

## JUDICIAL PROTECTION OF DAMAGED PERSONS AGAINST PRODUCT SAFETY DEFECTS: “A COMPARATIVE STUDY IN THE EGYPTIAN AND FRENCH LAWS”

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**Abstract:** *Recently developed technological products and commodities challenge legal liability systems because they lack the elements of safety and security, exposing individuals to major risks and damages. In response, modern legislative policies must adopt new legal systems concerning damage from defective products. Although several laws have been passed, the ultimate goal of ensuring such safety can only be fulfilled through judicial protection and efficient law enforcement. This study focused on legal systems which have activated judicial protection for damaged persons against safety defects in a product. It was found that, in comparison with the Egyptian law, the French Objective Responsibility Act for Defective Products is the most activated legal system regarding individual safety assurance. This is due to its coherent structure of legal rules and provisions, specifically its ultimate goal of safety, its definition of defective products, and its stipulations regarding safety defects as the sole legal grounds for liability for damages from defective products.*

**Keywords:** *Compensation, safety defects, defective products, consumer protection law, Objective Responsibility Act, judicial protection*

### 1. INTRODUCTION

The rules of civil responsibility have always been primarily focused on the issue of defective products and commodities in terms of an economic viewpoint centred on economic benefit and feasibility. However, recent developments in manufacturing mechanisms, including the resulting products and commodities, have negatively affected the health of individuals, and so there is an urgent need for a change in the common theory on the defects warranty in civil law. In this sense, the rules on contractual liability have evolved to include the principle of commitment to contractual safety, as well as several other new dimensions concerning hidden defects. Furthermore, the rules on tort liability have been expanded to cover the principle of physical safety, to protect individuals lacking a contractual relation with either the producer or vendor. Despite these advances, several legal problems remain concerning the relationship between a contractual error and tort fault. In turn, these issues have negatively affected the stated legal ground for compensation claims initiated by the damaged party, and have also negatively affected several judicial solutions through which the damaged parties may be compensated.<sup>1</sup>

Moreover, the concept of a defect has also been developed further to focus more on an individual's safety against risk and damage from products, whether these affect their health or finances; hence, the level of deficiency in the general rules has increased in re-

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<sup>1</sup> CARBONNIER, J. The obligations. *Thémis*. 2000, Vol. 22, No. 295, p. 200.

sponse to several legal problems. Thus, there is a need for private legal systems to ensure an individual's safety against defects in all products and commodities, as well as to overcome the issue of differentiating between contractual liability and tort liability.<sup>2</sup> Naturally, some jurists are excited about the adoption in consumer protection law of a legal provision stipulating a commitment to safety against defects. The law is not limited to the issue of compensation as this is already granted to damaged parties by virtue of civil responsibility; rather, it includes other legal obligations to which producers must adhere to achieve certain preventive goals that cannot be fulfilled by the general rules of civil responsibility. Other jurists, however, have been more enthusiastic about the rules of objective responsibility, considering that these rules are mainly aimed at providing the consumer with actual protection against damage from defective products. Such protection is achieved via a fair claim addressing the deficiencies of the general rules of civil law, such as the following issues: the hidden defects guarantee, contractual liability, tort liability, and the responsibility for the safekeeping of things.

On this basis, the current study evaluates the French and Egyptian legal systems regarding their efficiency to activate judicial protection for damaged persons in claims of compensation for safety defects in defective products, considering that this judicial protection is common to the two legal systems.<sup>3</sup> The paper does not cover all procedures and measures of prevention included within the systems' consumer protection laws. Furthermore, there is no doubt that the key role of the judge will be highlighted in such unbalanced relationships or fields subject to constant development, such as the various fields of economic activities and the different relationships between production and consumption. Therefore, in assessing the two legal systems, we will prefer that which guarantees a positive role for the judge through the stipulation of certain controls and standards that guide the competent judge in their judicial oversight.<sup>4</sup> That is, the legal system which is deemed more effective and appropriate for all parties damaged by defective products is that which adopts the concept of the safety defect as legal grounds for compensation claims, rather than as a merely abstract term or concept that is difficult to apply. Such a legal system shall define and identify the safety defect as a purposive concept that clearly reflects the preventive objectives of the legislator. In addition, this legal system will also progress the judge's positive role in compensation claims for damages of products deemed as defective due to safety defects.

In light of the above, this paper compares the Consumer Protection Law and the Objective Responsibility Act for Defective Products from two perspectives: first, the basis of judicial protection against damages from defective products, i.e., safety defects; and, second, the aspects of the judge's positive role in compensation claims for damages from defective products.

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<sup>2</sup> ELHELALI, Z. H. G. The modern concept of defect in light of systems governing the producer responsibility: a comparative study. *Law Journal for Legal Studies and Research*. 2014, Vol. 8, pp. 6–75.

<sup>3</sup> HEMLADJI, J. Compensation for damages of defective products and its effect on the consumer protection: a comparative study. *Journal of Teacher Researcher of Legal and Political Studies*. 2021, Vol. 6, No. 3, pp. 1767–1786.

<sup>4</sup> ELKHASAWNA, T. O. The Legal Basis for Compensation: A Comparative Study. Doctoral Thesis, Amman Arab University, 2005, Jordan. In: *e-Marefa* [online]. [2022-10-22]. Available at: <<https://search.emarefa.net/detail/BIM-536894>>.

