Belgium

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1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role?

The Belgian system of product liability includes the law of contract, traditional extra-contractual liability under Articles 1382 *et seq.* of the Civil Code ('C.C.') and the Act of 25 February 1991 on Liability for Defective Products (Product Liability Act, or 'PLA').

Contractual liability plays a significant role in the Belgian system of product liability and in particular the latent defects warranty (*garantie des vices cachés*) under the sale of goods regime. This warranty covers hidden defects which 'make the goods unfit for their purpose or reduce their usefulness' (Article 1641 C.C.). Hidden defects entitle the buyer to claim all heads of damages, provided the defect existed at the time of sale and the seller knew of it (Articles 1645 and 1646 C.C.). A commercial seller is presumed to know of the defect unless he proves otherwise (see question 2.3 below).

Under the PLA, a product is considered to be defective where it fails to offer the safety standards which could be reasonably expected, taking into account elements such as the appearance of the product and its normal or reasonable use (Article 5).

What renders the latent defects warranty particularly effective in product liability cases is the *action directe*, a type of third party action devised through case law. This action entitles a buyer despite the lack of a contractual relationship to sue any seller higher up in the chain of contracts (including the producer). However, someone who is not a buyer at any point in the chain of sales has, unlike under the French *obligation de sécurité*, no contractual right against the producer or commercial sellers.

The seller is also under a duty to provide the buyer with correct and useful information as to the characteristics of the product and potential dangers associated with it. The Act of 14 July 1991 on commercial practices and the information and protection of consumers (Fair Commercial Practice Act 1991) defines various duties in this respect. Failure to provide the consumer with correct information on the product (especially with respect to its characteristics) can render the product defective and give the consumer a claim for latent defects (Article 1641 C.C.). Incorrect information relating purely to the safety of products will usually not constitute a defect, but may entitle the seller to a pre-contractual claim for negligent or fraudulent misrepresentation (*culpa in contrahendo*). The *Cour de Cassation* has made it clear however that reckless use of a defective product does not preclude liability where the manufacturer could not have been unaware of the risks arising from the product, notwithstanding any written warning given to users.

A claimant can also, at least with respect to personal injury and damage to property other than the sold good itself, base his claim on tort, even where he has a contractual relation with the defendant (principle of *cumul limité*).

Article 1384 C.C. stipulates strict liability for things under a person's custody (garde). Belgian law construes the concept of *fait de la chose* as requiring that the item which caused the injury has a defect. Something is defective if it shows atypical characteristics capable of causing injury. However, Belgian case law has (unlike that in France) not developed this concept for the liability of producers further. The approach taken by the Belgian courts is that the producer gives up (all) custody over a product by putting it into circulation. Article 1384 C.C. is therefore not particularly relevant to the liability of producers and suppliers.

Fault based liability under Articles 1382 and 1383 C.C. requires the breach of an extra-contractual duty of care. Producers and suppliers are under a duty to exercise the care of a prudent and diligent professional of the same occupation. Statutes and regulations help define the duty of care within their occupational ambit, and breach of these laws will generally amount to fault.

The most important example of statutory law in the field of product liability is the Act of 9 February 1994 on consumer safety (Consumer Safety Act), which implements Directive 92/59/EEC on general product safety. This Act obliges producers to place only safe products on the market, to provide consumers with all relevant information and to take the appropriate measures against risks that emerge post-marketing. It also requires distributors not to supply products which they know or should have presumed to be dangerous and to cooperate in the necessary post-marketing measures. Note in this context that the revised Directive 2001/95/EC on general product safety further enhances the duties of producers and suppliers (for detailed information on the new directive see Lovells, *Product Safety in the European Union, A Practical Guide to the General Product Safety Directive*, 2002). This new directive has been

transposed into Belgian law by the Act of 18 December 2002 which amends the Consumer Safety Act (renamed as the 'Act on products and services safety' (Products and Services Safety Act).)

