

Moreover, the Central Contact Point of the Belgian FPS Economy recently published an FAQ, available only in French and Dutch, with the purpose of providing clear information to manufacturers/distributors on their product safety obligations. This FAQ is available on the FPS Economy website.

3.3 Impact of COVID-19

The Belgian government reacted to the growing need for protective equipment due to the COVID-19 crisis by softening some of its regulations on hydro-alcoholic and disinfecting solutions.

Normally, all products qualified as "biocides", such as hydro-alcoholic and disinfecting solutions, must undergo an authorisation procedure with the Belgian Ministry of Heath before they can be placed on the market.

A Royal Decree of 18 March 2020 on the preparation and implementation of the market for hydro-alcoholic solutions for hygiene (hand sanitiser gels) softened this rule, as part of the fight against the spread of COVID-19.

Under this Royal Decree, the preparation and marketing of hand sanitiser gels containing a minimum of 70% alcohol, intended for human hygiene as part of the fight against the spread of the COVID-19, by a person authorised to dispense drugs to the public (pharmacies, both those that are open to the general public and hospital dispensaries), is permitted for a period of six months from the date of entry into force of the decree (ie, 20 March 2020).

With respect to other kinds of personal protective equipment, the Belgian government actually imposed stricter regulations than prior to the crisis. By Ministerial Decree of 23 March 2020, the retail and wholesale distribution of certain types of personal protective equipment such as facemasks, as well as of medical devices used for treating COVID-19 patients, was temporarily prohibited. These measures were taken to avoid shortages of equipment and devices, whose availability may have been threatened by market disruption and measures taken by other countries.

The above measures are temporary in nature, and are thus unlikely to have a long-lasting impact on product safety regulation.

Contributed by: Annick Mottet Haugaard, Héloïse Fostier, Olivia Santantonio and Lola Stenuit, ***Lydian CVBA***

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Authors

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Lydian CVBA

Avenue du Port 86C B113
B – 1000
Brussels

Tel: +32 2 787 90 00
Fax: +32 2 787 90 99
Email: info@lydian.be
Web: www.lydian.be

Trends and Developments

Contributed by:
Annick Mottet Haugaard, Héloïse Fostier, Olivia Santantonio and Lola Stenuit
Lydian CVBA see p.19

Liability for Autonomous Vehicles under Belgian Law: Are Consumers Right to Be Concerned?

1. Recent Belgian developments

Autonomous vehicles are a hot topic in the Belgian socio-economic and legal spheres, as shown by a series of recent developments.

In 2016, the Belgian Ministry of Mobility issued a Code of Good Practice containing recommendations to companies willing to test automated assisted driving technologies or vehicles in public areas in Belgium. This Code details the minimum requirements considered necessary by the competent authorities in order to ensure road safety and minimise potential risks. It also provides for a definition of an "autonomous vehicle" and a "fully autonomous vehicle" (ie, a fully driverless vehicle).

In 2017, the Belgian Federal Minister of Mobility announced his plan to make Belgium the European centre of new technology regarding autonomous vehicles.

The following major leap appeared to confirm the Minister's declaration.

Until 2018, Belgian law still required that all vehicles must have a driver. An exception to this rule was introduced by the Royal Decree of 18 March 2018, amending the Belgian Traffic Code (Traffic Code) to allow car manufacturers and technology companies – subject to an authorisation from the Ministry of Mobility – to carry out tests with fully autonomous vehicles on Belgian roads.

Several tests have been carried out in the meantime in Belgium. For example, in late 2019, the Belgian national public transport company tested its first driverless buses.

In spite of the above developments, it seems that Belgian customers do not share this persistent enthusiasm for autonomous vehicles. A recent survey conducted by the VIAS Institute (a Belgian centre of expertise for mobility and road safety) shows that consumers' trust and interest in autonomous vehicles is gradually decreasing.

Among customer concerns identified by the survey, is the lack of clarity regarding the liability rules applicable to autonomous vehicles.

This concern is based on the fact that, currently, Belgian law does not provide for a specific liability regime addressing the risks generated by automated vehicles. Any person injured by an autonomous vehicle must thus bring his or her claim under the existing Belgian liability regime.

In theory, this existing liability regime allows for liability claims against the autonomous vehicle's driver, owner and manufacturer. However, as will be shown below, with respect to the liability regime applicable to the driver (see section 2.) and manufacturer of the vehicle (see section 3.), the Belgian rules are often not well adjusted to autonomous vehicles, thereby creating legal uncertainty and possible controversy.

2. Liability of the driver

The rules applicable to drivers' liability are laid down in the Traffic Code (see section 2.1.) and in a few provisions of the Belgian Civil Code (Civil Code) (see section 2.2.)

2.1. Criminal liability of the driver under the Traffic Code

Except for its recent amendment allowing for early testing of driverless cars on Belgian roads (see section 1 above), the Traffic Code has not been adapted for autonomous vehicles.

