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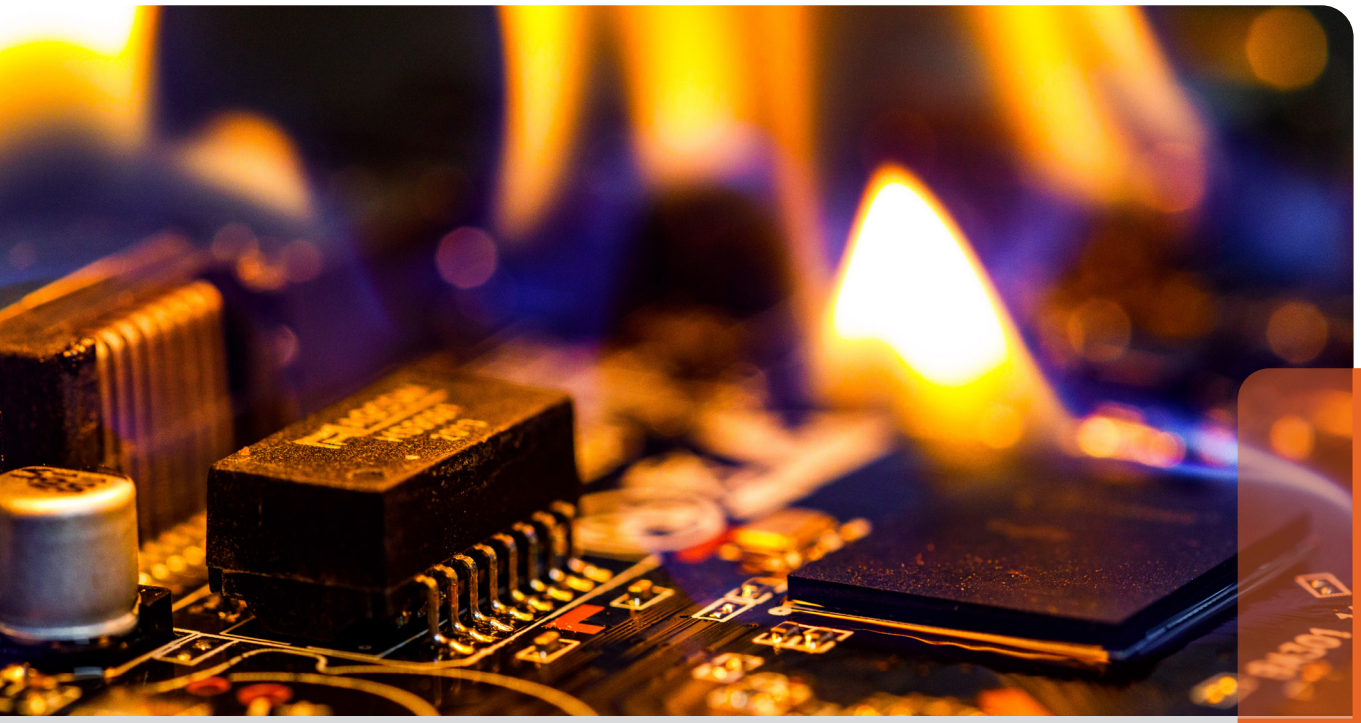

# Product Liability

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# Expert Analysis Chapters



# Q&A Chapters

# Switzerland



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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?**

Under Swiss law, there are primarily three routes of liability:

- strict liability under the Swiss Federal Product Liability Act (the "SPLA") and/or art. 55 of the Swiss Code of Obligations (the "SCO");
- negligence (fault-based liability) under art. 41 of the SCO; and
- contractual liability under the SCO and namely warranty-based liability.

The SPLA is by far the most common legal basis to a product liability claim. According to the SPLA the manufacturer (*cf.* 1.3) is liable if a defective product results in (i) a person being killed or injured, or (ii) property (other than the defective product itself) being damaged or destroyed. Products are deemed to be defective if they do not offer the safety that one is entitled to expect taking into account all circumstances (the decisive questions being what level of safety the product must offer according to an objective standard and what are the legitimate safety expectations of a reasonable person in the specific situation).

