

Austrian provisions are more extensive in certain respects and less in others than the American ones.

More extensive provisions: In Austria any defect, not only if it is one which renders the object "unreasonably dangerous," gives grounds for damage claims against the seller (original or intermediary) and not only for physical harm but for any harm to person or property. It is not required in Austria that the seller be engaged in the selling of such a product; he may be a private person selling a second-hand car. While the latter is not subject to liability as far-reaching as the professional dealer's, he might become liable for the intentional or negligent omission to call the other party's attention to defects about which he knows or ought to know. Within these limits privity is not required.

Less extensive provisions: If a defendant can prove that he has exercised all reasonable care in the production and sale of his product (e.g., construction of the vehicle, thorough inspection before sale), he will be exculpated. No liability exists without fault.

Belgium

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The liability of a manufacturer or subsequent seller of a defective product to users and consumers has received considerably less attention under Belgian law than in common law jurisdictions. Furthermore, Belgian legal doctrine as expounded by the courts and by legal writers has been slow to apply the principles of tort liability to a supplier of merchandise which, because of a defective condition, has resulted in injury to the person or property of users and consumers not in a contractual relationship with the supplier.

ous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to reach the user or consumer in the condition in which it is sold;

- (2) The rule stated in subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

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Certainly Belgian law has not compartmentalized rules pertaining to product liability for specific chattels such as motor vehicles. Therefore, the outline of Belgian law which follows is applicable to all chattels and not just to motor vehicles. The distinctions which must be drawn relate to basically two types of actions which an injured plaintiff can follow against a supplier of a chattel. First, he may be able to sue on the contract on the theory of hidden defects (*vices cachés*); or, second, he may, if he is not otherwise precluded from doing so, proceed on a tort theory (*responsabilité acquilienne*). This paper briefly reviews each of these alternatives.

I. Contract Liability

A seller is required to furnish a buyer with a product free from hidden defects which would prevent or hinder the use thereof.¹ The seller's liability does not extend to defects which careful examination by the buyer would have revealed or to defects which, even if not obvious, were known to the buyer.²

A. *Hidden Defects: Presumption of knowledge by seller.* The seller is liable to the buyer whether or not he knows of the hidden defect at the time of the sale. However, knowledge on the part of the seller does determine the remedy to which the buyer is entitled.³ Where the seller does not know of the hidden defects, the buyer can choose either to rescind the sale and have the purchase price returned and the expenses caused by the sale reimbursed, or to retain the merchandise and obtain a partial diminution of the sales price.⁴ If the seller is aware of the hidden defect, he must then not only return the purchase price, but be liable for general damages as well.⁵

The question of "scienter" has obviously troubled the courts since it would be difficult, in most instances, if not impossible, for a purchaser of a chattel containing a hidden defect to prove that the seller was aware of the defect at the time of the sale. Without such proof the plaintiff would not be entitled to claim damages resulting from the defect. To solve this problem, the Belgian courts have uniformly held that there is a presumption that a manufacturer knows

¹ Code Civil, § 1641.

² C. Civ., § 1642.

³ Van Hecke, "La Responsabilité du Fabricant," 14 *Revue Critique de Jurisprudence Belge* 204 (1960).

⁴ C. Civ., §§ 1644, 1666.

⁵ C. Civ., § 1646.

of the hidden defect when he sells the merchandise.⁶ This presumption can be rebutted upon a showing that the defect could not have been discovered by the defendant no matter how much care had been exercised.⁷

In Belgium the courts have extended this presumption of knowledge to sellers who habitually deal in the defective article,⁸ but there has been some dissent on this point.⁹ In the Belgian Supreme Court case of November 13, 1959, cited above, the plaintiff had purchased a motorcycle whose frame then split, causing an accident in which the plaintiff was injured. The court held that the seller, who was not the manufacturer, had not shown that he could not know of the defect. Presumably, the plaintiff obtained full recovery, including return of the purchase price and damages to compensate him for his personal injuries; but the court report does not specifically deal with this aspect of the case.

B. Hidden Defects: Extension of notion of expenses. Another theory upon which plaintiffs who could not show knowledge by the defendant have relied expands the notion of expenses of the original sale for which the vendor is obliged to compensate the buyer even though the seller was unaware of the defect.¹⁰ It will be recalled that Section 1646 of the Civil Code provides that if the seller did not know of the defect at the time of the sale, the buyer's remedy is rescission coupled with recovery of expenses "caused by the sale." The language of § 1646 is broad enough to encompass expenses not strictly connected with the sale. Some authorities have even said that the buyer can recover damages which he may have had as a result of an accident caused by the defective article even though the seller could show that he did not know of the defect. However, the weight of legal opinion is opposed to an extension of this nature.¹¹

C. Subsequent Purchasers. The courts have unanimously held that a seller's liability for hidden defects extends to a subsequent pur-

⁶ [1939] Pas. I, 224; III Van Ryn, *Traité de Droit Commercial*, No. 1716 (Brussels 1960).