## 2. THE BASIS OF JUDICIAL PROTECTION AGAINST DAMAGES FROM DEFECTIVE PRODUCTS (SAFETY DEFECTS)

In consumer protection law, the modern concept of the safety defect has been adopted both as a classification and in the determination of its components, so that it can be easily applied to reality. That is, in Article 27 of the Consumer Protection Law, the Egyptian legislator has stipulated the forms and patterns of a safety defect in products; for example, the cause of such defects may be attributed to a defect in the product's manufacturing, design or marketing. In the French Objective Responsibility Act, the modern concept of the safety defect has been adopted using a definition that is more appropriate to the preventive objective sought by the legislative policy.<sup>5</sup> The French legislator has also adopted the standard of legitimate expectations, as anticipated by the public audience of consumers. This standard acts as a general directive to guide the judge, when enforcing the law, towards the spirit and purpose of the French legal system, while ensuring the judge's full and free discretion so that they may apply the law to reality.

### 2.1 The Basis of Judicial Protection in Consumer Protection Law

By virtue of the provision of Article 27 of the new Consumer Protection Law,

The producer shall be liable for all damages caused by the product, when it is proved that the damage has indeed been incurred due to a defect in the product, which could be attributed to the product's design, manufacturing or composition. In addition, the supplier shall be liable for all damages caused or incurred by the product due to the misuse of this product, if it is proved that the damage has indeed been incurred due to the supplier's failure to take enough precautions in order to prevent the damage or warn of its possibility. Moreover, the distributor or the vendor shall be liable for all damages caused or incurred by the product, if it is proved that the damage has indeed been incurred due to a defect attributed to the product's preparation for consumption, preservation, packaging, circulating or displaying.

Interestingly, this legal provision is similar to that of Article 67 of the new Trade Law No. 117 of 1999, in which some believe the Egyptian legislator has adopted the legal system of objective responsibility for defective products.<sup>6</sup> This means that the Egyptian legislator has established a private legal system for the liability of both the producer and distributor, based on the concept of objective responsibility regarding the idea of damage resulting from a defect in the product's design, manufacturing, preservation, packaging, method of display, or lack of warning against its potential risks; hence, such defects compromise the safety of the health and funds of the consumer.<sup>7</sup>

<sup>5</sup> GEORGES-ALBERT, C. Liability for fault and liability for defective products. 2005. In: *Legavox* [online]. 30. 11. 2021 [2022-10-22]. Available at: <<https://www.legavox.fr/blog/christophe-georges-albert/responsabilite-pour-faute-responsabilite-fait-31660.htm>>.

<sup>6</sup> Thus, Article 67(1) stipulates that both the producer and distributor of a product are liable before any party that incurs a physical or material damage caused by the product, if the damaged party proves that this damage was incurred due to a defect in the product.

<sup>7</sup> DEWIDAR, H. *Regulation of the Trade Law*. Alexandria: Monshaat El-Maaref, 2000, p. 60; SHAHIDA, K. *The Producer's Civil Responsibility: A Comparative Study*. Alexandria: Egypt, Al-Gamaa Al-Gadida Publishing House, 2007, p. 200.

In Article 27 of the Consumer Protection Law No. 181 of 2018, the Egyptian legislator has divided the defects of products and commodities into three categories: the first is concerned with defects attributed to the stage of design, manufacturing and assembly; the second includes defects concerning the stage of using the product; and, the third is concerned with defects which occur during the marketing of the product. In this regard, defects of manufacturing may be defined as the existence of certain shortcomings in a product, attributed to the failure of this product – in its final form – to fulfil the initial design set by the producer. Defects of design can be defined as the existence of shortcomings in a product due to the failure of this product – in its final form – to fulfil the potential of an alternative design which could have upgraded this product at a suitable cost; this alternative design would have provided more safety and security for the product. Furthermore, the defects could also be attributed to the marketing stage and hence these are identified as defects of marketing, defined as the presence of certain shortcomings in a product due to the failure of this product – in its final form – to fulfil the expectations of consumers for its safety and security; this is due to the existence of certain hazardous characteristics that could have been avoided by the producer, if a safer and more secure method of use had been provided, or a clear warning against these characteristics had been given so that the consumer could avoid them.<sup>8</sup>

A major issue with this law is linked to the Egyptian legislator's definition of a defect, as set forth in the Seventh Clause of Article 1 of the Definitions Part. That is, according to the Egyptian legislator, a defect refers to any shortcoming in the value or benefit of a product in accordance with its intended purpose; this defect necessarily leads to the consumer's full or partial deprivation from its benefit within the purpose for which it is made, including any shortcomings that might result from an error in the commodity's handling or storage. However, a product may have a defect in the elements of its safety and security that do not affect its value or purpose. For example, this could include: a lack of proper instructions concerning the negative side effects of some medication; the lack of proper safety seat belts in the back seat of a vehicle; or, painting children's toys with harmful chemicals. In addition, it is worth mentioning that the efficiency of any legal rules adopted by the legislator is mainly based on the true and honest expression of all dimensions and components of the concept addressed in these rules; thus, these rules must accurately and clearly reflect the actual reality of products deemed to have safety defects, so that these rules can be effectively linked to facts constantly being introduced by modern developments. Moreover, it seems that the Consumer Protection Law has adopted the concept of a safety defect not as an independent concept, but as a secondary concept within the framework of traditional concepts of civil law. In other words, this concept was not adopted as an independent legal grounds, meaning that the Egyptian legislator has lost the opportunity to form a direct link between the concept of a safety defect and the legal protection of all parties damaged by defective products.

