



Product Liability

in 37 jurisdictions worldwide

2009

Contributing editors: Harvey L Kaplan and Gregory L Fowler



Published by
GETTING THE DEAL THROUGH
in association with:

A&L Goodbody
Advokatfirman NorelidHolm
Deneys Reitz Inc
Dorda Brugger Jordis
Drzewiecki Tomaszek & Partners
Formosan Brothers
Garcia & Bodán
Gianni, Origoni, Grippo & Partners
Hammarström Puhakka Partners, Attorneys Ltd
Kim & Chang
M & P Bernitsas Law Offices
Mallesons Stephen Jaques
Marić Law Office
Mayora & Mayora SC
Noetinger & Armando
Nörr Stiefenhofer Lutz
Pérez Bustamante & Ponce
Pietrantoní Méndez & Alvarez LLP
Pinheiro Neto Advogados
PLMJ – Sociedade de Advogados, RL
Portilla, Ruy-Díaz y Aguilar, SC
Radnóczy & Mészáros – Nörr Stiefenhofer Lutz Iroda
Shook Hardy & Bacon LLP
S Horowitz & Co
Simmons & Simmons
Smith & Partners
Stikeman Elliott LLP
Tilleke & Gibbins International Limited
Walder Wyss & Partners Ltd



Product Liability 2009

Contributing editors
Harvey L Kaplan and
Gregory L Fowler
Shook Hardy & Bacon LLP

Business development manager
Joseph Samuel

Marketing managers
Alan Lee
Dan Brennan
George Ingledew
Edward Perugia
Robyn Hetherington
Dan White
Tamzin Mahmoud
Elle Miller

Marketing assistant
Ellie Notley

Subscriptions manager
Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistants
Nick Drummond-Roe
Charlotte North

Senior production editor
Jonathan Cowie

Subeditors
Jonathan Allen
Kathryn Smuland
Sara Davies
Laura Zúniga
Ariana Frampton
Sarah Dookhun

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Product Liability 2009
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 100, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2009

No photocopying: copyright
licences do not apply.
ISSN 1757-0786

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2009, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law
Business
Research

