

The International Comparative Legal Guide to:

# Product Liability 2008

A practical insight to cross-border Product Liability work



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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?

Currently, there are three theories by which a product liability claim may be brought in Romania: (i) strict liability; (ii) tort liability; and (iii) contractual liability. There are three important laws regulating product liability matters in Romania. Law No. 240/2004 is in relation to the producer's liability for damages caused by defective products and implements European Directive 85/374/EEC regarding producers' liability ("Law 240"). Government Ordinance No. 21/1992 covers consumer protection issues ("GO 21") and Law No. 245/2004 ("Law 245"), which sets out the rules for product safety. In addition, the Romanian Civil Code (the "Civil Code") regulates the general law and rules applicable to tort and contractual liabilities.

Law 240 sets out the standards for strict liability in relation to products. Under Article 3 of this law, "the producer shall be liable for the actual and future damages incurred by the defects of such producer's products". According to the provisions of the law, a product is "defective" when the product:

[...] does not offer the safety which a person is entitled to expect, taking all circumstances into account, including:

1. the presentation of the product;
2. the use to which it could reasonably be expected that the product would be put; and
3. the time when the product was put into circulation.

We should note that the stated standard set out above is very similar to that set out in Article 6 of European Directive 85/374/EEC.

Tort liability follows the general principles in the Civil Code, which states that an individual who negligently or wilfully causes another person "damage", may be held liable to "repair" or remedy such damage. In order to recover, the claimant must prove the damage, the negligence and the causal nexus between the two.

The Civil Code also sets out the general principles in relation to contractual liabilities. These may only arise in cases when a contract has been formed between the respective parties and one of the parties does not fulfil or improperly fulfils (either through action or inaction) its obligations under the respective contract.

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

We are not aware of such schemes operating in Romania.

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

Under the provisions of Law 240, the "producer" bears responsibility for a defective product. However, please note that the law broadly defines the term "producer" as follows:

1. the entities who manufacture a final product, raw materials or parts of a product;
2. any person that presents itself as a producer and attaches to products its name, its brand name or other distinctive characteristics; and
3. any person importing a product in Romania with the intention to re-sell, lease, buy or commercially transfer the product ownership in any manner.

Moreover, in case the actual producer of a product cannot be identified, each supplier of the product will be construed to be the producer, provided that the respective supplier does not inform the injured person, within a reasonable period of time, of the identification of the actual producer or the person who supplied him the product.

- 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?

Law 245 regarding the general safety of products (implementing European Directive No. 2001/95 CE) sets out guidelines for producers to ensure a product is safe before entering the marketing as well as after the product is on the market.

Producers are required to continuously monitor or otherwise keep themselves informed about their products for possible "risks" presented by such products. Producers must be "prepared" to take all "adequate" measures to avoid such risks, including issuing warnings and recalling a product from the market. The obligation to recall a product arises whenever a producer's monitoring or an investigation conducted by the relevant Romanian authority (for instance, the National Authority for Consumer Protection) concludes that the risks of the product cannot be otherwise avoided unless the product is recalled.

Failure to recall the product, when required, may result in a fine ranging from RON 700 (approximately Euro 200) to RON 7,000

(approximately Euro 2,000). However, Law 245 expressly provides that parties that breach its provisions may be subject to additional civil, administrative and criminal penalties (as provided by the general provisions of Romanian law).

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

There are no specific criminal sanctions in relation to defective products. However, certain general provisions of the criminal law may be applicable, depending on the degree of harm and facts of a particular case. For instance, a producer could be charged with involuntary destruction of goods (for cases when a defective product causes the destruction of a good or renders a good unusable). In addition, depending on the facts, charges of involuntary bodily injury or involuntary manslaughter may also be levied. The penalties for such criminal offences may vary from penal fines to imprisonment (which is replaced by penal fine in case of companies), in accordance with the gravity of the harm and the particular crime.

## 2 Causation

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

As a general rule, the claimant has the burden of proof in relation to both fault/defect and damage.

### 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?

Romanian doctrine and jurisprudence have provided for numerous theories in relation to causation. However, in practice, the courts apply (by majority view) a test consisting of two interlinked factors, which establish the causal link with an action and the subsequent liability. The first factor is the actual cause of the event producing the damage, known as the “necessary cause” which consists of the action (or inaction), in the absence of which the relevant damage would have not occurred. The other factor consists of all other conditions favouring the occurrence of the relevant harm but which are not the immediate cause of the damage. Both factors are weighed by the court and used to determine if a causal link exists between the event and/or conditions and the harm.

### 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?

Please note that the concept of “market-share liability” is not regulated in Romania. However, under general civil liability principles applicable in Romania, when more than one person causes damage to a consumer, all such persons shall be held jointly and severally liable. This principle is also articulated under the provisions regulating strict liability; specifically article 5 of Law 240 states: “in case several persons are responsible for the damage, such persons shall be held jointly and severally liable”.

