



ICLG

The International Comparative Legal Guide to:

Product Liability 2013

11th Edition

A practical cross-border insight into product liability work

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

Advokatfirmaet Thommessen AS

Allen & Gledhill LLP

Allen & Overy Luxembourg

Anderson Mori & Tomotsune

Arnold & Porter (UK) LLP

Bahas, Gramatidis & Partners

Baker & McKenzie Krzyżowski i Wspólnicy sp. k.

BOPS Law Firm

Brandão Couto, Wigderowitz & Pessoa Advogados

Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados

Carroll, Burdick & McDonough LLP

Caspi & Co.

Clayton Utz

Clyde & Co

Crown Office Chambers

De Brauw Blackstone Westbroek

Eversheds

Faus & Moliner

Fiebinger Polak Leon & Partner Rechtsanwälte GmbH

Gianni, Origoni, Grippo, Cappelli & Partners

Gowling Lafleur Henderson LLP

Greenberg Traurig, LLP

Herbert Smith Freehills LLP

Kim & Chang

Liedekerke Wolters Waelbroeck Kirkpatrick

Matheson

McConnell Valdés LLC

Nelson Mullins Riley & Scarborough LLP

Pachiu & Associates

Portilla, Ruy-Díaz y Aguilar, S.C.

Seth Associates

Sidley Austin LLP



The International Comparative Legal Guide to: Product Liability 2013



Global Legal Group

Contributing Editors

Ian Dodds-Smith, Arnold & Porter (UK) LLP and Michael Spencer QC, Crown Office Chambers

Account Managers

Beth Bassett, Robert Hopgood, Dror Levy, Maria Lopez, Florjan Osmani, Oliver Smith, Rory Smith

Sales Support Manager

Toni Wyatt

Sub Editors

Beatriz Arroyo
Fiona Canning

Editor

Suzie Kidd

Senior Editor

Penny Smale

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Information Press Ltd
May 2013

Copyright © 2013
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-908070-61-6
ISSN 1740-1887

Strategic Partners



Preface:

- Preface by Tom Spencer, Counsel, GlaxoSmithKline Plc.

General Chapters:

1	Recent Developments in European Product Liability - Ian Dodds-Smith & Alison Brown, Arnold & Porter (UK) LLP	1
2	Update on U.S. Product Liability Law - Michael W. Davis & Rebecca K. Wood, Sidley Austin LLP	6
3	Our Company Has Been Sued in the United States: What Now? - David E. Dukes & Amanda S. Kitts, Nelson Mullins Riley & Scarborough LLP	16
4	Causation and the Use of Epidemiological Evidence in English Law - Howard Watson & Anthony Dempster, Herbert Smith Freehills LLP	23
5	International Electronic Discovery - Nicole B. Boehler, Carroll, Burdick & McDonough LLP	27
6	Implications of Recent U.S. Governmental Enforcement Activities on Pharmaceutical and Medical Device Products Liability Actions - Lori G. Cohen & Christiana C. Jacksens, Greenberg Traurig, LLP	44
7	The Practicalities of Managing a Global Recall - Richard Matthews & Fabian Volz, Eversheds	53
8	The Claims Process under Global Insurance Policies - Mark Wing & Neil Beresford, Clyde & Co	61
9	Recent Developments in United States Aviation Product Liability Law - Donald R. Andersen	66

Country Question and Answer Chapters:

