Germany: Product Liability

This country-specific Q&A provides an overview of product liability laws and regulations applicable in Germany.

For a full list of jurisdictional Q&As visit here
1. **Please summarise the main legal bases for product liability**

For product liability the most important legal provisions are § 1 of the German Product Liability Act (ProdHaftG) and § 823 of the German Civil Code (BGB).

§ 1 of the German Product Liability Act is based on the European Product Liability Directive 85/374/EEC that created a regime of strict liability for defective products. As a consumer protection regulation it is particularly relevant for cases of personal injury or death; damage to property is covered only if the damaged thing is normally intended for private use or consumption and is principally used for that purpose by the injured party.

§ 823 Section 1 of the German Civil Code provides for tort liability of the producer. Liability presupposes that the producer has culpably breached a manufacturer’s obligation (error in construction of manufacturing of the product, in giving instructions for the use of the products or in product monitoring). In contrast to the liability according to § 1 ProdHaftG, the liability according to § 823 BGB includes any damage to property, also including damage to commercially used objects.

2. **What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?**

Strict product liability is fully harmonized in the EU. In case a defect in a product causes a person’s death, injury to his body or damage to his health, or damage to an item of private property, the producer of the product has to compensate the resulting damage. Items of property are only covered if they are ordinarily intended for private use or consumption. Consequently, a claimant has to prove that a) a product had a defect b) this defect has caused a damage as defined above and c) who the producer of the product was (see definition of the producer below).

3. **With whom does liability sit? If there is more than one entity liable, is liability joint and several?**

Liability sits with everyone who is defined to be the producer under the Product Liability Act. This is the person who has produced the final product, a raw material or a component part or who presents himself as being the producer by putting his name, trademark or other distinguishing feature on the product. A producer is also anyone who imports or takes into the area of application of the Agreement on the European Economic Area a product for sale, hire, leasing or any form of distribution. Also, where the producer of the product cannot be identified, each supplier of the product is deemed to be its producer unless it informs the injured person within a month of his receipt of a demand to this effect of the identity of the producer or of the person who supplied him with the product. If two or more producers are liable for the same damage, they shall be liable jointly and severally towards the injured person. Internally, liability in damages as well as the extent of compensation depend, unless otherwise specified by an internal agreement or by a special law, on the circumstances, in
particular to what extent the damage is caused mainly by one or the other party.

4. **Are any defences available? If so, please summarise them.**

Where fault on the part of the injured person has contributed to the damage, the damage claim is reduced accordingly (concept of contributory negligence, Section 254 of the German Civil Code). Also, in the case of damage to property, the injured party has to pay for damages up to an amount of 500 euros himself. The producer is even not liable at all if he did not put the product into circulation or had never intended to do so, if it can be assumed that the defect did not exist at the time when the product was brought into circulation, the defect is due to compliance of the product with mandatory regulations or if the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the defect to be discovered.

5. **What is the limitation period for bringing a claim?**

The limitation period is three years from the day on which the party that is entitled to damages became aware, or should reasonably have become aware, of the damage, the defect and the identity of the party liable to pay the damages. Irrespective of that all claims expire ten years after the product had been put on the market.

6. **To what extent can liability be excluded (if at all)?**

Not possible by any kind of agreement or T&Cs.

7. **What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?**

Claims for damage caused by defective products may also be brought under the tort provisions of § 823 of the German Civil Code. Liability is fault-based.

The tort claim cumulatively requires a

- Defect of the product;
- Infringement of property, body and health, or any other legal asset;
- Causality between defect and infringement;
- Damage of the claimant;
- Causality between infringement and damage
Fault of the defendant (negligence or intent);

Usually the claimant has the full burden to prove the elements above. He has to evidence that
the producer either negligently put a defective product into circulation or committed another
infringing act, and that the defect that caused the damage did not exist at the time he has put
the product into circulation or he committed the other infringing act. The burden of proof for
culpable behavior generally lies with the injured party, as well. However, if the injured party
is able to show that a product was defective and caused damage it is usually up to the
defendant to show that he acted with diligent care and did not act faulty since the injured
party has no insight into the organizational circumstances at the producer. The mere trader
of a product is usually not liable unless he had reasons to suspect the defect or imported the
product from abroad without additional checks that the product is safely marketable under
the EU standards.

