



Product Liability

in 32 jurisdictions worldwide

Contributing editors: Harvey L Kaplan and Gregory L Fowler

2010



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Italy

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Civil litigation system

1 The court system

What is the structure of the civil court system?

At first instance, jurisdiction is exercised by justices of the peace (small claims up to €5,000 and some specific matters irrespective of value) and high courts (for all matters not attributed to other courts).

Appellate jurisdiction is vested in courts of appeal (which also have original jurisdiction in a number of specific matters such as actions to set aside arbitral awards and antitrust lawsuits).

Appellate judgments may be appealed on a point of law (eg, breach of law or flaw in reasoning) or procedure (eg, nullity or lack of jurisdiction) before the Supreme Court, which is the highest general court in the land and whose functions include assuring the correct and uniform application of law.

Issues regarding the constitutionality of a law may be raised before any court but the latter must remit the question to the Constitutional Court if it maintains that the allegation is not clearly unfounded (and relevant for the decision).

Proceedings before justices of the peace and high courts are heard and decided by judges sitting alone ('single-member' courts), although in some special cases before a high court (eg, collective actions for damages) the decision will be made by a panel of judges.

2 Judges and juries

What is the role of the judge in civil proceedings and what is the role of the jury?

In civil proceedings cases are heard and decided before a judge, whereas in the criminal sphere some crimes will be tried before a judge and jury.

The proceedings are essentially adversarial in nature based on the claims made and the principle that it is the parties who must adduce the evidence (see question 9). The inquisitorial powers of the court are thus extremely limited (but include that of appointing its own expert, ordering whatever inspections it deems useful for deciding the case, questioning the parties or persons that the parties have referred to when setting out their case and administering 'supplemental' or 'estimatory' oaths).

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Ordinary proceedings are instituted by a writ of summons served by the claimant. The case is then docketed and a judge assigned to it.

At least 20 days prior to the hearing the defendant must enter an appearance by filing its statement of defence and associated documents with the court registrar.

The writ of summons must specify *inter alia* the parties' particulars, the claim, the facts and law underlying the action and the sources of evidence that will be relied on.

The statement of defence must include the following, failing which the defendant will be barred from raising them at a later date: counterclaim, third-party claim (which will lead to the postponement of the first hearing to enable the third-party summons to be served) and procedural objections that cannot be raised by the court of its own motion (eg, lack of jurisdiction over foreigners, improper venue or expiry of the statute of limitations). The defendant must also adopt a position in respect of the claimant's arguments and specify the sources of evidence that will be relied on.

During the course of the proceedings and subject to the deadline laid down by the court at the first hearing (article 183 of the Civil Procedure Code) both parties will be afforded an opportunity to clarify and amend the claims and defences already made (but not to raise new matters) as well as to specify new sources of evidence and submit further documents.

At the conclusion of the evidence-gathering stage the court reserves judgment in the matter subject to granting the parties time to file final briefs and replies. The court may also grant an oral hearing.

In product liability litigation some advance technical findings may be useful and to this end the claimant may, prior to the commencement of the proceedings, on the merits apply to the court to appoint an expert to check the damage that has occurred and determine the amount and causes thereof.

4 Pre-filing requirements

Are there any pre-filing requirements that must be satisfied before a formal lawsuit may be commenced by the product liability claimant?

Legislative Decree No. 28/2010 has introduced a form of compulsory mediation into the Italian legal system, which, however, is not applicable to product liability cases (but just *inter alia* to disputes involving rights in rem, inheritance, leases, medical negligence, traffic accidents, defamation through the press and insurance, banking and financial contracts).

A collective action seeking an injunction is subject to issuing a cease and desist letter to be sent by the claimant at least 15 days prior to the writ of summons and an optional conciliation procedure.

There is no pre-filing requirement in respect of collective actions for damages.

5 Trials

What is the basic trial structure?

Trials are based on the principle that it is the parties who are in control subject to oversight by the court which sets the dates for hearings, regulates the proceedings and rules on the questions that the parties submit to it for a decision.

Ordinary proceedings start with an introductory stage whereby the claimant sues the defendant, the defendant enters an appearance and the court checks that the parties have been duly served, declaring the defendant to be in default of appearance as the case may be.