Art. 55 SCO (so-called principal's liability) used to be the general basis for product liability claims prior to the enactment of the SPLA and remains relevant namely as to claims not covered by the SPLA, like, for example, claims for damages to the defective product itself or to property used for professional or commercial purposes (all these claims being expressly excluded from the SPLA). According to the (rather apodictic) case law of the Swiss Federal Supreme Court, under art. 55 SCO, manufacturers of products cannot exonerate themselves by claiming that they have carefully selected, instructed and supervised their employees; as a matter of principle, they must also ensure proper work organisation and final inspection of their products if this can prevent harm to third parties. Under art. 55 SCO, purely financial losses (as opposed to damages to persons or property) are generally not recoverable.

Warranty and other contractual liability cases are relevant only if a contractual relationship exists between the manufacturer/supplier and the injured party. While contractual liability is generally fault-based, sales contract law provides for a strict liability for direct losses incurred by the buyer (art. 208 para. 2 SCO).

**1.2 Does the state operate any special liability regimes or compensation schemes for particular products, e.g. medicinal products or vaccines?**

There are no special liability regimes and/or compensation schemes for medicinal products or vaccines. However, according to art. 64 of the Swiss Federal Epidemics Act, persons injured as a result of a vaccination recommended or ordered by the state authority are entitled to compensation by the state (but only to the extent the damage is not covered by third parties like the manufacturer of the vaccine).

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

Under the SPLA, the following people are liable:

- the manufacturer of the final product, a component or raw material;
- all persons claiming to be the producer by attaching their name, trademark or other distinctive sign to the product (so-called "quasi manufacturer");
- all persons importing a product to Switzerland for sale, leasing or any other form of commercial distribution; and
- if neither the manufacturer nor the importer can be identified: the supplier.

If two or more of the above subjects are liable under the SPLA, they shall be liable jointly and severally.

In tort law, the party causing the damage (art. 41 SCO), or its employer/supervisor (art. 55 SCO), is liable.

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

In theory, it is possible to sue the state and its authorities for damages unlawfully caused to third parties (see, e.g., art. 3 of the Swiss Federal Act on the Responsibility of the Swiss Confederation and its Officials and Civil Servants). This rarely ever happens in practice. As a result, there are many unresolved legal questions, particularly in connection with the liability of state regulatory authorities organised under private law or outsourced from the centralised Federal administration (such as Swissmedic, the Swiss Agency for Therapeutic Products).

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

Neither the SPLA nor the SCO provide for an explicit obligation to recall a product. However, the generally accepted (albeit unwritten) so-called danger principle (stipulating that anyone who creates a dangerous condition must take the necessary precautions so that the latter does not materialise), may trigger a recall.

Moreover, the Swiss Federal Products Safety Act (the "SPSA"), generally applying to products intended for consumers, provides for a product monitoring obligation on the part of the manufacturer/importer and empowers the competent authority, amongst others, to recall a product if required to protect the safety or health of end users or third parties.

Similar obligations and powers can be found in special legislation, e.g. in the Swiss Federal Act on Foodstuffs and Utility Articles (the "SAFUA") and in the Swiss Federal Therapeutic Products Act.

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

Apart from the provisions of the Swiss Criminal Code, special legislation, like, for example, the SPSA and the SAFUA, regularly provides for specific criminal provisions.

## 2 Causation

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

Under the SPLA, the burden of proving the product's defects and the damages suffered lies with the claimant, whereas the defendant can attempt to prove that one of the (limited) exceptions to liability applies (*cf.* 3.1).

To establish liability under art. 55 SCO, the claimant has the burden of proving the product's defect and the damages suffered, while the defendant may attempt to prove they acted with due care and ensured proper work organisation and appropriate final inspection of the products (*cf.* 1.1).

For a warranty claim for damages pursuant to art. 208 para. 2 SCO, the claimant must prove the product's defect and the damages suffered (while the defendant is left with "no way out" – *cf.* 1.1).

