



ICLG

The International Comparative Legal Guide to:

Product Liability 2018

16th Edition

A practical cross-border insight into product liability work

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
June 2018

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ISBN 978-1-912509-14-0

ISSN 1740-1887

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EDITORIAL

Welcome to the sixteenth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

Seven general chapters. These chapters are designed to provide readers with an overview of key issues affecting product liability law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 23 jurisdictions.

All chapters are written by leading product liability lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Adela Williams and Tom Fox of Arnold & Porter for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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PREFACE

I'm delighted to have been asked to introduce the sixteenth edition of *The International Comparative Legal Guide to: Product Liability*.

The guide continues to be an ideal reference point with seven excellent general chapters covering significant developments in European, Asian and US law. This edition also has a special focus on product recalls, a practical guide around costs issues and considerations in the context of group actions in England & Wales and finally commentary on liability and insurance matters in the context of driverless cars.

As always, the bulk of the edition remains the enormously helpful country question and answer section, covering 23 jurisdictions, new to the guide this year being Albania and Kosovo.

I frequently have cause to make reference to the guide for matters concerning product liability all over the world and will continue to do so as the guide remains a thoroughly informative and comprehensive publication.

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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?

Product liability is mainly governed by provisions of Law no. 9902/2008 “On Consumer Protection” and the Albanian Civil Code.

Subject to the above instruments the manufacturer *shall be liable* for the damages being caused by defective products, *except* for some specific cases (see question 3.1 below).

The Civil Code sets forth a fault-based kind of liability.

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

There are no provisions that provide for the operation by the State of compensation/indemnity schemes for particular products, unless the State acts as the producer of certain products (i.e. electricity) and in eventual cases of defective products would be obliged to compensate for the relevant damage.

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

The responsibility for the defective products is attached to the manufacturer. Subject to provisions of the Albanian Civil Code and Law no. 10480/2011 “On general safety of non-food products”, the manufacturer is defined as:

- a. The manufacturer of a finished product, of a raw material, or manufacturer of an integral part of a product, as well as any other person appearing as such (manufacturer), by putting its name, trademark or another distinguishing mark on the product.
- b. The representative in Albania of the manufacturer, where the latter is not based in Albania.
- c. The importer of the products in absence of the manufacturer or its representative in Albania.
- d. Other persons included in the supply chain, insofar as its activity may affect the standard of the safety of the product.

1.4 May a regulatory authority be found liable in respect of a defective/faulty product? If so, in what circumstances?

The liability of regulatory authorities is regulated by Law no. 8510/1999 “On the non-contractual liability of public authorities”.

Public authorities shall be held liable for the damages caused to individuals or legal entities, *inter alia*, in case of unlawful actions/omissions, in case non-functioning of technical equipment used by public authorities and in case they impose a continuous danger.

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

As a general principle, under the Law on Product Safety, the manufacturer has to manufacture and market safe products.

The safety of the product is presumed if compliant with general safety requirements, imposed by applicable law.

The manufacturer and/or distributor within the framework of their activity, and in line with the features of the product supplied, should take appropriate measures to ensure that they:

- i. have appropriate information on the risks posed by the products; and
- ii. take appropriate measures to prevent these risks, including (where necessary) the notification of consumers through effective means, the suspension of trade of those products, the recall of the products from the market and the return of the products by consumers.

Measures subject to item (ii) above include, *inter alia*, (a) indicating information enabling the identification and traceability of the manufacturer (such as address, identity and other useful information in this respect) in the label or the packaging of the product, information in connection with the product itself or the group of products in case the products pertains to a group of products, and (b) conducting tests over samples of products placed in the course of trade, undertaking investigations with regard to the products, keeping a ‘claims recording system’, as well as the notification of distributors with regard to the tests being undertaken.

Measures herein above may be undertaken *voluntarily* by the manufacturer or upon instruction of the market supervision authority. Moreover, the manufacturer who considers or has reasonable grounds to believe that the products placed in the course of trade are not compliant with the general safety requirements must adopt corrective measures to remedy, to recall the product or to stop their trade. In addition, when a risk arises thereof, the manufacturer

should promptly notify the market supervision authority by also providing details on the non-compliance and the corrective actions undertaken by the manufacturer.