Global Overview Harvey L Kaplan <i>Shook Hardy & Bacon LLP</i>	3
Argentina Miguel N Armando and Luis E Denuble <i>Sánchez Noetinger & Armando</i>	4
Australia Moira Saville and Robyn Chalmers <i>Mallesons Stephen Jaques</i>	10
Austria Georg Jünger <i>Dorda Brugger Jordis</i>	17
Bosnia and Herzegovina Marić Branko and Anisa Strujić-Tomić <i>Marić Law Office</i>	22
Brazil Júlio César Bueno <i>Pinheiro Neto Advogados</i>	29
Canada Douglas Harrison and Samaneh Hosseini <i>Stikeman Elliott LLP</i>	37
China Terence Lee and Gao Jie <i>Smith & Partners</i>	44
Czech Republic Philip Smitka <i>Nörr Stiefenhofer Lutz vos</i>	50
Ecuador Rodrigo Jijón <i>Pérez Bustamante & Ponce</i>	56
El Salvador Daniel Martinez and Geraldo Cruz <i>Garcia & Bodán</i>	62
England & Wales Simon Castley and Aaron Le Marquer <i>Shook, Hardy & Bacon International LLP</i>	66
Finland Pekka Puhakka and Johan Pråhl <i>Hammarström Puhakka Partners, Attorneys Ltd</i>	71
France Jacques-Antoine Robert and Alexandre Regnault <i>Simmons & Simmons</i>	77
Germany Michael Molitoris and Boris Handorn <i>Nörr Stiefenhofer Lutz</i>	83
Greece Christina Vlachtsis and George Atie <i>M & P Bernitsas Law Offices</i>	90
Guatemala Eduardo A Mayora <i>Mayora & Mayora SC</i>	96
Honduras Terencio J García Montenegro <i>Garcia & Bodán</i>	102
Hong Kong Terence Lee and Karrie Cheung <i>Smith & Partners</i>	106
Hungary Ákos Bajorfi <i>Radnóczy & Mészáros – Nörr Stiefenhofer Lutz Iroda</i>	112
Ireland Marcus Beresford <i>A&L Goodbody</i>	119
Israel Avi Ordo <i>S Horowitz & Co</i>	125
Italy GianBattista Origoni and Barbara Ferraris <i>Gianni, Origoni, Grippo & Partners</i>	132
Korea Sang-Ho Han and In-Hak Lee <i>Kim & Chang</i>	138
Mexico Carlos Fernando Portilla Robertson and Enrique Aguilar Hernández <i>Portilla, Ruy-Díaz y Aguilar, SC</i>	143
Nicaragua Margina Baca <i>Garcia & Bodán</i>	148
Poland Andrzej Tomaszek and Magdalena Łuczak-Golenia <i>Drzewiecki Tomaszek & Partners</i>	152
Portugal Tomás Pessanha, Diogo Duarte de Campos and Luís Vaz Bravo <i>PLMJ – Sociedade de Advogados, RL</i>	158
Puerto Rico Néstor M Méndez, Heidi L Rodríguez and María D Trelles Hernández <i>Pietrantoní Méndez & Alvarez LLP</i>	164
Romania Alexandru Ene and Diana Grigoriu <i>Nörr Stiefenhofer Lutz</i>	171
Russia Ekaterina Kalinina and Thomas Mundry <i>Nörr Stiefenhofer Lutz OOO</i>	177
Slovakia Pavol Rak <i>Nörr Stiefenhofer Lutz sro</i>	184
South Africa Donald Dinnie and Michael Hart <i>Deneys Reitz Inc</i>	189
Sweden Christer A Holm <i>Advokatfirman NorelidHolm</i>	196
Switzerland Dieter Hofmann and Jan Hoffmann <i>Walder Wyss & Partners Ltd</i>	201
Taiwan Wei-Chun Chen and Chih-Peng (Xavier) Chang <i>Formosan Brothers</i>	206
Thailand Michael Ramirez <i>Tilleke & Gibbins International Limited</i>	211
United States Gregory L Fowler and Marc E Shelley <i>Shook, Hardy & Bacon LLP</i>	217

Israel

Avi Ordo

S Horowitz & Co

Civil litigation system

1 The court system

What is the structure of the civil court system?

The Israeli legal system is originally based on common law, although a significant amount of legislation has been passed.

The general court system consists of magistrates' courts, district courts and the Supreme Court in Jerusalem, which is the highest court in Israel. Judgments of the Supreme Court set precedents and are binding on all other courts.

Both the magistrates' and district courts may serve as courts of first instance. The division between them (in civil cases) is generally based on the value of the subject matter of the case, with the district court being the higher court.

The Israeli court system also contains other specialised courts or tribunals. There is no specialised court or tribunal for product liability cases.

2 Judges and juries

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

Traditionally, litigation is adversarial by nature. However, in recent years there has been a growing tendency to adopt certain principles from the inquisitorial system with judges taking a more active role in the trial, particularly during preliminary hearings. Decisions are rendered by professional judges and there are no juries.

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?

A product liability action commences upon service of a statement of claim. A statement of defence must be filed within 30 days after service of the statement of claim. The plaintiff may file a statement of reply to the statement of defence within 15 days after service of the statement of defence. In general, it is not necessary to file a reply, as the allegations in the defence are considered denied.

Deadlines can be extended by mutual agreement or by application to court. It is usual in complicated actions, or where foreign entities are involved, that the deadline for service of pleadings (or for other preliminary matters) is extended.

4 Trials

What is the basic trial structure?

Usually the trial opens with the plaintiff's counsel calling his witnesses. In the majority of cases, evidence-in-chief is submitted by affi-

davits and written expert opinions and, thus, the plaintiff's witnesses (including his experts) are first cross-examined by counsel for the defendant, and thereafter briefly re-examined by plaintiff's counsel, to clarify points discussed during cross-examination.

