



The Particular Legal Nature of Producer's Defenses in Consumer Litigation

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Abstract

This article examines the specificity of producers' defenses against consumer claims by comparing the general rules of liability with special provisions on consumer protection. The study highlights that the legislator has broadened consumers' legal options to initiate claims—whether under contractual liability, tort liability, or based on damage caused by defective products—while also expanding the circle of liable parties to include not only the original manufacturer but also component producers and distributors. At the same time, the legislator has preserved producers' interests by introducing additional defenses under Directive 85/374/EEC, such as the development risks defense, the defense of non-marketing, and the defense of compliance with mandatory regulations. These defenses have generated debate among jurists and courts, with proponents considering them necessary to preserve innovation and industrial growth, while opponents view them as unfairly limiting consumer rights. The article also notes the influence of French law on Algerian legislation, albeit with notable differences. The study concludes with recommendations, including the creation of specialized consumer chambers within courts, alleviation of the burden of proof for consumers, and the establishment of automatic compensation funds for damages caused by defective products. These measures aim to strike a fair balance between consumer protection and the promotion of industrial innovation and economic development.

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1. Introduction

Consumer protection has gained significant attention at both the international and domestic legislative levels, due to the multitude of risks to which consumers are exposed in nearly all aspects of their daily lives. This has become increasingly pressing with the massive influx of products, whether locally manufactured or imported. Individuals today can hardly dispense with machines and devices in their daily use, not to mention means of transportation, communication tools, and others. Moreover, pharmaceuticals, food products, and cosmetics have become among the most widely consumed goods in contemporary society, despite the consumers' limited ability to foresee the potential harms or accidents they may cause. Such risks may arise from inherent defects in these products, whether stemming from manufacturing flaws or from improper use once the product enters circulation. In either case, the producer is held liable pursuant to consumer protection rules, while the injured party bears the burden of proving that the harm resulted from a defect in the product.

Nevertheless, in certain situations, the producer may succeed in demonstrating the absence of any defect in the product—whether in its manufacture or during its circulation—despite the occurrence of harm. The producer may also establish compliance with consumer protection requirements, including conformity with legal standards, providing the consumer with adequate information about the product's use and risks, and ensuring after-sales service. Yet, harm may still occur. This situation, known as “development risks,” arises when scientific and technical knowledge at the time of manufacture and circulation does not allow the discovery or prevention of such risks. This has left doctrine and jurisprudence in a state of hesitation between imposing liability on the producer and exempting him from it. With the emergence of such risks, exemption from liability under consumer protection rules has acquired a distinctive nature compared to traditional civil liability. This was particularly consolidated with the European Directive 85/374, which introduced new defenses previously unknown in this context, most notably the defense of “development risks,” allowing the producer to escape liability.

Accordingly, the following research question may be raised:
What is the specificity of the producer's exemption from liability in light of legislative efforts to ensure

To address this research question, the following outline is proposed:

First, an examination of the defenses provided under the general rules;

followed by an analysis of the newly introduced defenses under European Directive 85/374, which governs the strict liability of the producer.

Section One: Defenses Provided under the General Rules

The liability of the producer within the framework of consumer protection rules is established on the basis of a breach of one of the obligations stipulated in consumer protection legislation, most notably the obligation to guarantee against latent defects, the obligation to ensure safety, and the obligation to provide adequate information. The producer's liability arises when the injured party

proves the existence of a defect in the product that caused the damage. In such cases, the rules of civil liability are applied pursuant to the general provisions, both with respect to the constituent elements of liability and with respect to the producer's ability .

Subsection One: The Concept of the Producer

Under the general rules, liability for damage is attributed solely to the person who directly caused the harm. However, pursuant to consumer protection rules, liability extends to every individual involved in the process of production and distribution until the product reaches the consumer in its final form. The Algerian legislator has designated such persons as “interveners” under Article 4 of Executive Decree No. 13/327, which sets forth the conditions and modalities for implementing guarantees of goods and services. The provision stipulates that, within the framework of guarantee enforcement, every intervener is obliged to deliver to the consumer a good or service in conformity with the contract of sale and is held liable for any defects present at the time of delivery of the good or performance of the service.

