

The International Comparative Legal Guide to:

# Product Liability 2008

A practical insight to cross-border Product Liability work



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# Switzerland

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## 1 Liability Systems

**1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?**

In Switzerland, product liability may be based on the Product Liability Act ("PLA") (see (a) below), tort (see (b) below) and contract law (see (c) below). A product liability claim may furthermore be based on statutes regulating specific kinds of products, industries or activities which contain product liability related provisions (see (d) below). Since the PLA provides only for a supplemental cause of action it does not affect any rights which a claimant may have based on other legal grounds. Thus, an injured person may base a claim on the PLA or alternatively on tort, contract or public law (Article 11 (1) PLA).

- a) The PLA provides for a strict liability of manufacturers, importers and suppliers for personal injuries and damages to items of property in private use caused by defective products. A product is defective pursuant to the PLA if it does not provide the safety which a person is entitled to expect. The provisions of the PLA resemble to a large extent the EEC Directive 85/374 on product liability.
- b) General tort law provides for a fault-based liability of any person who unlawfully causes damage to another (Article 41 et seq. of the Swiss Code of Obligations ("CO")). However, liability based on tort law is predominantly derived from the liability of the principal (Article 55 CO). Pursuant to this provision, a principal, e.g. a company, is liable for damages caused by its employees or other auxiliary persons in the course of their employment or business. With regard to this liability of the principal the law provides for a reversal of the burden of proof: it is not the claimant who has to prove the fault of the principal but the principal has to prove that he has taken all precautions appropriate under the circumstances in order to prevent damage of that kind. Due to the tough conditions as to such precautions set by the Federal Supreme Court, the fault-based liability of the principal comes in effect close to a strict liability. Since tort law provides a basis to recover a wider scope of damages compared to the PLA, it remains an important cause of action for product liability claims in Switzerland. Although the following comments mainly refer to product liability based on the PLA, references will therefore also be made to relevant aspects of other causes of actions, in particular tort.
- c) Under contract law damages may be recovered based on general contractual liability (Article 97 et seq. CO) or based on special contractual provisions, e.g. sales warranty (Article

197 et seq. CO) or the liability of the contractor (Art. 368 et seq. CO). While contractual liability is generally fault-based, Article 208 (2) CO exceptionally provides for the strict liability of the seller for direct damages. Damages can, however, in principle only be recovered based on contract law if the injured person and the defendant have a contractual relationship. Hence, contractual liability plays only a subordinate role in product liability litigation.

- d) Finally, product liability related damages can be recovered based on liability provisions of public law regulating specific kinds of products, industries or activities, e.g. Article 27 of the Explosives Act.

The civil procedure in cantonal courts is governed by cantonal codes of procedure (which differ to quite some extent, depending on the canton and the issue). In general, the following comments only refer to civil proceedings in the Canton of Zurich.

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

Switzerland does not operate any schemes of compensation for particular products.

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

Within the scope of the application of the PLA the "producer" is strictly liable for injuries and damages caused by a defective product. The statute provides for a broad definition of the term "producer" which includes (pursuant to Article 2 (1) PLA):

- the manufacturer of a finished product, the manufacturer of a component part as well as the producer of any raw material (lit a);
- any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer (lit b); and
- any person importing a product for sale, hire, leasing or any form of distribution in the course of his business into Switzerland (lit c).

Each supplier of a product is subsidiarily liable if he does not disclose the identity of the producer or the person who supplied him with the product and, if applicable, the importer upon request of the injured person within a reasonable period of time.

The claimant is burdened to prove that the defendant is a producer within the definition of Article 2 PLA.

In general, tort and contract law provide for a fault based liability of manufacturers and/or suppliers.

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

The PLA does not contain any provisions on the recall of defective products. However, such duty arises pursuant to legal doctrine under tort law (Article 41 and 55 CO). In Swiss law, legal doctrine - being defined as legal treatises written by scholars, university professors, lawyers etc. - has, in principle, the same relevance as case law (cf. Article 1 (3) Swiss Civil Code).

Pursuant to such doctrine, a producer has a duty to monitor its products after sale in order to take the appropriate measures if hitherto unknown sources of danger give rise to risk of damages. If a producer realises that his product might lead to damages, he has to take all appropriate measures to prevent potential future damages. This includes the obligation to, if possible, immediately change the design of the product or otherwise halt production and/or to change the relevant documentations and instructions. It furthermore obliges the producer to take all appropriate measures to prevent damages resulting from products already put into circulation, be it through the publication of new instructions and warnings or via a recall of the respective products.

Furthermore, statutes regulating specific kinds of products, industries or activities, contain duties to monitor, recall or warn if product defects are discovered, e.g. Art. 59 of the Pharmaceutical and Medicinal Products Act.