After the plaintiff has concluded presenting his evidence, counsel for the defendant may similarly present his witnesses.

The court may then allow the plaintiff to present rebuttal evidence.

Where the court has not ordered that evidence-in-chief be submitted by affidavits, or where a party cannot obtain an affidavit from a witness, witnesses may be summoned by the court for examination initially by counsel for the party who summoned them.

When all evidence has been presented, counsels for the parties sum up their case. The plaintiff usually sums up his case first. Summing up may be oral, but normally it is in writing.

Trials may run on consecutive days or in periodic sessions, depending on the circumstances, including: the complexity of the case, whether foreign affiants or experts are expected to arrive to Israel specifically for the trial and the workload of the judge.

Unless the court instructs that the trial is to be held in camera (ie, not open to the public), the public may attend the hearings and decisions in the case are also publicly available. However, restrictions for perusing the court file are imposed on persons who are not parties to the litigation.

5 Group actions

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

The Class Actions Law 2006 stipulates, inter alia, a list of claims where it is permitted to file with the court an application to approve the claim as a class action. One such claim is a claim against a dealer concerning a matter between him and a consumer, regardless of whether they are parties to a transaction. A 'dealer' is defined as a person who sells a commodity or performs a service by way of trade, including a manufacturer. Thus, a class action constitutes a potential mechanism available to product liability plaintiffs.

The Class Actions Law further provides that the court may generally approve a class action only if the following conditions are met:

- the claim raises material questions of fact or law that are common to the entire group of persons and there is a reasonable likelihood that those questions will be decided in favour of the group;
- such mechanism constitutes a fair and efficient way to resolve the conflict under the relevant circumstances;
- there is a reasonable likelihood that the interests of the entire group of persons will be properly represented and administrated; and

- there is a reasonable likelihood to assume that the interests of the entire group of persons will be represented and administered in good faith.

An application with the court to approve an action as a class action may be filed under certain conditions, inter alia, by a public authority or an organisation, with respect to one of the public purposes in which the public authority or the organisation engages.

In addition to the class action mechanism (albeit unrelated to it), the Civil Law Procedure Regulations 1984 provide, inter alia, that when there are several plaintiffs, one or several of them may be authorised by one or several of the others to appear, present arguments and act in every proceeding on their behalf.

6 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?

For cases submitted to a magistrates' court it may take one to two years to reach the trial stage of the proceedings. The duration of the trial (including summing-up) may take a few weeks or months and judgment is expected within a few weeks or months thereafter.

For cases submitted to a district court it may take one-and-a-half to three years to reach the trial stage of the proceedings. The duration of the trial (including summing-up) may take a few months and judgment is expected within a few months thereafter.

Evidentiary issues and damages

7 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?

Discovery relates to documents, and does not include depositions. Discovery imposes on a party to the litigation the obligation to disclose to his opponent, in a duly signed affidavit, the existence of all documents relevant to the dispute, which are or have been in his possession, as well as under his control. Thus, discovery also includes relevant documents which were lost, destroyed or transferred to a third party. The term 'documents' also includes (other than written records) materials such as videotapes. The test for relevancy is broad. A document is relevant if it assists a party to the litigation to establish his case or damages his opponent's case. Objections to disclosure would usually be limited to questions of relevancy, and to the test of whether the discovery sought will facilitate a fair trial and save costs, or whether it would be burdensome, with little benefit to the finding of the relevant facts in the actual trial.

A party is entitled to inspect any document referred to in the pleadings or affidavits of the other party, including the discovery affidavit. Thus, if a party objects to the other party inspecting a particular document mentioned in the discovery affidavit (on the ground that it is privileged), this objection must be specified clearly in the discovery affidavit. If a party is not satisfied with the extent of the other party's discovery or willingness to allow inspection, an application could be made to the court, which may order for further discovery, discovery of a specific document or inspection, as applicable (or make similar orders relating to interrogatories).