As a general principle, the producer is primarily liable for defects found in goods or services. However, where recourse against the producer proves impossible or places an undue burden on the injured party, the latter may seek recourse against others equivalent to the producer, such as the supplier—collectively referred to by the Algerian legislator as “interveners.” The term “producer” applies to any person connected with goods or services acquired by the consumer, even absent a direct contractual relationship with the consumer. This principle is reflected in Article 140 bis of the Algerian Civil Code, which holds the producer liable for damages resulting from a product defect regardless of any contractual link with the consumer, thus extending liability beyond contractual boundaries.

The Algerian legislator adopted producer liability through the 2005 amendment of the Civil Code without providing a precise definition of who qualifies as a producer. This differs from the French legislator, who, in order to maximize consumer protection, explicitly defined three categories of producers. These are enumerated as follows:

1.The Original Producer:

According to Article 1386 of the French Civil Code, this category includes any person acting as a manufacturer or professional, which encompasses the producer of the finished product, the producer of raw materials, and any person who manufactures a component part of the finished product. Thus, original producers include professionals engaged in extracting raw materials from the earth, agricultural and fishing practitioners, energy producers (such as gas and electricity), as well as all industrial manufacturing entities. This applies regardless of whether these products are

incorporated into other products or not. The designation “producer” also extends to those who manufacture parts used in construction, producers of electrical and mechanical devices, and even organizations that harvest elements from the human body for use by third parties. Examples include blood transfusion centers, healthcare institutions that remove organs for transplantation, or entities extracting germinal cells within the framework of assisted reproductive technologies. In sum, liability extends to all those who contribute to any stage of the production process.

2.The Equivalent Producer

Consumer protection legislation has introduced an additional category treated as a producer, known in French law as the “equivalent producer.” This category does not refer to an actual manufacturer but rather to a person operating within the broader distribution chain. The purpose of this extension is to broaden the scope of liability and ensure greater consumer protection, particularly in situations where it is difficult to identify the party responsible for the defect that caused the damage.

Article 1386 of the French Civil Code enumerates such persons, including: any individual who presents himself as a producer by affixing his name, trademark, or distinctive sign on the product; and any party engaged in a form of distribution. The provision further extends this category to suppliers, whereby the seller and the lessor—excluding the financial lessor—or any other professional supplier may be held liable for product defects under the same conditions as the actual producer¹.

Article 1386 of the French Civil Code defines a defective product as one “which does not provide the safety that may legitimately be expected.” Likewise, Article 9 of the Algerian Consumer Protection Law stipulates that products placed at the disposal of the consumer must be guaranteed and must ensure safety in light of their legitimate and expected use, such that they do not cause harm to the consumer, his safety, or his interests, in accordance with the normal conditions of use or those reasonably foreseeable by the interveners².

Accordingly, it is not sufficient for the consumer to merely suffer harm in order to establish the producer’s liability. Rather, the consumer must prove the existence of a defect warranting guarantee. This defect is assessed according to an objective standard, namely that of the reasonable person. Consequently, the producer’s obligation to guarantee against defects is considered an obligation of result, and the injured party is not required to prove fault.³

The recognition of the defect giving rise to guarantee is owed to the French Court of Cassation, which ruled that the manufacturer is under an obligation to deliver products free from any defect—or any manufacturing defect—that could pose a risk to persons or property. The Court

further clarified the concept of a defect warranting guarantee, holding that the obligation to guarantee is not limited to delivering products free from manufacturing defects. Instead, the seller must provide the level of safety that a reasonable individual is legitimately entitled to expect, which includes a duty to warn the buyer in the case of dangerous products.⁴

Subsection Two: Grounds for Exemption from Liability under the General Rules

Within the framework of civil law, the producer may be released from liability by establishing the existence of a foreign cause that intervened in the occurrence of the damage. In this way, the producer may break the causal link between the harm suffered by the consumer and his product by proving one of the general grounds for exemption, namely force majeure, a fortuitous event, the fault of the injured party, or the fault of a third party.⁵

The Particularity of the Defense of Force Majeure and Fortuitous Event

Legal doctrine is unanimous that force majeure and a fortuitous event are two terms describing the same concept, and it is difficult to distinguish between them, despite the attempts of some legal systems to draw a line of demarcation. Force majeure is defined as an unforeseeable event that cannot be resisted and that directly results in the damage. Thus, the producer may escape liability, either wholly or partially, by proving the occurrence of a force majeure or a fortuitous event that caused the harm.