In the successive evidence-gathering stage the court examines the motions for evidence of the parties submitted in their initial or subsequent supplemental pleadings, orders the obtaining of the evidence deemed relevant (through questioning of the parties, hearing of testimony, exhibition of documents and procurement of documentation from third parties) and may appoint an expert to assist it (usually necessary in product liability cases). The court will normally set out the timetable for this stage in terms of hearing dates and the matters to be addressed at those same hearings.

At the end of the evidence-gathering stage the court reserves judgment in the matter on the basis of the evidence on the record subject to granting the parties time to file final written briefs. The court may also grant an oral hearing if one of the parties so requests.

There is no formal distinction between the three introductory, evidence-gathering and decision-making stages of the trial and they are normally assigned to the same single judge (and not a panel).

Hearings in the introductory stage are not theoretically open to the public, whereas the final oral hearing is a public one. Hearings are scheduled by the judge depending on his or her workload, normally at intervals of some months one from the other.

6 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

Since 1998 the Italian legal system has made general provision for a collective action for an injunction to prevent repeated conduct that is harmful to consumers and to eliminate the harmful consequences thereof (in the past, collective action was only possible in certain specific cases such as unfair terms in consumer contracts). That action can be instituted by consumer and user associations who are recognised by the Ministry of Economic Development on the basis of formal statutory criteria.

In 2007 a collective action for damages was introduced in Italy by article 140-bis of the Consumer Protection Code pursuant to Law No. 244/2007, whose entry into force has since been postponed. In the meantime article 140-bis has been amended by Law No. 99/2009 with effect from 1 January 2010 and will now apply solely to wrongdoing committed after 15 August 2009.

Action can be instituted by any natural person who is sufficiently representative before the high court for the capital of the region where the defendant business has its headquarters. If the business is not established in Italy, it may be sued in the place determined by applying the ordinary criteria for territorial jurisdiction.

The proceedings, in this case held before the high court sitting as a panel for all stages, will require a preliminary decision on the admissibility of the action in terms of:

- its not being clearly unfounded;
- the absence of a conflict of interest;
- the suitability of the claimant to represent the interests of the entire class; and
- the identicalness of the rights of the members of the class.

The action is an opt-in one and other claimants must join in by the deadline set by the court at the first hearing, failing which other collective actions against the same business enterprises may not be brought in relation to the same facts. It is obvious that this makes it a rather ineffective form of collective action.

Some scholars stress that as the provision contained in Law No. 244/2007 was not formally repealed by Law No. 99/2009, it could apply also to the prior wrongdoing excluded from the scope of the 2009 legislation. In addition to the action envisaged by article 140-bis of the Consumer Protection Code, there would thus be a further form of collective action applicable to wrongdoing committed before 15 August 2009 that could be brought by user and consumer associations of a national dimension referred to in article 137 of the Consumer Protection Code (ie, associations listed in the register maintained by the Ministry of Economic Development that meet certain formal requisites) and other adequately representative associations. Likewise in this case the action would be an opt-in one, but other claimants could join in both at first instance and on appeal up to when judgment in the matter is reserved.

7 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

Product liability actions may, like civil proceedings in general, take as little as one year for very straightforward cases to as long as five or more years for particularly complex cases or where the judges have a very heavy workload.

Evidentiary issues and damages

8 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

There is no distinction between pre-trial and trial. There is no system of discovery similar to that in Anglo-American systems.

There are, however, ways of obtaining evidence prior to the proceedings on the merits, such as through advance technical findings whereby the court appoints an expert to investigate the alleged damage, the amount thereof and how it was caused. Such a step will not only facilitate the subsequent institution and prosecution of proceedings but may also contribute to avoiding litigation by being an indicator as to what the likely outcome would be.

9 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

In Italian law the onus is on the parties themselves to adduce the evidence to prove the constituent facts of the claim or those that serve to defeat the claim or substantiate defences thereto. The court must decide against the party on which the burden of proof lies if the latter fails to discharge that burden.

What constitutes admissible proof is laid down by statute and the court may freely assess the weight to be given to the evidence except where the law specifically attributes it a certain probative value (eg, a party's confessions or an undisputed private agreement in writing).

The forms of evidence must be specified at the very outset by the claimant (writ of summons) and defendant (statement of defence) or by the deadline set by the court after the first hearing. The evidence must be specifically indicated and detailed, including the names of witnesses. Each party may also indicate evidence to rebut that to be adduced by the other party.