The Civil Law Procedure Regulations provide a timetable for discovery and inspection, which may be extended by mutual agreement or by application to court. Failure to comply with court orders regarding discovery may lead to serious sanctions, including striking-out an action or defence. Documents and information derived from documents received in discovery should not be disclosed or used for any purpose other than the conduct of the trial in the framework

of which discovery was made. The destruction of documents which are or may be needed as evidence in legal proceedings, or making such documents unidentifiable or illegible, when done knowingly, constitutes a criminal offence.

8 Evidence

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

Generally, the court instructs that evidence-in-chief be submitted, where possible, by affidavit. In such event, the affiant will be cross-examined orally by counsel for the other party and then re-examined by counsel who called him to testify. Cross-examination is not limited to issues raised by the affiant in his evidence-in-chief; however it should be relevant to the issues in dispute. Re-examination, if conducted, is usually very brief as it is aimed to only clarify issues raised during cross-examination. Some judges may urge counsels to forgo cross-examination or limit the length thereof.

9 Expert evidence

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

If a party wishes to furnish expert testimony on a subject in support of any of his arguments, he must submit an expert opinion. An expert opinion pertaining to a medical issue should be attached to the pleadings. Unless the court has also appointed an expert in the same field of expertise and such appointment was made with the consent of the parties (see below) each party has the right to cross-examine an expert on his opinion submitted on behalf of the other party.

The court may itself appoint one or more experts on any matter in dispute between the parties. The parties may suggest appropriate candidates for this purpose, but the court has authority to appoint any expert, even if not acceptable to both parties, as long as such expert did not consult with any of the parties. A court-appointed expert is subject to cross-examination by the parties if they so request, unless the parties have reached an agreement to mutually waive such cross-examination.

If, in the same matter, the court appoints an expert, and the parties have also submitted expert opinions on their behalf, the experts on behalf of the parties will not be cross-examined, unless one of the parties informs that he wishes to cross-examine the other party's expert. In such case, the court may limit the cross-examination of the experts on behalf of the parties.

If the court appoints an expert with the parties' consent then, unless otherwise instructed by the court, the parties will not present expert opinions on their behalf. If the parties filed expert opinions on their behalf prior to the appointment (with the parties' consent) of the expert on behalf of the court such opinions will not be considered as valid evidence.

10 Compensatory damages

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

Compensatory damages in product liability claims include damages for bodily (including psychological) injury as well as damages to property or products. Damages for bodily injury may be pecuniary (such as for the loss of the capacity to earn money also during the 'lost years') as well as non-pecuniary (pain and suffering and reduction of life expectancy). Compensatory damages may also include negative feelings, feelings of disgust or feelings of harming the consumer's autonomy, provided that such damages or feelings are not

de minimis. Damages may also include consequential losses, such as loss of profits.

The main limitations imposed when awarding compensatory damages include the tests of remoteness and foreseeability. Other limitations are the duty of the injured party to mitigate the damage, reduction of damages for contributory negligence or in view of the injurer's fault and *volenti non fit injuria*.

As far as the tort of negligence is concerned damages may be excluded also on the basis of a determination that no duty of care exists or that it was never breached. This may be relevant in particular where 'intangible' (non-physical) damages are claimed, due to, for example, pure economical losses or mental injury or emotional distress unaccompanied by any physical injury.

Specific limitations on the amount of damages (with respect to non-pecuniary damages, loss of earnings and loss of earning capacity) are included in the Defective Products (Liability) Law 1980 (the Defective Products Law) and apply only with respect to actions based on said Law.

11 Non-compensatory damages

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

There is no clear-cut decision as to whether, in the absence of specific provisions in law, courts are authorised to award punitive damages. However, the general view is that even if courts are competent to do so, punitive damages will be awarded only in rare circumstances and only where the wrongdoer acted in malice.

The Consumer Protection Law 1981 authorises the court to award exemplary damages, in an amount not exceeding 10,000 New Israel Sheqels (approximately US\$2,500) for certain breaches of that law, only one of which may be regarded as related to product liability. In addition, under the Class Actions Law a court may not award exemplary damages or compensation without proof of damages in a class action against a dealer, as described in question 5.

