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Italy

PRODUCT LIABILITY

Contributor

Studio Legale Rinaldi e Associati

Maria Rosa Galletti

Senior Partner | mrgalletti@rinaldilawf.com

Andrea Lazzaretti

Senior Partner | alazzaretti@rinaldilawf.com

Silvio Severino

Associate | sseverino@rinaldilawf.com

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

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ITALY
PRODUCT LIABILITY

1. What are the main causes of action upon which a product liability claim can be brought in your jurisdiction, for example breach of statutory regime, breach of contract and/or tort? Please explain whether, for each cause of action, liability for a defective product is fault-based or strict (i.e. if the product is defective, the producer (or another party in the supply chain) is liable even if they were not individually negligent).

Under Italian law, product liability can arise from:

- breach of the provisions of the Consumer Code (i.e. Legislative Decree n. 206/2005, as amended), implementing Directives 85/374/EEC and 2001/95/EC and applicable to consumer damage only. The Consumer Code establishes a strict liability regime, even though the courts qualified it as a presumption of liability for manufacturers until otherwise proven. Therefore, consumers alleging damage by defective products shall prove the defects and the causal link with the alleged damage but not the manufacturer's negligence (Supreme Court n. 11317/2022);
- contractual breach, governed by the Civil Code and, in particular, by Articles 1490 et seq., which is a fault basis liability;
- tort, governed by Articles 2043 et seq. of the Civil Code, based on intentional or negligent acts.

2. What is a 'product' for the purpose of the relevant laws in connection with which a cause of action exists. Is 'product' defined in legislation and, if so, does the definition include tangible products only? Is there a distinction between products sold to or intended to be used by consumers and those sold for use by professionals or businesses?

'Product' is defined by the Consumer Code as 'any movable thing, even if it is incorporated into other movable or immovable things' (Article 115, paragraph 1), while no definition of product is given by the Civil Code, which, instead, provides for the definition of 'goods' as anything that can be the subject matter of rights. The definition of good then applies to any kind of sales made to both consumers and professionals while the definition of product only refers to consumer sales.

Software falls under the definition of good but it is still disputed whether it also qualifies as 'product' under the Consumer Code. As an effect of Legislative Decree n. 170/2021, implementing EU Directive 771/2019 and amending the Consumer Code, consumers are now guaranteed against non-conformities of digital products and services according to the standard established by the said Directive.

In September 2022, a proposal for a Directive on product liability, repealing Directive 85/374/EEC, has been made by the European Commission, which, inter alia, includes software in the definition of 'product'.

3. Who or what entities can bring a claim and in respect of what type(s) of damage? Can a claim be brought on behalf of a deceased person whose death was caused by an allegedly defective product?

Under the Consumer Code, the injured party can sue for damage resulting from death or personal injury as well as from destruction or deterioration of goods other than the defective products. In case of death, the action for damages can be brought by the heirs.

According to Supreme Court n. 13458/2013, all the people, even occasionally, exposed to the risk deriving from defective products can be qualified as 'users' in a broad sense, and, therefore, are entitled to bring a claim under the Consumer Code.

4. What remedies are available against a defendant found liable for a defect in a product? Are there any restrictions on the types of loss or damage that can be claimed?

In case of defective products, consumers, at their option, are entitled to (i) the repair or replacement of the defective goods, free of charge, unless such remedy is impossible or disproportionate, or (ii) an appropriate price reduction or (iii) the termination of the contract.

Under the Consumer Code, repair or replacement is deemed to be disproportionate if the costs imposed on the seller, in comparison with the alternative remedy, are unreasonable by taking into account (i) the value the goods would have, if no lack of conformity existed; and (ii) the significance of the non-conformity. In any case, consumer shall not pay for wear and tear of the replaced goods.

Under the Consumer Code, the user has the right of redress for all damages suffered as a result of:

– death or personal injury;

– destruction or deterioration of anything other than the defective product, provided that it is of a type normally intended for private use or consumption and thus primarily used by the injured party. In any event, damage to property will only be compensated if exceeding € 387.00.

5. When is a product defective? What must be shown in order to prove defect?

A product is defective if it does not offer the level of safety that may reasonably be expected in view of all the circumstances including a) the way in which the product was marketed, its packaging, evident features, instructions and warnings; b) its reasonable use and the reasonably expected life cycle; c) the period during which the product was marketed.

Therefore, a product is defective if it does not offer the safety normally offered by other samples from the same range. A safe product is any product which (under normal or those which may be reasonably envisaged, including shelf life and, where applicable, usage, installation and maintenance requirements) does not present any hazard or only minimum risks acceptable and consistent with a high level of personal health and safety.