#### 1.5 Do criminal sanctions apply to the supply of defective products?

The PLA does not provide for criminal sanctions. However, criminal liability might arise under the Swiss Penal Code (SPC). In product liability cases criminal liability will usually arise from negligent bodily injury (Article 125 SPC) and involuntary manslaughter (Article 117 SPC).

Pursuant to Article 102 SPC, not only individuals, but also a company can be liable under the Penal Code if the responsible individual cannot be identified within the organisation and the criminal act occurred within the company's course of business.

Additionally, certain statutes governing special products, industries or activities provide for criminal sanctions (e.g., Article 13 of the Federal Act on the Safety of Technical Installations and Appliances).

However, the conditions for criminal sanctions differ from those of the PLA, tort and contract law. A liability arising under the latter therefore does not lead automatically to criminal sanctions.

## 2 Causation

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

In order to establish a claim under the PLA, it is for the claimant to prove that the product did not provide the safety that one is entitled to expect as well as the damage. The claimant furthermore has to show that the defendant is a producer within the definition of Article 2 PLA.

While in tort the burden to prove fault is usually on the claimant (Art. 41 et seq. CO), this rule is significantly modified in product liability cases since these are predominantly based on the liability of the principal. For the latter cause of action the law provides for a reversal of the burden of proof of fault: it is not the claimant that has to prove the fault of the principal but the principal has to prove

that he has taken all precautions appropriate under the circumstances in order to prevent damage of that kind.

For claims based on breach of contract (Art. 97 et seq. CO) the defendant is generally burdened to prove the absence of fault.

Under all product liability regimes it is for the claimant to prove his damage and a causal link between such damage and the defect or breach of duty.

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

In order to establish liability, the claimant seeking relief has to prove a so-called "adequate causation" between the defect of the product and the injury or damage. A defect constitutes an adequate causation for an injury or damage if the defect is in accordance with everyday experience and the usual course of events suitable to cause the damage. The damage therefore has to be caused by the defect to a substantial degree, mere natural causation is not sufficient.

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

A person can only be held liable if it can be proven that he is a producer within the definition of the PLA. However, each supplier of a product is subsidiarily liable if he does not disclose the identity of the producer or the person who supplied him with the product. Therefore, an injured person can recover the damages from the supplier if it cannot be established which of several possible producers manufactured the defective product.

If more than one producer contributed to the defect they are jointly and severally liable. The claimant does not need to establish which of these single contributions effected the damage.

There is no market-share liability in Switzerland.

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

Pursuant to Article 4 (1) PLA, a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account. One circumstance to be taken into account is, according to the exemplary enumeration of Article 4 (1) PLA, the presentation of the product. "Presentation" is widely interpreted and includes all kinds of information, advice and warnings issued by the producer.

In general, the producer of a product is obliged to instruct consumers and users on how to use the product safely and warn regarding potential dangers. A product which is otherwise free from defects can still be legally defective, if the producer failed to instruct the consumer properly. On the other hand, a product with an inevitable residual risk can be legally free from defect if the producer issues proper instructions and warnings. However, such instructions and warnings can not eliminate other defects, in particular design and manufacturing defects, of a product.

The PLA does not provide for the principle of “learned intermediary”. In general, it is the responsibility of the producer to ensure that all necessary information and warnings reach the consumer. If a failure to instruct or warn is an adequate cause to effect the damage, the producer can be held liable.

### 3 Defences and Estoppel

#### 3.1 What defences, if any, are available?

Pursuant to Article 5 (1) PLA a producer is not liable if he proves:

- that he did not put the product into circulation (lit a);
- that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him (lit b); or
- that the defective product was neither manufactured for sale or any other form of distribution for economic purposes nor manufactured or distributed in the producers’ course of business (lit c).

A producer of raw material or of a component is not liable, if he can show that the defect resulted from the design of the product in which the raw material or component was incorporated or that the defect resulted from the instructions given by the producer of the final product (Article 5 (1) PLA).

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

Pursuant to Article 5 (1) lit e PLA the producer is not liable if, based on the state of scientific and technical knowledge at that time the product was put into circulation, one was not in a position to discover the defect.

The producer bears the burden of proof that the defect was not discoverable at the time it was put into circulation.

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

Under the PLA a producer is not liable if he proves that the defect occurred due to compliance with mandatory regulations issued by the public authorities (Article 5 (1) lit d).

However, a producer is obliged to design and manufacture a product according to the latest state of scientific and technological knowledge. The compliance with existing voluntary standards does therefore not exempt from liability if they do not represent the latest state of scientific or technological knowledge.

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

In general, judgments only have legal effect between the parties to the proceedings. Different claimants can therefore re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage in separate proceedings. However, although prior judgments have no legal effect on later proceedings, they can influence the decision of the court to a substantial degree.