Litigation funding, fees and costs

12 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?

Legal aid (which is not customary in product liability cases) may be provided by law to persons (plaintiffs or defendants) who meet financial criteria, with respect to monetary issues, including tort actions. Legal aid may also be available through clinical legal education, under the pro bono programme operated by the Israel Bar Association (the Bar) and by the Israeli Consumer Board. Usually, a third party is not entitled to contest the grant of such legal aid.

The Class Actions Law provides for the establishment of a fund for financing class actions (the fund). The purpose of the fund is to support representing plaintiffs in financing applications to approve claims as class actions, the filing and inquiring of which have public and social importance.

13 Third-party litigation funding

Is third-party litigation funding permissible?

The funding of litigation costs by insurance companies is permissible and customary in product liability cases. The only limitations or restrictions imposed are those included in the relevant insurance policy.

14 Contingency fees

Are contingency or conditional fee arrangements permissible?

Contingency or conditional fee arrangements are permissible in civil cases. However, if the Bar is of the view that the fee is excessive, it may, on the application of a client, determine the appropriate fee.

The Class Actions Law provides that the court will determine the fee of the attorney representing the plaintiff in a class action, and that he may not accept a fee higher than the amount prescribed by the court.

It should also be noted that a fee arrangement is also subject to the Contracts (General Part) Law 1973 and thus if a fee arrangement is not reasonable a client may have contractual causes of action against the attorney.

15 'Loser pays' rule

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

The general rule is that the successful party is usually awarded expenses and attorneys' fees (collectively, 'costs').

Traditionally, costs awarded by the court to the successful party often amounted to a small percentage of the actual costs, particularly as far as attorneys' fees were concerned. However, recent case law has shifted towards more realistic awards of costs being made by the courts.

Sources of law

16 Product liability statutes

Is there a statute that governs product liability litigation?

Yes. The Defective Products Law imposes strict liability on manufacturers that manufacture defective products, which is subject only to limited and specific defences provided by that Law. The Defective Products Law applies only where the injured party suffered bodily injury (ie, death, illness, injury or physical, physiological or mental defect).

The Defective Products Law does not provide exclusive causes of action and does not derogate from rights under any other law, including torts and contracts.

17 Traditional theories of liability

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

The main cause of action in product liability cases is based on the Civil Wrongs Ordinance (New Version), 1968 (the Civil Wrongs Ordinance), and in particular the wrongs of negligence and breach of statutory duty.

In order to establish negligence, a plaintiff has to prove the following: the existence of a duty of care; breach of such duty by the defendant; and a causal connection between the breach of such duty and the damage caused to the plaintiff.

To establish breach of statutory duty, a plaintiff has to prove breach by the defendant of a duty imposed on him by any law or regulation other than the Civil Wrongs Ordinance, provided, however, that the purpose of such other law or regulation is to protect or benefit the plaintiff, and that the damage caused as a result of the breach is of the nature contemplated by law or regulation. Thus, for example, a manufacturer who manufactures a product that does not meet the standards imposed by an official standard, as a result of which the plaintiff suffered damage, may be found liable under the wrong of breach of statutory duty.

The law of contracts is also an important source for imposing liability in defective products litigation. In addition to the provisions of the specific contract that form the contractual basis between the relevant parties, the Contracts Law (General Part) 1973, the Sale Law 1968 and the Sales Law (International Sale of Goods) 1999 should also be taken into consideration. These laws include provisions according to which, for example, a party to a contract should not mislead the other party and both parties should perform the contract in good faith and customary manner. In addition, according to the Sale Law a buyer does not fulfil his obligations under a contract if, for example, he delivers a product that does not meet the quality required for its normal or commercial use, or for the purpose of the agreement.