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

As already stated, Law 245 requires a producer to only introduce safe products into the market. One factor to consider when determining if a product is safe is articulated by both GO 21 and Law 245 which states that a producer must provide consumers with adequate and proper information in relation to the respective product and the producer itself. If consumers are given inadequate or improper information, the producer may be subject to product liability.

According to article 20 of GO 21 “the producer has to inform the consumers on the name and/or the trademark of the producer, the address of the producer, [...] as well as with regard to the country where the product has been manufactured in case of imported products.” The same government ordinance states that the following information should also be displayed on the product label:

- the quantity; and when applicable, the following information:
- the warranty term, availability term or minimal durability date;
- product’s main technical and qualitative characteristics;
- product composition and used additives;
- potential risks which may be foreseen;
- product utilisation, handling, storing and preservation manner;
- contra indications; as well as
- the nutritive value in case of pre packed food products.

Regarding the concept of “learned intermediary,” please note that this concept is also available under Romanian legislation. The producer bears the responsibility to give product information and warnings to the final consumer. However, in the classic case where a doctor prescribes a drug (defective or not), such doctor may be liable towards the patient for not knowing the actual effects of the respective medication. That is to say, there is a “chained causation” that may lead to an actual damage.

## 3 Defences and Estoppel

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

Under the provisions regulating strict liability, there are some circumstances when producers acting as defendants in court disputes may not be liable. Under article 7 of Law 240, a producer may avoid or limit liability if such producer can prove that:

- it did not release the defective product into the market;
- the defect which caused the damage did not exist at the moment the product was released into the market or the defect occurred afterwards due to causes for which the

respective producer does not bear responsibility or bears no responsibility;

- the defective product has not been manufactured for the purpose of sale or commercialisation or any other form of distribution and the defective product was not manufactured and distributed under the producer's usual business activity;
- the defect resulted from the producer's compliance with mandatory conditions imposed by regulations of the relevant authorities;
- the degree of scientific and technical knowledge at the moment the product was released into the market did not permit the detection of the relevant defect;
- the defect resulted from non observance by the consumer of the instructions provided by the producer as part of the technical information documentation delivered together with the product, proved by an expert's assessment; and
- a component's producer may be exonerated by liability in a case where the producer proves that the defect resulted from faulty design of the product and the components were integrated into that design or the wrong instructions were provided by the producer of the product that the component was incorporated.

Moreover, article 8 of Law 240 provides that a competent court of law may limit or exonerate liability in cases where the damage was caused by both a defective product and by the fault of the injured person (or the person suffering the damage).

Regarding liability from contractual obligations, please note that during the performance of a contract, the producer may be released from liability for non-performance (but not "improper" performance) of its obligations under the contract in case of a *force majeure* event.

**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?**

As stated under question 3.1 above, a producer may be exonerated of liability when the degree of scientific and technical knowledge at the moment the product was released on the market did not permit the producer to detect the relevant defect. As a general principle of law, the burden of proof falls on the invoking party.

**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?**

The fact that a producer proves that it complied with all regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of a product it is not regarded as a defence. According to Law 245, producers must release only safe products onto the market.

**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?**

In Romania, the legal system applies the principle of *res judicata*. Consequently, a matter that has already been decided upon by a

court of law cannot be re-litigated between the same parties and containing the same object and cause.

**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?**

The producer may not claim in a case brought by a consumer that the fault/defect of the product was due to actions of a third party. Thus, the producer is fully liable for the defective products and may not invoke that the defect resulted from, for example, the fault of a sub-contractor or a supplier of raw materials. However, according to the provisions of the Romanian Civil Procedure Code, the producer may make a request to the judge(s) to summon the relevant third party into the same proceedings, thus becoming an active part of the court trial. As a matter of practice, this is often made by a defendant seeking contribution or indemnity towards damages payable to the claimant. In addition, the producer may choose to file a recourse action against the relevant third party in separate proceedings. Generally, the time limit on commencing such proceedings is three years from the date of the judge's decision for the producer to pay damages to the original claimant when the judgment is final and irrevocable.

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

As already stated under question 3.1 above, a defendant may be exonerated of liability in cases where a defendant proves that the defect resulted from the claimant's failure to observe the instructions provided by the producer as part of the technical information delivered together with the product. However, in case it is proven that the damage occurred as a result of both an existing defect of the product and a misuse by the claimant, the judge(s) may decide to reduce the extent of payable damages to the claimant.

## 4 Procedure

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

As a general comment, Romania does not apply the "jury" system. A judge or a panel of judges preside over all trials in Romania and only the judge(s) may decide on a matter brought in front of a Romanian court of law.

