THE PRODUCT REGULATION AND LIABILITY REVIEW

Tenth Edition

Editors
Chilton Davis Varner, Madison Kitchens and Franklin Sacha

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

In today's global economy, product manufacturers and distributors face a dizzying array of overlapping and sometimes contradictory laws and regulations around the world. A basic familiarity with international product liability is essential to doing business in this environment. An understanding of the international framework will provide thoughtful manufacturers and distributors with a strategic advantage in this increasingly competitive area. This treatise sets out a general overview of product liability in key jurisdictions around the world, giving manufacturers a place to start in assessing their potential liability and exposure.

Readers of this publication will see that each country's product liability laws reflect a delicate balance between protecting consumers and encouraging risk-taking and innovation. This balance is constantly shifting through new legislation, regulations, treaties, administrative oversight and court decisions. However, the overall trajectory seems clear: as global wealth, technological innovation and consumer knowledge continue to increase, so will the cost of product liability actions.

This edition demonstrates how countries sought to maintain that delicate balance between consumer protection and innovation in 2022, particularly with respect to cutting-edge technological, supply chain and environmental issues. In the autumn of 2022, the European Commission took a significant step by publishing a draft revision of its 37-year-old Product Liability Directive. The revised Directive would extend product liability law not only to typical manufactured products, but also to digital products such as software and artificial intelligence systems. In addition to expanding the substantive reach of the Directive, the proposed draft would also ensure that business entities based in the European Union can be held liable for a defective product, even if the product is purchased from a manufacturer outside the European Union. That change reflects the modern global supply chain system, where products are often manufactured in one nation and sold in another through third-party distributors or fulfilment companies. Under the EU proposal, any natural or legal person who modifies a product (for instance, through a software update) or a fulfilment service provider can be liable for damage from a defective product. This change could dramatically expand companies' exposure to product liability actions. In addition, the draft Directive also includes consumer-friendly procedural changes, including requirements that manufacturers disclose evidence, flexibility for filing deadlines and a reduction in the burden of proof in complex cases (such as pharmaceutical actions). Spain has already taken steps to implement the new rules set out in the Directive.

Another theme of this edition reflects growing concerns about environmental sustainability and consumer health. For instance, France enacted new rules with the goal of promoting the 'circular economy', in which manufacturers produce goods with the intention that those goods will be recycled and reused, therefore reducing waste and promoting

sustainability. To achieve that goal, France enacted a rule that requires certain household products to include a label that informs consumers about the environmental impact of the product. The US government took significant steps in 2022 to regulate per- and polyfluoroalkyl substances (PFAS), commonly known as 'forever chemicals', with the goal of reducing the presence of PFAS in the environment and requiring companies to pay for clean-up costs. Those regulatory shifts likely augur more litigation on this front in the United States.

Although product manufacturers face a heightened regulatory environment across the globe, particularly for hot-button technological and environmental issues, they also notched important wins in the courtroom in 2022. Manufacturers of the heartburn drug Zantac scored a massive victory in the United States in a mass tort litigation arising from allegations that the drug's active ingredient causes cancer. A federal court granted the manufacturers' motions to exclude the plaintiffs' experts who sought to prove a link between Zantac and cancer, finding that no scientist outside the litigation had found that connection. The court's decision effectively ended tens of thousands of lawsuits, put the plaintiffs on the defensive in other Zantac-related lawsuits throughout the United States, and underscored the critical (and sometimes dispositive) role that experts play in product liability cases. And in a case involving asbestos liability in the construction context, Japan's Supreme Court held that asbestos manufacturers were not required to issue warnings about asbestos in building materials. Despite those victories, litigation challenges remain for product manufacturers. For example, Australia saw the removal of certain requirements for the operators of class action litigation funders, which will make it easier for plaintiffs to bring lawsuits. This litigation funding continues to grow in various jurisdictions, especially in the mass tort context. Those types of developments throughout the world underscore the need for product manufacturers to remain abreast of legal and regulatory changes in all jurisdictions where they operate or sell products.