The claimant must prove the existence of the unsafety or non-conformities of the product and they are deemed to exist at the time of the sale if they become evident within one year of the sale.

6. Which party bears the burden of proof? Can it be reversed?

The burden of proof, which cannot be reversed, is borne by the consumer, which must prove: (i) the defect, (ii) the damage and (iii) the causal link between defect and damage, while no evidence of the producer’s fault is required.

The producer, instead, must provide evidence of the facts excluding its liability.

7. What factors might the court consider when assessing whether a product is defective? To what extent might the court account for a breach of regulatory duty, such as a breach of a product safety regulation?

The court should assess the defect on the basis of several elements, such as (i) the degree of accuracy of the information provided by the manufacturer (e.g. instructions for use and warnings); (ii) the degree of accuracy of the product design; (iii) the fact that, in the case of series production, the defective product offers less safety than that normally offered by the other products in the same batch.

With regard to the possible violation of a regulatory obligation, the strict/presumptive liability established by the Consumer Code implies that producer is not exempt from liability in case of damage to consumers, even if the product has been manufactured and marketed in compliance with the relevant regulation.

8. Who can be held liable for damage caused by a defective product? If there is more than one entity liable, how is liability apportioned?

The product liability rests on the producer, i.e. the manufacturer of the finished product or one of its components, the producer of the raw material and, in the case of agricultural products from soil and those obtained by farming, fishing or hunting, the farmer, breeder, fisherman or hunter.

If the producer is unknown, the claimant may act against the supplier marketing the product in the course of a commercial activity. To be exempted from liability, the supplier must inform the consumer, within three months of the request, of the identity and domicile of the producer or the person who supplied him with the product. In any event, the liability imputed to suppliers has been deemed alternative to (and not joint with) the one imputed to the manufacturers, since product liability rests only on the members of the manufacturing chain (Supreme Court n. 32226/2018).

If there is more than one liable party, all of them will be jointly liable vis-a-vis the damaged party but the party paying damages shall be entitled to act against the others to the extent of the individually applicable liability, the seriousness of the defects, and the consequences arising therefrom. Unless otherwise proved, liability is deemed to be equally shared by all the parties.

9. What defences are available?

If the claimant proves the defect, the alleged damage and the causal connection between them, the producer may exclude its liability by proving that:

a. it did not put the product into circulation;
b. the defect causing the alleged damage did not exist when the product was put into the market;
c. the product was neither manufactured for sale or for any form of distribution for economic purpose nor manufactured or marketed by it in the course of business;
d. the defect is due to compliance of the product with mandatory provisions issued by public authorities;
e. the state of scientific and technical knowledge when the product was put into circulation did not enable the discovery of the alleged defects.

When the defect refers to a component only, the liability can be excluded by the producer of such component if evidence is given that the defect is imputable to the design of the product incorporating it or to the instructions given by the product's manufacturer.

10. What is the relevant limitation period(s) for bringing a claim? Does a different limitation period apply to product liability claims brought on behalf of deceased persons?

The Consumer Code provides for a limitation period of three years, starting from the day on which the consumer had or should have had knowledge of the damage, the defect and the identity of the liable party.

In case of worsening of the damage, the limitation period does not start before the day on which the injured party knew or should have known that the damage was sufficiently serious to ground an action.

In any case, the right to compensation expires ten years after the date on which the producer or importer put the product on the market in the European Union.

Should the three years' limitation period be expired, a tort claim can be brought by consumer pursuant to Articles 2043 et seq. of the Civil Code.

11. To what extent can liability be excluded, if at all?

Under Article 124 of the Consumer Code, any agreement that excludes or limits liability of the producer in advance is null and void.

12. Are there any limitations on the territorial scope of claims brought under a strict liability statutory regime?

Claims by and against consumers shall be brought before the court where the latter have their domicile or residence and any derogation affecting the consumers is deemed ineffective.

13. What does a claimant need to prove in order to successfully bring a claim in negligence?

According to the general rules of tort, any fraudulent, malicious or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages. Therefore, the injured party must prove:

– the fault/negligence of the tortfeasor;

– the suffered damage;

– the causal link between fault/negligence and damage.

In consideration of the different burden of proof resting on the claimant in case of tort, if the conditions are met, a claim for product liability is more likely to be successful.

In any case, Italian law allows the cumulation of actions and, therefore, a claim for product liability can be brought together with a tort claim.