On this basis, we conclude that the warranty of defects of design, manufacturing and composition will be received in this law pursuant to the principles of a hidden defects

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<sup>8</sup> ELHELALI, Z. H. G. *The modern concept of defect in light of systems governing the producer responsibility: a comparative study*, p. 7.

guarantee and nonconformity defects guarantee, rather than through the concept of product safety assurance as a separate concept independent from the general rules. In this sense, the judge may consider a defect of design and manufacturing to be the cause of a shortcoming that leads to the consumer's full or partial deprivation of the use and benefit from the product. That is, a commodity that does not provide the safety expected by the buyer, considering the nature and ordinary use of the sold item, shall be considered as defective for a defect that makes this commodity unfit for the use for which it is sold.<sup>9</sup>

Furthermore, there is no doubt that the theory of hidden defects guarantee has failed to provide the safety required by users and consumers of industrial products. This specific failure is mainly attributed to the fact that it is difficult to apply the terms of this theory in several cases, hence leading to the difficulty of proving the product's lack of safety, and negatively affecting the consumer's protection in this regard.<sup>10</sup> In certain cases, some jurists believe that the failure of this theory to provide the consumer with the required safety against risks and defects of industrial products is actually attributed to the fact that its main objective is to achieve the desired economic feasibility of sold items and products. As a result, all regulatory provisions of this theory have been drafted in the light of this economic goal, and so it has been difficult for judiciary to expand interpretations of the theory to avoid any deviation from the intended interpretation of legal provisions.<sup>11</sup>

As for defects concerning the stage of using the defective products, the legislator, pursuant to the said legal provision, has considered these defects from two perspectives as follows: a) the commitment to taking precautions; and, b) the obligation to inform and warn. In addition, it is clear that the legislator has linked these defects to the concepts of civil law, which involve both the preventive and economic aspects of an individual's safety.

Finally, as for defects at the stage of preparation for consumption and marketing, it seems that, for the legislator, these defects are associated with errors by professional distributors and vendors, especially regarding cases involving a lack of due diligence and precaution in the preparation of a product such that it is free of any defect. Hence, the consumer's safety is the sole driver behind the commitment to taking precautions and providing a warning. Moreover, the failure to inform may be considered the main axis for any faults at this stage, especially if the case involves a hazardous commodity.<sup>12</sup>

In light of the foregoing, it is clear that, by virtue of the Egyptian Consumer Protection Law, the nature of the judicial protection provided for persons damaged by safety defects in products has been significantly neglected; that is, the preventive purpose has not been expressed through a specific definition of a safety defect. In addition, the legislator has not stipulated any standards that could guide the judge towards taking the most appropriate path according to the legislator's ultimate goal; moreover, the approach stipulated by the legislator in the Consumer Protection Law undoubtedly limits the judge's discretion regarding consumer safety assurance.

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<sup>9</sup> MAHJOUR, A. G. The consumer's safety assurance against damages of defects in sold industrial products: a study in the Kuwaiti law as well as the Egyptian and French laws. *Law Journal*. Vol. 20, No. 4, p. 240.

<sup>10</sup> COLLART-DUTILLEUL, F., DELEBECQUE, P. *Civil and commercial contracts*. Paris: Dalloz, 2002, p. 296.

<sup>11</sup> MAHJOUR, A. G. *The consumer's safety assurance against damages of defects in sold industrial products: a study in the Kuwaiti law as well as the Egyptian and French laws*.

<sup>12</sup> SHAHIDA, K. *The Producer's Civil Responsibility: A Comparative Study*. p. 169.

Therefore, we may say that, in the Consumer Protection Law, the Egyptian legislator has failed to address the concept of safety as legal grounds for claims of compensation for damages from defective products. However, the legislator has addressed this concept from the perspective of certain regulatory rules for a set of controls over safety and security in products. The application of these rules is supervised by certain administrative authorities concerned with the product's quality and safety for the purpose of controlling the market. In other words, the Egyptian legislator has paid attention to the administrative control of product quality and safety before these products become available on the market, while leaving the issue of safety defects for the judiciary to determine and handle, pursuant to the general rules of civil law.

## 2.2 The Basis of Judicial Protection According to the Objective Responsibility Act for Defective Products

After passing Law No. 19 of May 1998, a new form of legal liability emerged in France based on the legal grounds of lack of safety in defective products. This legal liability is very different from contractual liability based on a commitment to safety assurance as it is more focused on the product itself rather than the nature, conduct and errors of the producer. In addition, the private legal system of this legal responsibility transcends the traditional distinction between contractual liability and tort liability, as it legally binds the producer to guarantee all damages from their products, whether there is a contractual relation between the damaged party and the producer or not.