18 Consumer legislation

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

The Consumer Protection Law 1981 provides, *inter alia*, that a dealer should do nothing – by act or omission – likely to mislead a consumer as to any matter material to a transaction. The Consumer Protection Law provides examples of matters that are material to a transaction, including: the quality and nature of the product or service, the use that can be made with the product and the risk associated with such use, the manner of handling the product, and the conformity of the product to a standard, specification or model. Said law also provides that a dealer should disclose to the consumer any defect or quality inferiority that materially diminishes the value of the product, as well as any feature of the product that necessitates a special manner of maintenance or use in order to avoid injury to the user or to any other person or to the product, during ordinary use or handling. Any act or omission contrary to the above provisions amounts to a wrong under the Civil Wrongs Ordinance.

19 Criminal law

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

General offences, such as causing death or severe injury due to negligence, as governed by the Penal Law 1977, may also apply in order to impose criminal sanctions for the sale or distribution of defective products. Other legislation, which refers to specific products, may provide criminal sanctions that may be relevant to the sale or distribution of defective products. In addition, the Standards Law 1953 provides that it is a criminal offence to manufacture, sell, import or export a product that fails to comply with the requirements of an official standard (subject to the terms of said Law). Also, under the Consumer Protection Law, a dealer who misleads a consumer as to any matter material to a transaction or fails to disclose to a customer any defect, inferior quality or other feature known to him that materially diminishes the value of the product may be liable to criminal sanctions.

20 Novel theories

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

Economic analysis has become an important and leading theory, *inter alia*, with respect to torts and contracts laws. One outcome of this trend is the adoption (at this stage mostly in medical malpractice cases) of the evidential damage doctrine, mainly as a tool for shifting the burden of proof. In addition, cries for adoption of the doctrine of market share liability are being heard, but the doctrine has yet to be endorsed by the Israeli courts.

21 Product defect

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

According to the Defective Products Law, a product is defective if: it is likely to cause bodily injury as a result of a defect therein; or under the circumstances, warnings or instructions for handling and use that were required for safety reasons, were not provided or are inadequate taking into consideration the danger involved.

Where the causes of actions are based on torts or contracts, any breach of statutory duty or negligent act, or any breach of a provision in the contract relating to safety, standards, manufacturing, training, etc, may be used to establish product defect.

22 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?

The Defective Products Law provides a presumption according to which a product is presumed to be defective if the circumstances of the case are more consistent with the conclusion that it was defective than with the conclusion that it was not. The plaintiff bears the burden to convince the court that such presumption should apply and if successful the burden is shifted to the defendant to prove that the product is not defective.

Where the causes of action are based on torts or contracts the plaintiff bears the ultimate burden to prove the defect, based on the required standard of balance of probabilities. However, the burden to bring evidence may be shifted from one party to the other during the trial. It should also be taken into consideration that the Civil Wrongs Ordinance provides several rules and situations whereby the onus to prove that no negligence exists shifts towards the defendant. Those include the rule of *res ipsa loquitur* and the following situations: the damage was caused by a dangerous object that the defendant owned or was in charge of; and the damage was caused by a fire and the defendant was the owner or holder of the property where the fire erupted. Further, where it is reasonable to assume that the defendant may have more information regarding the incident subject matter of the claim, or other similar incidents, then practically the court expects the defendant to provide evidence showing that no defect exists.

23 Possible respondents

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

A manufacturer, importer, distributor, seller and any other person connected with the supply of a defective product may be found liable. For example, the Defective Products Law defines the term 'manufacturer' as a person who engages, for commercial purposes, in the manufacture or assembly of products, including: a person who represents himself as the manufacturer of a product by using his name or trademark or in any other manner; the importer, for commercial purposes, of a product manufactured abroad; and the supplier of a product whose local manufacturer or importer is not easily identifiable. The definition of the term 'dealer' in the Consumer Protection Law (see question 5) is also broad and may extend to sellers as well.