#### 3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

Article 7 PLA provides for a joint liability for all persons liable for damages resulting from a defective product, independent of the legal basis of such liability. Where a damage is caused by a defendant and a third party, the defendant and the third party are therefore jointly and severally liable, irrespective of their individual contribution to the damage. However, the defendant can seek recourse from a liable third party for the damages paid to the claimant. It is at the discretion of the court to determine whether and to what extent there is such a right of recourse against a third party.

In general, the recourse takes place by means of a subsequent separate proceeding. In the initial proceeding, the defendant may seek the assistance of a potential liable third party by issuing a third party notice. However, such a third party notice cannot lead to a liability of a third party in the first proceeding but only means that the primary judgment against the defendant will have legal relevance in the recourse proceedings against the third party.

The recourse is subject to the statute of limitation applying to the initial claim.

#### 3.6 Can defendants allege that the claimant’s actions caused or contributed towards the damage?

Pursuant to Article 44 CO, the judge may reduce or completely deny any liability for damages if circumstances for which the damaged party is responsible have caused or aggravated the damage. These provisions of tort are pursuant to Article 11 (1) CO applicable on claims based on the PLA as well.

### 4 Procedure

#### 4.1 In the case of court proceedings is the trial by a judge or a jury?

There are no juries in civil matters in Switzerland. All cases are therefore tried before a judge.

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

The court does not have the power to appoint technical specialists to sit with the judge. However, special courts, e.g. the Commercial



Court in Zurich, partly consist of lay judges experienced in the industry of the case at hand.

- 4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?**

Swiss procedure laws do not provide for class action mechanisms.

However, claimants may bring a claim against the same defendant together as a group of claimants if the cause of action is sufficiently similar or identical, the same court is competent for all claims and if the same procedure is applicable to all individual claims.

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

Claims cannot be brought by a representative body in product liability litigation.

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

Litigation is predominantly conducted in writing. In an "assertion phase" the parties present the facts of the case to the court by exchanging briefs and by submitting documentary evidence. In a subsequent "evidentiary proceeding" the court takes evidence (on relevant and disputed facts that cannot be proven sufficiently by documentary evidence) in a hearing. These hearings usually take hours rather than days.

After submission to the court, the statement of claim is usually served on the defendant within a short period. The court sets a time limit by which the defendant has to submit his statement of defence. The subsequent (second) submissions of the claimant and of the defendant are subject to the same procedure.

The hearing to take evidence usually takes hours rather than days.

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

There are no preliminary trials in Switzerland.

- 4.7 What appeal options are available?**

Generally, the cantons are divided into jurisdictional districts with District Courts operating as courts of first instance. Cantonal Superior Courts serve as appellate bodies for judgments rendered by these District Courts but also as courts of first instance for a limited amount of subject matters and claims. Some cantons - Zurich, Bern, St.Gall and Aargau - have established a specialised Commercial Court which has sole cantonal jurisdiction over commercial matters. Only in the Cantons of Zurich and St.Gall there is, additionally, a Court of Cassation which reviews judgments rendered by the Superior Court and the Commercial Court.

The Swiss Federal Supreme Court is Switzerland's highest court and the sole federal court in civil matters. Final cantonal decisions may be appealed to the Swiss Federal Supreme Court for violation of federal law if the amount of the judgment exceeds CHF 30,000.

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

The court may appoint experts to assist it in considering technical issues. Such expert opinions are introduced to the proceedings as means of evidence. The court is free to determine the weight to be given to such expert opinion, as the court is free in weighing all presented evidence.

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

There are no pre-trial depositions. Witness statements and expert reports are given in an evidentiary hearing (see question 4.5) and are not exchanged prior to such hearing.

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

There are no pre-trial discovery procedures in Switzerland and there is, in general, no obligation to disclose documents and other evidence before the evidentiary proceedings (see question 4.5).

However, pursuant to the Code of Civil Procedure of the Canton of Zurich parties should file documentary evidence in their possession to their briefs and/or make reference to any evidence they wish to rely on.

On request of a party, the court may order a party to the proceedings as well as a third party to produce documents in its possession if the requesting party wishes to rely on these documents as evidence (and if the court regards the issue as relevant).

- 4.11 Are alternative methods of dispute resolution available e.g. mediation, arbitration?**

Alternative methods of dispute resolution, e.g. mediation or arbitration are available.

## 5 Time Limits

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

The limitation periods differ between the various legal grounds of liability.

Claims for the recovery of damages brought under the PLA are subject to a relative statute of limitations of 3 years which period begins to run from the day the claimant became aware or reasonably should have become aware of the damage, the defect and the identity of the producer (Article 9 PLA). Additionally, Article 10 PLA provides for an absolute statute of limitations barring any claims that are brought later than 10 years after the defective product that caused the damage was put into circulation.