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

Law no. 7895/1995 “Criminal Code in the Republic of Albania”, provides that the manufacturing, importing, preservation and selling of dangerous foods, beverages and other materials as well as medicaments, and the incorporation in manufacturing of chemicals and other materials in the manufacturing and processing of foods and beverages, thus causing death or severe injury to the health of individuals, are subject to pecuniary fines or imprisonment of up to 10 years. When more than one individual is affected, the sentence cannot be less than five years.

2 Causation

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

Pursuant to Law no. 8116/1996 “The Code of Civil Procedure of the Republic of Albania”, as amended (“Code of Civil Procedure”), the party that claims a right has an obligation to prove the facts on which the claim is founded.

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? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?

According to the case-law in this regard, in order for liabilities under the non-contractual damage to arise, the following elements shall be taken into consideration:

- *existence of damage;*
- *existence of illegal acts/omissions;*
- *fault* – which in this case relies upon the defendant to prove its non-existence; and
- *causal relationship between the damage and acts/omissions.*

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?

In cases when more than one person is responsible for the same damage, their liability towards the injured person is joint and several and thus obliged to compensate such injured person. However, in cases when one of the responsible persons will compensate the injured party, it has the right to ask the others to recover the paid amount.

The market share liability is not available.

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?

In cases when the manufacturer suspects that the product put on the market may potentially impose risks, he must undertake tests, investigate, and if necessary, keep the complaint on register. Together with other obligations imposed by the applicable law, the manufacturer shall keep his distributor informed upon each development. The manufacturer makes sure that the product is accompanied with usage instructions and, depending on the case, safety instructions (in the Albanian language) which must be easily understood by the end consumer.

The principle of “learned intermediary” is not recognised by the Albanian law. However, it shall be noted that similar (if not identical) liabilities are imposed upon intermediaries (i.e. importers, resellers, etc.) that put the product at the disposal of the final consumer, in some particular cases.

3 Defences and Estoppel

3.1 What defences, if any, are available?

Pursuant to article 628 of the Albanian Civil Code the manufacturer is liable for any damages deriving from product flaws, except when:

- (i) the manufacturer has not placed the products on the market;
- (ii) subject to certified events, the flaws did not exist at the moment the products were placed on the market;
- (iii) the product has not been manufactured for commercial purposes or any other distribution purpose, for any profit aim of the manufacturer, neither is manufactured or distributed in the framework of any commercial undertaking;
- (iv) the flaws are due to compliance with the requirements defined by the public authorities;
- (v) technical and scientific knowledge available the moment the product was placed in the market did not allow the manufacturer to consider the product as defective; and
- (vi) it is about the manufacturing of raw materials or spare parts, which in the entirety of the product represent flaws or such flaws derives from inaccurate instructions from the product manufacturer.

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 point (v) in our answer under question 3.1 above. The burden to prove that there is no liability, lies with the manufacturer.

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, see point (iv) in our answer to question 3.1 above. However, the defects shall relate to the fact that the product has been in compliance with the rules set out by the public bodies.

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

In principle, different consumers all allegedly damaged by the same kind of product may initiate separate proceedings and raise claims on different legal grounds. Anyhow, the court would consider as a precedent (though not binding), cases where the court has decided on liability for the same product.

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 the manufacturer shall be reduced or lifted where, under certain circumstances, the damage is caused due to the defects of the product, as well as due to the guilt of the damaged person or of another person, where the impaired person is responsible. The liability of the manufacturer shall not be reduced as long as the damage is a joint consequence of the defects of the product and conduct of a third party.

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

See the answer to question 3.5 above.

4 Procedure

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

Jury trials are not applicable in Albania. All trials are judge trials and the court is composed of a single judge or a panel of judges (depending on the dispute).

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, if the case in question involves issues for which expert advice is required, it may resort to a court-appointed expert.

A court-appointed expert is considered to be an auxiliary of the court, whose main purpose is to offer the court their technical knowledge that the court may not have. The court is not bound by the opinion of a technical expert, and, in fact, it can ignore it if it has a justifiable reason to do so.

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?

Pursuant to Civil Procedure a joint action can be brought before the court by many plaintiffs or against many defendants when: (i) they have joint rights or obligations on the object of the lawsuit; or (ii) their rights or obligations have the same basis from the point of view of the fact or of the law. In a product liability claim, if many people are liable for the same damage caused by the defects of their products, each of them is liable for the whole damage (see, article 633 of the Civil Code).

