



The
**LEGAL
500**

**COUNTRY
COMPARATIVE
GUIDES 2021**

The Legal 500 Country Comparative Guides

Switzerland

PRODUCT LIABILITY

Contributing firm

Kellerhals Carrard



Dr. Claudia Götz Staehelin

Attorney at Law, LL.M., CIPP/E, Partner | claudia.goetz@kellerhals-carrard.ch

Laura Manz

Attorney at Law, LL.M., Senior Associate | laura.manz@kellerhals-carrard.ch

This country-specific Q&A provides an overview of product liability laws and regulations applicable in Switzerland.

For a full list of jurisdictional Q&As visit legal500.com/guides

SWITZERLAND

PRODUCT LIABILITY



1. Please summarise the main legal bases for product liability

Product liability claims may be based on (i) the Swiss Product Liability Act (PLA), (ii) contract law, (iii) tort law, or statutory provisions applicable to specific industries.

1. The PLA is inspired by the European Union's Directive 85/374/EEC on product liability. According to the PLA, a manufacturer, importer or supplier is strictly liable for personal injuries and – to a certain extent – damage to property caused by a product which did not provide the safety which could reasonably be expected. Since the PLA is neither a complete nor an exclusive cause of action, an injured person may raise additional claims based on other legal grounds such as contract law, tort law or other statutory provisions applicable to specific industries (Article 11(2) PLA). 2. If a contractual relation exists between the injured person and the supplier, a defective product can also give rise to a claim for breach of contract. The Swiss Code of Obligations (CO) contains general contractual liability provisions (Article 97 et seq. CO) and special contractual liability provisions, such as for sales contracts (Article 197 et seq. CO). While contractual liability is generally fault-based, in sales contracts the seller is strictly liable for direct losses caused to the buyer (Article 208(2) CO). 3. Finally, tort law provides grounds for fault-based liability claims. Pursuant to Article 41 CO, a person is liable for unlawfully caused losses to another person. In practice, tort liability is often derived from the principal's liability (Article 55 CO). According to this specific provision, the principal – usually an employer – is liable for the loss unlawfully caused by its employees or ancillary staff in the performance of their work. An exemption from liability for the principal is only possible if it can be proven that due care in the choosing, instructing and supervising of the staff was taken to avoid any loss. In practice, however, the Swiss Federal Supreme Court (FSC) has set the bar for such defences extremely high. As a result, the principal's liability amounts to that of strict liability.

2. What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?

The PLA provides for a strict liability type claim for damage caused by a defective product. Pursuant to Article 1 PLA a claimant has to prove the following elements in order to recover damages: 1. Defective product: A product is defective if it does not provide the safety which could reasonably be expected (Article 4 PLA); 2. Recoverable damage: damage caused by the death of a person or a personal injury (Article 1(1)(a) PLA) as well as damage above CHF 900 to predominantly privately used property (Article 1(1)(b) and Article 6 PLA) constitute recoverable loss. Damage to the defective product itself is not recoverable; 3. Causal link between the defective product and the recoverable damage: the recoverable damage must be caused by the defective product 4. Defendant must be a producer pursuant to Article 2 PLA (cf. question 3 below).

3. With whom does liability sit? If there is more than one entity liable, is liability joint and several?

Pursuant to the PLA, liability sits with the producer of the defective product. The PLA provides for a broad definition of the term "producer". According to Article 2 PLA, producers are: 1. The manufacturer of the final product, a part or a component of the product and the producer of any raw material (manufacturer; Article 2(1)(a) PLA); 2. Every person who claims to be the producer by attaching his or her name, trade mark or other distinctive sign on the product (quasi-manufacturer; Article 2(1)(b) PLA); and 3. Every person who imports a product for sale, rental, leasing, or any other form of commercial distribution into Switzerland (importer; Article 2(1)(c) PLA). Manufacturer, quasi-manufacturer and importer are jointly and severally liable. Each supplier is liable as a producer if the manufacturer or the importer are unknown and if the supplier does not reveal their identity within a

reasonable timeframe after being requested to do so by the injured party (Article 2(2) PLA) or if the identity of the importer is unknown (Article 2(3) PLA).