10	Argentina	Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados: Daniel B. Guffanti & Mariano E. de Estrada	76
11	Australia	Clayton Utz: Colin Loveday	82
12	Austria	Fiebinger Polak Leon & Partner Rechtsanwälte GmbH: Peter Polak & Karina Hellbert	91
13	Belgium	Liedekerke Wolters Waelbroeck Kirkpatrick: Béatrice Toussaint	98
14	Brazil	Brandão Couto, Wigderowitz & Pessoa Advogados: Paulo Rogério Brandão Couto & Carlos Alexandre Guimarães Pessoa	108
15	Canada	Gowling Lafleur Henderson LLP: Mary M. Thomson & Nicholas Kluge	116
16	England & Wales	Arnold & Porter (UK) LLP: Ian Dodds-Smith & Alison Brown Crown Office Chambers: Michael Spencer QC	124
17	France	BOPS Law Firm: Carole Sportes & Valérie Ravit	136
18	Germany	Carroll, Burdick & McDonough LLP: Jörg Staudenmayer & Daniel Schulz	143
19	Greece	Bahas, Gramatidis & Partners: Dimitris Emvalomenos	151
20	India	Seth Associates: Karnika Seth	157
21	Ireland	Matheson: Tom Hayes & Michael Byrne	164
22	Israel	Caspi & Co.: Norman Menachem Feder & Gad Ticho	174
23	Italy	Gianni, Origoni, Grippo, Cappelli & Partners: Daniele Vecchi & Michela Turra	182
24	Japan	Anderson Mori & Tomotsune: Tetsuro Motoyoshi & Ryohei Ikeda	189
25	Korea	Kim & Chang: Sang Ho Han & Inhak Lee	196
26	Luxembourg	Allen & Overy Luxembourg: Donata Grasso	203
27	Mexico	Portilla, Ruy-Díaz y Aguilar, S.C.: Carlos F. Portilla Robertson & Enrique Valdespino Pastrana	211
28	Netherlands	De Brauw Blackstone Westbroek: Daan Beenders & Machteld de Monchy	217
29	Norway	Advokatfirmaet Thommessen AS: Odd Stemsrud	225
30	Poland	Baker & McKenzie Krzyżowski i Wspólnicy sp. k.: Ewa Rutkowska	231
31	Puerto Rico	McConnell Valdés LLC: Manuel Moreira-Toledo & Alejandro J. Cepeda-Díaz	239

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.



Country Question and Answer Chapters:

32	Romania	Pachiu & Associates: Remus Ene & Adelina Somoiaig	245
33	Singapore	Allen & Gledhill LLP: Dr Stanley Lai, SC & Amanda Soon	253
34	Spain	Faus & Moliner: Xavier Moliner	263
35	USA	Nelson Mullins Riley & Scarborough LLP: David E. Dukes & Amanda S. Kitts	270

Austria



Dr. Peter Polak



DDr. Karina Hellbert

Fiebinger Polak Leon &
Partner Rechtsanwälte GmbH

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?**

In Austria, product liability may arise out of general tort law, contract law and out of various specific liability regimes, such as the Genetic Engineering Act. Depending on the basic concept behind those regimes, product liability can be based on either fault or strict liability.

In general, product liability is regulated by the Product Liability Act (PLA, *Produkthaftungsgesetz*, BGBL No. 98/2001, as amended). The PLA implements the European Directive 85/374/EEC on Liability for Defective Products (the Directive).

As required by the Directive, the PLA contains a strict liability system and provides for stricter limits on recoverable damages, and also on the persons liable, as compared to the general tort system.

General tort law according to the Civil Code only applies if the purchase of a product does not qualify as a consumer transaction. Additionally, after the introduction of the Product Liability Act in 1988, relying on general tort law will only make sense if the statutes of limitations provided by the PLA have already expired.

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

The Act concerning Compensation for Vaccination Damages (*Impfschadengesetz*, BGBI 371/1973) operates a compensation scheme for damages caused by certain vaccines. Recoverable are damages caused by vaccinations that are, among others:

- recommended by the “mother-child-passport”;
- recommended by a regulation issued by the competent minister; or
- ordered by an administrative authority based on §17 of the Pandemic Law (*Epidemiegesetz*, BGBI 186/1950).

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

According to the PLA, the responsibility for a defective product is

placed on the manufacturer. This could be the entrepreneur manufacturing the product, importing it into the European Economic Area or marketing the product, if the latter fails to disclose the name of the actual manufacturer or importer in due time.

Under the tort concept, every person associated with the production and distribution of the product could potentially be liable. Contrary to the regulations of the PLA, even the supplier may be liable, irrespective of whether the manufacturer can be identified.

