ICLG

The International Comparative Legal Guide to:

Product Liability 2015

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A practical cross-border insight into product liability work

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Chapter 32

Sweden


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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 primary source of law relating to product liability in Sweden is the Product Liability Act (SFS 1992:18, "PLA") which is based on EC Directive 85/374/EEC. Claims for injuries and damage caused by products may also be brought on general grounds of contractual or non-contractual liability.

The PLA imposes strict liability, which means that the claimant simply needs to prove that the damage was caused by the product in order to be compensated. The PLA covers claims for personal injury and damage to consumer property caused by defects in products. Damage to the defective product itself is not covered by the PLA. Within the contractual realm of consumer cases, the Consumer Sales of Goods Act (SFS 1990:932) provides for liability with respect to property damage suffered by consumers.

There are also a number of legislative acts which impose liability with respect to damage or injury caused by provision of specific products and services, such as electricity and nuclear activities.

Claims based on non-contractual liability may also be brought under the Tort Liability Act (SFS 1972:207, "TLA"), which covers liability in respect of personal injury and property damage caused by negligence or intent on part of the tortfeasor. Liability for property damage under the TLA is not restricted to damage to consumer property.

The Sale of Goods Act (SFS 1990:931) contains provisions on liability which may apply in contractual relationships between businesses if they have not agreed otherwise. Product liability may also follow from applicable contractual provisions.

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

Yes. For instance, the state operates schemes of compensation for work-related injuries, and imposes mandatory insurance with respect to *inter alia* personal injuries caused by traffic accidents and by faulty medical treatment. For injuries caused by pharmaceutical products there is a privately held insurance scheme which applies with respect to products provided by the insurance's owners. It also applies when someone suffers adverse reactions following participation in clinical trials covered by the insurance. Most companies in Sweden who manufacture and market pharmaceutical products are part owners of the scheme.

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

The PLA imposes strict liability on i) the party that has manufactured or produced the defective product, ii) the party that has imported the product into the European Economic Area for the purpose of putting it into circulation, and iii) the party that has marketed the product under its own name, label, trademark or other distinguishing mark. If a liable party cannot be identified, a claim for damages may be lodged against the distributor or retail supplier of the product, which may however free itself from liability if it can identify a party with primary liability within a certain time.

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 circumstances under which there is an obligation to recall products are primarily outlined in the Product Safety Act (SFS 2004:451, "PSA"). The PSA applies only with respect to products intended for consumers or to products that may be assumed to be used by consumers. A producer who has supplied a dangerous product must immediately recall the product from the distributors to prevent injury. If such measure is insufficient in order to prevent injuries, the producer must also immediately recall the product directly from the consumers. The supervisory authority may issue an order for the producer to recall dangerous products. If the producer deliberately or negligently fails to recall the defective product, it may be ordered to pay a fine. Although failure to recall products does not in itself give rise to liability under the PLA, it can be assumed that such failure will constitute negligence under the TLA.

In business-to-business relationships, there is special legislation which regulates product safety and recall with respect to specific products, for instance construction equipment.

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

As a main rule there are no criminal sanctions against the supply of defective products. Instead, the general rules in the Criminal Code apply, although this is rare within the realm of product liability. Under certain circumstances, a company may be ordered to pay a corporate fine if criminal offences are committed within the company's business operations. There are, however, some criminal sanctions provided for in special legislation with respect to provision of certain types of products, such as medical technical devices.

2 Causation

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

Under the PLA, the claimant bears the burden to prove that i) the claimant has suffered personal injury and/or property damage, ii) that the product is defective, and iii) that there is a causal link between the defect and the personal injury and/or property damage for which compensation is claimed. The claimant must also prove that its claim is brought against a party which may be held liable under the PLA.

i)-iii) above apply also for claims under the TLA. As the TLA is based on intent or negligence, the claimant also has the burden of proving that the defendant has acted intentionally or negligently.

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 test. However, the claimant has to prove that it is entitled to compensation for injuries and damage caused by a defective product. The main rule is thus that the claimant needs to provide full evidence of the causation, why it is not enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk. However, the Swedish courts have in some complicated cases lowered the standard of proof for causation so as to make it sufficient for the claimant to show that it is considerably more probable that the damage has been caused as alleged by the claimant than as alleged by the defendant.

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?

If the producer cannot be identified, a claim for damages may be lodged against any other party that has imported, supplied or provided the defective product (*cf.* answer to question 1.3 above). Market-share liability does not apply. All liable parties 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?