The Traffic Code still requires, as a general principle, that each vehicle has a driver behind the wheel. It is not unique in this respect, as this requirement is a mere transposition of the corresponding provision of the international convention on road traffic (Article 8 of the Convention of Vienna on Road Traffic of 8 November 1968).

Moreover, the provisions of the Traffic Code – which provide for criminal sanctions in case of infringements – almost always refer to the "driver" of the vehicle. For example, the Code provides that the "driver" has to adapt his or her speed to the circumstances, that the "driver" may not run a red light or cross a solid white line, etc.

With respect to autonomous vehicles, the key question is whether a driver could be held liable for a violation of the Traffic Code committed by the autonomous vehicle itself.

Case law of the Belgian Supreme Court provides that someone may be qualified as the "driver" of the car within the meaning of the Traffic Code when that person is "responsible for driving",

even if they did not perform any act that had an actual impact on the movement of the vehicle. As such, the Court ruled that a driving instructor who had the possibility to influence his pupil's driving performance with his own pedals was responsible for driving and could accordingly be qualified as the "driver" of the car, even if he did not actually make use of the pedals.

By analogy, Belgian authors consider that the person who supervises the technological operating system of the vehicle could be qualified as a "driver" within the meaning of the Traffic Code, even when that person does not take any action having an impact on the car (eg, by overruling the decisions taken by the autonomous vehicle).

In the same ruling, the Belgian Supreme Court further contended that, not only could the driving instructor be qualified as a "driver" of the car, but he could be held personally liable for breaches committed by his pupil, insofar as the instructor had control of the pedals that allowed him to accelerate, break or stop the car.

This, by analogy, means that violations of the Traffic Code committed by an autonomous vehicle could in theory be attributed to the driver on the sole basis that they were "responsible for the driving of the car" and had access to its pedals or wheel.

It remains to be seen in practice whether Belgian case law will actually apply its prior reasoning to violations "committed by" autonomous vehicles.

Even if Belgian courts were to not follow prior case law, Article 8.3 of the Traffic Code can still be relied upon to hold the driver liable for the offence as if he or she committed it him or herself.

Article 8.3 of the Traffic Code stipulates that the driver needs to have his or her vehicle "well under control" at all times. Whether the driver had his or her vehicle under control implies that a comparison will be made with the prudent and reasonable driver placed in the same circumstances. Courts will consider if the driver does or does not exercise control over the vehicle, at least as well as the prudent and reasonable driver placed in the same circumstances, even when his or her behaviour did not cause any damage or injury. It suffices that the driver's behaviour increased the risks of danger.

Applying this principle in the context of autonomous vehicles would mean that a driver would at least need to supervise an autonomous vehicle and intervene whenever indicated by the autonomous system.

At present, under current road traffic legislation, the "driver" thus cannot sit in the back seat of the vehicle. Moreover, the driver who does not supervise the work of the autonomous vehicle, for instance by texting, increases the risk of an accident and damage to other traffic participants and thereby acts in breach of the Traffic Code.

2.2. Tort liability of the driver under the Civil Code

Like the Traffic Code, the tort liability regime applicable to drivers has yet to be adapted in consideration of autonomous vehicles. This is evidenced by the fact that the relevant provisions of the Civil Code contain a direct reference to a "human person".

Indeed, Articles 1382 and 1383 of the Civil Code provides for the compensation of damages caused by a wrongful or negligent act committed "by a human person", provided that there is a causal relationship between the act and the damage.

As these articles only provide for the compensation of damages caused by acts of a "human person", a person injured by an autonomous vehicle must prove that the driver of the vehicle acted wrongfully or negligently, thereby causing a damage.

This is likely to be difficult in practice when the accident is a result of the functioning – or malfunctioning – of the autonomous vehicle. For example, when the incident is caused by a faulty decision of the car's algorithm, which can be influenced by the driver's behaviour (e.g. through machine-learning), how could a person prove with sufficient certainty that the driver's behaviour had an essential part in causing the incident?

Similarly, Article 1384 of the Belgian civil Code creates a strict liability rule for malfunctioning goods "under custody" of a human person. This provision could be used by an injured person against the driver of a malfunctioning autonomous vehicle.

As this provision sets forth a strict liability rule, the injured person does not have to prove that the driver was at fault: he/she must only prove that the vehicle malfunctioned and that he/she suffered damage as a result (ie, that there was a causal relationship between these two elements).

For the injured person to be able to prove the malfunctioning however, he/she would need to have an understanding of the normal functioning of the relevant autonomous vehicle. This will prove to be a problem for most individuals, as the malfunctioning of an automated vehicle will often be due to a problem in the very complex software or machine-learning algorithm of the vehicle.

2.3. Interim conclusion on the driver's liability

The above shows that the current liability regime applicable to drivers of autonomous vehicles is not well adapted and does not

offer much scope for new technologies such as fully autonomous vehicles.