**2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?**

For all product liability claims it is the claimant who must show causation, i.e., the claimant must prove that the damage would not have incurred but for the product's defect (so-called natural causation), and that, considering the normal course of events and general life experience, the defect in the case at hand is generally of such a nature as to cause the damage incurred.

While the claimant must generally provide full (strict) proof, according to established case law, the reduced standard of proof of preponderance of probability is exceptionally applied if, due to the nature of the matter, full (strict) proof cannot be provided (please see question 4.2).

**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?**

Liability requires proof of actual causation. Market-share liability and other concepts of liability relying on possible causation only are occasionally discussed but are, as of today, alien to Swiss law.

**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?**

A product is considered faulty under the SPLA if it does not offer the safety that an average user is entitled to expect under the circumstances. Obviously, the average user's safety expectations will, amongst other things, depend on how the product is presented to the public. Therefore, the manufacturer is well advised to inform about potential hazards of proper use (such as side-effects) and warn against misuse.

As to the principle of "learned intermediary", the Swiss Federal Supreme Court has held (in a landmark decision on the negative health consequences resulting from the intake of a prescription contraceptive pill) that a warning about an increased pulmonary embolism risk included in the information leaflet for the medical doctor only was enough of a warning, given the doctor's general responsibility to assess and inform the patient about the risks resulting from the intake of the prescription contraceptive pill. As to the recall of a product, please see question 1.5.

## 3 Defences and Estoppel

### 3.1 What defences, if any, are available?

Under the SPLA, the manufacturer shall not be liable, amongst others, upon proving: (a) that it can be assumed from the circumstances that the defect causing the damage did not exist when it placed the product on the market; (b) that the defect is the result of a product's compliance with binding statutory requirements; or (c) that the defect could not have been detected according to the state of the art in science and technology at the time the product was placed on the market.

Under art. 55 SCO, the defendant shall not be liable upon proving to have acted with due care and to have ensured proper work organisation and appropriate final inspection of the products (please see question 1.1).

Under a warranty claim for damages pursuant to art. 208 para. 2 SCO, no defence is available whatsoever (please see question 1.1).

Special legislation may provide for additional defences, e.g. the Swiss Federal Act on Research involving Human Beings.

### 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?

Under the SPLA, such a defence is available, and it is up to the defendant/manufacturer to prove that the defect could not have been detected according to the state of the art in science and technology at the time the product was placed on the market (see question 3.1).

Special legislation may provide for additional defences in this context, e.g. the Swiss Federal Act on Research involving Human Beings.

### 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?

Under the SPLA, a manufacturer is not liable upon proving that the defect is the result of the product's compliance with binding statutory requirements (see question 3.1). Moreover, compliance with regulatory requirements indicates that a given product is not defective. On the other hand, the mere fact that a product has been given official authorisation or approval does not prevent a given product from being considered defective.

### 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?

Under the Swiss rules of civil procedure, it is admissible to re-litigate issues of defect, among others, in separate proceedings brought against the same defendant by a different claimant. The decision of a Swiss court binds the parties to the dispute only, and there is no issue estoppel or the like which a defendant manufacturer could invoke in later proceedings brought by different claimants.

As a practical matter, however, it is rather unlikely that the same court will decide an identical (and even a similar) issue differently in later proceedings (unless the first decision was based on procedural particularities or if there is new evidence calling for a re-assessment of the issue).

### 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?

A defendant can take recourse against a third party that is ultimately responsible for the defect (typically based on contractual or tort liability): either in the same proceedings (by way of a so-called third-party notice or a so-called third-party action); or (according to the defendant's choosing), provided that the pertinent recourse claim has not become time-barred yet (see questions 5.1–5.3), in separate proceedings, as well.

The defendant might choose to have the potentially liable third party involved in the initial litigation (between the claimant and the defendant) by way of third-party notice or third-party action, namely if the defendant depends on the third party to defend against the claimant's claim, or in order to prevent the third party from arguing in the later recourse litigation (between the defendant and the third party) that the defendant had handled the initial litigation badly.