Evidence may take the form of documents, the formal questioning of the other party, testimony, an order to the other party to exhibit documents, an order to third parties to exhibit documents and a request for information from public authorities and oaths. The court may also draw inferences from the conduct of the parties or the other acts and facts alleged at trial (eg, proof obtained in another lawsuit) and may rely on simple presumptions to deduce an unknown fact from a known fact where the elements are significant, precise and consistent with one another.

A party can be informally questioned where the court deems it relevant or both parties so request (although such is not a source of evidence). A party can also be formally questioned at the behest of the other party, which is a form of evidence designed to elicit a confession on specific facts detrimental to the questioned party. Finally, a party can be requested under oath (by the other party and in some limited cases by the court) to swear to the truth of a fact or the value of a thing.

Testimony is normally obtained from the witness in court. However, depending on the type of lawsuit and the circumstances of the case, a written deposition may be accepted if the parties so agree.

The actual parties and those that could potentially be parties may not be heard as witnesses. Testimony consists of statements from witnesses regarding their knowledge of specific facts and cannot contain opinions. Witnesses are under a duty to appear in court and give true and complete testimony, failing which they will be guilty of a criminal offence.

When obtaining evidence in court, legal counsel may not address the party or witness but must ask the court to put the questions seeking clarification or disputing a fact. The court may also order witnesses to confront each other.

10 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

In product liability cases the court normally appoints its own expert to establish certain technical facts that are beyond its own specialist knowledge, such as the amount and cause of the damage.

Normally the expert is appointed from a list kept by the court and often will not personally know the judge, who thus has no means in advance of checking whether the expert has the actual skills needed in the specific case. While the parties may suggest the requisites that the expert should meet and may ask that he or she be replaced, they have no formal power to guide or review the appointment.

The parties may always appoint their own experts, who may observe the court-appointed expert's work and make comments both during the course of the appointment and after the filing of the court-appointed expert's report.

The court may subsequently seek clarification from the expert. It may also order that the task be repeated, this time with a new expert or flanking the original expert with another one. The court is not obliged to adopt the findings set out in the expert's report subject to giving reasons therefor. If it does adopt the findings the court must address the parties' objections thereto, explain why they are unfounded and why it should not depart from the report's findings.

11 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

Damage must be compensated in full but without exceeding the amount that the claimant has effectively suffered. Normally loss is compensated through the award of monetary damages but the law

(article 2058 of the Civil Code) also makes provision for specific compensation (restoration of the status quo ante) when such is possible and is not unduly onerous for the defendant.

Compensation is awarded for economic loss but also for non-economic loss where specifically envisaged by law (eg, when the wrongdoing is a criminal offence too) or where the interest harmed is of direct constitutional importance. In product liability, where compensation is for bodily injury, non-economic loss must always be considered as compensable in all of its various forms (including, according to prevailing opinion, pain and suffering, even though some precedent expresses a contrary view – in favour: Milan Court of Appeal judgment of 21 February 2007 and Rome High Court judgment of 4 December 2003; against: La Spezia High Court judgment of 27 October 2005. In general, strict liability regimes do not preclude compensation for pain and suffering, as per Supreme Court judgment 15179 of 6 August 2004).

Both present and future damage is compensable, provided that the latter is certain to occur (even if its amount is uncertain, since it can always be assessed on the basis of what is fair and just having regard to known circumstances).

Economic loss consists of actual loss (costs and out-of-pocket expenses) and *lucrum cessans* (loss of profits stemming from the harm suffered).

Non-economic loss includes harm to one's health (ie, bodily injury in the sense of harm to one's physical and psychological wellbeing irrespective of its economic consequences, and other headings of damage such as pain, suffering and loss of amenity). This head of loss must be compensated in full but without duplication. However, when awarding damages for non-economic loss Italian courts usually adopt very restrictive criteria (see, eg, the Rome High Court judgment of 4 December 2003 awarding damages of €300,000 for the death of a child caused by a defect in an automobile's brakes, and the Salerno Court of Appeal judgment of 10 October 2001 awarding about €50,000 for the loss of an eye caused by a defective product).

The very existence and amount of the damage must be proved by the claimant, although the court may assess damages based on what is fair and just in the circumstances should it be impossible or very difficult to prove the damage.

12 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

The Italian legal system makes no provision for punitive damages and indeed the Supreme Court (in its judgment 1183 of 19 January 2007) has stated in the context of the recognition of foreign judgments that such damages would be contrary to public policy, a view that has been criticised by many authors owing to the abstract and mechanical nature of the Supreme Court's conclusions in this regard.