Liability could also arise out of the breach of statutory or regulatory duties. In such a case, the person violating the relevant provision could be held liable: for instance, persons covered by the Food Safety and Consumer Protection Act (*Lebensmittelsicherheits- und Verbraucherschutzgesetz*, BGBI 13/2006) or the Product Safety Act (*Produktsicherheitsgesetz* 2004, BGBI 16/2005).

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

The Food Safety and Consumer Protection Act (LMSVG) and the Product Safety Act regulate under which circumstances a product shall be recalled. According to the Product Safety Act, a product must be recalled if (i) the product under normal and reasonably foreseeable conditions of usage presents a risk, or (ii) the product does not fulfil the minimum risk requirements for the use of this product which are considered to be acceptable and consistent with a high level of protection for the safety and health of persons. In addition, if food products violate the standards laid down in the LMSVG, the competent authorities may also order a recall of these products. Furthermore, the authorities in charge of medical products and medical devices can order recalls.

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

Persons placing products on the market, which may contribute to the spreading of infectious diseases, can be liable to prosecution under the Criminal Code (*Strafgesetzbuch*, BGBI 60/1974, as amended). Applicable sanctions can be up to one year of imprisonment or a financial fine up to 360 daily rates, which depend on the income of the person or turnover of the company. If the products placed on the market cause damage to health, the fines will increase to up to two years of imprisonment and, if a person dies, up to three years. Additionally, the criminal court may order that the relevant judgment be published in a newspaper. Also legal entities can face criminal sanctions.

2 Causation

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

The claimant has to prove the damage, the defect, the causation and that the product was placed on the market by the manufacturer. These allegations can be countered in various ways: The defendant may provide evidence that the defect that caused the damage did not exist at the time the product was placed on the market, or that such defect originated afterwards. In addition, the defendant may also prove that he was not the entrepreneur placing the product on the market and may nominate the actual person putting it into circulation. Under the tort concept, the claimant must prove damages, causation, unlawfulness and, in addition, negligent conduct of the defendant.

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?

The relevant test is based on the so-called “*conditio sine qua non*”, which translates into the following question: Would the damages have occurred if the product had not been defective? If so, no liability arises. Generally, it is not sufficient for the claimant to show that the product exposed the claimant to an increased risk. However, if the event leading to the damages follows an established typical course of action, the Austrian courts consider it sufficient to prove causation by *prima facie* evidence. This means that the claimant must simply convince the judge that, according to general knowledge and understanding, the event followed a general course of action and, therefore, it is more likely that the damage was caused by the product than by other means. The concept of *prima facie* evidence aims at reducing the burden of proof, but of course, it can be counter-evidenced by the defendant.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

The Austrian system does not recognise the concept of market-share liability. However, under certain circumstances joint and several liability could arise, namely if the damages cannot be attributed to one specific person or if two or three persons were intentionally working together to harm the injured person. This concept might apply to situations where it cannot exactly be established what product caused the harm, but it will definitely not apply when the claimant cannot even prove which product he has actually used.

- 2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of “learned intermediary” under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

According to the PLA, a product is defective if it does not provide the safety that a person is entitled to expect. Therefore, a failure to warn could be considered as a defect. The warnings must generally be of such a nature that the risks associated with the product must be described to the greatest possible extent. Any inconsistencies will be held against the party issuing the warning. In principle, the concept applied is whether an average and well-informed consumer would have been reasonably warned about the risks. However, the court decisions in Austria are normally in favour of consumers.

If the product is intended to be used by professionals, the standard could be lower, albeit, if the manufacturer is aware that the professionally-used product is also constantly used by consumers, the manufacturer should provide more detailed information to avoid liability.

There is no learned intermediary rule under Austrian law. Consequently, warnings given to physicians normally do not release a pharmaceutical company from providing sufficient warnings to patients. In this context, it must be emphasised that certain warnings due to the lack of appropriate scientific proof are not allowed to be included in the package leaflet. Therefore, in product liability cases, the warnings provided in the summary of product characteristics, as well as in the package leaflet, must be seen as supplementing each other. According to at least one case in Austria, the manufacturer was not automatically held liable although certain information was not contained in the package leaflet. The Supreme Court stated that the lower court must still establish whether the patient would not have taken the product although recommended by her physician. Therefore, the learned intermediary defence can be tried to undermine causation.