Other legislation regarding products and services safety includes the Act of 24 January 1977 on consumer health protection (amended several times since), the Act of 5 July 1994 on blood and blood by-products and the Royal Decree of 6 June 1960 on pharmaceutical products (amended several times since).

The PLA, which entered into force on 1 April 1991, implements Directive 85/374/EEC on liability for defective products (the 'Directive') and is, according to Article 13 PLA, in any case available alongside contract and tort liability (as to the possibility of making the Directive the only legal basis in product liability claims, see Lovells, *Product Liability in the European Union: A Report for the European Commission*, 2003, pp. 44). The PLA provides for strict (objective) liability, but has a slightly narrower scope than the traditional regimes of contract and tort. The PLA sets stricter limits on recoverable damages as well as on the group of liable persons, and it also does not apply to post-marketing failures.

1.2 Does the state operate any schemes of compensation for particular products?

The Walloon Decree of 27 June 1996 and a Walloon Government Order of 5 November 1998 set up a fund for damage sustained in the Walloon region caused by waste.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Under the PLA, the producer is primarily responsible for a defect. 'Producer' means the manufacturer of a finished product or of a component of the 'finished product', the producer of raw material or the 'own-brander'. Liability of the 'own-brander' does not preclude liability of the 'actual' producer (although this appears to be controversial). 'Producer' also includes any person who imports the product into the EC/EEA. Any other supplier may be liable only where the producer cannot be identified. A supplier can exonerate himself by informing the injured person, within a reasonable time, of the identity of the producer or of any other person who supplied him (provided this person is located in the EC/EEA). The same applies if the importer cannot be identified, even if the identity of the producer is known.

The responsible persons in contract are the seller and any person higher up in the chain of supply, including the producer (*action directe*, see answer to question 1.1 above). The guardian of a particular item is responsible under Article 1384 C.C, and, under the fault based system of Articles 1382 and 1383 C.C., the person who is under the duty of care in question is responsible. This means that suppliers may be liable even where the producer can be identified, as their duties are separate and also, in most cases, of a different nature.

1.4 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

Post-marketing duties concerning the safety of products are primarily extra-contractual. The Products and Services Safety Act helps to define post-marketing duties. This Act obliges manufacturers to monitor products that are already on the market and to take appropriate steps in the event that defects become apparent. Appropriate steps in such a case range from informing and warning consumers, suppliers and public authorities, to recalling the product in question as the ultimate step. Failure to comply with the duties set out in the Products and Services Safety Act will usually amount to fault and give the injured person a claim under Articles 1382 and 1383 C.C. (See answer to question 1.1 above).

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

The burden of proving the existence of a defect is - under all regimes - on the claimant. In contract and under Article 1384 C.C., the 'defect' can be inferred from the uncharacteristic behaviour of the product, provided that any other cause (particularly mishandling by the victim) is ruled out.

In a similar vein, courts in Belgium tend to let it suffice that the victim, in order to prove defect under the PLA, demonstrates simply that the product failed, rather than requiring that the victim establishes the exact (technical) cause of the product's failure. However, this should not be taken as a general rule. Consumer expectation depends on the nature and presentation of the product and on how it is handled (Article 5 PLA). Accordingly, it seems more appropriate to relieve the claimant from showing the cause of the failure only where the (proven) events themselves suggest that the product was unsafe (cf. S. Lenze, *Proof of Defect*, Lovells, European Product Liability Review, December 2002, pp. 40).

Liability under Articles 1382 and 1383 C.C. generally requires proof of fault. Breach of statutory or regulatory duty, however, is usually enough to prove fault. The courts also tend to relieve the claimant from the burden of proving fault where he can establish that the product was defective in its design or manufacture. In all other cases, it is generally for the claimant to show that the defendant did not exercise the care of a prudent and diligent professional.