In case of particularly serious "fault" of a third party, the defendant can attempt to argue a so-called interruption of an otherwise existing (adequate) causal link (see question 2.2).

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

An actual misuse of a product excludes any liability under the SPLA, whereas a reasonably foreseeable inappropriate use does not.

In the case of particularly serious "fault" on the claimant's part, the defendant may attempt to argue a so-called interruption of an otherwise existing (adequate) causal link (see question 3.5 above).

Circumstances attributable to the claimant that contributed to the origin or the emergence of the damage can at least be invoked by the defendant as grounds for having reduced the amount of monetary compensation owed to the claimant.

### 3.7 Are there any examples in your jurisdiction of legislation providing exemptions from product liability in respect of products produced and/or deployed in the context of a public health emergency?

We are not aware of any such special legislation.

## 4 Procedure

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

There are no jury trials in Switzerland. A case is decided by one or several judge(s), the number of judges typically depending on the amount in dispute.

**4.2 What is the standard of proof applied by the court? Does the court have to be satisfied of a fact "on the balance of probabilities" (i.e. more likely than not), "beyond all reasonable doubt" or to a different or more flexible standard?**

The general standard of (full or strict) proof requires the court to be fully convinced of the accuracy of a factual assertion based on objective criteria. Some authors give percentages, and the percentage typically advocated for full/strict proof is 90%. That standard also applies in product liability cases.

The reduced standard of proof of so-called preponderance of probability is exceptionally applied if, due to the nature of the matter, full/strict proof simply cannot be provided. Proof by preponderance of probability still requires that, from an objective point of view, there are such weighty reasons speaking in favour of a given explanation that other explanations, while imaginable in theory, cannot reasonably be considered relevant. Some authors give percentages, and the percentage typically advocated for the preponderance of probability standard is 75%. According to established case law, the preponderance of probability standard applies namely to the proof of the natural causal link (see question 2.2).

For the sake of completeness, there is one other standard of proof under Swiss law: the so-called plausibility standard (often equated with a probability of 50%). Clearly, it does not suffice to win a product liability claim if a defect can be made plausible.

**4.3 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)?**

The court may appoint an expert either at the request of a party or *sua sponte*. A court-appointed expert does not sit with the judges but, typically, will render a written expert report.

**4.4 Is evidence introduced solely by the parties or may the court take evidence on its own initiative?**

Under the Swiss rules of civil procedure, in principle, it is up to the parties to present the court with the relevant facts in support of their case and to prove those facts by submitting appropriate means of evidence. In principle, the court must accept an undisputed fact (i.e., a fact asserted by one party and not contested by the other) as true, and may take evidence on its own initiative only, if serious doubts exist as to the correctness of an undisputed fact.

**4.5 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure "opt-in" or "opt-out"? Who can bring such claims, e.g. individuals and/or groups? Are such claims commonly brought?**

The Swiss rules of civil procedure do not yet provide for class actions or any other specific procedure of multiple claims.

In practice, if circumstances allow (e.g. the applicable statute of limitations), one or several specific cases out of a multitude of similar cases (possibly those considered to have the best chances of success) might be filed upfront in the sense of a model lawsuit, albeit without any prejudicial effect for all the remaining cases and parties.

Claimants with similar claims (i.e. claims resulting from similar circumstances and/or legal grounds, like, for example, multiple persons injured by the same defective product in a similar way) may file their claims jointly (as so-called joint claimants). However, each of them remains free to proceed independently from the others (and may, for example, enter into a separate settlement agreement).

Exceptionally, the Swiss rules of civil procedure allow for group actions, i.e., claims brought by associations and other groups of national or regional importance in relation to the (allegedly infringed) rights of its members (for a typical example, see question 4.6). However, group actions are limited to declaratory relief only.

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

A consumer organisation has standing to bring a claim on behalf of its members to the extent their rights have been infringed. Only declaratory relief is available (see question 4.5).