3 Defences and Estoppel

3.1 What defences, if any, are available?

Under the PLA, the following defences are available:

- the manufacturer did not place the product on the market;
- the manufacturer can prove that the product did not have the defect that caused the damages at the time the product was placed on the market or the defect came into being afterwards;
- the product was not intended for sale;
- the manufacturer complied with specific mandatory regulations issued by public authorities when manufacturing the product;
- the state of scientific and technical knowledge at the time when the manufacturer placed the product on the market was not such as to enable the existence of the defect to be discovered; or

- in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instruction given by the manufacturer of the product.

Under tort law, all defences are available that allow the defendant to disprove causation, that the manufacturer was not violating any protective laws, etc.

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?

Austria has implemented the development risk defence as provided for in Article 7 of the Directive. Most legal scholars in Austria assume that this defence will be only available in rare cases, because of the case C-300/95, *European Commission vs. the United Kingdom*. Advocate General Tesauro reasoned that the state of scientific knowledge cannot be identified by relying on the views expressed by the majority of learned opinion, but by taking into account the most advanced level of research, which has been carried out at the relevant time. Consequently, publications in a Chinese local journal would still allow a manufacturer to rely on this defence; however, if the article was published in an English journal, the manufacturer could not rely on this defence any longer. Therefore, the requirements to be met are extremely high and it is doubtful whether any company could reasonably meet them.

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?

Compliance with regulatory and/or statutory requirements constitutes only a defence when the manufacturer was specifically ordered to comply with these standards. Compliance with "general" authorisations, such as marketing authorisations for medicinal products or with a CE marking in the medical devices fields, does not normally constitute a defence under the PLA. However, it would be a suitable defence under the general tort concept.

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?

If a judgment rendered between two or more parties has become valid, those parties can generally not re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage again (some rare exemptions apply, e.g. if the first judgment is based on fraudulent evidence). The principle "*ne bis in idem*" prevents a court from ruling again on the same claim. The second judge would have to dismiss a claim which contains the same requests and is based on the same facts brought forward in the old proceedings. As a court's decision is binding only between the involved parties, a different claimant can re-litigate any issues of fault, defect or causality. However, if the Supreme Court has, for instance, already decided that under certain circumstances, a product was not defective, a lower court will generally follow this

ruling. As fault, defect and causation are questions of law and not of facts, the same claimant can re-litigate these issues provided that he is relying on different facts.

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?

Manufacturers who only provide raw materials or a part of the finished product will only be held liable if their contribution caused the damage. The plaintiff can freely decide whether to rely on the final manufacturer or on the person providing the raw material or parts of the finished product. However, such a claim could fail due to the fact that the final manufacturer is not required to provide the claimant with information on such an intermediate manufacturer.

Of course, there is a possibility to initiate subsequent proceedings if one court rules that the final manufacturer is not liable. Also, it is possible to interplead third parties. However, the ten-year statute of limitations must be met (i.e. an actual action against the third party must be filed in due time). Consequently, if ten years have already elapsed, a claim based on the PLA can no longer be filed. In such a case, the claimant must rely on the general tort concept which is more burdensome for the claimant.

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

The PLA allows that the liability of the manufacturer may be reduced if the damage is (partially) caused by the fault of the claimant or any other person the claimant is responsible for. The same principle also applies under tort rules.

4 Procedure

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

The Austrian system does not know a jury system in civil court proceedings. The proceedings are handled by career judges.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

If the judge does not have the required technical expertise, the judge will invite a technical expert to participate in the court hearings and to ask questions to parties and witnesses. Legally, the facts are assessed by the judge only. In practice, the judge will often rely on expert opinions containing also a summary of facts recorded by the expert.

