Switzerland

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For the individual suffering injury traceable to faulty manufacture or design of an automobile, the pursuit of legal remedies is restricted to uncharted highways under Swiss law. There have been no reported cases before the Swiss courts dealing with the problem, and even the more general question of liability for products defective in manufacture has seldom been litigated and only recently has begun to draw the attention of the commentators.[1] As in the Anglo-American system, remedies are offered under Switzerland's codified law by both the law of contracts, in particular the law of sales,[2] and the law of torts;[3] the realization of these remedies, however, may indeed be difficult.

Contract Claims

Under the Swiss law of sales, the seller is liable to the buyer for all damages directly caused by the delivery of defective goods,[4] but this basic rule of liability suffers from restrictions. While a manufacturer, for example, will be held responsible for damages caused by the actions of his employee, a contractual disclaimer of liability is permitted[5] and therefore normally will be included in the standard sales contract. A further limitation with respect to the normal sales warranty that the code provides is the short statute of limitations, which runs one year from the date of delivery of the product, even if the defect is discovered only later.[6]

[1] See Tandogan, *La Reparation du Dommage cause à un Tiers,* Melanges Roger Secretan (1964); and Thorens, *Le Dommage cause à un Tiers,* Geneva dissertation (1962). A considerable literature on this topic has developed in Germany and, since German jurisprudence not infrequently serves as a guide to Swiss decisions (see, *e.g., Bundesgerichtentscheide* (hereinafter cited as BGE) 64 II 254), the German practice may foreshadow Swiss developments. A recent summary of the German law may be found in Szladits, "Comparative Aspects of Product Liability," 16 *Buffalo L.R.* 229 (1966).

[2] Swiss Code of Obligations (hereinafter cited as C.O.) art. 184-238.

[3] C.O. Art. 41-61.

[4] C.O. Art. 208, para. 2. Recovery for indirect damages is also possible, but the seller can exculpate himself by showing that no fault (*Verschulden*) can be charged to him. C.O. Art. 208, para. 3.

[5] C.O. Art. 101, para. 1. The sales contract may even exclude liability for all except deliberately concealed defects. C.O. Art. 199.

[6] C.O. Art. 210.

The most serious obstacle to recovery under contract is that the seller or manufacturer is liable basically only to his contract partner, and then only for that damage which the latter has personally suffered. Though there are certain exceptions to this doctrine of privity, they are modest:

1. The contract obligee (*e.g.*, the last in a chain of sellers) may make claim for damages suffered by a third party to the extent he can demonstrate that the third party's damage is his own. This will normally be the case when the contract obligee, on the basis of the legal relationship existing between himself and the third party, is liable for the latter's damages.[7] But where there is no potential third-party liability on the part of the contract obligee, for example as the result of the absence of a contract relationship, the problem becomes acute. Thus, though there may be contractual liability of the seller to the purchaser, none exists toward the latter's family members, employees, or the like.

2. An attempt to break through the privity barrier is reflected in the writings of Tandogan and Thorens.[8] Both writers would support a third party right to recovery in those situations where a "shift of damages" has taken place, *i.e.*, where the damages are the third party's rather than the contract obligee's and this shift of damages has derived from a legal relationship between the third person and the contract obligee on the one hand, and a claim or right, with respect to the object of the transaction, on the other hand. Tandogan, in addition, would support the liability of the contract obligor where there has been a shift of damages to third persons who are in the "action circle" of the obligee, for example, employees and house quests.[9] The scope of the remedy so suggested, however, is kept modest. Tandogan suggests that the claim may be extended from the immediate seller to his supplier, but no further. Where products liability is involved, he would restrict the scope further to the immediate seller, and views remedies offered by non-contractual liability,

[7] So the Swiss Supreme Court; BGE 81 II 133; and the commentators: II von Tuhr, *Allgemeiner Teil des Schweizerischen Obligationenrechtes* Section 68, at 551; I Oftinger *Schweizerisches Haftpflichtrecht* at 50, n. 42; Thorens, *supra* note 1 at 31-32, Tandogan, *supra* note 1, at 307.

[8] Thorens, *supra* note 1 at 129; Tandogan, *supra* note 1 at 316.