Liability for defective products may i.a. result from unsafe product design, construction
defects, wrong or missing instructions and in case a defect becomes known, from the
violation of the producer’s obligation to warn the market. Moreover, the producer has to
monitor the market by adequate market surveillance. The individual duties of care depend on
whether or not the product meets the safety expectation that is deemed necessary for the
customary usage in the respective industry. Therefore, at the time a product is put into
circulation, the design and construction must comply with state-of-the-art science and
technology to prevent damage. The burden of proof lies with the defendant to show that he
complied with his obligations explained above.

8. What types of damage/loss can be compensated and what is the measure of
damages? Are punitive damages available?

Damage compensation principally follows the full compensation principle, i.e. claimant may
recover all losses incurred due to the damaging event. In product liability cases, the court
will usually order declaratory relief in respect of future damage caused by a defective
product. Damages may even extent to loss of profits. However, punitive damages are not
granted under German tort law.

The party that was affected by a defective product is to be set as it was before the damaging
event (restitution ad integrum). If in rem restitution is not possible, the party can claim all
costs necessary for restoring the previous position as damages. Damages for emotional
distress or pure economic losses can usually not be claimed, though.

9. How are multiple tortfeasors dealt with? Is liability joint and several? Can
contribution proceedings be brought?

Multiple tortfeasors are jointly and severally liable. The injured party may select which
tortfeaser(s) shall recover the full amount of damages (so called “external liability”).
Internally, the tortfeasor liability depends on the individual share of responsibility and the
tortfeasors may have corresponding claims against each other to be fully or partly indemnified and hold harmless from the full external liability.

10. **Are any defences available? If so, please summarise them.**

The primary defence is to dispute causality between the allegedly damaging act and the damage. The secondary defence is to contest fault. For example, the tortfeasor can deny any faults if he can show that he respected the required diligence and organizational duties. A further, in practice often relevant defence, is to accuse the injured party to have contributed to the damage by its own negligent behaviour or infringement of own obligations, e.g. for quality inspection of goods, uncommon use of a product or similar circumstances.

11. **What is the limitation period for bringing a claim?**

Claims can be brought within a period of three years after (i) occurrence of the damage and (ii) knowledge of the injured party. The maximum period for bringing a tort claim is ten years after commitment of the damaging act irrespective of when the damage became apparent. In case of bodily injuries, the statute of limitation is 30 years.

12. **To what extent can liability be excluded (if at all)?**

It is not possible to exclude liability with respect to bystanders.

In contractual relations liability, including tort liability, can be limited to a minimum but however not fully disclaimed. Liability for gross negligence and intent as well as liability for bodily injuries may not be disclaimed in General Terms and Conditions (GTC). A stricter limitation is possible by individually agreed agreements, e.g. individual framework contracts. Most B2B contracts however effectively use GTC, consequently a full exclusion of liability plays a rather minor role in practice. Liability for intent cannot be limited even in individual agreements.

13. **Does the law imply any terms into B2B or B2C contracts which could impose liability in a situation where a product has caused damage? If so, please summarise.**

Indeed, § 280 Section 1 of the German Civil Code foresees that the party of a contract who breaches a contractual duty is liable to the other party for any damages caused thereby. The breach of duty can be the delivery of a defective product that caused damage to the other party. Therefore, this contractual provision may become relevant for the distributor of the product (as opposed to § 1 of the German Product Liability Act and § 823 of the German Civil Code which primarily apply to the manufacturer). However, the provision applies only if the breach of duty has been due to fault (negligence or willful intent); it rarely happens, however, that a distributor culpably delivers a defective product.
What types of damage/loss can be compensated and what is the measure of damages?

Someone who is liable for damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred. If a person has been injured and/or a thing has been damaged, the claimant may also demand the required monetary amount in lieu of restoration. Lost profits must also be compensated. To determine these, the normal course of events has to be considered as well as any special circumstances.

15. To what extent can liability be excluded for contract liability (if at all)?

Liability can to some extent be excluded and/or limited on a contractual basis. However, there are restrictions in particular with regard to strict product liability according to the ProdHaftG (for which liability may never be excluded) and tort liability according to § 823 BGB (for which liability can be limited). Thus, in order for such clause to be effective, the legal restrictions have to be minded and the clause has to differentiate between the different liability regimes, the level of default and the respective legal rights affected.

16. Are there any recent key court judgements which have had a significant impact on the approach to product liability?

The decision of the European Court of Justice (ECJ, judgement of 5 March 2015 - C-503/13) and, following it, the German Federal Court (BGH, judgement of 9 June 2015 – VI ZR 284/12) concerning product liability for cardiac pacemakers should be mentioned here.