4. Are any defences available? If so, please summarise them.

According to Article 5(1) PLA, the producer is not liable if it can prove that: the producer did not put the product on the market; it can be assumed from the circumstances that the fault causing the damage was not present at the time the product was put on the market; the producer neither manufactured the product for sale or any other form of economically motivated purpose nor manufactured or distributed it in the course of commercial activity; the fault is due to the fact that the product complies with binding statutory requirements; or the fault could not be detected according to the state of the art in science and technology prevalent at the time when the product was put on the market. Moreover, the producer of a raw material or a partial product is also not liable if it can prove that the fault was caused either by the design of the product into which the raw material or partial product was incorporated or by the instruction of the manufacturer of that product (Article 5(2) PLA).

5. What is the limitation period for bringing a claim?

A claim based on the PLA must be brought within three years from the date the injured party became aware or reasonably should have become aware of the loss, the fault of the product and the identity of the producer (Article 9 PLA). In any case, the claim must be brought within 10 years after the producer put the product which caused the loss on the market (Article 10 PLA).

6. To what extent can liability be excluded (if at all)?

Liability based on the PLA cannot be contractually excluded (Article 8 PLA).

7. What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?

Pursuant to Article 41 CO, a person is liable for unlawfully caused losses to another person. In order to succeed in a claim based on Article 41 CO, the claimant

has to prove the following: 1. Loss: loss is qualified as any involuntary reduction of the assets. 2. Unlawful act: pursuant to Swiss law, an act is unlawful if it harms the property or the personal integrity of a person. An act which only harms the assets of a person is only unlawful if a law aimed at the protection of such assets was violated. 3. Causal link between unlawful act and damage: claimant must prove that without the unlawful act, the damage would not have been caused (natural causation) and that in light of the general experience, the unlawful act at issue is generally of a nature to cause the damage at issue (adequate causation). 4. Fault on behalf of the defendant: claimant must prove that defendant caused the damage intentionally or negligently. Negligence is deemed to have occurred if a reasonable person could have foreseen the occurrence of the damage. In practice, tort liability is often derived from the principal's liability (Article 55 CO). According to this specific provision, the principal – usually an employer – is liable for the loss unlawfully caused by its employees or ancillary staff in the performance of their work. An exemption from liability for the principal is only possible if it can prove that due care was taken to avoid any loss. In practice, however, the Swiss Federal Supreme Court (FSC) has set the bar for such defences extremely high. As a result, the principal's liability amounts to that of strict liability.

8. What types of damage/loss can be compensated and what is the measure of damages? Are punitive damages available?

Generally, tort law provides for monetary compensation of losses caused by faulty/defective products (cf. question 7 above). Losses are measured by comparing the assets of a person before and after the unlawful act. However, only losses which are caused by the unlawful act are recoverable. In addition, in cases of homicide or personal injury, the court may, depending on the degree of the injury and the degree of fault of the tortfeasor, award the victim of personal injury or the dependents of the deceased an appropriate sum by way of compensation for pain and suffering (Article 47 CO). Punitive damages are not available under Swiss law. Swiss courts refuse to award punitive damages even if the applicable foreign law provides for such damages (Article 135(2) Swiss Private International Law).

9. How are multiple tortfeasors dealt with? Is liability joint and several? Can contribution proceedings be brought?

Where two or more persons are subject to tort based

claims, they are jointly and severally liable to the person suffering damage (Article 50(1) CO). The court determines at its discretion whether and to what extent they have right of recourse against each other (Article 50(2) CO).

10. Are any defences available? If so, please summarise them.

Where (1) The person suffering damage, consented to the harmful act; (2) Circumstances attributable to the person suffering damage contributed to the occurrence of the damage; or (3) The person suffering the loss violated their duty to mitigate their loss, the court may reduce or even forego to award compensation (Article 44(1) CO). The defendant is not liable if they can prove that they acted in self-defense (Article 52(1) CO). Finally, the awarded damages can be reduced if defendant's damage to the property of another was necessary to protect themselves or another person against imminent damage or danger (Article 52(2) CO).

11. What is the limitation period for bringing a claim?

Tort claims must be brought within three years counting from the day the injured party became aware of the loss and the identity of the person liable for it. Tort claims are generally subject to an absolute statute of limitations of 10 years after the tortuous act (Article 60 (1) CO). Tort based claims for damages or satisfaction in the event of death of a person or personal injury are subject to a relative statute of limitation of three years counting from the day the injured party became aware of the loss and the identity of the person liable for it. In addition, an absolute limitation period of twenty years applies to such claims (Article 60(1bis) CO). If, however, the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim (Article 60(2) CO).