In this regard, to ensure the fulfilment of the safety element, the French legislator defines the concept of a defective product by linking it to that of lack of safety. According to the principle of objective responsibility, the concept of a defect is basically concerned with the main goal of protecting the individuals, and such protection is not limited to the protection of their property but also their health and safety. Based on this definition of a defective product, the following can be considered safety defects: the lack of anti-shock air bags in modern vehicles; the lack of safety seat belts in the back seat of a vehicle; painting children's toys with harmful chemicals; the possibility of disassembling children's toys into small parts that could be swallowed, with the absence of any clear warning against the use of these toys by children younger than a certain age; or, the possibility of an interaction between the metal packaging used for certain food and the material provided in this packaging.<sup>13</sup>

In this context, it is worth mentioning that, according to French law, the lack of a safety and security defect does not have the same meaning as stated by the judiciary on the commitment to contractual safety assurance. That is, the common provisions of guarantee in the general rules are stipulated from a contractual perspective so as to achieve mere economic purposes; thus, it moves away from the preventive and protective purposes concerning the rules of producer responsibility for the consequences of their defective products.<sup>14</sup>

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<sup>13</sup> ELHELALI, Z. H. G. *The modern concept of defect in light of systems governing the producer responsibility: a comparative study*. p. 8.

<sup>14</sup> TARIA, M. The idea of the producer's objective responsibility as a compensatory mechanism for victims of defective product incidents: a comparative study in Algerian and comparative legislation. *Journal of Jurisprudence and Law*. 2013, No. 3, p. 309.

Furthermore, this legislative policy has undoubtedly restricted the ability of the judiciary to adopt new solutions based on the main goal of safety, as expected by all parties damaged by defective products. Prior to passing Law No. 19 of May 1998, the French judiciary did not hold the vendor responsible except in cases involving the presence of a true product defect compromising consumer safety. However, this new private legal system is predicated on the objective responsibility for products when these products involve any aspects that compromise consumer safety, even if the product does not have a true defect. In other words, the safety defect in products has a broader scope than the commitment to contractual safety, and hence it guarantees a broader scope for the application of objective responsibility for product defects.<sup>15</sup>

Moreover, the adoption of the standard of legitimate safety expectations by the French legislator has also added greater privacy to this legal system of responsibility for defective products, by stating certain legal controls which activate the positive role of the judge. This standard of legitimate safety expectations legally binds the producer to take precautions by adhering to standards, as follows: the standard technical specifications of production;<sup>16</sup> the standards of safety and quality; and, the product's method of use and the purposes of this use, especially for hazardous products. Hence, the producer is legally required to follow safety precautions and this is considered one of the most important legal controls of modern times.

Considering the above, it seems that modern legislative policies tend to adopt certain legal standards and controls of a technical and practical nature which involve some preventive aspects that legally bind the professional to follow preventive procedures. That is, to keep pace with rapid technological developments, the stated legal rules include certain legal controls involving technical content to achieve the desired balance between the producer and consumer. These legal controls over technical content help the judiciary to establish flexible legal rules which achieve a fair balance between new scientific developments and the factors of legal regulation.<sup>17</sup>

Consequently, the legitimate expectations control helps the judge establish a balance between the principle of economic freedom on one hand, including its required necessary expansion in the production of commodities and services, and, on the other, the principle of consumer rights protection, including the required elements of safety and security. In order to apply the adopted legislative policy, the judge's mission is mainly concerned with achieving the desired balance between any conflicting interests. This is achieved by determining the scope within which a reconciliation can be reached between the objectives and policies of producers in developing their manufacturing and production, while also maintaining the safety expectations desired by the consumer.

<sup>15</sup> GRYNBAUM, L. General obligation of safety and effective liability for defective products. *L'Argus de l'Assurance*. 2013, [2022-04-01]. Available at: <[www.argusdelassurance.com/dossier-ja/obligation-generale-de-securite-et-responsabilite-effective-du-fait-des-produits-defectueux.61393](http://www.argusdelassurance.com/dossier-ja/obligation-generale-de-securite-et-responsabilite-effective-du-fait-des-produits-defectueux.61393)>.

<sup>16</sup> Even if the commodity's conformity to the standard technical specifications of production is considered as an indication of the lack of any defect, the final assessment in this regard is subject to the judge's discretion, as and the judge may give preference to the legitimate expectations of the ordinary individual over the said technical standards concerning the product's design and execution; GEMAIE, H. A. *The producer's responsibility for damages caused by their defective products*. Cairo: Al-Nahda Al-Arabia Publishing House, 1991, p. 185.

<sup>17</sup> BERNARD, E. *The specificity of the legal standard in community law*. European Union Law Collection, 2010, p. 200.

On this basis, the adoption of legitimate safety expectations as a legal control means that only certain some allegations may be accepted as legal grounds for compensation claims. Hence, when considering the availability of legitimate expectations, the judge shall consider all the circumstances, i.e., these are not limited to the personal circumstances of the damaged person, but also include the circumstances surrounding the stages of producing and marketing the commodity in question. Thus, this standard is objective rather than subjective. In addition, the implementation of legitimate expectations as a legal control is characterised by relativity; for example, the evaluation of legitimate safety precautions for medications or hazardous products will undoubtedly differ from a similar evaluation for commodities of ordinary use that do not affect consumer health.