Only in specific cases can there be liability for damages to some extent irrespective of the effective damage suffered.

Litigation funding, fees and costs

13 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Poor parties may avail of legal aid at the state's expense, which is admitted by the Bar Association when the claim is clearly not unfounded and the litigant meets the prescribed economic conditions therefor (household income of less than €10,628.16 per annum). Legal aid may subsequently be withdrawn if the conditions therefor are no longer met.

14 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party litigation funding is permissible but rarely occurs.

15 Contingency fees

Are contingency or conditional fee arrangements permissible?

Contingency fees were traditionally outlawed in Italy until the entry into force of Law Decree No. 233/2006, which removed the ban and at the same time also abolished obligatory minimum legal fees.

Therefore, it is now legal for attorneys to accept fees lower than the recommended minimum and to charge a bonus in proportion to the benefit obtained by the client. However, it is not possible from a legal standpoint to assign the claim or property that is the subject matter of litigation, while from a code of conduct standpoint it would be possible to overturn an agreement whereby an attorney totally waives minimum fees (on the basis that such is a breach of the duty of professional dignity and to request remuneration in proportion to the work done).

16 'Loser pays' rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

The 'loser pays' rule has traditionally been a part of Italian civil procedure subject to the discretion of the court to order the parties to pay their own legal fees and expenses when either reciprocally lose or when other valid reasons exist.

However, in practice the loser pays rule has been applied in an extremely questionable manner by unduly expanding the cases in which the parties are ordered to pay their own legal fees and expenses (including in many instances where one party totally loses and where also the arguments of the loser turn out to be totally groundless), by interpreting the concept of reciprocally losing in a very formalistic way (eg, when one party substantively wins the case but loses on a wholly minor point) and by assessing legal fees and expenses often below the minimum rates that the court should abide by, all of which leads to a notable inflation of litigation.

The law on legal costs has recently changed in two respects. Firstly, parties will have to pay their own legal fees and expenses solely if they reciprocally lose or there are 'grave and exceptional reasons' why each party should so pay, which must be specifically explained by the court in its judgment. Secondly, when the claim is granted for an amount that does not exceed a settlement figure rejected by the other party without valid reasons therefor, the party that refused to settle can be ordered to pay legal costs even though it may have won in court.

A further application of the loser pays rule is an award of damages for vexatious litigation when a party sues or defends an action in bad faith or maliciously, but such an award is exceedingly rare.

Sources of law**17 Product liability statutes**

Is there a statute that governs product liability litigation?

Product liability for products put on the market after 30 July 1988 is governed by Legislative Decree No. 224/1988, which transposed Directive 85/374/EC. The legislation has been consolidated in the Consumer Protection Code enacted by Legislative Decree No. 206/2005 (articles 114 to 127). In addition, there are also the rules on product safety contained in articles 102 to 113 of the Consumer Protection Code and special laws for particular categories of products or hazardous products (eg, health products, cosmetics and items for children). Also of importance is the general law on warranties for

sales (article 1490 et seq of the Civil Code), including for consumer goods (articles 128 to 135 of the Consumer Protection Code), and on liability in tort (articles 2043 to 2059 of the Civil Code).

Liability for defective products lies with the producer and in some cases (where it does not disclose the producer's identity) the supplier. In the case of assembled products the producer of the raw materials or the components is liable unless the defect is due entirely to the design of the finished product or the instructions given by the manufacturer. The law is based on the principle of strict liability subject to proof by the injured party of the existence of a defect (design defect, manufacturing defect or information defect) in the product that does not assure the safety which a person is entitled to expect taking all circumstances into account, the damage and the causal relationship between defect and damage. The onus is on the producer to prove the facts that exclude its liability, namely:

- that it did not put the product into circulation or manufacture it for sale;
- that it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation;
- that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
- that the state of scientific and technical knowledge at the time when it put the product into circulation was not such as to enable the existence of the defect to be discovered.

Liability is also excluded by voluntary use of the product by an injured person aware of the defect in the product and the risk of danger associated therewith.

Damage caused by death or personal injuries and damage to any item of personal property other than the defective product itself is compensable, but the specific action for product liability in this regard does not preclude other general actions in tort, in contract or based on consumer goods warranties.

The specific product liability action is subject to a limitation period of three years and may be brought only within 10 years after the date on which the product is put into circulation in the European Union (see question 27).

18 Traditional theories of liability

What other theories of liability are available to product liability claimants?

