The International Comparative Legal Guide to:

Product Liability 2009

A practical insight to cross-border Product Liability work

Published by Global Legal Group with contributions from:

Allen & Overy Luxembourg
Andreas Neodeous & Co. LLC
Arnold & Porter (UK) LLP
Bahas Gramatidis & Partners
Barretto Ferreira, Kujawski, Brancher e Gonçalves (BKBG)
Borislav Boyanov & Co.
Caspi & Co.
Clayton Utz
Cliffe Dekker Hofmeyr Inc.
Crown Office Chambers
Dedák & Partners
Fiebinger, Polak, Leon & Partner Rechtsanwälte GmbH
Freshfields Bruckhaus Deringer LLP
Herbert Smith
Kromann Reumert
Lee & Ko
Lovells LLP
Marval, O'Farrell & Mairal
McGriggors LLP
Muscat Azzopardi & Associates
Oppenheim
Orrick (CIS) LLC
Portilla, Ruy-Díaz & Aguilar, S.C.
Roschier, Attorneys Ltd.
Shook, Hardy & Bacon LLP
Sidley Austin LLP
Simpson Grierson
Smith & Partners
Thelius
Tonucci and Partners
Vernon | David
Walder Wyss & Partners Ltd.
White & Case LLP
Wiersholm, Mellbye & Bech AS
Chapter 42

Sweden

Roschier, Attorneys Ltd.

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?

Product liability is primarily regulated by the Product Liability Act (PLA) based on the EC directive 85/374/EEC. The PLA provides for strict liability for personal injuries incurred as a result of a defect in a product. Liability is also strict for damage caused by a defective product to property (other than the defective product itself) of a type ordinarily intended for private use or consumption which, at the time of the damage, was used by the injured person for his own private use or consumption. Agreement clauses contravening the PLA, e.g. by limiting compensation for personal injury, are invalid.

In addition, a number of specific acts stipulate strict liability for certain causes of injury or damage, i.a. electricity, inflammable or explosive goods, nuclear activities and activities harmful to the environment.

An injured party may also base a product liability claim on the general rules of the Tort Liability Act (TLA). Liability for personal injury or property damage under the TLA is based on negligence (or intent). The wider scope of the TLA makes it necessary i.a. for claims for damage to property not intended or used for private use or consumption, e.g. in business and industry. The TLA does not apply when liability is covered by an agreement (unless there is gross negligence or intent).

Contractual liability therefore often plays a role for product liability between businesses, but also for damage caused to the product itself as this is neither covered by the PLA nor the TLA. Contractual liability can follow from an express or implied warranty or from the Sale of Goods Act. The Consumer Sales Act and the Consumer Services Act provide further liability for damage to consumers’ property in contractual relationships between consumers and businesses.

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

There are a number of insurance schemes that provide for strict liability for particular products and situations. The state manages an insurance and compensation scheme for work-related injuries. There are also mandatory insurance requirements for injuries and damage due to motor vehicle traffic and personal injuries due to medical treatment. In addition, there is an industry-wide private insurance scheme for damage caused by pharmaceutical products.

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

According to the PLA, anyone who has produced (i.e. manufactured, extracted or grown) a product or imported the product into the European Economic Area for the purpose of putting it into circulation, has a primary liability for the defects of that product. If the defective product was a component of another product, both the producer of the component and the producer of the finished product are liable. In addition, anyone who has marketed the product under his own name or trade mark is liable. As a secondary responsibility, any distributor or “retail” supplier of the product is liable unless he can identify the producer or importer of the product. In case there are multiple liable parties, they are considered jointly and severally liable.

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 Product Safety Act, based on the EC directive 2002/95/EEC, stipulates that a producer that has put a dangerous product into circulation shall, without delay, recall the product from any distributor that holds it, if this is necessary to prevent injury. Should this measure not be sufficient to prevent injury, the producer shall, without delay, recall the product from any consumer that holds it. A product is considered dangerous if it, during normal or reasonably foreseeable use and life span, presents more than low risks for injury and or if the risks are not compatible with the product’s intended use.

A failure to recall a dangerous product does not affect liability under the PLA, but may constitute negligence in liability under the TLA. Further, a business may be ordered by the appropriate authority to issue a recall under penalty of a fine and may be fined for failing to issue a recall.

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

Not generally. However, responsibility according to the Criminal Code for the crimes of carelessly causing injury or death to other persons or carelessly exposing them to grave danger may...
2 Causation

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

A person claiming compensation according to the PLA has the burden of proving (i) that he has incurred injury or property damage, (ii) the existence of a defect in a product, and (iii) that the injury or property damage was caused by that defect.

A person claiming compensation according to the TLA must prove (i)-(iii) above and also (iv) that the defect was caused by the defendant’s negligence.

A product is considered defective when it is less safe than a person is entitled to expect. So-called systemic defects, i.e. the known and accepted risks or effects of certain products, e.g. known side effects of pharmaceutical products or the effects of alcohol or tobacco, do not fall within the scope of the PLA.