It may also be noted that courts in Belgium have adopted the doctrine of 'loss of opportunity' (*perte d'une chance*), according to which the victim can claim for the loss of an opportunity that would have arisen had the defendant acted properly. This doctrine has been used in various fields, such as in medical negligence where the loss of opportunity to avoid injury can be considered. However, there seems to be no reason why it should not be applied to certain cases of product liability, as, for instance, in the case of an ineffective drug or a failure to warn.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure?

The claimant must prove a causal relationship between the defect (or - where necessary - fault) and the damage: it must be shown that, had the product not been defective, there would have been no damage. As is the case with the defect, it is possible for circumstantial evidence to suffice.

The *Cour de Cassation* seems to consider that fault only has a causal relationship with the damage if it constitutes a condition without which the damage would not have occurred in the way that it did *in concreto*. Conversely, if, without this fault, the damage would in any event have occurred as it did in concreto, there is no causal link. It is the theory of equivalent conditions (*l'équivalence de conditions*). However, the judges of the substance (*juges du fond*) often apply the theory of sufficient causation (*causalité adéquate*), under the guise of this theory. The theory of sufficient causation tends only to retain as causes of damage events which, in the natural order of things or according to general experience, must have caused it.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

Cases in which the actual manufacturer of the (defective) product cannot be identified remain a source of legal uncertainty. However, it is clear that where several people as a group created a risk, which then manifested itself in an injury, all members of that group are jointly and severally liable. The victim may bring an action against any producer member of the group for the total amount of damages. The defendant will then be able to recover the difference from the other producers. Each individual member of the group can exonerate himself by proving that it was not he who actually caused the damage. One must doubt, however, whether this approach is capable of dealing with modern mass torts. Producers usually have no more in common than the manufacturing of similar products, which is hardly enough to render them a group. And even if it does, the risk to consumers does not arise from the availability of choice between different products, but from using them. The minimum requirement must therefore be that the claimant shows that he has used the products of the defendant.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

A failure to inform can make a product defective and give rise to liability. Indeed, according to jurisprudence the producer-seller who knows or should have known that the products which he is producing contain hidden defects is required to inform the purchaser of these defects. However, if, before the sale, the producer-seller has warned the buyer that there is a defect in the product, the defect will be likened to an apparent defect, of which the buyer will therefore be aware. The *Cour de Cassation* does not require the seller's declaration to be express and specific. Besides, Belgian doctrine and case law impose on the seller an obligation to give information as to the risks and dangers of the product for sale, both when the contract is being formed and performed. This duty to inform during the performance of the contract is the application of the principle of performance of agreements in good faith provided for in article 1134 of the Civil Code.

The following decisions concern the obligation to inform which, indirectly, lies with the producer.

In its judgment rendered on 14 November 1997, the Civil Court of Namur seemed to consider that the defect in a product - a weighing and dividing machine - can not be inferred from the failure to issue an instruction leaflet. In the case in question, a doubt nonetheless subsisted over the issue of whether an instruction leaflet had been delivered with the machine. In any event, the judge considered that the claimant could not put this argument forward since he had used the machine for several months and therefore knew how it worked (Civ. Namur, 14 novembre 1997, *J.L.M.B.*, 1998, p. 664).

The Civil Court of Brussels had to give a ruling in a case where a person had hurt his hand whilst trying to change the height of a basket ball net. In the opinion of the court, "the lack of any comprehensible warning anywhere on the box, an instruction leaflet or advertising and the failure to supply an accessory, may be commonplace but is nevertheless indispensable" and may have been the cause of the defect in the product. In this case, the instruction leaflet drafted in English did not state that a special pole was needed to carry out the manoeuvre in question. On the other hand, the court stated that the failure to supply an instruction leaflet in French and/or in Dutch did not *ipso facto* bring about the producer's liability (Civ Bruxelles, 23 January 2001, unpublished (RG 97/10865/A).