Civil liability for damage caused by a product traditionally involved identifying a link between the injured persons and the producer satisfying the standards required by traditional theories of liability. In Italy, as in other European countries and the US, legal writers and the courts came to the conclusion that strict liability in tort was the best model to deal with producers' liability.

In the late 1950s and early 1960s a number of special cases of strict or vicarious liability for defective products were enunciated to go along with the general fault-based rule (in article 2043 of the Civil Code). Hence, liability for wrongdoing committed by one's employees (article 2049 of the Civil Code), for hazardous activities (article 2050 of the Civil Code) and for damage caused by items in one's custody (article 2051 of the Civil Code), irrespective of negligence, provided the building blocks for a theory of strict liability for producers in respect of their products: using presumptions of defectiveness, causation and negligence, the courts constructed a model of strict liability in case law (Supreme Court judgments Nos.: 4004 of 21 October 1957; 1270 of 25 May 1964; 2337 of 10 November 1970; 4352 of 20 July 1979; 5795 of 28 October 1980; 294 of 13 January 1981; and 8395 of 27 July 1991).

The injured person may also rely on the ordinary contractual remedies it has against the seller under article 1490 et seq of the Civil

Code regarding warranties as to absence from defects or under article 128 et seq of the Consumer Protection Code regarding the statutory warranties applicable to the sale of consumer goods.

Liability for defective products under the general theories of tort and contract is still relevant for damage that cannot be compensated under the strict liability rules such as:

- that caused by products not put into circulation for sale;
- that caused by products put into circulation more than 10 years earlier;
- that which falls foul of the three-year limitation period; or
- that stemming from development risks (see question 33).

19 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

A Consumer Protection Code was enacted in 2005 consolidating a range of consumer protection provisions. The Code:

- recognises some rights as ‘fundamental’ rights of users and consumers (health, safety, information, correctness in advertising, consumer awareness and education, propriety and fairness in contracts, etc);
- regulates some aspects of consumer contracts, including warranties applicable to the sale of consumer goods and post-sale duties;
- regulates product safety and product liability; and
- addresses consumer access to justice and forms of collective action.

The Consumer Protection Code is part of a wider system which, in conjunction with general law (such as the Civil Code), embodies a range of rules designed to protect consumers, such as those on transparency in banking and consumer credit agreements, regulation of contracts and liability of financial brokers, insurance contracts and regulation of the retail trade.

20 Criminal law

Can criminal sanctions be imposed for the sale or distribution of defective products?

The Criminal Code addresses a number of situations involving defective products, including personal injury and homicide that the natural person to blame for the event can be charged with if that person can be identified (but the authorised representatives of the firm can also be made liable when the legal requirements occur).

If the event does not constitute a more serious crime, a violation of the rules on product safety and public controls will be punished by a fine and in some cases by detention of up to one year (article 107 of the Consumer Protection Code).

The administrative liability of legal persons is governed by Law No. 231/2001 but is not applicable to product liability.

21 Novel theories

Are any novel theories available or emerging for product liability claimants?

Not relevant.

22 Product defect

What breaches of duties or other theories can be used to establish product defect?

A product is defective when it does not provide the safety which a person is entitled to expect. It follows, as confirmed by both case law

and legal writers, that the key aspect is not the defect (in the sense of a ‘flaw’ that makes the product unfit for its purpose and which is relevant when suing in contract on the basis of the seller’s warranty) but the lack of safety that leads to the damage which occurs unless there are other causes. The defect may be in the product itself (or its packaging; Benevento High Court judgment of 24 February 2006) or may derive from the instructions and information given by the producer or the fact that none were given at all (Milan High Court judgment of 26 October 2009 and Vercelli High Court judgment of 7 April 2003).

The defects contemplated by Italian law are the classic ones associated with product liability theory. There may be a design defect, which the mere existence of a better product is not proof of per se. There could be a manufacturing defect when the product does not afford the safety normally assured by other examples. There could even be an information defect, although in this instance the provision of adequate information does not per se mean there is no liability, especially in cases of serious risk or difficulty in following the instructions (which is different from a consumer voluntarily and knowingly assuming the risk, which excludes compensation (see question 30)).

Producers are not liable for development risks under specific product liability legislation but only on the basis of traditional tort law (see question 33). That said, it should be noted that the introduction of post-sale duties (see question 26) has an impact on the producer’s liability also in connection with development risks.