According to the PSA, a producer who supplies a product must provide safety information. A producer who supplies a dangerous product must also immediately recall the product from the distributors to prevent injury. If such measure is insufficient, the producer must immediately recall the product from the consumers. The supervisory authority may issue orders and injunctions necessary in order to ensure compliance with the PSA. A failure to provide safety information or a failure to warn may thus be grounds for the supervisory authority to order the supplier to pay a fine.

However, a failure to provide safety information or a failure to warn does not in itself give rise to liability towards consumers under the PLA, although insufficient information and/or failure to warn may constitute a defect for which liability may arise under the PLA and the Consumer Sales of Goods Act.

Swedish law does not recognise the principle of "learned intermediary".

3 Defences and Estoppel

3.1 What defences, if any, are available?

The defendant will not be held liable under the PLA if it can prove that i) the defendant did not put the product into circulation, ii) the defendant makes it probable that the product was not defective when it was put into circulation, iii) the defendant shows that the defect was caused by compliance with mandatory regulations issued by a public authority, or iv) the defendant shows that it was not possible to discover the defect on the basis of the scientific and technical knowledge available at the time when the product was put into circulation (state of the art defence). The PLA also stipulates that compensation to the claimant may be reduced if the claimant has contributed to the injury or damage, why the defendant may use contributory negligence as a defence in this respect. Lastly, the defendant may invoke a systematic defect defence. To be successful the defendant must show that the risk of damage associated with the product is known and accepted by society, as is for instance the case with tobacco products.

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, the defendant will not be held liable if it can show that it was

not possible to discover the defect on the basis of the scientific and technical knowledge available at the time when the product was put into circulation. The defendant bears the burden of proof regarding the discoverability.

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, the defendant will not be held liable under the PLA if it shows that the defect was caused by compliance with mandatory regulations issued by a public authority. However, it may be pointed out that even if the defendant has complied with mandatory regulations, a product may still be regarded as defective.

This defence does not free the defendant from liability for claims brought under the TLA, although it may have an effect on the assessment of negligence.

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?

As a general rule, the principle of *res judicata* will bar a claimant which has obtained a final judgment against the defendant from litigating the same matter against the same defendant, i.e. if the grounds are the same or similar. However, *other* claimants are not barred from litigating claims against the same defendant even though the first claimant's grounds may be the same or similar.

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?

There is nothing that prevents the defendant from claiming that the fault/defect was due to the actions of a third party. The defendant may thus lodge a claim against the third party, and the defendant may ask the court to deal with the two proceedings as one proceeding. Is it also possible for the defendant to initiate subsequent proceedings against the third party within a time limit of ten years from when the harmful event occurred.

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

Yes, the PLA stipulates that compensation to the claimant may be reduced if the claimant has contributed to the injury or damage. Compensation for personal injury may be reduced if the defendant can prove that the claimant contributed to its own injury intentionally or by means of gross negligence. Compensation for property damage may be reduced if the defendant can prove that mere negligence on part of the claimant has contributed to the damage.

4 Procedure

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

Civil actions related to product liability will be tried by either one or three legally qualified judges. The number of judges depends on the size of the claim. Claims which do not exceed SEK 22,500 (in 2015) will be tried by one judge. The action will also be tried by one judge if the parties agree to it. There are no jury trials.

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)?

No, the court cannot appoint technical specialists to sit with the judge. If the determination of an issue requires professional knowledge, the court may instead appoint an expert to give its opinion, although this is not common. However, the parties are free to engage technical specialists (*cf.* the answer to 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?

Yes, the possibility of bringing group proceedings has been introduced under the Group Proceedings Act (SFS 2002:599). Such proceedings may be brought by representative bodies such as trade unions, consumer organisations, government authorities, NGOs, as well as natural persons. Group proceedings are open to any self-defined group of persons which share a common claim. The Group Proceedings Act is based on an "opt-in" mechanism – to enter as member into a group, an individual must register with the group within a certain time. Only the group representative is deemed to be the claimant party. The group members in such proceedings are thus not deemed as parties in the proceedings, although the judgment does carry legal force for all members of the class.

Group proceedings are not commonly brought 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 the answer to question 4.3 above.

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

Product liability claims are brought in the Districts Courts and the time it takes to get to trial depends on which District Court in Sweden will handle the case, and of course, on the complexity of the case. Normal cases usually take 8 to 12 months to get to trial at the District Court.

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, preliminary issues may be tried by the court. Such issues may relate to matters of law, as well as to mixed matters of law and fact.

4.7 What appeal options are available?

The District's Court's judgment can be appealed to the Court of Appeal, and the Court of Appeal's judgment may in turn be appealed to the Supreme Court. To bring a case before the Court of Appeal or the Supreme Court, the appellant needs to apply for a review permit.