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

Although the Austrian Civil Procedure Code (ACPC) contains no provisions governing class actions, the Austrian Supreme Court held that a "class action with a specific Austrian character" (*mit*

österreichischer Prägung) is legally permissible (based on §227 of the ACPC concerning joinder of actions) (*objektive Klagenhäufung*). §227 of the ACPC allows consolidating claims of the same applicant against the same defendant. In the case 4Ob116/05w, individual claims were assigned to an association, the Consumer Association, which then filed an action in court. The claims can be jointly filed under the following conditions: (i) jurisdiction of the court for all claims is given; (ii) application of the same type of procedure; and (iii) the matter of the dispute must be of the same nature with respect to the facts and the law (*gleichartiger Anspruchsgrund*).

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

Contrary to other statutes, consumer associations are not specifically entitled to initiate proceedings under the PLA. This seems reasonable because the individual medical facts must be taken into account, e.g. predisposition of a plaintiff.

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

Austria does not have a pre-trial stage. Once the claim is filed, the defendant normally has four weeks to respond. After the court has received the response, it usually takes one to two months for the first hearing to be conducted.

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The Civil Procedure Code (*Zivilprozeßordnung*, RGBI. No. 113/1895, as amended) does not provide for the court to try preliminary issues first. Under certain circumstances, the parties may request that, for instance, the judge first issues an interim award with respect to the merits, and only afterwards, the amount of the damages to be awarded will be established.

4.7 What appeal options are available?

The first instance judgment can be appealed to the appellate court (there are certain restrictions, however, regarding disputes not exceeding EUR 2,700).

A further appeal to the Supreme Court is admissible if the matter in dispute relates to an issue of substantial or procedural law which is of utmost importance for the consistency or legal certainty of the law, or contributes to an important advancement of the legal system. In general, no appeal to the Austrian Supreme Court is admissible if the matter in dispute does not exceed EUR 5,000.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

If a judge does not have sufficient technical and/or scientific knowledge, the judge can appoint an expert. In general, a judge will allow the parties to comment on the expert selected by the court. The expert is instructed to provide a written opinion on technical and scientific issues, and if so requested, he must also draw a conclusion and provide a thesis.

Parties are allowed to rely on their own experts. However, reports submitted by those experts are not considered as expert opinions in the meaning of the Civil Procedure Code. Therefore, they are of lesser importance. Private expert opinions are normally used to undermine the court expert report because, for instance, it did not discuss all the issues at stake or is not in line with the opinion of the parties. In general, private expert opinions are not submitted before the court appointed expert has rendered his/her opinion.

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

There is no pre-trial deposition proceeding in Austria. In general, no expert reports are exchanged before the trial has started.

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

In Austria, no discovery procedure is available. Consequently, the parties are not required to disclose any documents before the trial has started. However, if a party relies on a specific document in the proceedings, this document must also be given to the other party. In addition, if a document is considered a joint document, for instance, a contract signed by both parties, and it is in possession of only one party, the possessing party must furnish the other party with this joint document. However, only under very limited circumstances could a party legally enforce the provision of such documents. If such a document is not provided, the judge will normally hold this against the refusing party.

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

Alternative methods of dispute resolution are available, but are not relied upon in practice. Sometimes the so-called *Patientenanwaltschaft*, comparable to a patient ombudsman, intervenes on behalf of a patient and tries to achieve a settlement.

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

According to the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), Austrian law will generally apply irrespective of where the defendant is domiciled, if (i) the claimant has his habitual residence in Austria when the damage has occurred, and (ii) if the product is marketed in Austria.

Austrian jurisdiction is even given if a product is not marketed in the country of the habitual residence of the claimant, but which is marketed in Austria and if (i) the product is acquired in Austria, or (ii) if the damage occurred in Austria. In those cases, neither the claimant nor the defendant has to be domiciled in Austria.

5 Time Limits

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

The Civil Code, as well as the PLA, provide for statutes of limitations.

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?

With respect to time limits on initiating proceedings, it must be distinguished between the statute of relative limitation period and absolute limitation period. The relative limitation period of three years starts from the day on which the claimant should have reasonably become aware of the damage, the defect and the identity of the manufacturer. The absolute limitation period under general tort rules is 30 years, starting from the incident leading to the damage. Under the PLA, this period is reduced to ten years. With respect to the latter, the starting point is the day when the product was placed on the market.

Contractual warranty claims, such as a claim due to the delivery of products not suited for the agreed purpose, must be lodged within two years.