[9] Tandogan, *supra* note 1, at 312, note 24, and 318-319, notes 49 and 50. *Cf.* Szladits, *supra,* note 1 at 239. Earlier definitional efforts of United States courts were not dissimilar; see Note, "Products Liability and the Choice of Law," 78 *Harv. L. Rev.*, 1454, and cases there cited.

as developed in American, English, and French law, as adequate.[10] Thorens, while prepared to hold the manufacturer liable for damages suffered by any member of the sales chain, would restrict the third party's standing to sue by making available to him only the right to have the contract obligee's claim assigned to him, and this only if there is a contractual relationship between the contract obligee and the damaged third party which would permit the latter to claim damages from the contract obligee.[11]

Tort Claims

In addition to giving rise to a contract claim, the manufacture and sale of defective products may also create liability under the law of torts. The precondition for such liability is that the causing of damage be "unlawful," *i.e.*, that a legal norm of general applicability has been violated.[12] Under Swiss law, such unlawfulness is always found when the injured party has suffered an invasion of an absolute subjective right—for example, the integrity of his life and limb or his property. Unlawfulness may also be a violation of general rules of the legal system—for example, the responsibility to take such measures as may be necessary to prevent injury to others. And finally, unlawfulness may also be found in cases of violation of unwritten rules of law, as in the principle that he who creates and maintains a dangerous condition must take precautionary measures to avoid harm to others.[13] An early decision of the Swiss Supreme Court illustrates these principles.[14] The plaintiff, an electric lineman, had suffered injury when his safety belt, which he alleged had been negligently repaired by the defendant's firm of harness makers, broke while he was working on a power pole. In holding for the plaintiff, the court took in consideration the following:

> The defective repair placed the plaintiff's life and limb in jeopardy, and while the legal system does not ban the creation of all risks to third parties, there is a responsibility to limit the risks. Where a risk to life and property is not usual, he who creates the risk is liable. In the instant case, since an employee of the defendant undertook the repair, it was left open to the defendant to exculpate himself by making a showing that he had

[10] Tandogan, *supra* note 1, at 307, 317-18, and 323.
[11] Thorens, *supra* note 1, at 110, 118-119.
[12] C.O. Art. 41, para. 1.
[13] Oftinger, *supra* note 7, at 112.
[14] 64 BGE II, 254

> used all care required in the circumstances to avoid the damage that resulted, or that the damage in question would have resulted even had such care been used.[15]

No such showing having been made, and with no proof offered that there had been proper instruction or supervision of the employee in question, or that he was skilled and reliable, the plaintiff was entitled to recover.

Where, however, the plaintiff's life does not so dramatically "hang" upon the defendant's product, the impetus toward granting relief may be limited. And the extent to which any manufacturer of an acknowledgedly defective product may be excused from liability is illustrated by the only other decision written by the Swiss Supreme Court in this sphere. In this, a 1964 case, the plaintiff had purchased for his restaurant an electric deep-fat fryer from the defendant, who was both manufacturer and seller of the product. As a result of the failure to insert a thermostatic sensing element correctly during the assembly of the apparatus, the unit overheated when used and set the frying oil on fire, which, in turn, damaged the restaurant substantially. The court held that plaintiff could not recover:

> With respect to liability under the sales contract, the statute had run. With respect to tort liability, while plaintiff had made the necessary showing that he had suffered an actionable injury, the defendant had been able to relieve himself from the rule of strict liability for injury resulting from an act of his employee by showing that he had taken all objectively appropriate measures to avoid such mishaps in that he: carefully selected his employees, gave them proper and adequate instructions for the performance of their duties, carefully supervised their activities, and had established a rational production operation.[16]

It would appear to be the exceptional manufacturer who would fail to meet this burden.[17]

In those situations where the manufacturer cannot demonstrate taking careful measures to prevent marketing a dangerously defective product, the normal contractual disclaimer of warranty, which any sales contract is likely to contain, may still serve to protect him from liability. Both Oftinger [18] and von Buren [19] view the exclusion of

[15] See C.O. art. 55, para. 1.

[16] 90 BGE II, 86.

[17] The more extensive German jurisprudence illustrates this in greater detail. See Szladits, *supra* note 1 at 237-39.

[18] *Op. cit. supra* note 7, at 414 *ff.*

[19] von Buren, *Schweiz. Obligationenrecht,* p. 407, note 206.

non-contractual (*i.e.*, tort) liability through a disclaimer as permissible, within the general limits permitted for contractual disclaimers by the Code.[20] Reasonably strict standards will be applied, however, in requiring specific language to exclude liability. The Swiss Supreme Court has recently held that a disclaimer which read:

> Guarantee. The seller extends a full factory guarantee pursuant to a separate guarantee policy; all further claims are excluded. . . .

was insufficiently clear to exclude liability for delivery of an automobile with a defective motor.[21]

Conclusion

Switzerland's courts, having relatively limited litigation in this area, may not be ruling for some time upon the question of liability for injury resulting from a defective automobile. If the issues were presented today, it seems clear that unless the plaintiff were "fortunate" enough to have been the defendant's contract partner, the prospect of success in suing on a contract claim would be limited. The tort claim might offer more hopeful prospects, but only if the courts require a substantially higher standard of care from the manufacturer of an automobile than from the manufacturer of other products.

[20] C.O. Art. 100 and 101.
[21] 91 BGE II, 344.