A review permit in the Court of Appeal will only be granted if i) there is reason to believe that the District Court's judgment requires review or scrutiny, ii) there is reason to believe that the Court of Appeal would arrive at a different conclusion than that of the District Court, iii) there is a need for legal precedent, or iv) there are extraordinary reasons to grant a review permit.

In order to be granted a review permit in the Supreme Court, the appellant must show that a Supreme Court judgment is important for providing guidance as to how other similar cases are to be adjudicated. The Supreme Court is extremely restrictive in granting review permits.

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, the court may appoint experts, although this is very uncommon. In practice it is often the parties who select their own experts. All experts must submit a written opinion to the court and appear for oral examination at the main hearing if the party requests it.

The parties may invoke any expert evidence they want, and the court can only dismiss evidence if the court finds that i) the circumstance that the party wishes to prove is without importance in the case, ii) the invoked item of evidence is unnecessary or will obviously have no effect, or iii) if the evidence can be presented in another way with considerably less trouble or costs. It is, however, very rare for the courts to dismiss expert 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?

In Sweden there are no pre-trial depositions. Pre-trial exchanges of witness statements are very rare and as a general rule the witnesses give oral witness testimonies at the main hearing. Such testimonies may only be substituted by written witness statements under certain circumstances, for instance if a witness examination of the person who made the statement cannot be held before the court, or if the costs of the witness examination would be too high.

Expert witnesses also give oral witness testimonies at the main hearing, although expert reports shall also be submitted to the court in writing and be made available to all parties before the main hearing.

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

Under Swedish law, all documentary evidence that one party invokes must be submitted to the court, which makes the evidence available to the other party.

Swedish law does not recognise general duties of disclosure or discovery procedures. However, if one party knows that the other party is in possession of certain evidence that the first party wishes to see, it can ask the court to order the other party to produce the evidence. If a public document can be assumed to be of importance as evidence, the party may also ask the court to order the document to be placed at the court's disposal. If the requested document contains information subject to secrecy or if it contains trade secrets, such information will be exempted from disclosure.

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

The parties are free to resolve disputes by alternative methods of dispute resolution, but if the claimant is a consumer there are some limitations as to the circumstances under which the dispute may be settled by arbitration. According to the Arbitration Act (SFS 1999:116) and the Contracts Act (SFS 1915:218), a dispute between a company and a consumer may not be subjected to arbitration on the basis of an arbitration agreement entered into before the dispute arose.

Pending disputes handled by a court may be settled. If the court finds it appropriate that special mediation occur, the court can direct the parties, if they agree, to appear at a mediation session before a mediator appointed by the court.

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

In January 2015, EU Regulation 1215/2012 (Brussels I Recast) replaced the EU Regulation 44/2001 (Brussels I). The Brussels I Recast lays down rules governing the jurisdiction of courts in civil and commercial matters. According to the Brussels I Recast, a defendant who is not domiciled in Sweden can be brought within Swedish jurisdiction if i) the harmful event occurred in Sweden, or ii) the claimant is a consumer who is domiciled Sweden. A claimant who is not domiciled in Sweden can bring proceedings in Sweden if i) the defendant is domiciled in Sweden, or ii) the harmful event occurred in Sweden.

5 Time Limits

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

Yes, to bring a procedure under the PLA the proceedings must be initiated within 3 years from the time when the claimant became aware or should have become aware that a claim may be brought. However, an action for damages must always be lodged at court within 10 years from the time when the allegedly liable party put the product into circulation. If the claimant fails to adhere to these provisions, the claim becomes time barred.

For other actions based on non-contractual grounds, the Statute of Limitations Act (SFS 1981:130) sets out a time bar which comes into force when 10 years have passed after the valid claim for damages arose. However, the time bar can be discontinued by means of written notifications at any point within the 10-year period. If this is done, a new 10-year period begins.

Under the Consumer Sales of Goods Act the buyer has to notify the seller of the defect within three years of receiving the product. This limitation period may of course be longer if there are rights arising under warranty or other undertakings which provide for a longer limitation period.

With respect to contractually based actions under the Sale of Goods Act, the buyer has to give notice about the defect to the seller within two years of receiving the product, unless the parties have agreed otherwise.

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 discretion to disapply time limits?

See the answer to question 5.1 above. The age or condition of the claimant does not affect the calculation of the time limits. The court does not have discretion to disapply time limits.

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

Concealment or fraud will not prolong the limitation period. However, concealment or fraud may affect the assessment of when (i.e. the date) the claimant became aware or should have become aware that a claim could be brought.