14. In what circumstances might a claimant bring a product liability claim in negligence?

A product liability claim in negligence can be brought by anyone damaged by a defective product and not only by consumers: its limitation period is longer than the one applicable to the consumer claims and can be brought against anyone causing an unlawful damage (and not only against the producer). Therefore, while product liability claims under the Consumer Code can be brought only in case of B2C relationship, claims in negligence may also refer to B2B relations.

15. What remedies are available? Are punitive damages available?

The claimant bringing a tort action is entitled to restoration of all (pecuniary and non-pecuniary) damages caused by defective product but he is not entitled to claim for repair or replacement or for a price reduction.

Punitive damages are not allowed in our Country but Italian courts (see, inter alia, Supreme Court n. 16601/2017) have granted the exequatur to foreign judgements ordering the payment of punitive damages.

16. If there are multiple tortfeasors, how is liability apportioned? Can a claimant bring contribution proceedings?

In case of concurrent liabilities in the causation of tort, all the tortfeasors are jointly liable vis-à-vis the damaged party, which, in any event, is entitled to recover the entire damage by each of them. In this case the party paying damage has a right of recourse against the other tortfeasors, whose liability is deemed to be equally shared unless otherwise proven.

The claimant is also entitled to bring contribution proceedings or extend an existing action vis-à-vis the tortfeasor against any third parties which have contributed or have been suggested (by the defendant) to have contributed to the tort.

17. Are there any defences available?

To be exempted from liability, the alleged tortfeasor must prove (i) to have acted with the due diligence, providing, inter alia, for all the information necessary for the correct use of the product placed on the market; or (ii) to have marketed a safe product taking into account its normal use or (iii) that the alleged defect is imputable to mandatory rules regarding the products or fortuitous events.

Also the conduct of the injured party may exempt, in whole or in part, the tortfeasor from the alleged liability if such conduct has caused or contributed to cause the claimed damage.

18. What is the relevant limitation period(s) for bringing a claim?

The limitation period for a tort action is five years. In this respect, the Supreme Court has clarified that 'The right to compensation does not arise merely from the existence of the wrongful act and, then, from the conduct of the agent, but from the damage caused by such conduct; consequently, the limitation period runs from the time when the damage becomes externally evident, objectively perceptible and recognisable' (Supreme Court n. 5913/2000).

When the wrongful act amounts to a crime or may be qualified as a criminal offence, the limitation period for the tort action shall be the same applicable to the alleged crime/offence, if longer.

19. To what extent can liability be excluded, if at all?

As a general rule, the liability of the tortfeasor(s) cannot be limited or excluded in advance, as also stated by Article 124 of the Consumer Code. Nonetheless, some precedents seem to apply to tort claims limitations agreed by the parties provided that such limitations are not intended to exclude liability for gross negligence and fraud, so extending to tort the principle set forth in Article 1229 of the Civil Code stating that 'Any agreement excluding or limiting in advance the debtor's liability for intentional conduct or gross negligence is null and void'.

In any event, no limitation of liability is allowed when it is in conflict with public order rules as in the case of death or personal injuries.

20. Do the laws governing contractual liability provide for any implied terms that could impose liability in the event that the product that is the subject of the contract is defective or fails to comply with the terms of sale?

Under Article 1490 of the Civil Code ‘A seller is bound to warrant that the good sold is free of defects which render it unfit for the use for which it was intended or which appreciably diminish its value’.

Such a warranty may be limited or excluded by agreement between the parties, but such limitation/exclusion will be ineffective if the seller, aware of the claimed defects at the time of the sale, has failed to disclose them to the buyer.

Similarly, the warranty is excluded if the buyer was aware of the defects in the goods at the time of sale or the defects were easily detectable.

On the other hand, under Article 133 of the Consumer Code, ‘the seller is liable to the consumer for any lack of conformity existing at the time of delivery of the goods […] and which becomes apparent within two years of that time’ and any agreement, which is intended to exclude or limit the seller’s liability, if executed before the discovery of the lack of conformity, is null and void.

21. What remedies are available, and from whom?

If a product does not comply with the terms of the sale contract, the buyer may act against the seller for termination of the contract or reduction of the price as well as for damage.

If the termination is requested, the seller must refund the price and reimburse the expenses and payments reasonably incurred by the buyer, which shall return the purchased good.

No damage can be claimed against the seller if, at the time of the sale, he did not know, without fault, that the sold good was defective.

22. What damages are available to consumers and businesses in the event of a contractual breach? Are punitive damages available?

In case of contractual breach, the defaulting party shall restore all pecuniary and non-pecuniary damages suffered by the creditor including the loss incurred as a consequence of default and the loss of profits.