⁷ [1960] Pas. I, 313; [1960] *Journal des Tribunaux* 59; Van Hecke, *supra* note 3, at 206; XVI *Répertoire Pratique de Droit Belge*, No. 378 (Brussels 1960) [hereinafter cited R.P.D.B.].

⁸ [1960] Pas. I, 224.

⁹ III Van Ryn, *supra* note 6.

¹⁰ XVI R.P.D.B., No. 369.

¹¹ IV De Page, *Traité de Droit Civil Belge*, No. 185 (Brussels 1935); see XVI R.P.D.B., No. 372.

chaser who can sue either the person from whom he bought the merchandise or the original seller.¹² Naturally, when the chattel is acquired by the subsequent purchaser, the defect must be the same as at the time of the original sale.¹³

D. Limitation on Contractual Liability. Belgian courts have awarded full damages to a plaintiff injured in his person or property by a hidden defect in a product purchased from a defendant unable to rebut the presumption of knowledge.¹⁴ However, the remedies available are limited. First, an action on the contract must be brought within a "brief period of time in accordance with the nature of the hidden defect and the usages of the place where the sale was effected."¹⁵ The courts must decide in each particular case where the plaintiff's action has been timely.¹⁶ A purchaser who discovers a hidden defect runs the risk, therefore, of finding that his action before a court has been started too late.

A second serious limitation is that the seller is entitled to limit the warranties which are provided by statute. A good example is a typical clause in an automobile sales contract which reads as follows:

Products . . . are guaranteed by the manufacturer for 6 months limited to 10,000 kms for automobiles and vehicles derived therefrom; 6 months limited to 10,000 kilometers for commercial and industrial vehicles, from the date of delivery. The guarantee, the terms of which have been imposed by the manufacturer, is expressly limited to the exchange or free repair of the part recognized to be defective on condition that the replacement or repair is not required as a result of improper use or lack of maintenance . . .

A finding of a hidden defect unbeknownst to the seller at the time of the sale can never result in cancelling the sale . . .

The seller and the manufacturer decline all responsibility as the result of personal injury or material damage resulting from an accident even if such accident is the result of a defect in manufacture or a hidden defect.

This clause, taken from the general conditions of sale of a

¹² XVI R.P.D.B., No. 402; IV De Page, *supra* note 11, No. 186; [1950] Pas. III, 1 (Civil Court of Dinant).

¹³ IV De Page, *supra* note 11, No. 186.

¹⁴ See III Mazeaud & Tunc, *Responsabilité civile*, No. 2190 (Paris 1960).

¹⁵ C. Civ. § 1648.

¹⁶ XVI R.P.D.B., No. 403.

Belgian distributor for a major European automobile manufacturer, serves to limit the far broader warranties provided by law. A warranty limited to the replacement of defective parts is not valid, however, where the seller knew of the defects or was presumed to have known of them or where there is fraud or negligence on the part of the seller.¹⁷ It is fair to say, in any event, that a court of law will interpret a contractual limitation upon liability in a restrictive manner.¹⁸

II. Tort Liability

An action on the sales contract is not available to persons who are not parties to the original agreement of sale or who are not subsequent purchasers. Moreover, even where an injured party can sue on contractual principles he may be unwilling or unable to do so because of the brief period of limitations for suing on statutory warranty principles,¹⁹ because the contract has whittled away the rights which he would otherwise have had, or perhaps because of the limitations of contract liability where the defect was apparent or where the seller can show good faith. It should be remembered that the usual period of limitations for an action in tort is 30 years,²⁰ although where the plaintiff has suffered physical injuries for which the defendant may be criminally liable, the period of limitations is reduced to either 5 years or the criminal statutory limitation, whichever date is later.²¹

A. *Fault*. The principal problem which faces a plaintiff who has been injured is proving fault, since under Belgian civil law tort principles there can be no liability without fault with one major exception which will be mentioned later. Belgian legal theorists and the judges who apply the law have felt themselves obliged to respect the words of Civil Code Section 1382, which in rough translation provides that "Any human act which results in injury to another requires the person whose fault it was to repair it."²² Furthermore, in the field of products liability, there can be no shifting of the

¹⁷ Van Hecke, *supra* note 2, at 219; III Van Ryn, No. 1718.

¹⁸ III Van Ryn, No. 1718.