6 Remedies

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

Monetary damages are the principal form of compensation available. In certain cases the claimant may ask the court for declaratory relief, which is common if there are difficulties with assessing the size of the monetary damage and the time limit for bringing a claim for injury or damage is soon to expire. It is also possible to ask the court for some kind of injunctive relief.

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

Under a product liability claim, personal injury, property damage and consequential loss is recoverable. Personal injury encompasses bodily injury and mental damage. Compensation for bodily injury encompasses economic losses, such as medical expenses and loss of income. Under the PLA damage to property is only recoverable if the property is consumer property, and a deductible of SEK 3,500 applies to all awards for property damage. Furthermore, the PLA provides no right to compensation for damage to the defective product itself. The same heads of loss are recoverable under the TLA, although the TLA does not encompass limitations as to consumer property damage. Furthermore, no deductible applies to damages awarded under the TLA.

Damage to the product itself may be recoverable under the Consumer Sales of Goods Act, the Sale of Goods Act, or pursuant to applicable contractual provisions between the parties.

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 main rule is that damages can only be recovered if the product has *de facto* caused injury or property damage. In theory, damages for personal injury may in certain situations be recovered if costs of medical monitoring have been necessary as a result of anxiety over the risk that a product may cause injury in the future.

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

Punitive damages are not available 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?

No, there are no regulations on maximum limits on the damages recoverable from one manufacturer. The general principle for calculating damages under Swedish law is that the damages shall put the claimant in the same financial situation as before the harmful event. However, Swedish courts have traditionally been rather conservative with respect to awarding large amounts as damages.

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?

According to the Group Proceedings Act a settlement will only be valid if the court approves it. Product liability claims which not are brought under the Group Proceedings Act may be settled without court approval.

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?

When the court determines the amount of damages to be awarded to the claimant, the courts takes into account the compensation which the claimant is entitled to receive from authorities in respect of his injury. As such, entitlement to unemployment benefits and sick pay may reduce the awarded damages. Even though it does not happen in practice, the authority that has paid the costs to the claimant could in theory seek reimbursement from the liable defendant.

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, as a general rule the losing party must reimburse the successful party for all legal fees and expenses. However, the court may scrutinise the successful party's fees if the other party does not accept the size of the fees when presented with the bill at the end of the main trial.

Specific rules apply to claims not exceeding half of the so-called "base amount" according to the Social Insurance Act (SFS 2010:110), which in 2015 is SEK 22,500. For such claims there are limitations on the amount the successful party may recover from the losing party.

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

Yes, legal aid is available for natural persons who have limited income, resources and insurance protection. Legal aid is usually restricted to 100 hours of legal work. However, most natural persons and companies have insurance which encompass coverage for legal costs to some extent.

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

Yes, see the answer to question 7.2 above.

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

Contingency fees are permissible to a certain extent under the Group Proceedings Act, if they follow from a written agreement presented to and approved by the court.

In all other circumstances, contingency fees are normally considered in breach of the Swedish Bar Association's Code of Conduct. Members of the Swedish Bar Association are thus generally prohibited from entering into such fee arrangements.

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

Under Swedish law, there are no restrictions for third party funding of claims. In practice, insurance companies will often fund the parties' legal costs and expenses throughout the proceedings.

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.

Swedish product liability law is at a mature stage, and there have been no noteworthy trends or developments with respect to the PLA or its application as of late. The main development in Swedish product liability has instead come through Supreme Court judgments and arbitral awards in commercial cases, which may also apply to product liability cases.

In the Supreme Court judgment NJA 2009 s. 94 regarding statute of limitations for subrogated claims between insurers, the Supreme Court established that the starting point of the 3-year time limit (*cf.* the answer to question 5.1 above) in recourse cases begins on the date when the liable party pays the indemnity or damages that entitles it to bring a subrogated action.

In the Supreme Court judgment NJA 2001 s. 758, the Supreme Court applied strict liability for damage to commercial property caused by a defective product in the shape of a zinc based lubricant, since the purchaser had expressly ordered zinc free lubricants from the supplier.

In 2010, a notable arbitral award was issued by Supreme Court judge Stefan Lindskog among others. The arbitral tribunal found that an audit firm's contractual liability cap amounting to 2 times the paid fees should be set aside as unreasonable when taking into consideration factors such as the sum insured in the audit firm's liability insurance. The arbitral tribunal stated that a reasonable liability cap in such situations should amount to 10-25 times the paid fees. It is yet to be seen whether this principle will be upheld by the courts, and whether it will also have effect in future commercial product liability cases.

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