**4.7 May lawyers or representative bodies advertise for claims and, if so, does this occur frequently? Does advertising materially affect the number or type of claims brought in your jurisdiction?**

Advertising for claims by lawyers occurs rarely and is hardly of practical relevance in Switzerland, the main reasons being the lack of class action under Swiss law (see question 4.5), the non-availability of punitive damages the prohibition of true contingency-fee arrangements, and the Swiss rules on professional conduct which provides for strict limitations in connection with advertising.

**4.8 How long does it normally take to get to trial?**

As a rule, the initiation of court proceedings requires the completion of conciliation proceedings (see question 4.14). Conciliation proceedings usually take a few months to complete. In the absence of settlement, at the end of the conciliation proceedings a so-called authorisation to file suit is issued which enables the claimant to file its claim with the first instance court within three months.

The duration of the proceedings before the first instance court depends heavily on the complexity of the respective case and the defendant's behaviour. In a standard case, the parties may expect the court to issue a judgment within 12 to 18, exceptionally within 24 months after the filing of the lawsuit with the court. Note that there is no common law-style trial in Switzerland.

**4.9 Can the court try preliminary issues, the results 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?**

The court is the master of the pending proceedings and may, amongst others, limit the proceedings to specific issues and/or specific prayers for relief; and the parties are free to (and typically do) file corresponding requests. In essence, limitation to a specific factual issue is feasible if the factual issue is of legal relevance.

While the court (consisting of three or five judges) may decide to (and typically does) delegate the instruction of the proceedings to one of its members, the actual decision-making power remains with the full court at all times. Note that there are no jury trials in Switzerland.

**4.10 What appeal options are available?**

In principle, decisions of the cantonal first instance courts can be appealed with the cantonal second instance courts (the courts of appeals), the admissible grounds for appeal mainly depending on the amount in dispute. As a last resort, the decisions of the cantonal courts of appeal can be challenged with the Swiss Federal Supreme Court. Exceptionally, if the cantonal first instance court is a so-called commercial court (only four cantons having commercial courts in place), that court's decision must be appealed directly with the Swiss Federal Supreme Court.

**4.11 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?**

As a matter of principle, it is up to the parties to submit expert evidence and/or to request the court to appoint an expert (the court may also appoint an expert *sua sponte*, e.g., if it lacks the technical knowledge required to decide a given case – question 4.3). In principle, only questions of facts may be the subject of an expert opinion, the power to decide questions of law lying exclusively with the court.

**4.12 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?**

The concept of pre-trial discovery is alien to the Swiss rules of civil procedure.

The taking of evidence in a pre-trial stadium (i.e., with no claim pending) is admissible only in exceptional cases (so-called precautionary taking of evidence), in particular if the requesting party can credibly demonstrate that a crucial piece of evidence is on the verge of being lost forever (e.g. an important witness is about to die).

Note that according to the case law of the Swiss Federal Supreme Court, written witness and expert statements are considered "mere" party claims (without any special probative value).

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

The concept of pre-trial discovery is alien to Swiss law. In a pre-trial stadium (i.e. with no claim pending), a party is, in principle, required to produce specific documents only if, and to the extent the law applicable exceptionally grants the requesting party an entitlement to such document(s), or by way of precautionary taking of evidence.

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

The initiation of court proceedings generally requires the completion of conciliation proceedings in which an amicable solution is sought under the auspices of a conciliator: depending on the canton this could be a judge, a court clerk or a layperson (see question 4.8).

Alternative means of dispute resolution (such as mediation and arbitration) are available, but require an explicit agreement by the parties.

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

Swiss courts accept or deny their competence to decide a claim (and namely to accept or deny their jurisdiction over a foreign defendant) based on the Swiss private international law and/or the pertinent international treaties (e.g. the Lugano Convention). As a matter of principle, it will always be admissible to file a claim against the defendant with the Swiss court at the defendant's Swiss domicile or residence. Things are a bit more complicated when it comes to bringing a defendant with a foreign domicile or residence within the jurisdiction of a Swiss court (Swiss courts may accept their jurisdiction at the Swiss place where the tort or its consequences occur).