¹⁹ C. Civ., § 1648.

²⁰ C. Civ. § 2262.

²¹ Preliminary Instructions to the Code of Criminal Procedure, art. 26.

²² In French, § 1382 reads: "Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

burden of proof, and the injured plaintiffs must show fault on the part of the manufacturer or seller.²³

The courts have not always recognized the tort liability of a manufacturer to persons other than purchasers and subsequent purchasers,²⁴ but in an important case decided in 1959 plaintiff Peleman was injured by a reservoir which exploded and was granted compensation from one not in contractual priority. This reservoir, originally sold by Van Wynendaele to Humbert for incorporation into a compressor, was then sold to deNeef, the employer of Peleman. The lower courts found that the reservoir had been defectively soldered together. The court held, in part, that Van Wynendaele was liable to Peleman on a tort theory.²⁵

B. *Contract.* A plaintiff's second problem is that, given a contract with the defendant, the contractual relations generally exclude liability on tort principles; but the mere existence of a contract is not sufficient to eliminate tort liability. If, however, the contract explicitly or implicitly disclaims tort liability, then the plaintiff is precluded from relying on a tort theory.²⁶ If the defendant was acting in bad faith, a contractual limitation of tort liability will not be valid.²⁷

A subsequent purchaser who wishes to sue the original seller would appear to have a choice of suing on a tort theory or on the contract. We have already pointed out that a subsequent purchaser can rely on his vendor's contract with the original seller. Since the subsequent purchaser was not party to the original contract, it would seem that he would have an action in tort as well. The law on this point does not, however, appear to be fully settled.²⁸ Naturally, a person without a contractual relation with the original seller or anyone else in the chain of title who is injured by the chattel can sue the original seller exclusively on a tort theory.²⁹ It should be pointed out that the right of a plaintiff to maintain both a tort and a contract

²³ Van Hecke, *supra* note 3, at 223.

²⁴ Van Hecke, *supra* note 3, at 217.

²⁵ Case of 1 decembre 1958, cited *id.* at 204; see Van Hecke at 212.

²⁶ Van Hecke at 216; II De Page, *supra* note 11, No. 926; see, *e.g.* text of automobile guarantee set forth in part II (D.), *supra*.

²⁷ Case of 3 avril 1959, cited in Van Hecke, *supra* note 3, at 207.

²⁸ See I Dalcq, *Traite de la Responsabilité Civile*, No. 103 (1959); see also Van Hecke, *supra* note 3, at 212.

²⁹ I Dalcq, *supra* note 27, No. 102; for French doctrine, see Mazeaud, "La Responsabilité Civile du Vendeur—Fabricant," 53 *Revue Trimestrielle de Droit Civil* 611 (1955).

action based on the same set of circumstances is disputed under Belgian law, but this doctrinal problem falls outside the scope of this study.³⁰

C. *Liability of a guardian.* While not central to the topic of this paper, Article 1384, paragraph 1, of the Civil Code should be mentioned. This article provides, in part, that "one is responsible not only for an injury which one has caused oneself, but also for that which has been caused . . . by things which are in one's keeping."³¹

The victim of an accident who wishes to sue a manufacturer or seller on the basis of Article 1384, paragraph 1, must show three things: First, he must prove that the accident was caused by a chattel.³² Second, the accident must have resulted from a defect in the chattel.³³ Third, the defendant must have been the guardian of the chattel.³⁴ The term "guardian" or "guardianship" refers, in general terms, to the person whose responsibility it is to see that the chattel does not harm others.³⁵ This responsibility has been said to exist where the defendant has the power to use and supervise the property which has damaged the plaintiff.³⁶

The plaintiff suing under Article 1384, paragraph 1, is not required to prove the fault of the guardian. All he must show is that there was a defect which caused the accident. Of course, suits against a manufacturer or seller pursuant to Article 1384, paragraph 1, are rare because in most instances the manufacturer or seller is no longer the guardian of the object which has injured the plaintiff.

Conclusion

The Belgian law with respect to product liability can be summarized as follows:

- (1) Manufacturers and sellers are liable for hidden defects to purchasers and subsequent purchasers. There is a presump-

³⁰ II De Page, *supra* note 11, Nos. 957 *et seq.*; I Dalcq, *supra* note 27, Nos. 32 *et seq.*

³¹ In French this paragraph reads: "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par . . . des choses qu'on a sous sa garde."

³² XI R.P.D.B., No. 919.

³³ XI R.P.D.B., No. 927.

³⁴ XI R.P.D.B., No. 956.

³⁵ XI R.P.D.B., No. 958.

³⁶ [1958] Pas. I, 616.