

The International Comparative Legal Guide to: Product Liability 2009

A practical insight to cross-border Product Liability work



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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?

The legal framework in respect of product liability is robust and primarily consists of:

- a) Law 105(I)/95 - The Defective Products (Civil Liability) Laws of 1995 to 2002 ("Defective Products Law") which implement European Directive 1999/34/EC into Cyprus law;
- b) Law 41(I)/2004 - The General Safety of Products Law of 2004 ("Safety Law") which implements European Directive 2001/95/EC;
- c) Contract Law Cap 149; and
- d) Civil Wrongs Law Cap 148.

A consumer has a *prima facie* claim under the Defective Products Law if he can prove that the product was defective and that it caused damage. The full definitions of 'damage' and of a 'defective product' are provided in the Defective Products Law. The law does not permit the producer to limit his liability via a contract or another form of agreement with the purchaser. The Safety Law imposes the legal requirements for product safety on all goods other than those for which specific legislation has been enacted. Specific legislation exists in respect of toys and electrical goods.

Cap 149 allows an injured purchaser to claim for breach of contract against the immediate supplier of a defective product only. Liability depends on both the express and the implied terms of the contract between them. The Sale of Goods Law 10(I)/94 as amended implies several terms to contracts for the sale of goods to the consumer including fitness for purpose.

Cap 148 allows an injured person to bring a claim for negligence provided that he can prove that a duty of care was owed to him, that the defendant breached that duty of care and that damage was suffered as a result of that breach.

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

There are no such compensation schemes in place at this time.

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

Under the Defective Products Law and the Safety Law, the injured party is able to claim against:

- a) the manufacturer of the defective product;
- b) any person who has manufactured any component part thereof (including the production of raw materials);
- c) any person who, by putting his name on a product or using a trade mark or other distinguishing mark in relation to a product, has held himself out to be the producer;
- d) the importer of the product; and
- e) a supplier who fails to disclose details of the producer within a reasonable timeframe when asked in writing to do so provided that such a request is made within reasonable time from the cause of damage.

Where under the law more than one person is held liable for the damage suffered the liability is joint and several.

Cap 149 allows an injured purchaser to claim for breach of contract against the immediate supplier of a defective product only.

Under Cap 148, claims are usually made against the product manufacturer but they can be brought against other parties in the supply chain if fault can be established.

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 provisions in the Safety Law mirror those of Directive 2001/95/EC article 3. Product recall is viewed as an action to be taken as a last resort. A recall will be issued by a producer:

- a) where other measures would not suffice to prevent the risks involved - for example where the defect in the product cannot be made safe;
- b) if the producer considers it necessary, for example if there is evidence to suggest that the product is dangerous despite it complying with criteria designed to ensure general safety; or
- c) where the producer is obliged to do so further to a measure taken by the competent authority. In Cyprus this is the Competition and Consumer Protection Service ("the Service") which is a division of the Ministry for Commerce, Industry and Tourism. Failure to recall in such circumstances is a criminal offence. Proceedings against the offender will be initiated by the Service.

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

The Safety Law obliges producers to only place products on the market which under normal conditions of use do not contain any danger for the health and safety of consumers. Breach of this obligation is a criminal offence.

2 Causation

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

The onus under the Defective Products Law is on the claimant to prove that the product was unsafe, namely that its use, consumption or storage by any person exposes:

- a) that person or any other person to a risk of personal injury of any kind, including any risk to health, which persons generally should not reasonably be expected to incur thereby; or
- b) any property (including immovable property) to a risk of loss or damage which property generally should not reasonably be expected to incur thereby,

The claimant must also establish that the damage complained about was caused, either entirely or partly, by the unsafe product.

The burden of proof in claims under Cap 148 and 149 is also on the claimant.

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?

As stated in question 2.1, the claimant must prove that the injury was caused either entirely or partly by the defective product.

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?