This edition covers 10 countries and territories and includes a high-level overview of each jurisdiction's product liability framework, recent changes and developments, and a look forward to expected trends. Each chapter contains an introduction to the country's product liability framework, followed by four main sections: regulatory oversight (describing the country's regulatory authorities or administrative bodies that oversee some aspect of product liability); causes of action (identifying the specific causes of action under which manufacturers, distributors or sellers of a product may be held liable for injury caused by that product); litigation (providing a broad overview of all aspects of litigation in a given country, including the forum, burden of proof, potential defences to liability, personal jurisdiction, expert witnesses, discovery, apportionment, whether mass tort actions or class actions are available and what damages might be expected); and the year in review (describing recent, current and pending developments affecting various aspects of product liability, such as regulatory or policy changes, significant cases or settlements, and any notable trends).

Whether the reader is a company executive or a private practitioner, we hope that this edition will prove useful in navigating the complex world of product liability and alerting you to important developments that might affect your business.

We wish to thank all the contributors who have been so generous with their time and expertise. They have made this publication possible.

Chilton Davis Varner, Madison Kitchens and Franklin Sacha
King & Spalding LLP
Atlanta
March 2023

Chapter 9

SWITZERLAND

Frank Scherrer and Marcel Boller[1]

I INTRODUCTION TO THE PRODUCT LIABILITY FRAMEWORK

In Switzerland, product liability is governed mainly by the Product Liability Act (PLA), contract law, general tort law and criminal law.

Although Switzerland is not a Member State of the European Union, its product liability and product safety legislation to a large extent implement EU legislation. The PLA is based on Directive 85/374/EEC on liability for defective products.

Until the PLA came into effect in 1993, product liability was mainly governed by the rules on contract law and tort law. The PLA does not affect other legal rights.[2] Therefore, in addition to the rules of the PLA, the rules of the Swiss Code of Obligations on contract and tort law can still apply if a product is defective. A claim may be based on different legal grounds. In addition, a person responsible for a defective product can be subject to criminal liability.

According to the PLA, a producer is liable if a defective product leads to the death or injury of a person, or damage to, or destruction of, property for private use.[3]

The following persons are deemed to be producers:

a the manufacturer (in whole or in part) of the defective product;
b any person who applied their name or trademark to the product;
c any person who imported the product for commercial distribution; and
d the person who supplied the product, if the producer (at items (a) to (c)) cannot be identified.[4]

According to the PLA, a product is deemed to be defective if, at the time it is marketed, it is not as safe as it can justifiably be expected to be, taking into account all circumstances. Special consideration must be given to:

a the ratio between benefit and risk;
b the method and manner used to present the product (particularly the product information);
c the use of the product that can be reasonably expected; and
d the point in time the product was placed on the market.

1 Frank Scherrer is a partner and Marcel Boller is a counsel at Wenger Vieli Ltd.
2 Article 11, Product Liability Act (PLA).
3 id., Article 1.
4 id., Article 2.

The subsequent launch of an improved product on the market does not in itself make an older product defective.[5] In a decision of 2013, the Federal Supreme Court clarified that a lack of functionality of products that serve to protect against dangers, such as fire extinguishers, is also to be qualified as a defect, although, strictly speaking, the lack of functionality does not concern the safety of the extinguisher as such.[6]

The Product Safety Act of 2009 (PSA) and many other administrative laws and corresponding ordinances contain rules on conformity assessments and on standards and proceedings that specific products have to fulfil to be considered safe. To a large extent, these rules refer to or implement EU or international harmonised standards and proceedings. The PSA provides in its Article 6 that the applicable technical standards are published in the Swiss Federal Gazette.

II REGULATORY OVERSIGHT

In Switzerland, administrative laws grant different regulatory agencies the authority to enforce legal rules on product safety. The regulatory authorities' competence depends mainly on the nature of the product. On the basis of the federal structure of Switzerland, there is often also a cantonal authority competent for enforcement of the legal rules. Prominent authorities are the Federal Food Safety and Veterinary Office, which is competent in the fields of food safety, nutrition, cosmetics and animal health, and the Federal Inspectorate for Heavy Current Installations, which is competent in the fields of electrical products, domestic installations and heavy-current installations.