**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)?**

Judges may appoint experts, whether upon the expressed request of the parties or at the court's own initiative, if it considers it necessary to better assess the case. However their advice is only consultative and does not have any binding power on the court's final decision.

**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?**

Under Romanian law and practice the concept of a class action lawsuit does not exist. However, according to the provisions of the Romanian Civil Procedure Code, several claimants may file a common claim against a defendant provided that the object of the claim arises from the same right or obligation. In this case, the decision of the court is binding on all the parties. No individual that was part to such trial may initiate again a different action in court against the producer if the claim would have the same object, parties and cause (please also see question 3.4 above). On the other hand, if only part of the aggrieved parties initiate an action in court, the decision ruled in such case would not be binding on the non-participating aggrieved parties. Consequently, such individuals could decide to initiate a separate action.

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

Under the provisions of article 30 of GO 21, consumers may organise under non-governmental associations whose sole purpose is to protect its members and consumers. Usually in Romania, the only one who can file a court claim is the injured party; however, under the aforementioned ordinance consumer associations may file collective suits in order to protect consumers.

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

In Romania, trials regarding product liability are civil proceedings. Consequently, there is not a pre-trial stage and litigation starts immediately after filing a claim. However, for trials arising out of a contractual relation between two or more commercial professionals (e.g. producers, suppliers, merchandisers etc.), the Civil Procedure Code requires direct conciliation before appearing in a court of law.

The length of a trial may vary between a few months and a few years, depending on the difficulty of the matter.

**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?**

Although a pre-trial stage does not exist, once a claim has been filed and proceedings have begun, a preliminary stage is part of the actual trial. At the preliminary stage, the issues raised usually relate to matters of law (such as exceptions regarding competence of the respective court, time limits, capacity and authority of the parties involved). Please also see our answer under question 4.1 above.

**4.7 What appeal options are available?**

In general, under Romanian procedural law a trial may have two successive common appeals, each of the appeals being tried by the relevant higher court (depending on the value, certain commercial cases can only have the second appeal). The first appeal usually deals with the facts of the trial as well as with the first court's interpretation of the law. The second appeal is more restrictive in terms of requirements for filing and usually only refers to the actual

decision of the inferior court on a specific point. In any of the appeals the courts may rule upon the cassation of the inferior court(s) decision(s) and send it back for retrial. The highest court for appeals is the High Court of Cassation and Justice of Romania depending on where the main claim is first ruled upon.

**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?**

As mentioned under question 4.2, if it considers necessary, the court could summon a scientific/technical expert. The expert provides the court with a written report that will help the judge make a ruling at the respective trial. However, as said before, the judge is not bound by such expert's report. Moreover, the parties involved may challenge the results of the expert's report by requesting the opinion of different experts appointed at the request of the relevant party.

**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?**

As already mentioned, under Romanian law there is not a pre-trial stage; therefore, neither factual nor expert witnesses are required to take depositions. Please also see answer to question 4.10.

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

In accordance with the provisions of article 172 in the Civil Procedure Code, whenever one of the parties to a trial reveals that the opposing party is holding a document relevant to the matter at hand, the court is compelled to request the respective party to disclose the relevant document. However, certain professionals are limited to disclosing information regarded as confidential under specific statutes or regulations.

The Civil Procedure Code provides an exception which states that any interested party in the litigation may ask the court to order the submission of a document or a deposition, in order to secure evidence prior to the trial, provided that the document or deposition would be difficult or impossible to obtain during the actual trial.

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

Yes. Parties may opt to resolve a product liability claim as an alternative to a court trial by using mediation and/or arbitration in accordance with the parties' legal status. Disputes between companies may be settled by any of the two alternative dispute resolution methods. Disputes between individuals, or individuals and businesses, may be settled through mediation even if a trial was already initiated.

## 5 Time Limits

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

Yes, Romanian legislation provides time limits on bringing or issuing proceedings.

**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?**

The time limits for bringing or issuing proceedings depends on whether the liability is tort, strict or contractual based. For tort liability, Romanian law provides a three-year time limit from the date the damage occurred for a claim to be filed.

Under strict liability, article 11 of Law 240 provides that a product liability claim is subject to a three-year statute of limitations from the date the claimant knew or should have known about the existence of the damage, the defect and the identity of the producer. However, a claim may not be filed within more than ten years after the respective product was introduced on the market.

For liability arising from contractual obligations, Law No. 449/2003 regarding product warranty, states a claim must be filed within two years of the delivery date of the noncompliant product. Moreover, the consumer must notify the producer with respect to the noncompliant product within two months from the discovery of the defect.