The position of the claimant is unaffected as the Defective Products Law will treat the supplier of the product as the producer unless the supplier identifies the producer to the claimant within a reasonable timescale. In a situation where one or more parties may be responsible for the damage, the Defective Products Law allows for liability to be joint and several. The liability of a supplier cannot be diminished if the damage is caused both by the defective product and by the act or omission of a third person. However, liability under the Defective Products Law does not affect the supplier's right to claim indemnity or contribution from the third person.

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?

A failure on the part of a producer to give adequate product warnings may give rise to criminal liability under the Safety Law. The Law specifically provides that within the limits of their respective activities, producers must provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks. The presence of warnings does not exempt the producer from the general safety of goods requirement laid down in the law.

There is no principle of a "learned intermediary" in Cyprus product liability law.

3 Defences and Estoppel

3.1 What defences, if any, are available?

A number of defences are available to the producer under the Product Defect Law. These are that:

- a) he neither manufactured or imported, the product for sale or supply in the course of his business;
- b) he did not put the product into circulation;
- c) the product was used as a component in another product and that the defect was wholly attributable either to the design of the other product or to compliance on his part with instructions given by the producer of the other product;
- d) the defect was wholly attributable to compliance on his part with requirements imposed on him by any provision of law;
- e) the defect did not exist in the product at the time when it was under his control or that it came into existence at some later time;
- f) not being the producer or importer of the product, he has made known the identity of the producer or of the person who supplied the product to him; or
- g) when he put the product into circulation, the standard of the scientific and technical knowledge could not permit the determination of the existence of the defect.

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?

There is no state of the art or development risk defence available.

As stated in question 3.1, there is a defence available if the product defect was not discoverable at the time of supply because of the standard of scientific and technical knowledge prevailing then. The onus is on the defendant to prove that this was indeed the case.

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?

As stated in question 3.1, compliance with regulatory and/or statutory requirements is a specific defence available to the manufacturer.

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?

There is no issue estoppel to prevent such proceedings. A final judgment in previous proceedings is only conclusive between the parties to those proceedings.

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?

The liability of a producer (or those treated as producers) under the Defective Product Law cannot be diminished if the damage is caused both by the defective product and by the act or omission of a third person. This is without prejudice to the rights of the producer against the third person. Thus a defendant may either join the third party in the main proceedings within a month from the date of filing of the defence, or alternatively bring separate proceedings against the third party, in which case the time limit is governed by the normal limitations law (see question 5.1).

The Law is silent on how any liability is apportioned between these parties and each case will be judged on its own merits but it may generally be assumed that all such persons will be jointly and severally liable towards a consumer for any damages which may have been caused by a defective product.

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

It is possible to make such an allegation.

Under the Defective Products Law (s7) and Cap 149, liability may be reduced or disallowed when the damage is caused both by a defective product and by the fault of the person damaged or of any person acting under his responsibility.

Cap 148 also acknowledges the possibility of contributory negligence on the part of the claimant.

4 Procedure

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

Both criminal trials and civil trials are conducted by 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. However, it is common practice for the parties to make use of such specialists as expert witnesses.

An expert witness testifying on behalf of one of the parties may be challenged by expert testimony introduced by the adversary. The court will form its own opinion as to the weight that should be attached to such testimony.

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?

Cyprus Civil Procedure Rules do allow for class and representative body actions although in practice such actions are not common.

Where many persons share the same interest, a class action may be filed after one or more of such persons are authorised by the court to sue or defend in this class action on behalf of, or for the benefit of, all persons interested. Before the court grants the relevant authorisation, a power of attorney signed by the persons to be represented and certified by the Registrar or certifying officer and empowering the person or persons who are to sue or be sued on their behalf to represent them in the cause or matter specified must be lodged alongside the main action. An exception to this arises in the case of any unincorporated religious, charitable, philanthropic, educational, social or athletic institution or association not established or conducted for profit. Where a class action is allowed the persons represented are bound by the judgment of the court in the action, and such judgment may be enforced against them in all respects as if they were parties to the action.