The PSA is applicable if no other federal legal rules on the safety of products apply.[7] The State Secretariat for Economic Affairs (SECO) is responsible for coordinating the enforcement of the PSA.[8]

According to the PSA, the manufacturer or other distributors (importer, retailer or service provider) of consumer products have to notify the competent authorities if they have reason to assume that their product is a danger to the health or safety of users or third parties.[9] Notification can be made using the form provided on the SECO website.[10] Product recalls can be published on the Federal Consumer Affairs Bureau website free of charge.

It is also possible for consumers, assessment bodies and authorities to notify the SECO if they suspect a product to be defective.

The competent authority can take the necessary measures to ensure the safety of products, such as inspecting products, banning the distribution of or confiscating certain products, and issuing warnings about certain products.[11]

The competent authority can even prohibit products that are in line with applicable EU harmonised standards if the authority comes to the conclusion that a product does not meet health and safety requirements. In a 2017 case, the Federal Supreme Court held that, first, the product's compliance with the requirements of the applicable harmonised standard

5 id., Article 4.

6 BGE 139 II 534.

7 Article 1, Section 3, Product Safety Act (PSA).

8 Article 3, Ordinance on Product Safety.

9 Article 8, Section 5, PSA.

10 www.seco.admin.ch/seco/de/home/Arbeit/Arbeitsbedingungen/Produktsicherheit.html.

11 Article 10, PSA.

has to be assessed. Second, it must be assessed on whether the risks spotted by the competent authority are addressed by the standard. If this is not the case, the producer must prove that the product meets safety requirements. If the risks in question are addressed by the standard, the presumption of conformity applies. This presumption may, however, be proven wrong by the competent authority. In the case at hand, the Court came to the conclusion that the machines in question did not meet the basic health and safety protection requirement that reasonably foreseeable mishandling should be taken into account when constructing the machines (a requirement that is not taken into account by the standard SN EN 474-1 on earth-moving machinery either).[12]

Apart from the PSA, sector-specific federal laws provide for similar rules. For example, the Swiss Agency for Therapeutic Products (Swissmedic) is the competent authority in the field of the safety of medicinal products and medical devices. The Federal Act on Medicinal Products and Medical Devices vests Swissmedic with broad competence for ensuring the safety of these products.

As many different authorities are competent in the field of product safety, it is often not entirely clear to the distributor or manufacturer which agency has to be notified in the event of product defects or which agency is authorised to enforce legal rules on product safety.

III CAUSES OF ACTION

Actions for product liability may be based on the PLA, general tort law and contract law. Furthermore, criminal provisions may apply. Federal and cantonal laws governing certain products or activities, such as railways or explosives, may also serve as a basis for product liability claims.

Under the PLA, the manufacturer is liable for damages in the event of death or personal injury or damage to things that are intended for private use or consumption and that have been used mainly for private purposes. Under the PLA, the manufacturer is not liable for damage to the defective product itself. To prevail in a claim based on the PLA, the plaintiff must generally show the following elements: the damage, the defect and adequate causation of the damage by the defective product.

Under contract law and tort law, damage caused by a breach of contract or an illegal act must be compensated. To prevail in a claim based on breach of contract or general tort law, the plaintiff must generally show the following elements:

a the damage;
b the breach of contract or breach of a protective legal provision;
c adequate causation of the damage by the breach of contract or breach of a protective legal provision; and
d a fault of the liable person (intent or negligence).

In the case of breach of contract, the fault is presumed and the contract partner must prove that no fault is imputable to it. Unless the state is damaged itself, the government may not start civil actions for product liability.

12 BGE 143 II 518, E. 5.8.

In cases of intentional or negligent distribution of a defective product, the provisions of the Swiss Criminal Code may apply, in respect of common assault, endangering of health, serious assault or manslaughter through negligence. Penalties for these crimes extend to a 10-year custodial sentence (in cases of intentional serious assault).

The PSA provides penalties (a fine of up to 40,000 Swiss francs) for putting into circulation a product that does not fulfil the requirements of the PSA, if the safety or health of the user or third parties is thereby endangered. Various sector-specific laws also contain criminal provisions.