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

Under the provisions of Law 240 there is not a difference between defects hidden by negligence and defects hidden intentionally. Under the general provisions of the Civil Code regarding contractual liability, in cases regarding the sale of assets, the buyer may file a claim against the relevant seller within six months from the discovery of a defect of the acquired asset. However, if the relevant defect proves to be intentionally concealed, the statute of limitations is extended from six months to three years from the discovery of the concealed defect which cannot occur later than one year from the acquisition of the relevant asset. If the concealment is proved to have been done by fraud then the provisions of the Criminal Code could become applicable, in which case the term of such limitations might change.

## 6 Remedies

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

The Civil Code generally provides for monetary compensation.

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

The general principles of tort liability grant the claimant the right to recover monetary and non-monetary damages (including bodily injury, mental damage and damage to property).

Strict liability regimes follow the same principles as tort liability; however, there are small differences. Law 240 provides that the term “damage” may represent a bodily injury, illness or death of a person. In addition, damage may mean the destruction of a good, other than the defective product, provided that the respective good is normally and privately used by the respective consumer and has a value of more than RON 200.00 (approximately EUR 65.00). Please note that the aforementioned law does not provide for compensation for the loss of the defective product or for loss of

profits. However, Law 240 states that pecuniary damage does not exclude compensation for non-monetary damage.

In addition, if the destroyed goods or the injured or deceased person was insured, insurance companies have the right to an action in recourse against the faulty producer.

**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?**

As stated under question 2.2 above, in order to recover damages, a claimant must prove “damage” (the existence of the damage). Consequently, a claimant cannot recover for medical monitoring prior to the occurrence of the damage.

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

Romanian legislation does not provide for punitive damages.

**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?**

Romanian law does not have a maximum limit on the amount of recoverable damages; therefore, the relevant producer will be fully liable for the entire amount of damages.

**6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?**

Under Romanian law, parties may settle a claim before the claim is filed with the competent court, after the trial has started or as an alternative to court litigation (please also see question 4.11 above). When a claim is settled prior to any court hearings, the court does not need to approve the settlement.

If a claim is settled after the court hearing has started, the parties may opt to settle the claim, either outside the court proceedings followed by a withdrawal of the claim, or inside court proceedings, where the court will acknowledge the settlement within the judge’s decision.

**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?**

Although it is not a common practice, under the general principles governing tort liability, concerned authorities may step into court proceedings relating to tort liability as civil parties. Moreover, according to article 313 in Law No. 95/2006 regarding healthcare reform, “any person who by its own deeds brings damage to another person’s health shall be fully liable and bound to repay damages towards the medical services supplier representing the expenses supported by such medical services supplier with the victim of such deeds.” (Please note that in Romania medical services are free

because of the state health care system which is funded by a portion of fiscal residents income.)

## 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?

As a matter of law and practice, the successful party is entitled to recover from the losing party all expenses related to the respective trial, including fees paid for legal assistance, experts, expenses related to witnesses and all other incidental provable expenses.

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

Yes, legal aid is available and permitted under the provisions of the Civil Procedure Code in all stages of the trial. However the person requesting legal aid must meet certain minimum income requirements in order to benefit of such aid.

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

The Civil Procedure Code provides under article 75 that any person who meets the requirements referred to under question 7.2 above, may benefit from free legal services and/or discounted or rescheduled payments of the legal taxes and duties. All expenses shall be borne by the state budget. However, the aid may not be sufficient in cases where additional expenses are incurred, such as experts. As a separate matter, the “loser pays” principle is applicable.

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

Under the provisions of the Lawyers Statute, Romanian lawyers are not allowed to establish their fees entirely based on the outcome of a trial or as a percentage of the trial’s value. However, besides the flat fee agreed upon, prior to any legal assistance, a lawyer may receive a success fee.

### 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 not regulated under the Romanian law.

## 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 Romania.

Following Romania’s accession to the European Union on 1 January 2007, the country’s economic growth is keeping a steady pace. Consequently, the consumption indicators registered correlative increases. Although the internal legislation related to product liability was already harmonised with European directives since 2004, it was only recently the legislative framework in this area has developed. The regulation of strict liability deriving from defects or non-compliance of products brought a new wave of practice and legal disputes among Romanian scholars and courts of law.

The most visible effect of such regulations was increasing the care producers use to manufacture better products and deliver better services for the general benefit of consumers. Moreover, insurance companies have benefited from product liability laws by showing increased profits because producers are carrying insurance policies for their products.

Few cases related to this issue appeared in front of Romanian courts of law and a practice has yet to be developed. However, it is clear that product liability is no longer a simple or isolated matter. It is becoming a minefield of complex law, litigation procedure and sophisticated tactics that will force local law firms to gain significant expertise in a short time as we are expecting an increase of court proceedings relating to product liability. The stakes can be high, particularly in multi-party litigation, which can strike suddenly and require expert handling.



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## Vernon | David

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