The shortcoming as to safety is to be considered taking all circumstances into account, including: the nature of the product; who the users are; the use to which it could reasonably be expected that the product would be put; the time and way it was put into circulation; its presentation to the public; its visible features; the instructions and warnings furnished by the producer; and the sale price.

Liability can not be excluded by the mere fact that the consumer uses the product other than in accordance with the instructions when such abnormal use is reasonably foreseeable (Supreme Court judgment 4004 of 21 October 1957) or that the person who uses the product does not have the required skill or authorisation (although in this case there may well be contributory negligence: Supreme Court judgment 12750 of 14 June 2005).

23 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

By defining a defect in terms of a failure to exhibit the safety a consumer is entitled to expect, it follows that proof of the defect, damage and causal nexus, which by law the injured person has the onus of demonstrating, entails proof of the use of the product, damage and causal nexus (Supreme Court judgment 20985 of 8 October 2007), although the relationship between the use of the product and damage can be ruled out when the circumstances indicate that the damage is caused not by a defect in the product but by other factors (Supreme Court judgment 6007 of 15 March 2007, in the case of damage caused by using hair colourant on a person with a particular health condition who should not have used the product based on the producer’s instructions, with consequent liability on the part of the hairdresser).

The causal nexus between the product and the damage may be proved also by relying on presumptions, which pursuant to article 2729 of the Civil Code enables a court to deduce an unknown fact (the causal nexus) from a known fact (use of the product) where the elements are significant, precise and consistent with one another, even in terms of probability as per the Supreme Court’s general statements on causation (see judgment 10741 of 11 May 2009, *infra*

Update and trends

The introduction of collective actions for damages is without doubt the most significant development in recent years, although the disappointing features of the action means that it is of little use to consumers and indeed could end up being exploited by producers to their advantage. Another issue is how to reconcile the views expressed by the European Court of Justice on the general (as opposed to minimum) harmonising nature of Directive 85/374/EC, and the interpretation to be given to article 13 with the views

expressed in Italy to the effect that the remedies under specific product liability legislation and traditional theories of liability are cumulative.

Finally, whether pain and suffering are compensable and establishing the boundaries and the criteria for awarding non-economic loss are hot topics in case law, as are (from a probative standpoint) the application of the rules on causal nexus and the relevance of probability.

question 25) and as is demonstrated by article 120 (paragraph 2) of the Consumer Protection Code, under which a producer may rebut a presumption of a defect in the product at the time it was put into circulation by relying on probability.

24 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

The producer is liable, meaning the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part (unless the defect stems from the design of the finished product or the component has been made in accordance with the instructions of the manufacturer of the finished product).

Unlike Directive 85/374/EC and the original version of Legislative Decree No. 224/1988, the current Consumer Protection Code (article 120) does not regulate the liability of importers of products into the EU or apparent producers. However, liability on the part of these two categories may without doubt be established considering that article 103 (subparagraph d) of the Consumer Protection Code equates them with producers for product safety persons and also, where necessary, by interpreting the rules in light of the supremacy of European law.

Where the producer of the product cannot be identified, the supplier of the product will be treated as its producer unless it informs the injured person within three months of being so requested of the identity and address of the producer or of the person who supplied it with the product.

25 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The causal nexus between damage and defect (or better, between damage and use of the product) must be proved by the injured person (ie, that on the balance of probabilities the damage occurred due to a want of safety). For its part the producer may prove on the balance of probabilities that in the circumstances there was no defect in the product at the time it was put into circulation (article 120 (paragraph 2) of the Consumer Protection Code). The Supreme Court has further held (judgment 10741 of 11 May 2009) that causation is to be determined on the basis of a regular and adequate chain of causation – unless circumstances occur that are apt to break the causal nexus – on the basis that the damage stems from wrongful conduct on the balance of probabilities (in the case of producers' liability from the use of the product).

26 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Producers and distributors are bound by specific information, safety and public notification obligations allied to a duty in some cases to

withdraw or recall products either spontaneously or at the request of supervisory authorities (articles 102-113 of the Consumer Protection Code). Breach of those obligations may give rise to liability in circumstances where liability on the part of the producer would normally be ruled out.

Limitations and defences

27 Limitation periods

What are the applicable limitation periods?

The limitation period for product liability actions is three years from when the injured person became aware of the damage, the defect and identity of the liable party. Moreover, when the damage is of a continuing nature or is aggravated over time, the limitation period runs from the aggravation that gave standing to bring suit.