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?

There is no established standard of proof for causation for product liability. It would however not be enough to show an increased risk of injury. Rather, the claimant must prove that the injury was caused by the defect in the product. In cases where causality can be unclear or complex, e.g. environmental or medical injuries, the courts have been known to apply somewhat lower standards of proof for causation.

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?

There is no market-share liability. However, any producer that cannot show that he was not responsible for putting the defective product into circulation is liable. If more than one producer is thus considered responsible, they are jointly and severally liable.

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?

The Product Safety Act stipulates that a producer that has put a dangerous product into circulation must warn of the risks for damage and injury and inform consumers of how it can be avoided. While failure to warn does not directly give rise to liability, insufficient information and documentation about a product may be considered a defect in the product according to the PLA and may therefore, provided that it can be established that this defect caused a damage or injury, be grounds for a claim under the PLA.

There is no principle of learned intermediary in Swedish law.

3 Defences and Estoppel

3.1 What defences, if any, are available?

A number of defences can be made against a claim under the PLA. If the defendant proves (i) that he did not put the product into circulation, (ii) that it is probable that the defect did not exist at the time he put the product into circulation, (iii) that the defect was caused by compliance with mandatory regulations by a public authority, (iv) that the product was not produced by him for sale or for any form of distribution for economic purpose nor produced by him in the course of his business, or (v) that the defect, given the scientific and technical knowledge at the time the product was put into circulation, was not discoverable, he is not liable under the 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?

Yes, see question 3.1 above. The producer has the burden of proof regarding discoverability. There is unfortunately no Swedish case law regarding the standard of proof for such a defence.

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?

Yes, but only if the defect causing damage was due to such compliance and only if the requirements were mandatory.

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 preventing different claimants from litigating the same issues of fault, defect or damage in separate trials. Between two parties, the same issues may not be re-litigated if already tried in earlier 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?

Defendants can seek contribution from a third party, however only...
in subsequent proceedings against such third party.

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

Yes, defendants can allege that the claimant’s actions caused or contributed towards the property damage or personal injury and argue that the compensation therefore shall be reduced. Compensation for personal injury may only be reduced if the injured party’s contribution was grossly negligent or intentional if the claim was brought under the TLA. Negligence is sufficient for reducing a claim under the PLA.

4 Procedure

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

Most civil cases (including all product liability cases) are tried by a panel of three judges. Cases regarding lesser amounts, or when the parties consent thereto, may be tried by a sole 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)?

Yes, in theory the court could appoint technical or other experts to sit with the judge, although this is very rare. The court may also appoint experts to give expert testimony (see question 4.8 below).

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?

The Group Action Act sets out the procedure for dealing with multiple claims. A group action may be initiated by (i) a natural or legal person with a claim covered by the group action, (ii) a non-profit organisation representing consumer or employee interests, or (iii) a suitable public authority (e.g. the Consumer Ombudsman). The group action has legal effect on all members of the group, even if they are not parties to the case.

A group action may be initiated if (i) it is based on the same or similar circumstances for the group members’ claims, (ii) the grounds for such claims are not manifestly different, and (iii) if the court finds that the claims, the group and the representative are appropriate for a group action.

The procedure is ‘opt-in’, meaning that potential group members who, after being informed of the group action by the court, wish to be included in the group must notify the court else be deemed to have left the group.

Unless initiated by an authority, a group action must have a member of the bar as counsel (which is not a requirement for any other procedures in Sweden).

Group actions are very rare in Sweden.

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

Yes, see question 4.3 above.

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

The time to trial varies greatly on the circumstances of the particular case and between the different district courts. As a general rule, it takes between one and three years to get to trial.

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?

Yes, when appropriate, the court may decide preliminary issues through a separate judgment on one of several issues that are each individually of immediate importance to the outcome of the case. The matters thus tried may relate to issues of law, to issues of law and fact, but not to factual issues only. There is no trial by jury and these issues are decided by the judge or panel of judges.

4.7 What appeal options are available?

A judgment by the district court may be appealed to the court of appeal, which will normally grant leave to appeal unless the issue is completely clear. A judgment by the court of appeal may be appealed to the Supreme Court. The Supreme Court will generally only grant leave to appeal if a case is assumed to be of value as a precedent.

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 an expert to assist it. The parties may also present expert evidence. There are very few restrictions on presenting evidence and evidence will only be dismissed if the court deems it manifestly unnecessary.

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 in the Swedish procedure, nor are statements from factual witnesses used. Witness statements/expert reports by expert witnesses are generally required prior to trial.

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

There is no pre-trial discovery in the Swedish procedure. A party may request the other party, or any third party in possession of certain documents, to disclose documentary evidence at any time during the procedure. Such a request must however be specific and refer to a certain identified document or set of identified documents assumed to have value as evidence and may be denied if disclosure of the document(s) would reveal business secrets.