The concept of available for trading is also a major standard within the provisions of the Objective Responsibility Act for Defective Products. This standard represents the incident upon which the producer's responsibility for a product's lack of safety is based. In this sense, the judiciary has adopted this concept to broaden the circle of those liable for a product defect, and hence it supports the ultimate goal of protecting the damaged parties throughout the entire process of offering products for public consumption, from the beginning of a product's manufacturing until its final release to market.

The standard of being available for trading has also led to the avoidance of several legal issues concerning the application of the principle of safekeeping the transfer of things within the framework of the responsibility for the safekeeping of things, if the product is transferred from the producer's possession to someone else's. That is, pursuant to this scope of responsibility for defective products, the judge is no longer necessarily required to investigate the methods and causes behind the transfer of the authority and supervision of the safekeeping of the thing, or behind enabling someone else other than the producer to possess the product. However, the fact of making the product available for trading can be elicited in various ways once the product has been transferred from the producer's possession to someone else, or through the fulfilment of certain standards (e.g., it is necessary to prove that this transfer has taken place by virtue of the producer's free will and choice).

On this basis, if the product is released to market against the producer's will, this constitutes firm legal grounds for relieving the producer of any relevant responsibility. For instance, if a product that was stolen from the producer's custody and subsequently released to the market has caused damages, the producer may not be held responsible for such damages due to their fulfilment of one of the causes of acquittal. Hence, making the product available for trading is identified by its release from the production chain to the market upon the full and free will of the producer.<sup>18</sup>

Based on the above, we may say that the legal system adopted by the French legislator for the liability for defective products guides us towards the major ways in which an integrated legal system for responsibility is characterised by unity and harmony. This legal system adopts the concept of safety assurance as a clear and ultimate goal; it interprets this goal practically through a number of legal mechanisms that reflect the desired spirit of cohesion between all legal provisions. Hence, it activates the judge's role within the scope of claims of objective responsibility for damage from defective products.

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<sup>18</sup> Civil Cassation, January 24, 2006, Appeal No. 03-19.534, *Periodical Juris-Classeur*, general edition, 2006, II, 10082, note L. Grynbaum.



Nevertheless, the same cohesion between all legal provisions is not present within the Consumer Protection Law since this focuses more on product safety assurance through several regulatory rules. Their application is supervised by certain administrative authorities which control the markets by stating certain strict administrative and criminal penalties. Consequently, the increased focus on this purpose has led to the legislator's negligence not only of consumer warranties but also of the practical mechanisms that guarantee legal protection for the consumer, especially the adoption of an adequate legal system of proof.

### 3. ASPECTS OF THE JUDGE'S POSITIVE ROLE IN CLAIMS OF COMPENSATION FOR DAMAGES FROM DEFECTIVE PRODUCTS

Like the Egyptian Consumer Protection Law, the French Law has also stipulated that it is imperative for the consumer to prove both a product's defects and the relation between these defects and the damages incurred. This fact has been met with much criticism as it is more difficult for the damaged person to prove their claim. In the French Law, the situation is much better as it stipulates that the legal grounds for a compensation claim are specified, first, in the principle of commitment to safety, instead of in the hidden defects or nonconformity defects guarantee, and, second, in the commitment to take precautions or the obligation to inform. That is, when the claim's legal grounds revolve around the definition of a defect as a shortage or lack of safety and security, the judge can elicit sufficient evidence to establish the producer's responsibility, even when it is difficult to confirm the presence of a defect; hence, this lightens the burden of proof placed on the damaged party.

#### 3.1 The Inadequacy of the Consumer Protection Law Regarding the Requirements of the Judge's Positive Role

Obviously, the Consumer Protection Law has failed to link compensation claims and the safety defect, potentially because of several factors, such as legally binding the damaged parties to prove both the product's defects and the relation between these defects and the incurred damages. This is in addition to the lack of any legal standards or mechanisms that enable the judge to play a positive role in verifying the plaintiff's claim. Consequently, by virtue of this law, the seriousness of claims initiated by damaged parties for compensation for damages from defective products has mainly been based on the plaintiff's ability to prove the incurred damage and its relation to the alleged defect in defective products.

Practically speaking, it is acknowledged that the consumer's need to prove the producer's responsibility for the existence of defects in a product's design, manufacturing or composition has become even harder. In other words, there is no doubt that this stipulation places a greater burden upon the damaged party, who most likely lacks the required technical knowledge to enable them to prove these defects, not to mention the costs of hiring technical experts, to provide tangible evidence in support of the claim. Moreover, some jurists have explicitly pronounced that, without assuming the product's fault in this case, it would be doubtful whether the judge could hold the producer responsible for any damages or incidents incurred due to their defective products.<sup>19</sup>

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<sup>19</sup> SHAHIDA, K. *The Producer's Civil Responsibility: A Comparative Study*. p. 169.

In this regard, it is common knowledge that during the processing of initial materials, several errors may occur, whether of the raw material, the machines used, the circumstances of storage and transportation, or the different personnel handling all the materials throughout the production process, leading eventually to the existence of defects in the end product. These facts raise several questions concerning the difficulty of proving and determining the causes behind the defect at the stage of manufacturing. For example, we may question whether the defect was caused during the production process or was due to the initial materials used, or whether the defect was caused by the negligence of those in charge of production or by the surrounding environmental circumstances.