Claims based on tort law are subject to a relative statute of limitations of one year after the day the claimant was aware of the damage and the liable person (Article 60 para. 1 CO) and to an absolute statute of limitations of ten years after the tortious act.

The general statute of limitations for contractual claims is ten years. However, a claim based on sales warranties is barred one year after

the delivery of the purchased product and furthermore requires an immediate notice of defects by the buyer.

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

See question 5.1.

The age or condition of the claimant does not affect the calculation of any time limits. Statutes of limitations are regulated solely by federal law and courts have in general no discretion in applying these time limits.

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

Pursuant to Article 9 PLA the relative limitation period of three years begins to run from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. Therefore acts of concealment or fraud affect the commencement of the relative limitation period. However, such acts do not affect the absolute limitation period of 10 years (see question 5.1). If the tortious act of the producer constitutes concurrently a criminal offence, the longer limitation period of the penal code is also applicable to civil claims based on PLA and tort law (Art. 60 (2) CO).

If the buyer is wilfully deceived by the seller, an omission of notification of defects by the buyer does not limit the sales warranty (see question 5.1).

## 6 Remedies

- 6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?**

In general, the PLA as well as tort and contract law provide for monetary compensation of damages caused by defective products.

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

Pursuant to Article 1 (1) lit a PLA compensatory damages are available for all damages caused by death or personal injury. Furthermore, compensation for damage to, or for destruction of, any item of property other than the defective product itself, provided that the item of property is of a type ordinarily intended for private use or consumption and was used by the claimant mainly for his own private use or consumption is available based on the PLA (Article 1 (1) lit b). However, a producer is only liable for damages in excess of CHF 900 to such property (Article 6 (1) PLA). Since the PLA provides only for a supplemental cause of action, damages that are not recoverable under the PLA may be claimed based on other legal grounds, in particular tort or contract law.

Based on tort liability all damages caused by death or personal injury as well as all damages to property other than the defective product itself, in particular damages to commercially used property, as well as other damages can be recovered. Furthermore, a judge may award, based on tort law, an adequate sum of money as reparations in case a person has been killed or has sustained bodily

injury (Article 47 CO). The judge will base his decision regarding the award of reparations mainly on the degree of the injury and the degree of fault of the tortfeasor.

Damages to the defective product itself can only be recovered based on contract law (e.g., Article 97 et seq. and 197 et seq. CO).

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

There is neither case law nor doctrine establishing the recoverability of costs of medical monitoring in circumstances where the product has not yet malfunctioned and caused injury.

- 6.4 Are punitive damages recoverable? If so, are there any restrictions?**

Punitive damages are not available in Switzerland and are considered incompatible with Swiss public policy. Pursuant to Article 135 (2) of the Federal Act on Private International Law ("PIL") a Swiss court may not award punitive damages even if the applicable foreign substantive law provides for such damages.

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

There is no maximum limit on the recoverable damages.

- 6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?**

The settlement of a claim is accomplished by means of a private contract. In order to have a procedural effect on ongoing court proceedings, i.e. the termination of the proceeding, the contract has to be filed with the court. In the canton of Zurich the court is obliged to examine the contract with regard to legal permissibility and clearness before it can approve the settlement and end the proceedings.

- 6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the Claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the Claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?**

Pursuant to Article 72 et seq. of the Federal Act on the General Part of the Social Security Law, insurance carriers subject to this law (e.g. compulsory health insurance, unemployment insurance, accident insurance and disability insurance) can seek recourse for treatment costs, unemployment benefits or other costs from any person liable for these damages. The claim against such person is subrogated to the insurance carrier in the moment of the damaging event. The injured party is, therefore, not entitled to recover these damages from the liable person directly.

## 7 Costs / Funding

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

The loser pays rule applies. The successful party can recover its legal costs (attorney fees and expenses) from the unsuccessful party. Whilst the unsuccessful party has to bear all court fees or other incidental expenses, the amount of legal costs (attorney fees and other expenses) to be compensated is governed by a statutory tariff schedule and mainly depends on the amount at stake.

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

A party can be exempted from paying court costs if it can show that it is unable to pay these costs and that the case at hand is not without reasonable chance of success. If necessary for the protection of the rights of such a party, upon request, the court may appoint an attorney at no cost for such party.



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

See question 7.2.

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

Contingency fee arrangements with attorneys are not permissible in Switzerland. However, attorneys may enter into an arrangement as to success fees, but only in addition to a non-conditional, basic remuneration (which must, however, cover at least the attorney's costs and expenses and also contain some profit element).

- 7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Parties may fund litigation by third parties and may promise in return a share of the result to such third parties.

## 8 Updates

- 8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in Switzerland.

There are at present no new peculiar cases, trends or developments in Product Liability Law in Switzerland.



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## Walder Wyss & Partners Attorneys at Law

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