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

In principle, a product liability claim could be settled through arbitration if the parties so agree. In practice, it is rare in product liability cases as an arbitration agreement involving a consumer or
other natural person would likely be set aside by a court as unreasonable.

5 Time Limits

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

Yes there are.

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 time limits vary depending on what the claim is based on and the court may not choose to disapply them. They must, however, be invoked in order to be applicable.

A claim under the PLA must be brought within three years from the time when the claimant discovered, or ought to have discovered, the defect. In no event may an action be brought later than ten years after the defective product was put into circulation.

A claim under the TLA must be brought within ten years from the time of the act (or omission) that caused the damage. A claim for damage in a contractual relationship regarding the purchase of goods must be brought within two years from the time the contract was entered into, if the parties have not agreed otherwise. The time limit under the Consumer Sales Act and the Consumer Services Act is three years, unless the vendor has offered a longer warranty.

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

Concealment or fraud does not directly affect time limits. Concealment or fraud may however indirectly affect the time limit according to the PLA as it may determine the time when the claimant discovered or ought to have discovered the defect.

6 Remedies

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

The primary remedy in Sweden is monetary compensation, but injunctive or declaratory relief is available under certain circumstances. A request for a declaratory relief in a product liability case may e.g. be granted if the damage is difficult to assess and the time limit for bringing a claim is approaching.

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

Damage to the product itself is not covered under the PLA or the TLA. If there is an agreement between the parties, such damage may be compensated through the agreement or the general rules of the Sale of Goods Act.

Bodily injury and mental damage is recoverable under the PLA and TLA and compensation for such damage covers (i) reasonable medical costs and other associated costs, (ii) compensation for present and future loss of income, (iii) certain compensation for disability, disfigurement and scars, and (iv) certain compensation for pain and suffering.

Damage to property of a type ordinarily intended for private use or consumption which, at the time of the damage, was used by the injured person for his own private use or consumption is recoverable under the PLA less a deduction of SEK 3,500. There is no corresponding deduction under the TLA. Compensation for property damage covers repair or replacement costs up to the market value of the damaged property.

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, unless a defective product has already caused damage or injury, damages cannot be recovered.

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

Punitive damages in product liability cases do not exist under Swedish Law.

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 stipulated limit on damages recoverable. A court may however reduce the amount of compensation for a claim or series of claims if considered unreasonably burdensome for the defendant.

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?

All settlements of group actions must be approved by the court. There are no special requirements for settlements in other product liability cases.

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?

No, not in general.

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 general rule in Sweden is that the successful party can recover every cost deemed necessary for its pleading of the case, including court fees, expenses, legal costs and counsel fees, from the losing party.
7.2 Is public funding e.g. legal aid, available?

Yes. In addition, most natural persons in Sweden have insurance that covers legal expenses up to a limited amount.

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

Public funding is only available for persons with limited resources that do not have requisite insurances and only covers 100 hours of legal work.

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

Contingency fees are generally not allowed by the Swedish Bar Association (however a form of contingency fee is allowed in group actions). For non-lawyer counsel, there is no such restriction. Contingency fees are rare in Sweden.

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 without restrictions.

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 Sweden.

The Supreme Court (NJA 2008 p.100) has confirmed that a government authority does not, in the absence of explicit support in law, have a right of recourse against a manufacturer of a defective product for costs or compensation disbursed to users of the defective product. In order to contain a salmonella outbreak related to the feed, a number of pig farmers were forced to slaughter their pigs. The farmers were compensated for part of their losses by the Swedish Board of Agriculture, but the Supreme Court found that the Swedish Board of Agriculture did not have a right to claim compensation from the feed producer for its disbursements to the farmers.

ROBERT LAKATOS is a Partner at Roschier. He is specialised in dispute resolution and litigation & arbitration and also heads the firm’s Employment and Labour law practice in Stockholm. Robert Lakatos has gained an L.L.M. from the Lund University in 1992 and has been a member of the Swedish Bar since 2002. He joined Roschier in 2007. Mr. Lakatos is a member of the Swedish Arbitration Association. His working languages are Swedish and English.

PER FRANKE is an Associate Lawyer at Roschier in Stockholm with his main areas of expertise in general commercial law, litigation and arbitration. Mr. Franke has gained an L.L.M. from the University of Uppsala in 2004. He joined Roschier in 2006 after working at the Stockholm City Court for two years. Per Franke’s working languages are Swedish, English and German.

Roschier, as a leading law firm in Northern Europe, operates in the international marketplace. The firm’s clients include leading domestic and international corporations, financial service and insurance institutions, investors, growth and other private companies with international operations, as well as governmental authorities.

As a member of RoschierRaidla, a cross-border operation of approximately 280 lawyers in five jurisdictions, including Roschier in Sweden and in Finland and Raidla Lejins & Norcous in Estonia, Latvia and Lithuania, the firm offers cross-border solutions based on uniform quality and best practices of international standard by premier law firms in each jurisdiction.

Please visit www.roschier.com and www.roschierraidla.com for more information.