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

The Consumer Protection Law provides for the right of consumers' association to initiate legal proceedings.

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

In virtue of the Civil Procedure Code, the trial proceedings start with the filing of the lawsuit.

Overall, the first instance proceedings may last from six months to one year. Timing may vary depending on several factors such as workflow, evidence gathering, third-party experts, etc.

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?

Preliminary procedural matters include lack of jurisdiction, lack of competence, lack of legal capacity to sue, or any other incompleteness that might be identified by the judge related to the formal requirements of the lawsuit. These procedural matters also include verification on the lack of power of representation.

Such issues relate to matters of law. Issues of fact are evaluated during the trial.

4.7 What appeal options are available?

The final decision of a district court can be appealed by the parties to an appeal court, within 15 days of the judgment. Non-final and intermediate decisions of a district court can be appealed to an

appeal court, within five days of each decision, except when the law provides that they are appealed together with the final decision. Appeal court decisions can be appealed to the Supreme Court within 30 days of the 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?

Yes, see the answer to question 4.2. Parties may present their own expert evidences, which do not imply that they will necessarily be under the court's consideration. In general, there is no restriction on the nature or the extent of this kind 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?

Factual or expert witnesses are not required to present themselves for pre-trial deposition. Neither are witness statements or expert reports exchanged prior to trial.

Witnesses are required to present themselves during trial and are sworn to speak the truth.

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

The plaintiff should attach to the lawsuit any documentary evidence that supports the arguments of the lawsuit. These documents should be attached in original form to the court and as a copy for each defendant or other party called to trial.

4.11 Are alternative methods of dispute resolution required to be pursued first or available as an alternative to litigation e.g. mediation, arbitration?

The situation regarding arbitration in Albania remains unclear, since the latest changes to the Civil Procedure Code were repealed in the chapter on arbitration and no arbitration law has been enacted so far. However, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and European Convention on International Commercial Arbitration are applicable in Albania. Mediation is also applicable in resolving all civil, commercial and family law disputes, as well as cases in which it is requested and accepted by the parties, before or after the dispute has arisen.

Additionally, according to the Civil Procedures Code, the court shall try to seek an amicable resolution of the dispute and/or notify and instruct the parties for the option of resolving the dispute through mediation.

4.12 In what factual circumstances can persons that are not domiciled in your jurisdiction be brought within the jurisdiction of your courts either as a defendant or as a claimant?

A person that is not domiciled in Albania can be brought within the jurisdiction of Albanian courts when there is a foreign element in his/her judicial-civil relationship. "Foreign Elements", for the purpose of implementing Law no. 10428/2011 "On private international law" ("Private International Law"), imply any legal circumstance that is related to the subject, content or object of a

judicial-civil relationship and which is the cause of connection of such relationship to the Albanian legal system.

Also, article 63/a/b of Private International Law, provides that the responsibility for the damage resulting from the products is regulated by:

- a) the law of the country in which the product was purchased, if the product was placed on the market in that country; or
- b) the law of the State in which the damage was caused if the product was placed on the market of that State.

5 Time Limits

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

The limitation period for bringing products' liability claims is three years, running from the date when the consumer allegedly damaged by the defective products, became aware of or should have become aware of the damage or the defect, or the date when he became aware of the identity of the manufacturer.

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?

Please see the answer to question 5.1 above.

The right of the injured party against the manufacturer for damages, shall expire 10 years from the date when the producer put into circulation the product that caused the damage. The age or condition of the claimant does not affect the calculation of any time limits.

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

No specific provisions are set in this regard.

6 Remedies

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

In a product liability claim under the Civil Code, claimants can seek damages that have been caused and the loss of profit, as well as the expenses done reasonably to avoid or reduce the damage, or damages for death (i.e. living and nutrition expenses for minor children, consort and parents unable to work who used to be under the responsibility of the dead person, the necessary expenses of funeral); or personal injury, taking into consideration the loss or the reduction of working capabilities of the injured person, the expenses of his medical treatment and other expenses that are related to the damage caused.

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

In virtue of the Albanian legislation, the following can be recovered:

- economic damages, which consist of monetary damage due to pecuniary loss or loss of profits;

- biological damages, affecting the psychological and/or physical integrity of a person, directly related to his/her health;
- moral damages, essentially consisting of pain and suffering to the plaintiff; and
- existential damages, essentially consisting of any event that negatively affects someone's 'quality of life'.