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

Claims can be brought by a representative body as stated in question 4.3. As with a class action the approval of the court must be obtained prior to filing the action.

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

The time taken to get to trial may normally be expected to exceed the Supreme Court's target average of a maximum three years. The actual period taken will be influenced by a number of factors including the complexity of the claim and the tactics employed by the relevant legal advisors. Attempts to reach an out of court settlement may also delay proceedings as might a request for interim orders in respect of matters such as document disclosure.

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?

It is both possible and common for the courts in Cyprus to try such preliminary issues, but only on points of law. The Court will not consider issues of fact at a preliminary stage, but only at the hearing of the substance of the case.

4.7 What appeal options are available?

Decisions issued by both the civil and the criminal lower courts are subject to appeal before the Supreme Court of Cyprus. An appeal against an interlocutory decision must be filed within 14 days of that decision. Case precedent allows that only interlocutory judgments that have an imminent effect on the rights of the parties may be appealed.

Notice of an appeal against a final judgment must be filed no later than six weeks after the date of the judgment. The appellant may appeal against either the whole or a part of the final judgment.

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?

As stated in question 4.2, the court does not have the right to appoint expert witnesses but the parties to the hearing may present expert evidence. Such evidence is restricted only in the sense that:

- a) it must be relevant to the case being heard; and
- b) it must be admissible, that is, it must comply with Cyprus law of 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 is no requirement for factual or expert witnesses to present themselves for pre trial deposition. The judge may on application order the discovery of witness statements or expert reports at the pre trial stage. See question 4.10 for more detail. Without the granting of such an application, pre-trial exchange of such documents is not a legal requirement.

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

In general there is no obligation to disclose such evidence. A disclosure obligation will only arise if, following an application by either party to the action, the court orders the discovery of documents relevant to the action which are under the control of the other party.

Such an order will only be granted if the evidence in question is deemed material to the case in as much as:

- a) its disclosure is necessary for disposing fairly of the action; or
- b) its disclosure will result in significant cost savings.

The Courts will not encourage so-called "fishing" expeditions and actual discovery only takes place after the completion of the pleadings and the particulars.

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

In most disputes the option of resolving a dispute via arbitration or mediation does exist although there is no single scheme in place which is specifically designed to deal with consumer product liability issues.

The Service and the two major consumer associations that exist in Cyprus will often mediate between consumers and suppliers with a

view to obtaining an out of court settlement. This does not preclude legal action on the part of the consumer if no settlement is reached.

Domestic arbitration proceedings are governed by the Arbitration Law, Cap 4 of the codified laws of Cyprus, whilst international arbitration proceedings are governed by Law 101 of 1987 which adopts, with some minimal amendments, the UNCITRAL Model Law. Domestic arbitration law allows for extensive intervention by the courts in all stages and it should be noted that if an arbitration agreement covers disputes which involve a question of whether one of the parties has been guilty of fraud, then the court will step in so far as necessary to enable that that question is determined by the court. In these circumstances the court has the power to order that the arbitration agreement shall cease to have effect and has the power to revoke any agreement made thereunder. Law 101 of 1987 minimises the court's intervention in proceedings.

5 Time Limits

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

Time limits do exist and they are detailed in question 5.2.

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?

The Defective Product (Civil Liability) Law requires proceedings for compensation of damage to be commenced within three years from when the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer of the defective product that caused the damage.

No claim may be made under the Law after the expiry of ten years from the time at which the actual defective product, by reason of whose defect the damage was suffered, was put into circulation, unless either:

- a) the producer or, as the case may be, the importer of the product has given an express warranty that the product can be used for a longer period; or
- b) the injury was caused within the ten-year period but could not be reasonably discovered until sometime thereafter.

Time limits for contractual claims are set out in the Limitation of Actions Law, Cap. 15. It should, however, be noted that this law is currently suspended until 31 March 2010.