Furthermore, some jurists believe that the stipulation concerning the damaged party's proof of the existence of a safety defect in a product is in fact one of the most difficult and exacting issues for several reasons. First, proving a defect (regardless of whether a defect of design, manufacturing or marketing) is a precise and technical matter with most products (e.g., those of pharmaceutical industries, medical device manufacturing, or software products); hence, it is very difficult for the damaged party to determine such specialised details accurately. Second, in most cases, the issue of determining the existence or non-existence of defects in the product is often referred to certain authorities that are usually linked somehow to the producers. For example, these referees may be the owners of similar industries or technicians who have a network of interests with the producers, and thus their neutrality is affected.<sup>20</sup>

Second, the issue of identifying a product as defective is one of the most difficult tasks that can be assigned to the judge in terms of subject matter, especially concerning the scope of defects of design. The judge must balance two conflicting interests: the public users' interest in acquiring a product that provides more safety and security, and the producers' interest in avoiding further burdens concerning designs that might affect the commercial marketing of their products (whether regarding the end product's final cost after adopting the alternative design, or the appropriateness of this alternative design for the tastes of ordinary users).<sup>21</sup>

Third, linking the misuse of products to the issue of negligence or lack of precaution will also add further difficulty to the requirement of proof, as this could push the case towards tort liability instead of being a personal error. In fact, the same applies for the obligation to inform and warn, as it is easy for a professional to prove that they have indeed informed the consumer of the potential negative effects of defective products. Consequently, the damaged person finds themselves abandoned in a litigation process whose other litigant has significant economic and scientific influence that enables them to refute the consumer's arguments, and hence the administration of justice is negatively affected.

Finally, with no legal provision stipulating that compensation for damages from defective products is based on the firm legal grounds of the safety defect, the judge's authority is restricted in terms of eliciting more evidence to maintain the consumer's physical safety protection. That is, the purpose of safety against defects in products is a key motivation

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<sup>20</sup> ELHELALI, Z. H. G. *The modern concept of defect in light of systems governing the producer responsibility: a comparative study*. p. 19.

<sup>21</sup> *Ibid.*, p. 20.

driving the judiciary to adopt more protective solutions in favour of the damaged party. In addition, considering that the issue of eliciting judicial evidence is an aspect of the judge's discretionary role in proof, just as with other compelling evidence of proof, the judge plays a positive and effective role in investigating the disputed facts and adjudicating on the subject matter, based on the judge's personal discretion and conviction of the evidence.

### 3.2 The Adequacy of the Objective Liability Act Regarding the Judge's Positive Role

To survive and remain practical over time, it is necessary for any law to comprise within its legal provisions and stipulations the qualities of evolution and stability. These factors are usually represented by flexible standards added by the legislator to other strict legal rules, so that these rules do not obstruct development. Another significant factor concerns the judge's discretion concerning their enforcement of the provisions of law in accordance with the circumstances and conditions of each case. In this sense, the stated provisions of law may be used by the judge as a flexible tool to ensure the constant development of law and remain current with changing circumstances and conditions. Moreover, the idea of judicial discretion must also facilitate the achievement of justice and equality when enforcing the stated legal rules. In other words, when the judge is granted the required authority to adjudicate on a dispute considering the circumstances of each case, without bearing in mind a prior legislative obstacle that might restrict their discretion, then the judge will deliver true and actual justice, not just a nominal one.

In this regard, the judge is mainly concerned with two major tasks in claims of compensation for damages from products with safety defects, as follows: first, verifying all facts of the claim pursuant to the provisions of law; and, second, identifying which legal provision is applicable to the claim in question, if there are several provisions through the various private legal systems and general rules. These two tasks are clearly highlighted in the Objective Responsibility Act for Defective Products.

#### 3.2.1 The Judge's Role in Accommodating both the Objective Responsibility Act and the General Rules

The issue of identifying which legal provisions are applicable to the claim of compensation for damages from defective products is related to another issue concerning the conflict between these private provisions and the general rules of civil law. The major question which arises in this regard is how the French Court of Cassation handles the contention between the principle of objective responsibility, whose legal grounds are specified in the lack of safety defect on one hand, and the general rules of civil law on the other.

In this regard, the French Court of Cassation has ruled that the damaged party may not base their claim on the principle of commitment to contractual safety if the damaged party claims the absence of the two elements of safety and security in the disputed defective product.<sup>22</sup> The Court of Cassation ruled that if the damaged party so bases their claim, then it is not permissible to choose between the objective responsibility for defective prod-

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<sup>22</sup> Court of Cassation, Civil Chamber 1, March 17, 2016, Appeal No. 13–18.876. *The Bulletin*.

ucts and the civil responsibility for the safekeeping of things. That is, the plaintiff's resort to this claim as legal grounds automatically excludes the applicability of any general rules concerning the responsibility for the safekeeping of things.<sup>23</sup>

Those who support the rulings of the French Court of Cassation believe that the application of general rules shall be excluded if the damaged party means to use them for an end that could be achieved through the said private legal system, or if the plaintiff has based their claim on the same legal grounds on which this private legal system is founded.<sup>24</sup> On this basis, since the judge's positive role is dependent on having a reasonable judicial discretion regarding two major issues (i.e., verifying the evidence and identifying which legal provision is applicable in case of any conflict between the general and private rules), then we may say that adopting the claim of compensation for damages from defective products within the scope of objective responsibility provides the judge with the required latitude for these two tasks.