Comparative legislation does not provide a precise definition of these concepts but merely refers to them within the provisions of civil law as causes for exemption from liability. The Algerian legislator addressed them in Articles 127 and 138 of the Civil Code, exempting the liable party from compensation if it is proven that the damage arose from a cause beyond his control, resulting from force majeure or a fortuitous event. Article 332 of the Code of Civil and Administrative Procedure also refers to them as exceptions preventing the forfeiture of rights or the lapse of appeal deadlines.

In contrast, the French legislator did not address force majeure or fortuitous event under Articles 1382 and 1386 of the Civil Code governing tort liability, but rather within the framework of contractual liability under Articles 1147 and 1148. For force majeure or a fortuitous event to be established, the cause of the harm must be external, i.e., not directly related to the product or its custodian. Conversely, if the product itself contained a defect that contributed to the harm, the producer may not invoke force majeure or a fortuitous event to avoid liability. Another condition is the impossibility of preventing the damage, such as when an individual unexpectedly develops an allergy to a certain medication—*ad impossibilia nemo tenetur* (no one is bound to do the impossible). Here, impossibility refers to an objective impossibility affecting everyone, not just

the defendant. Furthermore, unforeseeability is a necessary condition for the recognition of force majeure.

It is noteworthy that the 1985 European Directive made no reference to force majeure as a ground for exemption from liability. From this silence, many scholars infer that the omission is due to the difficulty of adopting a uniform definition of force majeure suitable for most Member States⁶.

The Particularity of the Defense Based on the Fault of the Injured Party or a Third Party in Producer's Liability

The product defect may not be the sole cause of the harm; the fault of the injured party or of a third party may also have contributed. In such cases, the producer may invoke these faults to escape liability. However, these must have occurred after the product was placed on the market⁷.

In addition to being recognized defenses under the general rules, the 1985 European Directive also accepts the producer's exoneration where the harm is attributable to the fault of the injured party or of persons for whom he is responsible. However, it diverges from the general rules with regard to the fault of third parties, holding that the producer remains liable for damage resulting from both a product defect and the act of a third party. This is confirmed by Article 8 of the Directive, which provides:

“Without prejudice to the provisions of national law concerning rights of recourse, the liability of the producer shall not be reduced where the damage is caused both by a defect in the product and by the act of a third party. The liability of the producer may, however, be reduced or disallowed in accordance with the circumstances where the damage is caused both by a defect in the product and by the fault of the injured person or of a person for whom the injured person is responsible.”

The Directive equates the fault of the injured party with that of those for whom he is responsible, such as minor children, dependents like employees, or animals under his custody⁸. However, for liability to be excluded, the following conditions must be met:

1. The injured party's fault must occur after the product has been placed on the market.
2. The producer must prove that the injured party's fault had a direct and substantial role in causing the harm.
3. The injured party's conduct must be abnormal, such as disregarding the producer's instructions for product use—for example, taking a higher dose of medication than prescribed by a doctor. If the conduct is ordinary or foreseeable, the producer cannot rely on it, even if it results in harm. Producers are therefore required to anticipate probable or foreseeable errors by the general public, and such errors do not exempt them from liability⁹.

Section Two: Defenses Introduced under European Directive 85/374

In light of the growing emphasis on integrating technology across all fields, particularly the industrial sector, and the opening of markets to free competition among producers, industrial products have come to permeate virtually every household. Although such products have undoubtedly facilitated daily life, they are not devoid of risks unforeseen by producers. Indeed, while producers may discharge their duty by providing all relevant information regarding the use of the product and by warning of its potential hazards through labeling, such measures alone are insufficient to ensure effective consumer protection. This is especially true in relation to products whose use—or even mere possession—entails risks that continue to endanger consumers, even where the product is used in accordance with the prescribed instructions.

Accordingly, the European Directive No. 85/374 of 25 July 1985, concerning product liability, sought to unify the rules governing producer liability across the Member States of the European Union. To this end, it introduced a number of defenses unknown to the general principles of civil liability, enabling producers to avoid liability under specific circumstances. These defenses are enumerated in Article 1386 of the French Civil Code and Article 7 of the Directive, and include: the defense of risks inherent in technological and scientific development, the defense relating to the product not being placed on the market, the defense concerning the determination of the defect triggering liability, and the defense based on compliance with mandatory regulations. Where these circumstances are established, producer liability is excluded, as they constitute negative facts preventing the conditions for liability from being fulfilled.