**4.16 May hearings take place or witness evidence be given virtually via teleconferencing or other technical methods?**

As of 1 January 2025, it will finally be admissible to conduct hearings and examine witnesses by means of videoconferencing, teleconferencing and the like. However, this always requires the consent of all parties involved.

## 5 Time Limits

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

Claims under the SPLA become time barred within three years after the date on which the injured party became aware (or should have become aware) of the damage, the defect and the identity of the manufacturer, or within 10 years after the date on which the manufacturer placed the product on the market, whichever comes first.

Contractual claims under the SCO generally become time barred after five or 10 years from the due date.

Tort claims under the SCO generally become time barred after three years from the date on which the injured party became (or should have become) aware of the damage and the identity of the tortfeasor, or within 10 years after the tort took place, whichever comes first. Limitations more favourable to the injured party/claimant may apply if the tort also constitutes a criminal offence. Claims based on special legislation may be subject to special time limits.

**5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?**

Please see the answer to question 5.1 above. As a matter of principle, neither the age nor the condition of the claimant are relevant as to the applicable statute of limitations. Swiss courts (applying Swiss law) do not have the discretion to disapply time limits provided for by the law.

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

As the statute of limitation for tort claims under the SPLA and the SCO starts to run once the injured party has become aware of the identity of the tortfeasor, concealment and fraud may obviously have an impact on the time limits. In addition, if a tort constitutes a criminal offence at the same time, for example in the case of fraud, the statute of limitation applicable to the criminal offence (typically more favourable to the injured party/claimant) also applies to the tort claim.

## 6 Remedies

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

In practice, monetary compensation is by far the most important remedy. Injunctive/declaratory relief is also available but requires the showing of a particular interest in such relief.

For the sake of completeness, violations of pertinent provisions may also result in administrative consequences such as an obligation to recall a defective product, or criminal sanctions (*cf.* 1.5 and 1.6).

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

There are two basic principles to be considered in this regard. Only damages resulting from bodily injury or death of a natural person and damages resulting from destruction, damage or loss of property are recoverable, whereas merely pecuniary losses are, in principle, only recoverable if, and to the extent that, other absolute rights have been violated.

Moreover, damages are recoverable only to the extent that they correspond to an unintentional reduction in net assets and are thus limited to the difference between the current state of the claimant's assets and the (hypothetical) state that the claimant's assets would have had without ("but for") the damaging event.

Pursuant to the SPLA, the injured party must bear the damage to the property up to an amount of CHF 900, and damages to the product itself are not recoverable. There is a possibility that compensation for pain and suffering could be awarded, although the corresponding amounts are very low by international standards.

**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?**

Such costs do not qualify as damages under Swiss law (see question 6.2 above).

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

Punitive damages are not recoverable under Swiss law. Moreover, Swiss Private International Law expressly states if a product liability claim is adjudicated by a Swiss court pursuant to the applicable foreign law, no compensation must be awarded beyond that which would be awarded for such kind of damage under Swiss law.

**6.5 Is there a maximum limit on the damages recoverable from one manufacturer, e.g. for a series of claims arising from one incident or accident?**

There is no limit on the amount of the damages recoverable (for the notion of damages pursuant to Swiss law, please see question 6.2).

**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?**

As a matter of principle, the settlement of claims/proceedings is not subject to court review and/or approval. It should be noted, however, that if a settlement is concluded at a court hearing (with the help of the court) or filed with the court to be recorded by the court, such settlement has the same legal effect as a final judgment by the court.

Regarding the absence of (true) group/class actions, please see question 4.5.

**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?**

According to a general principle of Swiss law, the insurance carrier, whether private or state-owned, such as a health insurance carrier, accident insurance carrier or invalidity insurance carrier, subrogates to the claims of the insured injured party (or the latter's survivors) against the party liable for the insured event, up to the amount of the benefits paid by the insurance carrier to the insured injured party (or the latter's survivors).