12. To what extent can liability be excluded (if at all)?

Tort based liability can be excluded in a contract. Liability for unlawful intent or gross negligence cannot be excluded (Article 100(1) CO).

13. Does the law imply any terms into B2B or B2C contracts which could impose

liability in a situation where a product has caused damage? If so, please summarise.

The seller is liable to the buyer for any breach of warranty of quality and for any defects that negate or substantially reduce the value of the product or its fitness for the designated purpose, even if the seller is not aware of the defects (Article 197 CO). This rule applies to both, B2B and B2C contracts.

14. What types of damage/loss can be compensated and what is the measure of damages?

As in the case of tort based liability (cf. question 8 above), damages are compensatory only. No punitive damages are available. Losses are measured by comparing the assets of a person before and after the unlawful act. However, only losses which are caused by the unlawful act are recoverable. In addition, in cases of homicide or personal injury, the court may, depending on the degree of the injury and the degree of fault of the seller, award the victim of personal injury or the dependents of the deceased an appropriate sum by way of compensation for pain and suffering (Article 47 CO).

15. To what extent can liability be excluded for contract liability (if at all)?

Contractual liability can be excluded to the extent that the damage was not caused grossly negligently or intentionally (Article 100(1) CO). For sales contracts, contractual liability can be limited or excluded as long as the seller has not fraudulently concealed from the buyer the failure to comply with warranty (Article 199 CO). However, for B2C contracts, such exclusion of liability is unlawful if it is located in the general condition of a contract and if it causes, to the detriment of the consumers and contrary to good faith, a significant and unwarranted imbalance in the contractual rights and contractual duties (Article 8 of the Federal Act on Unfair Competition [UCA]).

16. Are there any recent key court judgements which have had a significant impact on the approach to product liability?

The last key supreme court judgement with respect to product liability was published in 2015. The case concerned a prescription contraceptive pill which can only be obtained through a learned intermediary (i.e. a doctor). A patient who took this prescription

contraceptive pill suffered a pulmonary embolism leading to irreversible brain damage. The patient sued the manufacturer of the contraceptive pill arguing that the pill did not provide for the safety which could reasonably be expected because the manufacturer's warning about increased pulmonary embolism risk was only included in the specialist information intended for the physician but not in the package insert intended for the patient. The court reasoned that for prescription medication like the contraceptive pill, the notice in the specialist information intended for the physician was sufficient warning because a physician has the duty to assess and personally discuss the risks associated with the medication with the patient (FSC decision 4A_371/2014 of 5 January 2015).

Whilst it was not deemed a key judgement, a recent court decision regarding product liability under tort law showed the hesitance of the courts to assign liability in the area of product liability. In the case, a wall bed had not been sufficiently secured to the wall, which resulted in the severe injury of a woman who was sleeping in the bed when it collapsed onto her. Neither the home owner, nor the man who installed the bed were held liable by the court, with the reasoning that the danger was not perceivable by a layman. Liability under tort (Art. 41 CO) within Swiss law requires the potential damage caused by the perpetrator to be perceivable to the perpetrator as a possibility. Thus, no liability was assigned in the case, demonstrating that the Swiss courts require high hurdles to be met in order to assign liability. Product liability under the PLA was not evaluated as it was deemed that the statute of limitations had most likely been met, as the wall bed was given to the owner already used (FSC decision 4A_608/2017 of 30 April 2018).

17. What are the initial litigation related steps you should take if you are facing a product liability claim or threatened claim?

When facing a product liability claim, the defendant first has to establish the facts and circumstances which led to the claim. This allows the defendant to assess if the facts alleged by the claimant are correct and what facts the defendant can allege in its defence. Once these facts are established, the case should be analysed from a legal perspective. This allows the defendant to assess the next steps in the proceeding and to decide if the defendant should try to initiate settlement discussions. Moreover, all insurances which might cover for product liability damages and/or the legal fees related to such claims, must be informed immediately. Generally, such insurances want to be involved from the beginning and advise when the defendant takes decisions regarding

further steps in the procedure. To avoid similar cases, the defendant might also consider a product recall. This especially under the view point that liability may be established under 55 CO if damage mitigation in the form of a recall is not undertaken by the producer. However, it has to be taken into account that such recall could be interpreted by claimant as an admission of guilt. In any case, a good collaboration amongst all actors involved (i.e. managers, lawyers, insurance) as well as fast but circumspect actions are of paramount importance.