Only if raised by the defendant, the judge must take into consideration the statute of limitation period and dismiss the claim. Under certain circumstances, the time period provided for by law can be suspended, for instance, if the parties conduct settlement negotiations. However, such settlement negotiations must be specific, meaning that there must be at least an exchange of proposals, rather than one party alleging liability and the other party denying it.

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

Concealment or fraud does generally not affect the running of any time limit. However, because the time limit will only start to run from the actual knowledge of the damage and the person inflicting such damage, concealment will simply result in a later beginning of the time limit.

6 Remedies

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

Under the PLA, the same remedies are available as in normal civil court proceedings, such as monetary compensation and declaratory relief, e.g. for all future damages. It would also be possible to file a cease and desist claim, but this is never done in PLA proceedings.

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

The tort law, as well as the PLA, cover both monetary and non-monetary losses. Compensation for personal injuries includes, among others, the cost for medical treatment, loss of income, etc. Furthermore, damages can be awarded for suffering due to the loss of a close relative. Damages awarded in Austria are much lower than in the United States. For instance, to a man whose arms and legs are paralysed, who needs artificial respiration until he dies, and who is completely conscious about his condition, the Supreme Court awarded an amount of approximately EUR 218,000.

Mental damages, as well as so-called disfigurement damages, must also be compensated.

Damages to property are generally recoverable under all three

regimes, but restricted under the PLA to damages exceeding EUR 500 (i.e. there is a deductible figure of EUR 500). Under warranty law, damages to the product itself are generally not recoverable, except for damages that have spread from a defective part to the non-defective portion of a purchased product.

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?

Under the PLA, such damages cannot be recovered because one of the requirements to be met by the claimant is to prove that damages actually occurred.

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

The Austrian legal system does not recognise punitive damages. A foreign judgment granting punitive damages would not be enforceable in Austria (violation of the *ordre public* principle).

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 are no caps on damages under the PLA.

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 mentioned above, Austria does not (yet) have the concept of group or class actions. Claims filed by infants need the approval of a judge and are filed on behalf of the infant by his/her legal representatives.

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?

The award is only binding between the litigating parties and so payment is only effected between those parties. The government/reimbursement institutions cannot claim any part of the damages awarded to an individual person. In practice, if an unfavourable decision is rendered for a company, sometimes the insurance bodies approach the company requesting to be compensated for the treatment costs.

7 Costs / Funding

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

According to the Civil Procedure Code, the prevailing party is

reimbursed for its necessary legal costs and court fees by the losing party. Recoverable costs will be calculated in accordance with the lawyers' tariff, which is based on the value of the claim.

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

Legal aid will be granted to physical persons and, in limited circumstances, to corporations. However, the person getting legal aid must still pay the costs of the other party if the other party prevails. Legal aid consists of a waiver of court and expert fees and free representation by an attorney appointed by the bar association.

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

Legal aid will only be granted if a party does not have sufficient financial means to conduct the proceedings. In addition, the judge approving legal aid must evaluate whether the claim has a sufficient prospect of being successful. Under certain circumstances, e.g. if the financial situation has favourably changed, the legal aid must be paid back.

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

Austrian attorneys are prohibited from working on a contingency fee or on a "no win – no fee" basis. It is admissible to agree on a bonus for successful work. This prohibition was recently confirmed by the Austrian Constitutional Court.

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 permitted under Austrian law. In general, a request is sent to a private company asking for financial assistance, which will normally only be granted if the amount in dispute exceeds a certain threshold. Based on the expected outcome, the compensation for the private financer is between 20% and 50% of the awarded amount.

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in Austria.