Companies can generally be held criminally liable if a criminal act is committed in the exercise of commercial activities in accordance with the purpose of the corporation and if it is not possible to attribute this act to any specific individual owing to inadequate organisation of the company.[13] In these cases, a fine of up to 5 million Swiss francs can be imposed on the company.

IV LITIGATION

i Forum

Product liability claims are tried before the general civil court system. The system is partly regulated by cantonal law; thus, there are some local variations. There are four distinct levels of ordinary civil courts:

a the local conciliation authority;
b the local court of first instance;
c the cantonal high court; and
d the Federal Supreme Court.

With certain exceptions, the claimant must start by initiating a mandatory conciliation proceeding. The conciliation authority will try to reconcile the parties in a conciliation hearing.[14] The parties must appear in person at the conciliation hearing but may be accompanied by a legal representative. Parties domiciled outside the canton or in a foreign country are exempt from the obligation to appear in person and may send a representative on their behalf.[15] The conciliation authority can, on petition, issue decisions on monetary claims if the value of the claim does not exceed 2,000 Swiss francs.[16] For claims of a higher value, the conciliation authority has no competence to decide on the merits of the case.

The local courts of first instance are competent to hear civil cases for which no reconciliation was achieved before the conciliation authority. Court decisions are rendered by one or several judges, depending on cantonal law and the value of the claim.

There are no jury trials in Switzerland for civil lawsuits. A civil trial is commenced by filing a written statement of claim to the local court of first instance, within three months of authorisation to proceed being granted by the conciliation authority.[17] Usually, there will be an exchange of one or two written statements and, thereafter, one or several court hearings (hearing witnesses, final statements by the parties). Swiss litigation is, in practice, highly

13 Article 102, Swiss Criminal Code.
14 Articles 201 and 203, Swiss Civil Procedure Code (CPC).
15 id., Article 204.
16 id., Article 212.
17 id., Article 209.

focused on the written statements and on the other documents submitted by the parties, although, formally, the oral part of the proceeding and other means of proof are not less meaningful. After the first written statements have been filed, the instructing judge will usually hold a hearing and propose a settlement to the parties. The courts often encourage a conclusion by means of a settlement, particularly in complicated and costly proceedings.

Judgments by the conciliation authority and the courts of first instance can be appealed (the details vary depending on the value of the claim) and brought before the cantonal high court.

If the value of the claim is over 100,000 Swiss francs, the parties can agree to commence proceedings directly before the cantonal high court.[18]

Four cantons have installed commercial courts that are competent to hear certain claims that would otherwise be handled by the regular civil courts. For product liability claims, the following preconditions of the competence of commercial courts are relevant: registration of at least the defendant in the commercial registry in Switzerland or in a comparable registry in their country of domicile; and claim value of at least 30,000 Swiss francs.[19] If only the defendant, but not the claimant, is registered in the commercial registry, the claimant may choose whether to proceed before the commercial court or the ordinary courts.

Judgments by the cantonal high court and the commercial court can be appealed before the Federal Supreme Court, the highest court in Switzerland, if the value of the claim amounts to at least 30,000 Swiss francs (subject to further preconditions).[20]

For any stage of a civil proceeding, the claimant or the party appealing will be required to pay an advance on the court fees.

Proceedings by the administrative authorities regarding product safety are separate from civil proceedings. Federal administrative authorities can issue orders and obligate a manufacturer or distributor to take certain measures regarding product safety (e.g., a product recall).[21] Orders by federal administrative authorities can be appealed before the Federal Administrative Court.[22] Judgments of the Federal Administrative Court are subject to appeal before the Federal Supreme Court.[23]

Criminal proceedings are handled by cantonal criminal authorities (i.e., public prosecutors and criminal courts; usually the local court of first instance and, on appeal, the cantonal high court and the Federal Supreme Court). Criminal courts may also decide civil claims connected to criminal allegations.[24] Administrative authorities are often also vested with a certain competence to impose fines. They issue penal orders that are subject to appeal.

ii Burden of proof

In civil litigation, the burden of proof for an alleged fact rests on the person who derives rights from that fact; therefore, in a product liability case, the burden of proof for the preconditions of product liability rests on the plaintiff. The plaintiff needs to prove the defectiveness of the product, the damage and adequate causation. Adequate causation means, according to the

18 id., Article 8.