24 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 most commonly employed standard for determining causation-in-fact is the 'but for' test, namely, that the accident or damage would not have occurred but for the defect. If the accident or damage would have occurred just the same, regardless of whether the defect existed, the defect would not be considered as the cause for the injury or damage. Theoretically, the plaintiff bears (also) the burden to prove the causal connection. However, practically, when it is proven or presumed that a defect exists the court would usually expect the defendant to show that the damage or injury was not caused due to the defect. The burden may be shifted also where the court applies the rule of *res ipsa loquitur*. In addition, in cases involving several wrongdoers there is a growing tendency to make the causation-in-fact requirement more flexible in order to enable broader liability. Such flexibility may be reflected, for example, by shifting the burden of proof to each of several wrongdoers to show that he is not responsible for the entire injury or damage (see also question 20).

25 Post-sale duties

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

Post-sale duties may include, for example, a duty to recall defective products, a duty to supplement warnings regarding new potential risks that were not known at the time of manufacturing the product and a duty to repair defective products (including retaining spare parts). Such duties may be imposed by the relevant authorities with respect to specific products (ie, pharmaceuticals, medical devices, vehicles, etc), or may be deducted from general provisions and duties, such as: contractual obligations, the duty of care a manufacturer or a distributor of a product has towards those who use the product, and the duty imposed on a dealer under the Consumer Protection Law – which applies also after the date of the transaction – not to mislead (also by omission) a consumer as to any matter material to a transaction. A breach of such duties, resulting in damage, may lead to a product liability action based, for example, on the causes of action of negligence, breach of statutory duty, breach of the Consumer Protection Law, breach of contract, etc.

Limitations and defences

26 Limitation periods

What are the applicable limitation periods?

The general rule is that the limitation period with regard to civil actions, including product liability matters, is seven years. There are circumstances which, where applicable, lead to extension of the limitation period. The period of limitation begins on the day on which the cause of action occurred. The Civil Wrongs Ordinance provides, inter alia, that where the cause of action is damage caused by an act or omission the cause of action occurred on the day on which such damage occurred; or, if the damage was not discovered on the day on which it occurred, the day on which the damage was discovered, provided that in the latter case the action will be barred by limitation unless it is brought within 10 years of the day on which the damage occurred.

The Defective Products Law provides for a shortened limitation period for causes of actions under that Law, namely, three years. In addition, an action under said Law can only be brought within 10 years from the end of the year in which the product left the manufacturer's control.

A plea of limitation may not be entertained unless the defendant raised it at the earliest opportunity after the action was brought.

27 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?

One of the defences that a manufacturer may have against an action under the Defective Products Law is that, in accordance with the state of scientific and technological development at the time the product left the manufacturer's control, he could not have known that with regard to its design the product did not meet reasonable safety standards. The burden of proof to establish that defence lies on the manufacturer. The Supreme Court ruled that a similar defence also applies where a claim is based on the Civil Wrongs Ordinance since 'where risk is unknown and unfamiliar to the most advanced professional experts at the relevant time, any level of caution and skills on behalf of the manufacturer shall not be effective to prevent the damage'. Nonetheless, it is doubtful whether the defence will apply where scientific and technology improvements are made following distribution of the relevant product and become available to the manufacturer prior to occurrence of the damage, and the manufacturer failed to comply with his post-sale duties.

28 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 mere fact that a product complied with a standard or other requirement does not constitute a defence nor does it indicate that the manufacturer was not negligent.

29 Other defences

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

The Defective Products Law provides a numerous clauses list of defences that a manufacturer may raise upon a claim being filed against him under that Law. In addition to the defence mentioned in question 27, three additional defences against a cause of action based on said Law include:

- that the defect arose after the product left the manufacturer's control; if the manufacturer proves that the particular product concerned underwent reasonable safety checks before leaving his control, the defect shall be presumed to have arisen after the product left his control;
- that the manufacturer had not intended the product to leave his control and that he took reasonable steps to prevent it leaving his control and to warn the relevant section of the public of the risk involved; and
- that the injured party knew of the defect and the risk involved and voluntarily exposed himself to that risk, provided that the injured party is not less than 12 years old.