### 3.2.2 The Judge's Role in Proof

Since the damaged party is legally required to prove the lack of safety and security in defective products, a very difficult task in some cases, the judge shall attempt to elicit evidence to facilitate the task of the damaged party.<sup>25</sup> In this regard, judicial evidence plays a major practical role in any litigation, taking into consideration its wide variety and unlimited nature as well as the judge's broad discretion regarding its acceptance or dismissal. In addition, this judicial evidence eases the burden of proof required from the plaintiff in many cases. For instance, the Toulouse Court of Appeal ruled that the explosion of a car tyre that had recently been marketed was evidence of its lack of safety as expected by the consumer.<sup>26</sup> In addition, the High Court of Aix-en-Provence ruled that the breaking of a glass drawer represented a defect for which damages would be paid in accordance with the rules of objective responsibility for defective products.<sup>27</sup> As such, if the damaged consumer is required to prove the causation between a defect and the incurred damage, a task which could be hindered by many difficulties, then the judge may adopt and acknowledge evidence to settle the situation, especially with cases where the judge fails to find other causes explaining the occurrence of such defects.<sup>28</sup>

Some jurists believe that the French Court of Cassation demonstrated superb ingenuity and great flexibility regarding the proof or denial of an association, based on the adoption of certain clues elicited from the facts of the claim. For instance, a clear example can be demonstrated in the time association between contracting an illness while taking medication or being vaccinated, considering the medical history of the patient and their family, as well as similar effects experienced by other patients taking the same medication or vac-

<sup>23</sup> Court of Cassation, Civil Chamber 1, July 11, 2018, Appeal No. 17–20.154. *The Bulletin*.

<sup>24</sup> LEDUC, F. Competitions between special regimes and common law. *Civil Liability and Insurance*. 2012, No. 2.

<sup>25</sup> In this case, the technical reports of experts play a major role in proof.

<sup>26</sup> GRYNBAUM, L. (note) *Commentary No. 199*. Toulouse: Toulouse Court of Appeal, 2001, *Civil Liability and Insurance Review*.

<sup>27</sup> Tribunal de Grande Instance of Aix-en-Provence, Quick information from the Dalloz collection. 2001, p. 3092.

<sup>28</sup> BORGHETTI, J.-S. (note) Civil Cassation. 22 May 2008. *Bulletin Civil*. I, No. 147, *Review of Contracts*. (2008): p. 1186.

cine. Hence, the idea of probability is replaced by that of the inevitability or certainty of the causation, overcoming any difficulties that might hinder the claim.<sup>29</sup> However, as an exception, the French legislator stipulated in the Objective Responsibility Act that the burden of proof is transferred to the producer in some cases, where the producer is exempted from any liability, as in the following instances.

The first instance concerns making the product unavailable for trading. If it is proven that a defective product has not been made available to the market upon the free will and choice of the producer (e.g., it could have been stolen), this provides reasonable cause for the producer's relief of any responsibility. Hence, a product may not be considered available for trading by virtue of any temporary release; however, if the product has been released permanently to the market, the producer may not demand relief from responsibility.

The second instance is a lack of defects when making the product available for trading. The producer of a commodity may be relieved of any legal responsibility if: they prove that the product was free of any safety defect at the time it was made available to the market; or, they prove that the disputed defect was caused at a later time after its release to the market. Undoubtedly, it is not an easy task to prove the absence of a defect in a product at the time of its market release, especially with cases in which the defect appears several years afterwards.

Third, there is the instance of making the product unavailable for sale or any other economic purpose. This exception is concerned with a product that has been made available for trading by virtue of the producer's full and free will; however, its release to the market is not meant to achieve any economic or profitable purpose, i.e., the commodity is not made to be sold, leased or distributed in any way whatsoever. For example, the producer may submit their commodity to a laboratory to undergo safety checks before its release to the market.

The fourth instance concerns the product's conformity to laws and regulations. The producer may be relieved of any liability if they prove that their product conforms to all applicable legislative rules. However, the producer may not be relieved of the legal responsibility for their defective product if these defects appear during a period of ten years from the date of the product's market release, and it is proven that the producer failed to take all necessary precautions to protect the consumer from harmful outcomes. In this regard, it is worth mentioning that the period of ten years, as stipulated by the French legislator in the Second Clause of Article 1386/12, is the statute of limitations for a claim concerning the producer's responsibility for safety defects in their defective products.

Fifth, there is the instance of relief of responsibility due to risks of scientific development. In some cases, certain defects may not be detected in a product until it has been released to the market simply because science has not yet found a way to discover such defects. In this regard, it is worth mentioning that it is not easy to discover defects in technically complex products before their release. In other words, the producer may be relieved from the legal responsibility for defects in their commodity if the scientific and tech-

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<sup>29</sup> ELHELALI, Z. H. G. *The modern concept of defect in light of systems governing the producer responsibility: a comparative study*. p. 34.

nical knowledge at the time of making this commodity available to the market could not have enabled their detection.