18. Are the courts adept at handling complex product liability claims? Are cases heard by a judge or jury?

Since product liability claims are relatively rare in Switzerland, courts are not particularly used to handle complex product liability cases. All cases are tried by either one or multiple judges, depending on the applicable procedural rules in the competent Canton. There are no jury trials in Switzerland.

19. Is it possible to bring a product liability related group action? If so, please summarise the types of procedure(s) available

To date, a class action system does not exist in Switzerland. A group action right is available to certain associations to protect the interest of a certain group of individuals. However, this group action right is limited to non-monetary claims such as cease-and-desist orders and declarations of unlawful conduct (Article 89 CPC). Because monetary group action claims are, to date, not allowed, group actions are practically irrelevant in liability claims. There are, however, alternate instruments for collective reparatory redress, such as simple rejoinder pursuant to Article 71 CPC. According to this provision, two or more claimants whose rights or duties result from similar circumstances or legal grounds may jointly appear as plaintiffs or be sued as joint defendants, provided that the same type of procedure is applicable. Suggestions by the Swiss government which would allow certain forms of group-litigation have been abandoned during the current revision of the Swiss Code of Civil Procedure.

20. How are cases typically funded? Can lawyers charge success fees? Is third party funding permissible?

Cases are typically funded by the party itself. In case the

parties have a concluded a legal protection insurance, such insurance may cover attorney's fees and court fees in case the insured party loses the case. If the insured party wins the case, the opposite party has to pay attorney's fees and court fees. Full-success fee arrangements are not permissible in Switzerland. However, an arrangement pursuant to which the client pays a reduced fee and, in turn, the attorney receives a share of the compensation awarded by the court as an additional (contingent) fee component is permissible according to the FSC. In any case, the reduced fee that is unrelated to the litigation outcome must at least cover the attorney's costs and expenses and must allow for a reasonable profit. The success-related component must not exceed the amount of the unconditional fee component. Third party funding is permitted in Switzerland. Over the last years the FSC issued a couple of decisions addressing the question of legality of litigation funding and providing guidance on a number of critical aspects of litigation funding. There is, however, currently, no specific regulation and supervision of third party litigation funding in Switzerland. Typically, after assessment of the case, third party funders do not purchase the claim, but they offer to finance the claim by paying all costs reasonably required to litigate (court costs, claimant's own attorney costs, party-appointed expert costs and defendant's attorney costs in case).

21. How common are product liability claims and what factors influence their frequency?

Product liability claims are relatively rare in Switzerland due to both procedural (e.g. no concept of class-action) and to substantive law (e.g. no punitive damages).

22. What are the likely future

developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?

Future developments in product liability law and practice will probably address the challenges posed by advanced technology, in particular artificial intelligence. Scholars generally argue that (self-learning) software can be a product in the sense of the PLA. Moreover, an application of the PLA would be fitting because no (human) fault is required to make the producer liable. In the specific case, however, the producer of the software may raise the arguments that (a) the fault did not exist when the product entered the market (because the fault was "learnt" after by means of artificial intelligence), or (b) the state of the art defence applies.

23. Please provide an update of any interesting developments which have taken place in your jurisdiction over the last 12 months.

Within the last 12 months there have been no substantial changes within legislation nor have there been any leading cases published in regards to product liability.

However, within the dogmatic discussions the topic of liability in regards to AI and smart devices and products has become increasingly relevant. In particular being discussed at the moment is the potential criminal liability in cases of harm ensuing from products functioning with AI, e.g. self-driving automobiles. Whilst the legal opinion in regards to civil liability remains that a casual chain to the producer would be constructible, the question of knowledge and intent would provide obstacles in assigning criminal liability in the cases of harm ensuing from products programmed by AI.

Contributors

Dr. Claudia Götz Staehelin

Attorney at Law, LL.M., CIPP/E, claudia.goetz@kellerhals-carrard.ch
Partner



Laura Manz

Attorney at Law, LL.M., Senior Associate laura.manz@kellerhals-carrard.ch