## 7 Costs / Funding

**7.1 Can the successful party recover: (a) court fees or other incidental expenses; and (b) their own legal costs of bringing the proceedings, from the losing party?**

Pursuant to the general principle of "loser pays all", the winning party can recover from the losing party its legal costs and in particular court fees – in principle, the claimant must advance the court fees at the outset of the proceedings – and attorneys' fees. The latter are determined – and capped – by the applicable cantonal tariff, which primarily calculates the amount of compensation in relation to the amount in dispute.

Note that witnesses are summoned (and paid for by way of a minimal compensation) by the courts, not the parties (those costs being part of the court costs, as are the costs related to a court-appointed expert); costs for party-appointed experts are not necessarily recoverable, even by the winning party.

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

A party has a constitutional right to legal aid, which comprises (a) the right to litigate without having to advance (as the claimant) or to bear (as the losing party) the court costs, and (b) as the case may be, the right to legal representation free of charge (i.e. at the state's expense) (see question 7.3 below).

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

Legal aid is limited to persons (a) who do not have the means to bear the legal costs, and (b) whose case does not appear to be futile. Moreover, free legal representation is available only if, and to the extent that, it is necessary to safeguard a party's rights.

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

In Switzerland, true contingency fee arrangements are prohibited. Alternative fee arrangements with a contingency fee element (allowing for a bonus in case of success) are admissible under the following restrictive conditions: (a) the alternate fee arrangement must be concluded at the outset of the client relationship; (b) the alternate fee arrangement must enable the lawyer to cover the costs and to make a reasonable profit irrespective of the outcome of the litigation; and (c) the contingency-based (success-based) fee component must not be higher than the other not-contingent fee component.

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

Third-party funding of claims is admissible. While its exact prevalence in practice is rather difficult to assess, third-party funding is certainly on the rise.

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

No, it does not.

## 8 Updates

**8.1 Please outline the approach taken to date by the courts in your jurisdiction in relation to product liability for new technologies such as artificial intelligence, machine learning, and robotics, and identify the ways in which this approach differs (if at all) from the approach taken with other products.**

Swiss courts have not yet had an opportunity to decide how new technologies such as AI and robotics fit into the existing Swiss product liability framework and to decide the legal questions arising in this context.

**8.2 If relevant for your jurisdiction, what impact do you anticipate as a result of the revised disclosure requirements under the proposed new EU Product Liability Directive?**

Switzerland is not a member of the EU, and unless Switzerland adapts its laws accordingly, EU regulations do have no direct legal effects in Switzerland.

**8.3 Please identify any other significant new cases, trends and developments in Product Liability Law in your jurisdiction.**

As far as we can see, within the last 12 months, there have been no significant developments in the area of product liability law in Switzerland.

**Maurice Courvoisier** advises and represents clients in arbitration and litigation proceedings in all areas of corporate and commercial law. His areas of expertise include general contract law, product liability law, conflicts of laws, international judicial assistance as well as recognition and enforcement of foreign judgments and arbitral awards in Switzerland. Maurice is listed as a "National Leader" in litigation and arbitration by *Who's Who Legal* and as an expert in litigation and international arbitration by *Best Lawyers*. Maurice is, amongst others, co-head of the Basel local group of the Swiss Arbitration Association (ASA), member of the American Bar Association (ABA), the New York Bar Association (NYSBA) and the International Bar Association (IBA). Born in 1970, Maurice was educated at the University of Basel (*lic. iur.*, 1995; *Dr. iur.*, 2001; both *summa cum laude*) and at Columbia University in New York (LL.M., 1998; Harlan Fiske Stone Scholar). He was a research and teaching fellow for Professor Ingeborg Schwenzer and of Swiss Federal Supreme Court Judge Professor Thomas Geiser at the University of Basel. Maurice speaks German, English, French and Italian. He is admitted to practise law in Switzerland and also in the State of New York.

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