As regards liability of intermediaries, it should be noted that the manufacturer of a component part is not, in principle,

liable for a defect in the product in which the component part was incorporated, when this defect is attributable to the design of the finished product or the instructions given by the producer of the product. It should however be noted that the seller of a component could be forced to guarantee the latent defects affecting the assembled product if this component was unsuitable for the use to which, to the seller's knowledge, the buyer (the manufacturer of the assembled product) was putting it.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The producer or supplier can, according to the Cour de Cassation, defend himself against a claim for latent defects (see question 1.1 above) only by showing that the defect was "totally undetectable". The court, however, hesitates to define exactly what it means by that. It seems appropriate, though, to apply the standard of a prudent and diligent professional rather than the mere objective criteria of the development risks defence available under the PLA.

Similarly, the producer/supplier can, under Articles 1382 and 1383 C.C., exonerate himself by showing that he applied the care of a reasonable professional, although the defence does not relate only to the discoverability, but also to the avoidability of the defect in question. There is usually no defence with respect to fault, however, where the producer/supplier has breached a statutory duty (for example one arising under the Products and Services Safety Act).

- Liability under the PLA is independent of fault and contains only a specified list of defences (Article 8). The producer (supplier) is therefore not liable if he proves:
  - that he did not put the product into circulation;
  - that it is likely that the product did not have the defect which caused the damage at the time when the producer put it into circulation or that this defect came into being afterwards;
  - that the product was manufactured neither for sale nor for any other form of distribution for commercial purposes nor manufactured or distributed in the course of business;
  - that the defect is due to compliance of the product with mandatory regulations issued by public authorities;
  - that the state of scientific knowledge at the time when the product was put into circulation was not such as to enable the defect to be discovered; or
  - in the case of the manufacturer of a component or a producer of raw material, that the defect is attributable to the design of the product in which the component or the raw material has been fitted or to the instructions given by the manufacturer of the product.
- Fault on behalf of the claimant (contributory negligence) is a defence under all regimes. This is particularly relevant where the claimant knew more about the characteristics of a product than the typical consumer or where the claimant handled the product wrongly (both are also factors that - if strong enough - can render a product free of defects). Also available under all regimes is the defence of force majeure.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

The PLA contains a development risks defence (Article 8 e). This defence only applies where the producer proves that the defect could not objectively have been discovered. The standard of care required is not that of a particular industry, nor is it a national one. To determine whether the defect could be discovered, one must take into account the most advanced state of scientific and technical knowledge that is accessible at the time the product was put into circulation.

Once the problem with a certain product is known, there is no longer scope for the development risks defence. The question then is whether the defect could have been avoided rather than whether it could have been discovered.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

The manufacturer can escape liability only if compliance with regulatory or statutory requirements has unavoidably led to the damage (Article 8 PLA). This is not the case where regulatory or statutory requirements merely impose minimum standards.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Judgments in Belgian civil law usually have effect only between the parties to the proceedings. The same claimant is precluded from bringing the same cause of action twice (*res judicata*). A different claimant can bring a claim against the defendant, without restriction, even where it is based on more or less the same facts and/or involves the same legal issues. There is no form of "issue estoppel" or "collateral estoppel" that would prevent either party from re-litigating preliminary issues, such as defect, fault or causation. Third parties can neither make defensive use of the fact that certain issues were already dealt with in a prior action, nor rely on such a fact to prove their case. The only situations where preliminary issues may be determined are cases of third party intervention and third party notice. However, these happen primarily in recourse scenarios.

4 Procedure

4.1 Is the trial by a judge or a jury?

The trial is led and decided by a judge only. There is no jury verdict on any question.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

No, the judge may appoint technical experts but the advice given will not be binding. The evidence is assessed by the judge only (see question 4.8 below).

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Are such claims commonly brought?

Class actions, or similar means to bundle mass tort claims, prejudicing the rights of each member of the group, are not available under Belgian law. The courts can deal with several claims in the same hearing. If the claims are related, claimants can also bring a joint claim or request that the court combine their claims. However, this does not prejudice the rights of the individual claimants.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

Certain associations can bring representative actions for injunctions under the Fair Commercial Practice Act 1991 as well as under the law of 12 January 1993 on the protection of the environment. However, these actions neither give the representative body a right to claim damages nor can they be used to force the producer to recall a product. Note also that Directive 98/27/EEC on injunctions for the protection of consumers' interests does not apply in the area of product liability or product safety.