With respect to torts, section 68 of Cap. 148 states that generally, no action can be brought in respect of any civil wrong unless such action commences:

- a) within three years after the act, neglect or default of which the complaint is made;
- b) where the civil wrong causes fresh damage continuing from day to day, within three years after the ceasing of such damage;
- c) where the cause of action does not arise from the doing of any act or failure to do any act but from damage resulting from such act or failure, within three years after the claimant suffered such damage; or
- d) if the civil wrong has been fraudulently concealed by the defendant, within three years of its discovery by the claimant, or of the time when the claimant would have discovered such civil wrong if he had exercised reasonable care and diligence.

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

As stated in question 5.2, Cap 148 allows an action to be brought within three years of:

- a) the discovery of the concealment or fraud; or
- b) the time when the claimant would have discovered such wrong if he had exercised reasonable care and diligence.

An action to enforce a charge against or to set aside a property transaction will not be entertained by the courts if it is brought against a *bona fide* purchaser.

6 Remedies

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

In all cases the claimant has a right of action for damages. Additionally the claimant may, under Cap 149, obtain equitable remedies such as a right of action for a quantum meruit, a right to sue for specific performance or an injunction, a right to request rescission of the contract, or a refusal of further performance of the contract by the aggrieved party.

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

Under the Defective Product Law, compensation for damage caused by a defective product is assessed in the same way as a claim for negligence. In accordance with common law principles the aim is to put the injured party into the position he would have been in if the negligent act had not occurred. Damages in contract claims will also aim to put the injured party into the position he would have been in if the breach had not occurred.

Damages can be recovered for death or personal injury including mental injuries and damage to property (subject to a *de minimis* lower limit of €427). There is no upper limit, and the right to claim compensation is without prejudice to the claimant's contractual rights or his rights under any other law. No recovery may be made in respect of damage to the product itself.

Liability may be reduced or disallowed when the damage is caused both by a defective product and by the fault of the person so damaged or of any person acting under his responsibility.

Cyprus law does not generally limit the amount of damages awarded in tort claims. The courts have been reluctant to permit contract exclusion clauses which have been imposed on a weaker party by a stronger party. Furthermore, the court may find exclusion clauses abusive and consequently ineffective under the Abusive Clauses in Contracts Law 93(I)/1996. The Defective Products Law expressly provides that any contractual term or any notice or other provision that purports to limit or exclude liability under it is ineffective.

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?

No. Damages are only available when actual harm occurs.

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

As stated in question 6.2, the intention in awarding damages is to put the injured person in the position that he would have been in had the injury not occurred rather than to punish the defendant. Consequently it is rare for punitive damages to be awarded.

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?

No such limit exists.

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?

In such instances the parties to the dispute declare before the court that they have reached a settlement of the claim. The court will then issue a consent order incorporating the settlement.

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?

Such a claim is not permissible. The relevant authorities will need to either sue the defendant or join the claimant as a party to any existing litigation in order to attempt to obtain such reimbursement.

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 court will exercise its discretion when awarding costs. Generally both types of costs will be awarded against the unsuccessful party to the action. Occasionally costs may be allocated between the parties or may be referred by the court to the Registrar of the Court for assessment.

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

The Law on Legal Aid 165(I)/2002 does not provide for legal aid to be made available in product liability claims.

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?

The use of contingency fee arrangements is not permitted in

Cyprus. Outside of this restriction advocates are free to negotiate their payment terms with a client subject to compliance with local Bar rules.

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

Third party funding of claims is permitted. There are no regulations governing the basis of funding.

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 Cyprus.

There have been no significant cases brought in the past year. There have also been no major changes in trends or the law. A "Law on the Out of Court Settlement of Consumer Disputes by Arbitration" which would provide for an Alternative Dispute Resolution scheme in keeping with EU Commission recommendation 98/257/EC remains under discussion but there is no agreed timetable for its introduction.



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NEOCLEOUS

Andreas Neocleous & Co. LLC is among the largest law firms in the South-East Mediterranean region, and is generally regarded as the leading law firm in Cyprus.

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