19 id., Article 6.

20 Article 77 et seq., Federal Law on the Federal Supreme Court (FSCL).

21 Article 10, PSA.

22 Article 31, Federal Act on the Federal Administrative Court.

23 Article 75, FSCL.

24 Article 122, Swiss Criminal Procedure Code.

Federal Supreme Court, that a cause must be appropriate to cause a result of the kind that occurred or to considerably facilitate the occurrence of the result based on general experience of life and the usual course of things. The standard of proof is overwhelming likelihood.[25] The defectiveness does not necessarily need to be proven by an expert opinion.

iii Defences

The producer is not liable for a defective product under the PLA if it proves any of the following:

a it did not market the product;
b the product was not defective when it was put into circulation;
c it did not manufacture the product for a business purpose or within the framework of its professional activity;
d the defect is attributable to compliance with compulsory official regulations;
e the error was not identifiable on the basis of scientific and technological knowledge at the time the product was put into circulation (development risk); or
f it had produced only base material or part of the product and the defect was caused by the construction of the product, in which the base material or part was incorporated, or by the instruction given by the producer of that product.[26]

Apart from defects owing to compliance with compulsory official regulations, there is no 'regulatory compliance defence' in civil litigation (i.e., liability cannot be excluded only because all regulatory requirements have been complied with). However, as defectiveness is assessed based on all circumstances, compliance with regulatory requirements and the assessments of the experts of the regulatory authorities need to be taken into account.

In administrative proceedings, compliance with (harmonised) technical standards constitutes a (disputable) presumption that the product complies with the essential health and safety requirements.[27]

The statute of limitations period for product liability claims under the PLA is three years from the day when the injured person gained or could have gained knowledge of the damage, the defectiveness and the identity of the manufacturer. Claims under the PLA are time-barred if no lawsuit is filed within 10 years of the day when the product in question was put on the market.

Since 1 January 2020, the statute of limitations period for product liability claims under general tort law has increased from one year to three years from the day the injured person gained knowledge of the damage and the liable manufacturer, or 10 years from the day on which the damaging behaviour took place or ceased. In the case of death or personal injury, the statute of limitations for product liability claims under general tort law and contract law is three years from the day the injured person gained knowledge of the damage and the liable manufacturer and 20 years from the day on which the damaging behaviour took place or ceased. In the case of a longer limitation period for a criminal act, this longer period would apply. The limitation period cannot expire in ongoing judicial proceedings

25 BGE 133 III 81, E.4.2.2.
26 Article 5, PLA.
27 Article 5, PSA.

as this would contradict the purpose of the revised statute of limitation rules; once legal proceedings have been initiated, the statute of limitations is suspended until all legal remedies have been exhausted.[28]

The general statute of limitations period for contractual claims is 10 years. The statute of limitations period for contractual claims based on defects of a purchased product, however, is generally two years from the delivery of the product. The buyer is obliged to examine the product and to notify the seller immediately if they discover a defect. In the relationship between buyer and seller, claims under contract and tort law can exist in parallel with different limitation periods.

Apart from the statute of limitations, there are additional defences against contractual claims or claims under general tort law.

iv Personal jurisdiction

International jurisdiction is determined by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the Lugano Convention) for defendants domiciled in a contracting state of the Convention.

According to the Lugano Convention, claims must generally be brought before the courts of the state in which the defendant is domiciled. However, the Convention defines a number of exceptions to this general rule. There are several situations in which a person domiciled in a contracting state may be sued in another contracting state. The relevant additional forums for product liability cases are:

a for claims based on the PLA or general tort law, the courts at the place where the harmful event occurred;[29]

b in matters relating to a contract, the place of performance of the obligation in question (i.e., in the state where the defective product was delivered);[30]

c for civil claims for damages or restitution that are based on an act giving rise to criminal proceedings, the court handling those criminal proceedings, to the extent that the court has jurisdiction, under its own law, to entertain civil proceedings;[31]

d if a number of defendants are sued together, in the courts of the place where at least one of them is domiciled;[32] and

e in an action on a warranty or guarantee or in any third-party proceedings, in the court of the primary proceedings.[33]

If the defendant is not domiciled in a contracting state of the Lugano Convention, international jurisdiction of Swiss courts is determined by the Federal Act on International Private Law (PILA).