4.5 How long does it normally take to get to trial?

There is no formal pre-trial stage under Belgian procedural law. After the claim has been filed and written submissions have been exchanged, litigation moves straight on to trial. Delays before getting a judgment vary from one region to another. The courts in the Brussels region are presently overloaded, and it can therefore take several years before a judgment is adopted. .

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

It is common for the courts to rule on a preliminary issue, e.g. appointing an expert to assess the damage caused in a first judgment before ruling on the substance of a case in a second judgment after some of the factual issues have been resolved. The judge may decide to do so on his own motion or following a request by one or several parties to the case.

4.7 What appeal options are available?

Decisions of the court of first instance and the commercial court are open to appeal if the value of the case exceeds €1,860. The court of appeal has jurisdiction over all factual and legal aspects of the claim to the extent of the motion of appeal. A similar form of appeal is available for decisions of conciliatory tribunals (*juge de paix*) exceeding €1,240, although they are referred to the court of first instance. Final decisions and appeal decisions may be referred to the *Cour de Cassation* for revision on legal grounds only.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court can appoint experts to advise on technical or scientific issues. Alternatively, the claimant's and the defendant's own experts may try to find a common position on the controversial issues. If that proves to be impossible, they may try to agree to appoint an independent expert to provide an opinion. Note also that courts are not bound by expert opinions (see question 4.2 above).

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/ expert reports exchanged prior to trial?

There is no pre-trial discovery in Belgium and thus no instrument comparable to pre-trial depositions. Prior to trial, however, the parties have to exchange all documents which they intend to submit to the court. It must also be noted that the taking of oral evidence is rare in Belgian litigation proceedings as Belgian courts prefer written statements.

4.10 What obligations to disclose documentary evidence arise either before proceedings are commenced or as part of the pre-trial procedures?

As there is no pre-trial stage, there is also no institutionalised initial disclosure procedure (apart from the requirement to exchange documents, see question 4.9 above). The court can, however, by itself or following an application from either party, order the disclosure of documents (if necessary from a third party when the document is in the hand of that third party). The judgement ordering the production of a document is not likely to be appealed. Such a judgment can be obtained before commencing the proceedings relating to the product liability case (for instance, in order to obtain documents necessary to this main claim) or pending the course of these proceedings.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes time limits do exist.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

All claims are, in principle, subject to a limitation period of 30 years, unless a shorter period is provided for by law

(Article 2262 C.C.). In the absence of specific provisions, this period is mainly relevant to tort claims. The limitation period starts to run from when the damage occurred.

Contractual claims based on the latent defects warranty must be brought 'within a short period of time' (Article 1648 C.C.). The beginning of this period is not laid down in the C.C. but is left to the discretion of the judge who will consider the nature of the product and the discoverability of the defect as well as commercial practices. This limitation period is usually suspended during any negotiations between the parties.

Claims under the PLA must be brought within three years from the time the claimant became or should have become aware of the damage, the defect and the identity of the producer (Article 12). However, the right to bring an action under the PLA will in any event be extinguished ten years after the producer put the product in.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Neither doctrine nor case law has looked into this question.

6 Damages

6.1 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

Where the claimant has suffered personal injury, he is - under all available product liability regimes - entitled to claim both pecuniary and non-pecuniary damages.

Pecuniary loss resulting from personal injury includes, for example, medical expenses and loss of income or earning capacity. Relatives (e.g. spouse and children) can claim pecuniary loss for the death of the (primary) victim. Note also that that the claimant may claim the 'loss of a chance' (see question 2.1 above).

Non-pecuniary loss includes pain and suffering as well as loss of amenity. Loss of amenity can be claimed even where the victim's personality is destroyed and the victim has lost his senses permanently.