Subsection One: The Defense of Risks Arising from Technological and Scientific Development

This defense concerns those damages suffered by consumers which the producer could not reasonably have foreseen or detected at the time of manufacture or marketing of the product.

Definition of Risks of Technological Development

The risks of technological development refer to the absence of the scientific and technical knowledge necessary to enable the producer to identify the state of the product at the time of marketing, and hence the inability to apprehend its dangers. From this definition, it follows that the producer could neither have known of the defect present in the product at the time of manufacture nor anticipated it upon marketing, being convinced that the product was safe for use. Nevertheless, consumers may suffer harm, notwithstanding the fact that the producer acted with due diligence in light of the scientific and technical knowledge available prior to the product's release into circulation.

Consequently, the injured party may claim compensation for the direct harm caused by a defective product, provided he establishes the existence of such defect. A defective product is understood as one that fails to provide the level of safety which one is legitimately entitled to expect. Opposing this claim, the producer may rely on the defense of technological risks by demonstrating that it was impossible, despite full awareness of the scientific advances related to his activity, to discover the defect at the relevant time. The risks of technological development are thus intrinsically linked to the state of scientific and technical knowledge prevailing at the moment the product was placed on the market, or where it is established that such knowledge did not allow another producer, engaged in the same activity, to detect the defect while the product remained under his control.¹⁰

This defense has sparked significant controversy among jurists, courts, consumer protection associations, and professional unions since its introduction as a ground for exemption of producer liability, resulting in a division between supporters and opponents, as follows:

The Proponent Approach: Article 7 of the 1985 Directive introduced the notion that a producer may be exempted from liability if he establishes that the defect arose from risks of technological development which could not have been detected at the time the product was placed on the market. This represented a novel defense previously unknown to the rules of civil liability. Supporters argue that holding producers liable for defects undiscoverable in light of the prevailing scientific and technical knowledge would create an impediment to scientific progress. Their main justifications include:

- * The essential aim of consumer protection laws is to strike a balance between the rights of producers and consumers, rather than privileging one group over the other.
- * Imposing liability for defects that could not have been discovered at the time of marketing would inevitably stifle scientific research, hinder the development of innovative products, and adversely affect industry and the national economy.
- * Subjecting producers to liability for unforeseeable defects would impose excessive financial burdens, particularly through elevated insurance premiums for covering such unforeseeable risks.

The Opponent Approach: Conversely, part of the doctrine and judiciary have rejected this defense, relying on the following arguments:

- * It is unjust to impose the burden of such damages—often of a serious nature—on consumers.
- * In situations of conflict between consumer and producer interests, consumer rights must be afforded priority.

* French jurisprudence historically rejected the risks-of-development defense on the basis of an irrebuttable presumption that producers are deemed aware of defects, even if their detection was scientifically impossible. For instance, in cases involving contaminated blood, including those related to the HIV virus, the courts held that internal defects in blood, even if undiscoverable, did not constitute a foreign cause capable of exonerating suppliers from liability. Similarly, French courts initially refused to exempt contractors and architects from liability for construction defects linked to scientific progress, holding that such progress did not constitute a foreign cause excluding liability.¹¹

Given the divergent approaches among EU Member States regarding the adoption of this defense, Article 15 of the Directive adopted a compromise solution, leaving it to Member States to decide whether to incorporate the defense of risks of technological development into their domestic law. This explains why French legislation only adopted this defense in 1998, after sustained academic criticism emphasizing that failure to do so would undermine the competitiveness of French companies compared to their European counterparts.

Subsequently, Article 1386-11 of the French Civil Code was enacted, stipulating that a producer shall be strictly liable unless he proves that the state of scientific and technical knowledge at the time of marketing did not allow the discovery of the defect. Nevertheless, the Directive did not grant producers absolute exemption: it explicitly excluded certain categories of products, namely (i) products related to the human body, including those with therapeutic, diagnostic, or preventive purposes; and (ii) pharmaceutical products, given their inherently high-risk nature. These exceptions are codified in Article 1386-12 of the French Civil Code.

As for Algerian law, although heavily influenced by French legislation, Article 140 bis of the Algerian Civil Code governing producer liability does not expressly recognize the risks-of-development defense. However, an implicit acknowledgment of such risks may be discerned in the Consumer Protection Law, which imposes on producers an overarching duty to ensure the safety and security of products.