28 BGE 147 III 419.

29 Article 5.3, Lugano Convention.

30 id., Article 5.1.

31 id., Article 5.4.

32 id., Article 6.1.

33 id., Article 6.2.

The PILA provides for the following places of jurisdiction, in addition to the domicile of the defendant, that are relevant for product liability trials:

a for claims based on the PLA and general tort law, the courts at the place where the harmful act was committed or where its effect took place or, for claims based on the activities of a Swiss branch office, at the branch office's domicile;[34]

b for claims based on a contract, the place of performance of the characteristic contractual obligation;[35] and

c for claims based on contracts with consumers, the domicile of the consumer.[36]

v Expert witnesses

In civil litigation, the parties have to present the facts of the case to the court in substantiated form and are obligated to offer evidence supporting their factual statements. The court must review or administer the evidence offered by the parties for facts that are disputed among the parties and that are legally relevant to the case. The following evidence is admissible:

a testimony;

b physical records;

c inspection;

d expert opinion;

e written statements; and

f questioning and statements of the parties.[37]

The court forms its opinion based on its free assessment of the evidence.[38]

According to the Federal Supreme Court, expert opinions commissioned by the parties themselves are not to be regarded as expert opinions within the meaning of the Swiss Civil Procedure Code (CPC). This 'private expert opinion' may not be treated as evidence by the courts but merely as a statement by the party that commissioned the expert opinion.[39]

Parties can, however, request the court to appoint an independent court expert. Parties have the right to be heard regarding the identity of the expert and the questions they shall be asked. They may also request that the court ask additional questions after reviewing the expert opinion. Usually, as far as technical or scientific matters are concerned, a court will rely strongly on a court expert's opinion.

vi Discovery

Swiss law does not provide for the possibility of discovery, or depositions, as they are known in common law jurisdictions. Parties generally have to gather the evidence they consider necessary to substantiate their claim or defend themselves or request the court to collect specified evidence in the evidentiary proceeding. In the evidentiary proceeding in a pending lawsuit, the court may order a party to produce certain evidence. If the party refuses to comply with this order, the court may weigh this behaviour against the party.[40]

34 Article 129, Federal Act on International Private Law.

35 id., Article 113.

36 id., Article 114.

37 Article 168, CPC.

38 id., Article 157.

39 BGE 141 III 433.

40 Article 164, CPC.

The CPC provides the possibility of the precautionary taking of evidence by the court if the applicant credibly shows that evidence is at risk or that they have a legitimate interest.[41] If an expert opinion is to be a central piece of evidence in a future court proceeding, a party can request that the court commission the expert opinion before an actual trial is commenced, based on Article 158 of the CPC.[42] The requesting party must cover the costs for the expert opinion.[43]

Witnesses may be summoned to appear in court if a party requests that they be questioned. The questioning of witnesses is conducted by the court. The parties or their representatives may ask additional questions.

vii Apportionment

In principle, a court decision may hold only that the named defendant is liable towards the claimant. If the defendant named in a lawsuit would, if it loses the trial, turn towards a third party such as a manufacturer, it is possible either to invite the third party to join the process or to file a formal claim against the third party. In the first situation, the third party is not obliged to join the process, whereas in the second the process is extended to it.

Where several persons are liable for the same damage based on similar or different causes (e.g., several persons being considered the manufacturer, or where a doctor is liable based on a contract and a manufacturer based on product liability), they are jointly and severally liable and can each be sued for the full amount of the damage.[44] The law states that the judge may determine the extent to which they have recourse claims against each other.[45] If two or more persons are liable based on different legal grounds, the law provides that the person having caused the damage through tort shall bear the liability for the damage primarily and the person who is liable without fault and without contractual obligation shall bear the liability for the damage secondarily.[46]

viii Mass tort actions

Swiss law does not provide for class or mass actions. Several claimants can ask that their respective claims be joined and the proceedings conducted together, but the claims remain separate from each other and are judged separately.