First, the Traffic Code still forbids the use of fully autonomous (ie, driverless) cars, except for their early, temporary testing under the authorisation of the competent Ministry. This effectively limits the scope of autonomous vehicles allowed to drive in Belgium, hindering manufacturers' innovation efforts as a result.

Furthermore, on the basis of the liability rules set forth by the Traffic Code, the car's driver could be held criminally liable for the violations committed by an autonomous vehicle, even if the driver did not take any action leading to those violations. Purchasers of autonomous vehicles may therefore be disinclined to rely on the autonomous systems of their vehicles, as they will in any case have to remain in constant control of the vehicle if they do not want to be held criminally liable.

Moreover, it appears from the survey conducted by the VIAS Institute that the potential criminal liability of the driver is not evident to most consumers, as only a third of the surveyed consumers indicated that they believed that the "driver" is responsible for incidents caused by an autonomous vehicle.

Finally, the current tort liability regime is not well adapted to damage caused by autonomous vehicles. Indeed, injured persons bringing claims against an automated vehicle's driver are likely to face difficulties in proving whether their damage was due to the driver's behaviour, or to the vehicle's malfunctioning.

3. Liability of the manufacturer

3.1. Tort law liability

Manufacturers of autonomous vehicles can be held liable under tort law liability (see section 2.2. for the applicable rules), but also under the strict liability regime applicable to defective products (see section 3.2).

3.2 PLA

The Belgian Product Liability Act of 25 February 1991 (hereinafter the PLA) provides that manufacturers are liable for defective products they have placed on the market. This liability regime could also apply to manufacturers of autonomous vehicles.

3.2.1. Limited scope of the PLA

The scope of liability under the PLA is limited. First, the compensable damage under the PLA is limited to personal injuries (including moral damage) and, subject to certain conditions, damage to property. The PLA specifically excludes the loss of the defective product itself as a form of compensable damage.

Accordingly, the manufacturer of an autonomous vehicle will not have to compensate owners for the costs of the vehicle itself when that vehicle is damaged or destroyed as a result of its defective nature.

Moreover, the claimant must be a consumer. Any individual purchasing an autonomous vehicle for professional reasons thus cannot seek recourse for the damage they suffered because of a defective vehicle under the PLA.

These limitations are somewhat regrettable in the context of autonomous vehicles. As seen above, tort liability for malfunctioning autonomous vehicles may be difficult to establish in practice. Therefore, individuals whose claims are excluded from the scope of the PLA may be left in a situation where they have, depending on the concrete circumstances, no possible recourse to claim damages.

3.2.2. Which vehicles are defective?

Pursuant to the PLA, products are defective when they "do not offer the safety that a person might reasonably expect from them". What is considered reasonable will depend notably on how the product was presented by the manufacturer, and on "the normal and foreseeable use of the product by its users".

In the context of autonomous vehicles, the above criteria may have important consequences. Car manufacturers are likely to be reluctant to present autonomous cars as a safer alternative to normal cars, as doing so will increase their potential liability under the PLA. Presenting an autonomous vehicle as a safe option will easily trigger the manufacturer's liability if the vehicle reacts in a way that was not expected by the driver.

Tesla, for instance, tried to hedge this risk by announcing that their software was still in a "beta-phase" and recommending that every purchaser of one of their vehicles keep their hands on the steering wheel at all times.

This behaviour from manufacturers seeking to limit their liability is a likely cause of consumers' decreasing trust in the safety of autonomous cars, as shown by a recent survey.

4. Conclusion

Currently, the Belgian liability rules do not seem sufficiently adjusted to autonomous vehicles.

First of all, modifications to the Traffic Code will be required before fully autonomous vehicles can travel on Belgian roads for purposes other than early testing.

Moreover, there remain a number of open questions on the matter of liability for autonomous vehicles, thereby creating legal uncertainty and gaps.

For example, the question of the extent to which the person behind the wheel may be held criminally liable for violations committed by the vehicle itself could be discussed.

As for civil claims, the unadjusted nature of applicable tort liability rules, combined with the limited scope of the PLA, may lead to situations in which individuals have no recourse for damage they suffered because of autonomous vehicles.

Finally, manufacturers seem to have developed a tendency to undermine impressions of the safety of autonomous vehicles in order to avoid their liability being triggered too easily under the PLA. A survey suggests that this behaviour has had a negative impact on the market, as consumers' interest and trust in autonomous vehicles seem to be gradually decreasing.

It remains to be seen whether Belgium will go forward with introducing a liability regime dedicated to autonomous vehicles, which may be a solution that answers the remaining open questions and gaps in the liability regime.

In the meantime, the Belgian government's innovation project to become the autonomous vehicle centre of Europe might have to be put on hold for as long the current legal framework does not offer sufficient legal certainty to consumers.

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Lydian CVBA

Avenue du Port 86C B113
B – 1000
Brussels

Tel: +32 2 787 90 00
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Email: info@lydian.be
Web: www.lydian.be