Section Two: The Defense of Non-Marketing of the Product and Compliance with a Mandatory Legal Standard

Article 7 of Directive 85/374 broadened the scope of defenses available to the producer to escape liability for damages, by recognizing the defenses of non-marketing of the product and compliance with binding legal rules.

1. The Defense of Non-Marketing of the Product

The producer may avoid liability if he proves that the product was never placed on the market. Although the Directive expressly mentions this ground, it does not provide a precise definition nor indicate when a product can be considered to have been placed on the market.

This gap was filled by the Court of Justice of the European Union (CJEU), which in its judgment of 9 February 2006 held that a product is deemed to be placed on the market once it leaves the production process and enters the marketing phase. Similarly, in its judgment of 10 May 2001, the Court held that a producer cannot escape liability where the use of the product results from the act of a person who retained control and authority over the thing.

Thus, a product is deemed to be marketed when the producer voluntarily transfers it to another person. This may be equated with the concept of sale, whereby ownership and possession are transferred to the buyer, enabling him to make use of it. French law refers to this as the authorization to market, meaning that a product is marketed once the producer has obtained authorization from the competent public authorities. In contrast, Algerian law uses the term transfer, whether for consideration or gratuitously, as set forth in Article 3 of the Consumer Protection Act.

Accordingly, the producer may rely on the defense of non-marketing where he establishes that:

- * The product remained under his control and was never definitively relinquished in favor of the consumer.
- * The product was stolen or counterfeited by third parties without his consent.
- * The product was manufactured solely for the producer's personal use, not intended for sale or any form of distribution. This requires two cumulative conditions: (i) the manufacture was not for economic gain, and (ii) the manufacture or distribution occurred outside the scope of professional activity, i.e., not intended for consumers.
- * The product was manufactured exclusively for testing or research purposes, and not for consumer use.
- * The defect occurred only after the product had been placed on the market, due to external factors such as misuse, improper storage, or its incorporation into a final product by another manufacturer.

2. The Defense of Compliance with a Mandatory Legal or Contractual Standard.

Pursuant to Article 7(f) of the Directive, the producer is exempt from liability if he proves that the defect arose despite the product's conformity with mandatory safety standards issued by public authorities. This defense is valid only where the following conditions are met:

- * The standards in question were issued by the competent public authorities.
- * The standards were binding upon the producer.
- * The defect directly resulted from compliance with these standards.

Furthermore, the producer of a component part may avoid liability if he proves that the defect was caused by the design of the final product, and that his component was manufactured in accordance with the specifications and instructions provided by the final producer under a contractual arrangement. This is explicitly recognized under Article 7(f) of the Directive, which relieves the component producer of liability where the defect is attributable to the design choices of the final producer¹².

Conclusion

The comparative analysis between the general rules and the special provisions on consumer protection demonstrates the distinctive features of the latter, particularly in terms of its primary purpose: safeguarding consumer rights on the one hand, while simultaneously preserving the interests of producers by encouraging innovation and industrial development on the other, thereby ensuring economic stability and growth.

These specificities are most apparent in consumer litigation, as follows:

With respect to the protection of consumers' rights: The legislator has broadened the legal bases available to the injured consumer to initiate proceedings. Consumers may choose to bring claims under tortious liability, contractual liability, or, failing that, on the basis of damage caused by a defective product. Furthermore, the scope of liable parties has been expanded to encompass not only the original manufacturer, but also component manufacturers, distributors, and marketers.

With respect to the protection of producers: The legislator has granted producers a wide range of defenses against consumer claims. In addition to those provided under the general rules, Article 7 of Directive 85/374/EEC introduced further defenses available to producers, including the defense of development risks, the defense of non-marketing of the product, and the defense of compliance with mandatory rules.

In light of the foregoing, several conclusions and recommendations may be drawn:

1. The alleviation of the burden of proof borne by consumers, particularly with respect to establishing the defect causing the damage.
2. The establishment of specialized chambers within courts to adjudicate consumer protection disputes.
3. The incorporation of an explicit provision in consumer protection law to ensure a fair balance between the protection of consumers and that of producers.
4. The creation of special compensation funds for damages arising from defective products, particularly those linked to scientific and technological developments.
5. The development of legal mechanisms and specialized institutions dedicated to the effective implementation of consumer protection policies

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