Currently, the Swiss government is examining amendments to the CPC to facilitate class actions. According to a Federal Council proposal, the existing regulation of actions brought by an association in the CPC is to be extended. The requirement for this type of action brought by an association is that at least 10 affected persons have authorised the association to file a lawsuit. It is not known when this proposal will be dealt with by the Swiss Parliament. In June 2022, the competent consultative commission postponed discussions regarding the proposal and asked the Federal Council for further clarifications of the proposal's economic effects and of comparisons with specific EU Member States.

41 id., Article 158.
42 BGE 140 II 16, E. 2.5.
43 BGE 140 III 30.
44 BGE 115 II 42, E. 1.
45 Article 50, Swiss Code of Obligations.
46 id., Article 51.

ix Damages

There are no maximum limits of damages available for one claimant or one manufacturer. According to Swiss law, damage is generally defined as the difference between the injured person's current financial situation compared with their hypothetical financial situation if the damaging event had not taken place.

Under the PLA, the injured person may claim for compensation of personal damage and material damage to things for private usage. The PLA provides for a retention of 900 Swiss francs in cases of material damage to things. These limitations do not apply for liability under general tort law or contract law. Damages can also be allocated if the amount of the damage cannot be exactly defined; however, the damaging event must have occurred. Punitive damages are not available in Switzerland. Amends for non-economic damage such as pain and suffering are available to the injured person or their next of kin. The amounts are usually moderate but range from approximately 100,000 to 200,000 Swiss francs in cases of severe violations of physical integrity.

V YEAR IN REVIEW

Cases regarding product liability and safety are rare in Swiss courts.

In a ruling of 26 November 2021 (published on 30 March 2022),[47] the Supreme Court of the Canton of Berne examined the defectiveness of a hip prosthesis in a civil litigation case. The Court came to the conclusion that a hip prosthesis is to be classified as 'defective' under the PLA if:

a according to the manufacturer's own claims, it had a higher than expected revision rate;
b it caused a metal toxicity reaction in approximately half of patients;
c it had to become the subject of an Urgent Field Safety Notice just over five years after its market launch in Switzerland;
d it was recalled from the market just over five and a half years after its market launch in Switzerland; and
e the manufacturer agreed, without acknowledging any legal obligation, to bear all reasonable and customary costs for examinations and treatment, including any revision surgery.

The Court rejected the defendant's objection that the hip prosthesis was compliant with all regulatory requirements and argued that the regulatory requirements had been enacted or drafted under medicinal product law and not liability law, which is why compliance with these requirements does not mean the product was not defective in terms of liability law.

47 ZK 20 399.

Appendix 1

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Frank Scherrer obtained his law degree from the University of Neuchâtel, Switzerland in 1991, his LLM in European legal studies from the University of Exeter, United Kingdom in 1993 and his *Dr iur* from the University of Zurich, Switzerland in 1996. He was admitted to the Bar in Switzerland in 1999.

Mr Scherrer's areas of practice include pharmaceutical and health law, product liability law, contract law, unfair competition and cartel law, and advertising law.

Recent mandates include advising and representing pharmaceutical and other companies in product liability matters, as well as advising and representing pharmaceutical companies on a regular basis regarding marketing authorisation and reimbursement, contracts, advertising, sponsoring and gifts, clinical trials and data protection.

Mr Scherrer speaks German, English and French.

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Recent mandates include advising and representing companies in pretrial negotiations and legal proceedings concerning product liability; advising pharmaceutical companies and manufacturers of medical devices regarding contracts, cooperation with other stakeholders in the health sector, clinical trials and data protection; and advising and representing pharmaceutical companies in administrative and appeal proceedings regarding price decreases and revisions of marketing authorisations.

Marcel Boller speaks German, English and French.

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