The Supreme Court recently had to decide when various violations of product monitoring obligations would finally result in a violation of the product liability provisions. The Supreme Court stated that the PLA does not impose on the producer a duty to monitor the product after the producer has placed the product on the market. However, the experience gained with the product, revised standards and new technical possibilities allowing the safer use of a product could require from the producer to modify the product in the interest of product safety. Thus, in the case of serial production, the producer must decide for each batch whether the batch complies with acceptable standards. For judging this, the producer has to take into account the potential damages which could be inflicted by the product, which consumer groups shall be a target and, of course, also whether such amendments are still justified from an economic point of view (principle of proportionality). If, after weighing these factors and by taking into account the expectations of an average consumer, the safety interest of the consumer prevails, the producer has two possibilities: either to change the production process; or to expressly warn the consumer about such a defect. The Supreme Court also clarified that, when it is unusual in the industry to warn consumers about such a defect, this would not relieve the producer from his liability, because industry practices can lag behind the technical or legal requirements. Thus, via a back door strategy, the Supreme Court has imposed a product monitoring duty also under the PLA.

**Dr. Peter Polak**

Fiebinger Polak Leon & Partner
Rechtsanwälte GmbH
Am Getreidemarkt 1
A-1060 Vienna
Austria

Tel: +43 1 5825 8122
Fax: +43 1 5825 82
Email: p.polak@fplp.at
URL: www.fplp.at

Peter Polak is a named partner of Fiebinger Polak Leon Attorneys-at-Law, one of the leading commercial firms in Austria. He graduated from the University of Vienna School of Law with a J.D. in 1982. In 1984, he obtained a Master of Laws degree (LL.M.) from the University of California, School of Law (Boat Hall) and was subsequently admitted to the California Bar in 1986. He was admitted to the Austrian Bar in 1989. Peter Polak and the team of Fiebinger Polak Leon Attorneys-at-Law have extensive experience in representing national and multinational life sciences companies. In particular, the firm regularly advises on both regulatory issues of the industry, including with respect to the admission of pharmaceutical products into the list of reimbursable drugs and all IP and competition matters relating to the industry. This includes, in particular, all aspects of product liability issues, patent law, including patent litigation, unfair competition and anti-trust matters.

**DDr. Karina Hellbert**

Fiebinger Polak Leon & Partner
Rechtsanwälte GmbH
Am Getreidemarkt 1
A-1060 Vienna
Austria

Tel: +43 1 5825 8147
Fax: +43 1 5825 82
Email: k.hellbert@fplp.at
URL: www.fplp.at

Karina Hellbert is an attorney at law and also holds a degree in microbiology from the University of Innsbruck. Her practice focuses on all aspects of life sciences, especially patent/SPC, regulatory and reimbursement issues and strategic advice concerning management of medicinal products. She is experienced in handling product liability cases and advises extensively on borderline matters, clinical trial agreements, data protection issues, on co-marketing/co-promotion and distribution agreements. Karina Hellbert was in recent years also involved in running major patent and SPC cases for multinational companies, not only before the civil courts, but also before criminal courts. Karina is associate professor at the IMC University of Applied Sciences Krems and has authored numerous articles in the field of regulatory issues, product liability, and pharmaceutical advertising, among other things. She became a partner of Fiebinger Polak Leon Attorneys-at-Law in 2007 and is head of the Life Sciences Group.

FIEBINGER POLAK LEON RECHTSANWÄLTE ■

Established in 1990, Fiebinger Polak Leon & Partner Rechtsanwälte GmbH ("Fiebinger Polak Leon Attorneys-at-Law") is a modern and dynamic firm and one of the leading commercial law firms in Vienna and Austria.

With a strong international focus, Fiebinger Polak Leon Attorneys-at-Law works in all areas of civil, commercial and administrative law for medium-sized private to large stock exchange listed national and multinational companies, but also for universities, non-profit organisations and private individuals.

The firm's life sciences team is unique to Austria, combining outstanding expertise and experience in the field. Fiebinger Polak Leon Attorneys-at-Law regularly represents national and multinational life sciences companies, in particular, concerning pharmaceutical, medical devices and biosimilars. The firm advises on all regulatory matters, in particular, concerning market authorisations and advertising of medicinal products, as well as the inclusion of pharmaceutical products into the list of reimbursable drugs. Another focus of the firm's life sciences practice is IP and competition matters including, in particular, all aspects of patent law and protection, litigation, unfair competition and anti-trust matters. Other areas covered by the life sciences team include borderline issues, distribution/co-promotion agreements and dietetic products.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