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?

The casual relationship between the damage and acts/omissions (see question 2.2 above) would be required to reach a conclusion on the case. Therefore, damages can be claimed, only when such damage has actually been caused.

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

This is not applicable in Albanian jurisdiction.

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 limit is set forth.

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?

When a settlement of the claim has been achieved prior to the court hearing, the minutes are kept for it, which are signed by the parties. The court then approves the settlement with a decision. In case of presentation of an agreement for the settlement of claim or an agreement for the resolution of the dispute through mediation, the court decides on its approval, if the agreement does not have conflict with the law. When the settlement is achieved during the court hearing, the terms of the agreement are reflected in the court minutes. The court decides on its approval, but in any case, the agreement shall not conflict with the law.

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 specific rules are provided in this regard; however, in cases when an individual has received amounts as a result of fraudulent behaviour, in principle the state could initiate proceedings against such individual.

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?

Yes. In principle, the losing party bears the legal costs of both parties, in full. However, in case the claim is partially accepted or when the court finds justified reasons, it may decide that the costs are to be paid by the losing party in proportion with the accepted claim, or that each party should pay its own costs.

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

Yes. The Albanian parliament recently adopted Law no. 111/2017 "On legal aid offered by the state" ("Law on Legal Aid").

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

Generally speaking, the legal aid is provided to all persons proving that their income is not sufficient in affording costs associated with counselling, representation and defence in criminal, administrative and civil law cases. However, there are also certain categories that, by default, are entitled to legal aid (i.e. victims of family violence, children, disabled persons, etc.).

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

Persons qualifying for legal funding under the Law on Legal Aid are entitled to be excluded from:

- payment of general and particular fees, under the law on judicial fees;
- payment of judicial expenses (i.e. experts, witnesses, translators) according to the procedural law; and
- the obligation to prepay the fee of enforcing a judgment by the public bailiffs.

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

The law is silent on the matter.

7.6 In advance of the case proceeding to trial, does the court exercise any control over the costs to be incurred by the parties so that they are proportionate to the value of the claim?

The court does not exercise control over the costs to be incurred by the parties. The damaged party quantifies its claims when starting the case. As for legal fees, the losing party is generally condemned to refund them to the winning counterparty.

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 your jurisdiction.

Product liability legislation in Albania is under continuous development and improvement with the aim to be fully harmonised with the EU legislation. Though, a weak point of legislation remains its implementation. The supervising market authority, though legally established, is not yet operative and therefore the market is missing an efficient surveillance; hence, the consumers still remain

unprotected in cases of defective products. Case law is also very weak and there are very few cases in this regard. Public awareness of consumer rights is weak and, in this regard, the authorities have still a lot to improve on.

Provisions on product liability should be incorporated in any new Law on Consumer Protection in future amendments of the Law. The present state of the legislation on product liability and consumer protection is not satisfactory enough and broader inclusiveness could be achieved through revisions of the Law.

Furthermore, it is important that the harmonised rules be implemented in practice through right incentives and enforcement mechanisms.



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Renata Leka is a Partner at Boga & Associates, which she joined in 1998. She is an authorised trademark agent and has ample experience in trademark filing strategy, portfolio management and trademark prosecution, and handles a range of international matters involving IPR issues. She manages anti-piracy and anti-counterfeit programmes regarding violation of copyright in Albania and assists international clients in all aspects of the IPR. She is also head of the IPR Committee of the American Chamber of Commerce in Albania and is active in all its activities *vis-à-vis* public authorities in matters of IPR in Albania.

For years, Renata has been recognised as a "Leading Individual" in "Intellectual Property" in *Chambers and Partners* and *Chambers Europe* – "Europe's Leading Lawyers for Business" (2010, 2011, 2012, 2013, 2016, 2017 and 2018). According to *Chambers Europe*, Renata continues to be highly active, and assists a number of international corporations with trademark protection. She is also contributing to *World Trademark Review* magazine for Albania.

Renata is fluent in English and Italian.

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Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality of legal, tax and accounting services to its clients. The firm also operates in Kosovo (Pristina) offering full range of services. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga was also Senior Partner/Managing Partner of KPMG Albania.

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