Nevertheless, this case of relief from responsibility has been controversial, with those who support it believing that binding the producer to compensate for damages from unexpected risks negatively impacts the economic performance of producers. In contrast, its opponents believe that it is more important to guarantee consumer protection by compensating for the damages of such risks than to consider any economic conditions, considering that these risks will most likely cause severe damage to the consumer.<sup>30</sup> As a result of this controversy, the French legislator has restricted relief of responsibility, i.e., this acquittal may not be applied in all cases absolutely. However, two cases are excluded by the provision of Article 1386/12, as amended by Article 1245/11. First, the producer may not plead relief of responsibility based on the risk of scientific development in cases concerning products for the human body. In such a case, the producer must abide by their duty to investigate any risks that might be discovered by modern science in these products. Of course, this exclusion was stipulated in the aftermath of several scandals concerning transfusions of contaminated blood in France. Second, the risk of scientific development does not relieve the producer from the responsibility to follow up recent scientific developments and discoveries concerning their products. That is, if the risk of a commodity has been scientifically proven, the producer must immediately take all necessary precautions regarding consumer protection against these risks. In this sense, French law legally binds the producer to follow up their products on the market in the light of recent scientific developments investigating the quality, risk and impact of the same regarding consumer health. In turn, this follow-up legally binds the producer to warn consumers of these risks and to withdraw the affected products from all markets when necessary.

#### 4. CONCLUSION

After reviewing and studying several legal systems concerning the goal of safety assurance, the major conclusions are as follows:

The legal system of objective responsibility for defective products, as adopted by the French legislator, can be considered the most coherent and homogeneous system, mainly because the legislator has addressed producers through specific legal provisions that clearly reflect the legislative purpose embodied in the concept of safety assurance, considering that this purpose was obviously formulated in reality.

It is more appropriate to support the legal system of objective responsibility as its concepts are stipulated accurately and flexibly in a way that is more appropriate to recent industrial developments, including the outcomes of defective products that could affect the health and funds of individuals. In addition, the French legal system pays more attention

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<sup>30</sup> ELBARRAWI, H. H. *The Risks of Development between the Presence or Absence of Responsibility*. Cairo: Al-Nahda Al-Arabia Publishing House, 2008; VINEY, G. Responsibility in the case law of the Court of Cassation. *Colloquium*. 2006, Vol. 7; BERG, O. The concept of development risk in matters of liability for defective products. *Periodical Juris-Classeur*. 1996, p. 3945.

to the ongoing process of development by linking law to reality, i.e., it contributes effectively to the application of the legal concepts of the facts and disputes concerning the emergence of new defects.

The legal system of the objective responsibility for defective products, as adopted by the French legislator, is the most appropriate system for activating the requirements of providing judicial protection to all parties damaged by products with safety defects.

There is no better evidence for the French legislator's goal of activating the role of judicial protection of consumer safety than the adoption of the standard of the legitimate expectations of the consumer. In addition, the legislator has also managed to use this standard with other relationships or fields subject to constant development, such as the various fields of economic activity and the different relationships between production and consumption. Moreover, it is worth mentioning that the legislator's adoption of this standard grants the judge broad discretion, bestowing upon them the capacity of an expert. In other words, the judge cannot function automatically and blindly; however, a competent judge must perform certain brilliant mental tasks, as they cannot depend on the same fixed solution for all cases and instead must produce various solutions in accordance with the privacy of the submitted facts in each case. That is, the law is a living organism that must be granted enough latitude to evolve naturally with the changing developments of life.

The spirit of the Objective Responsibility Act has inspired the French judiciary with the legislator's adherence to protect the consumer as the weaker party in their relation to the producer, hence affecting the consumer's ability to provide enough evidence for their compensation claim. On this basis, the French judiciary has taken the initiative by adopting several means through which a ruling of compensation can be granted to the party damaged by products with safety defects.

As for the association between the Objective Responsibility Act and the general rules of civil law concerning the individual's safety assurance, according to this study, the French judiciary has taken into consideration the defect of lack of safety (i.e., the ultimate peak of objective responsibility) as the only legal grounds in claims of compensation for damages from products that lack safety and security. Hence, the application of the general rules of civil responsibility are excluded in each case when the plaintiff bases a claim on the defect of lack of safety.

Considering these findings, the following recommendations may be proposed to the Egyptian legislator:

The Egyptian legislator should adopt the Objective Responsibility Act for Defective Products as well as the Consumer Protection Law, whose legal rules are mostly regulatory. That is, the Consumer Protection Law is mainly concerned with administrative control to protect the consumer against risks from products and commodities. However, the goal of the individual's safety assurance against damages from defective products is the task of judicial oversight. Therefore, the French judiciary bases its rulings in this regard solely on the Objective Responsibility Act.

There is an urgent need to develop a clear definition of the concept of a safety defect in products, and this definition should include obvious and specific standards that can be easily adopted by the judiciary.

This law should also comprise controls linking its legal provisions to reality, so that the judge may enforce the law easily, e.g., the controls of legitimate expectations and making a product available for trading.

Egyptian civil law should be subject to certain amendments which accurately identify the nature of the relationship between general rules and private legal systems concerning safety assurance, to fulfil the ultimate goal of legal security.