The specific product liability legislation also extinguishes liability in the sense that no action may be brought 10 years after the date on which the product was put into circulation in the European Union. Action brought against a given defendant within the 10 years does not interrupt the running of that 10-year period for other potentially liable persons (and thus differs from the statute of limitations whose interruption against a given defendant applies also to all other potentially liable persons).

Ordinary actions in tort (see question 18) become statute-barred five years after the injured person can bring action, while the limitation period for actions in contract is 10 years. Moreover, the above-mentioned 10-year period extinguishing liability does not apply.

28 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

Producers are liable solely for defects existing at the time the product is put into circulation. Moreover, a producer is not liable if the state of scientific and technical knowledge at the time when it put the product into circulation was not such as to enable the existence of the defect to be discovered. The rationale for this rule is a need not to discourage technical and scientific development which otherwise would be hindered by liability for development risks.

However, if a product is discovered to be dangerous after it has been put into circulation, the producer has a number of specific duties, breach of which could give rise to liability on its part at least under the traditional liability theories (see also question 26).

29 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

The producer is exempted from liability in the (unlikely) event that the defect is due to compliance of the product with mandatory regulations or binding measures issued by the public authorities, provided

that the damage is an immediate consequence of observance of the said rules and not, for example, the result of the way that the producer decided to implement them.

By contrast, the producer is not exempted from liability if the rules embody a minimum standard of protection, as is normally the case, which the producer can exceed.

30 Other defences

What other defences may be available to a product liability defendant?

Voluntary and informed assumption of risk by the injured person excludes liability. Contributory negligence on the part of the injured person may reduce liability or compensation (eg, having used the product without holding the necessary licences and authorisations).

31 Appeals

What appeals are available to the unsuccessful party in the trial court?

High court judgments on product liability can be appealed to the relevant court of appeal, whose own judgment in the matter will replace that of the trial court.

New claims and defences may not be raised on appeal (except as regards further damage that has occurred in the meantime and accrued interest). As a rule, neither may any new documents or evidence be submitted, although the court of appeal may admit new evidence if it is deemed indispensable for the decision or if the party demonstrates that it was impossible to obtain it before through no fault of its own. The court of appeal may also appoint a new expert if considered necessary.

The appeal judgment can in turn be reviewed by the Supreme Court on a point of procedure or law for issues concerning jurisdiction, nullity of the appeal judgment or proceedings, violation of law in the judgment on the merits or reasoning in the judgment that is incorrect, lacking or insufficient.

Jurisdiction analysis

32 Status of product liability law and development

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Product liability developed slowly in Italy during the 1950s and 1960s, and even after the transposition of Directive 85/374/EC in 1988 it made little headway.

Nowadays, considering new consumer legislation, collective actions and a growing awareness of the issue, there is a tendency towards holding producers liable. However, the limitations

associated with collective actions makes it reasonable to suppose that such actions will not be very common.

33 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

As early as the 1950s and 1960s Italian case law progressively established a system of strict liability for producers which today stands side by side with the contractual remedies envisaged by the Civil Code and specific product liability legislation. This has given rise to a system of protection that is certainly broader than that contemplated by article 114 et seq of the Consumer Protection Code and hence goes beyond the limits inherent in specific product liability legislation.

The prevailing opinion in case law and among legal writers is that the general remedies afforded to injured persons under general law can be relied on by them for cases not covered by specific product liability legislation (Supreme Court judgment 8981 of 29 April 2005) notwithstanding the European Court of Justice's (ECJ) view on the general harmonising nature of Directive 85/374/EC and its interpretation of article 13 (see inter alia ECJ judgment of 25 April 2002, in case C-183/00, *Gonzales Sanchez*).

Case law has clarified the rules on causal nexus, proof and damages in terms that permit the causal nexus to be determined also on the basis of probability. Clarification has also been given on the burden of proof incumbent on the injured person in relation to use of the product and the causing of consequences other than those which one would normally expect. Finally, despite some judgments to the contrary, the prevailing view is that damages for pain and suffering can be awarded even where strict liability rules apply.

34 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs?

Since the end of the 1980s Italian law has progressively introduced a wide series of measures to regulate business activities and protect consumers, which over the course of time have significantly changed the views of courts in this field such that Italian case law in this regard can be said to be mature. However, courts adopt very restrictive criteria when awarding damages for non-economic loss (see question 11).

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