Where a claim for product liability is based on the Civil Wrongs Ordinance or the Consumer Protection Law a defendant may also argue the following defences:

- no fault – the damage was caused by an extraordinary natural event that a reasonable person would not have anticipated and the consequences thereof could not have been prevented even with reasonable care, or that the fault of another person was the decisive cause for the damage;

- voluntary exposure to risk (does not apply where the cause of action is a breach of statutory duty);
- a trivial act; and
- the action disputed was committed pursuant to any enactment (does not apply where the cause of action is negligence).

Where the product liability claim is contractual the defences are based largely on the provisions of the contract.

Jurisdiction analysis

30 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?

The Israeli product liability law is well developed. It provides efficient tools for injured parties to obtain sufficient remedies.

31 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?

Although rendered almost 20 years ago, one of the most renowned cases that shaped Israeli product liability law is CA 166/88 *Phoenicia et al v Amar et al*. In that case the Supreme Court held, inter alia, that:

- under the Defective Products Law a manufacturer of every component of a product may be liable for damage caused by that component, either alone or together with manufacturers of other components of the same product;
- the manufacturer of a product (in that case a bottle) should take into consideration the purpose of the product and the future procedures that such product is expected to undergo and their impact on the product (in that case a pasteurisation procedure conducted by an entity other than the bottle manufacturer);
- sample checks are not sufficient in order to establish the presumption that the defect arose after the product left the manufacturer's control; and
- in the absence of any information regarding the extent of the fault of each of the wrongdoers, liability should be distributed equally between them.

Update and trends

The possibility that a product liability action against a foreign manufacturer will be heard and decided by an Israeli court is becoming significantly easier, mainly for two reasons: orders allowing service outside of the Israeli jurisdiction are rendered more easily; and courts have ruled that a manufacturer who markets his products on a worldwide basis should expect that he might be sued in different territories, including Israel, thus limiting significantly the chances that an argument that the Israeli forum is not convenient will prevail.

Manufacturers' liability for their products is expanding, also following completion of their use by consumers, for reasons not necessarily related to defects in the products but rather to preservation of the environment.

The proposed Monetary Law (Civil Codex) is in the process of being finalised into a binding act replacing most of the current civil legislation, including the Defective Products Law, the Civil Wrongs Ordinance and the Contracts Law (General Part). The enactment of the Monetary Law is not expected to result in many material changes but its main purpose will be to create coherency among the various civil laws. Currently, expected material changes include a broader definition of the term 'defective product' and extending the limitation period under the Defective Products Law from three to four years.

A recent case also worth mentioning is the judgment rendered in November 2008 by the Tel Aviv-Yafo District Court, in which it accepted a class action (CF 1372/95 *Heirs of Tufic v Tnuva Commercial Marketing Centre*). In that case, the claim originated when it was discovered that, for almost two years, one of Israel's biggest milk distributors, Tnuva, mixed silicone into milk in order to prolong the product's shelf life, without disclosing it on the product's label. Adding silicone to milk contravenes the relevant Israeli standard. Despite there not being any real evidence proving actual damage, the court held that compensatory damages may include also negative feelings, feelings of disgust or feelings of harming the consumer's autonomy. The court further held that 'it was not a mistake, but wilful deception bordering on fraud and a serious breach of trust toward consumers

S. Horowitz & Co.

advocates, notaries and patent attorneys

Avi Ordo

41-45 Rothschild Boulevard
Tel Aviv 65784
Israel

PO Box 2499
Tel Aviv 61024

avio@s-horowitz.com

Tel: +972 3 5670700
Fax: +972 3 5660974
www.s-horowitz.com

and regulatory authorities'. Therefore, the court accepted the class action and awarded compensatory damages in a substantial amount, in Israeli terms, of 55 million New Israel Sheqels (approximately US\$14.5 million).

32 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.

The level of 'consumerism' is very high. Consumers are well aware of product liability laws and use it without hesitation to redress perceived wrongs. Two recent events may even strengthen this awareness and increase it: the Israel Consumer Council, whose aims are to increase consumer awareness and to encourage consumers to stand up for their rights, gained further power and autonomy following the enactment of the new Israeli Consumer Board Law, 2008; and the judgment to award substantial compensation in the Tnuva case (see question 31).