Courts tend to compensate mental damage rather generously. Mental damage does not need to manifest itself in an injury to health, i.e. in a recognised psychological disorder. Mere distress and grief can suffice. Accordingly, relatives (and other 'close people') can claim damages for a 'nervous shock' as a reaction to the injury or death of the primary victim, even where it does not constitute post traumatic stress disorder. However, the quantum of awards for mental damages is relatively low compared to US and even UK standards.

Damage to property other than the defective product itself is recoverable under all regimes. However, the PLA requires that the damaged items are usually, and were largely, used for private purposes (Article 11 PLA). Also, property damage can only be claimed to the extent that it exceeds €500.

Damage to the product itself is covered by the law of contract. The PLA expressly excludes such damage (Article 11 (2) PLA), and tort law is usually not applicable as a consequence of the cumul limité principle (see question 1.1 above).

6.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

So far, such cases are unknown in Belgium. The basic legal position is that damages are recoverable only where they have occurred. The Cour de Cassation further allows the claimant to recover damages if it is certain that damage will occur in the future. However, it is not entirely inconceivable that expenses for medical monitoring may be recovered in certain circumstances. Exposure to a product in a way that is known to be likely to cause certain types of injuries can without doubt lead to severe mental disturbances and lead to genuine mental damage. The focus under Belgian law must be on causation. Medical monitoring expenses, freely paid by the claimant, may often be seen as not directly linked to a damage, which renders them unrecoverable. However, this may be different where the claimant has reasonable grounds to be seriously disturbed, e.g. where the product has already caused an injury to him which is closely related to the one he now fears.

6.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not recoverable.

6.4 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

No, Belgium has not made use of the option provided for under Article 16 of the Directive to include damage caps.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

The successful party can recover the costs of court proceedings (e.g. court-appointed experts and common costs of the proceedings which are supposed to also cover legal fees; there is a very limited lump sum depending on the type of procedure). In principle each party bears its own legal costs of pursuing the claim, e.g. lawyers' fees and expenses for amicable expert opinions (see question 4.8 above).

However, in a recent judgment dated 2 September 2004, the Cour de Cassation accepted the principle that, in certain circumstances, legal fees could be regarded as part of the damage and could therefore be fully recovered as damages. The Cour de Cassation ruled that, since Article 1382 C.C. obliges the liable person to fully remedy the damage, it does not exclude that damages can extend to the fees which the victim had to incur in order to ascertain the existence of the damage and/or its extent.

As a result of this judgment the minister of justice

announced that he hoped to introduce a legislative measure to remedy the inequality created between the parties to the proceedings as a result of the *Cour de Cassation's* judgment. Indeed, the judgment only permits the victim of the fault to recover his legal costs.

In light of these developments, the French speaking Brussels Bar adopted on 15 November 2004 a recommendation which *inter alia* recommends a lawyer to inform his client of the possibility to recover from the other party compensation for the costs of preparing the defence.

7.2 Is public funding e.g. legal aid, available?

A party can apply for a waiver of court fees under Articles 664 *et seq*. of the *Code judiciaire*. It is also possible to ask for representation by a pro bono lawyer under Articles 446 bis and 508/1 to 505/53 of the *Code judiciaire*. Reference may also be made to the Council Directive 2003/8/EC to improve access to justice in cross-border disputes (which should have been implemented by 30 November 2004).

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7.3 If so, are there any restrictions on the availability of public funding?

Legal aid is granted depending on the financial situation of the claimant. Persons earning less than €620 per month will generally be able to get legal aid. People with higher incomes can also qualify for legal aid if the costs of the action are particularly high (e.g. because it involves difficult expert opinions).

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Lawyers are prohibited from working on a 'no win - no fee' basis (Article 459 of the *Code judiciaire*). However, fixed fee scales were repealed in 1995, and the *Ordre des avocats* now only requires that fees be fair and moderate. It is thus possible to agree on higher fees conditional upon success. Success fees should however be fair and modest.

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