The court stated that all cardiac pacemakers of the same product group or production series may be regarded as defective because of their function, the situation of particular vulnerability of the patients using these devices and the exceptional potential for damage, if a significantly increased risk of failure has been detected for devices of the group or series, without there being any need to detect a defect in the cardiac pacemaker implanted in the specific case. For a defect within the meaning of § 1 of the German Product Liability Act it shall therefore be sufficient that the implanted cardiac pacemaker belongs to a product group with a significantly increased risk of failure. In addition, according to these decisions, the costs of the operation required to replace the defective product shall constitute compensable damage within the meaning of the German Product Liability Act.

17. What are the initial litigation related steps you should take if you are facing a product liability claim or threatened claim?

Firstly, a lawyer should be consulted because product liability proceedings in German courts are generally subject to the obligation of a lawyer (this means legal proceedings require the services of a lawyer in order to be effective). The same is recommended when a company is faced a threatened claim in order to jointly develop a strategy (active or passive) and to assess whether or not authorities or customer groups potentially affected by the defective
product must be informed.

Besides this, companies should always carefully examine whether the claimed product defect could also have occurred in other products. If this is the case, it is the responsibility of the manufacturer to take all necessary and reasonable measures to avert damage because of its product monitoring obligations.

18. **Are the courts adept at handling complex product liability claims? Are cases heard by a judge or jury?**

At least higher German courts usually have the expertise and capacity to handle complex product liability proceedings. However, such proceedings most often last several years and end in a settlement, anyway.

At German courts, one or more professional judges rule in civil proceedings. A higher court composed of several professional judges is usually responsible for product liability claims. In Germany, cases are not heard by a jury.

19. **Is it possible to bring a product liability related group action? If so, please summarise the types of procedure(s) available**

German law provides for a kind of a group action called “Musterfeststellungsklage”. This model declaratory action is a new type of action with which the collective legal protection under German law is extended and exists since end of the year 2018. It creates a right of action for qualified institutions, such as consumer associations, to establish the factual or legal prerequisites for claims or legal relationships between a consumer and a trader. Claims arising from product liability are therefore also conceivable. The complaint is subject to additional formal and material admissibility requirements. The substantive and local jurisdiction are specially regulated. Consumers can file their claims in a new action register. Among other things, the filing of a claim binds the findings made in a judgment to an individual action by the filing consumer. The complaint and essential procedural steps as well as the judgment are made public in the complaint register. A settlement can be concluded with effect for the registered consumers.

20. **How are cases typically funded? Can lawyers charge success fees? Is third party funding permissible?**

Basically, there are two options for fee agreements for lawyers in Germany. On the one hand, the lawyer’s fees can be calculated on the basis of the statutory fees. The statutory fees are based on the amount in dispute, in particular on the value of the asserted claim. Such fees must be reimbursed by the other party in the event of a defeat. On the other hand, an hourly fee may be agreed alternatively or cumulatively to the statutory attorney fees. This fee shall be borne solely by the client. Success fees are also possible and are subject to regulatory requirements.
The financing of legal costs by third parties is permissible in Germany. In addition, there are legal expenses insurances by which legal costs can also be covered.

21. **How common are product liability claims and what factors influence their frequency?**

Product liability claims are in fact common in Germany. Product liability cases are however defined very broadly, meaning that not only products with a failure that can have a negative effect on people’s health constitute product liability but also “simple” warranty cases.

Our experience proves that “real” product liability claims increase. This might result from companies, which optimize their production processes by using common product platforms, in particular in the automotive industry. The more products consist of the same pieces, the more they are affected to a large number in case one of the pieces used therein is defective.

22. **What are the likely future developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?**

We see the likely future developments in product liability law and practice in the effects of automation and digitalization of products. New legal challenges arise in particular where products, e.g. house appliances and cars are connected and interact with other products. This creates new questions, for example, who is responsible for a failure of a product (the product itself?) and which are the effects of automation on the product monitoring obligations of manufacturers.

23. **Please provide an update of any interesting developments which have taken place in your jurisdiction over the last 12 months.**

The Federal Court of Justice (BGH) clarified that the testing body for medical devices can be held directly liable by consumers for negligent release of unsafe products under sec 823 para 2 BGB. The recent judgment (dated 27.02.2020 - docket VII ZR 151/18) comes after a long series of litigation concerning silicone breast implants from the French company Poly Implant Prothèse. The BGH now clarified that EU Conformity Assessment under harmonized EU medical device law qualifies as protective legislation for consumers. While there is no contractual liability with respect to the individual consumer the BGH confirmed that the Notified Body nonetheless may be liable for tort by infringement of the EU Conformity Assessment Procedures.