Non-pecuniary damages are compensated only when expressly contemplated by the law or the contractual breach has caused serious prejudice to a right of the person protected by the Constitution (as in the case of death and personal injuries).

Although, under Article 1223 of the Civil Code, only damages directly and immediately imputable to default are restorable, the courts have provided a broaden construction of this provision, authorizing the indemnification of indirect damages which may be deemed a normal consequence of default according to the principle of the so-called causal regularity (see, inter alia, Supreme Court n. 6474/2012 and n. 15274/2006). As a general rule, only damages foreseeable at the time of execution of the contract can be validly claimed, unless the defaulting party has fraudulently acted.

When the exact amount of damage cannot be proven, upon request of the claimant, the damage can be assessed by the judge on an equitable basis.

Since the compensation for damage is intended to put the injured party in the same (patrimonial) conditions as if the breach of contract had not occurred, Italian law does not contemplate punitive damages.

23. To what extent can liability be excluded, if at all?

Contractual liability can only be excluded/limited in case of negligence other than gross negligence. Such limitation/exclusion, when set in the standard terms and conditions of the sellers, is effective only if the relevant clause is specifically accepted in writing by buyer.

In any event, no exclusion/limitation is permitted in case of gross negligence or willful misconduct.

24. Are there any defences available?

The seller is exempt from liability if he proves that the buyer was aware of the defects at the time of the sale or the defects were easily detectable.

The seller’s liability may also be limited if the good sold was destroyed as the result of a fortuitous event or buyer’s fault.

The seller shall be exempt from liability for damage if he proves that he could not have been aware of the defects despite he exercised the due care in the conduct of the business and carried out all the checks and procedures required by law.

25. Please summarise the rules governing the disclosure of documents in product liability claims and outline the types of documents that are typically disclosed.

The Italian rules on disclosure do not vary according to the subject matter: therefore, also in case of product liability, the rules are those established by the Code of Civil Procedure (e.g. cross-examination of the other party, examination of witnesses, order to produce evidence, etc.).

Each party shall then submit in court all the documents supporting its defence or, if such documents are not available to the party, the latter may request the judge for an order of exhibition against the other party or any third parties holding such documents.

The key evidence to be submitted to the court is the proof of the purchase (i.e. the invoice) as well as the allegedly defective product. Physical damages are usually proved by photographs, medical records and expert opinions. In our experience, if the non-conformities are challenged by the buyer, a court expert is appointed to carry out a technical appraisal on the products.

26. How are product liability claims typically funded? Is third party funding permitted in your jurisdiction and, if so, is it subject to regulation?

As a general rule, the claimant must pay in advance the court duties, the amount of which is related to the value of the claim. Each party shall bear its legal costs (attorney fees and other expenses), which will be refunded by the losing party as set forth in the judgement by making refence to the criteria established by Ministerial Decree n. 55/2014, regularly amended by the Ministry of Justice.

If court experts have been appointed during the trial, the payment of their fees is charged on the losing party.

No rule prohibits third parties to finance the costs of legal proceedings.

27. Can a successful party recover its costs from a losing party? Can lawyers charge a percentage uplift on their costs?

The legal costs borne by the successful party shall be refunded by the losing party as set forth in the judgement. However, in the event of (i) mutual defeat, (ii) novelty of the legal issues brought to court, or (iii) leading case changing the existing precedents, the legal costs may be set off by the judge.

Although contingent fees are not permitted by the lawyers' professional code, nothing prevents the parties from agreeing upon a percentage uplift on the lawyer's costs.

28. Can product liability claims be brought by way of a group or class action procedure? If so, please outline the mechanisms available and whether they provide for an 'opt-in' or 'opt-out' procedure. Which group action mechanism(s) is most commonly used for product liability claims?

Class actions were introduced in 2010 and are now governed by Law 31/2019, effective from 18 May 2021. However, Italy is expecting to implement the principles set by EU Directive 2020/1828, introducing, from 25 June 2023, the new representative action for the protection of the collective interests of consumers.

The current law establishes for an opt-in mechanism whereby the claimants are entitled (i) to join the action within the time period established by the court authorising it or (ii) to benefit of the judgment ruling on the merits.

In brief, the request for a class action has to submitted by any of the damaged parties or representative organisations to one of the specialised courts which (i) determines whether and in what manner homogeneous individual rights (i.e. rights common to several individuals) have been infringed; (ii) defines the characteristics of the infringed rights; (iii) declares the adhesion procedure open and indicates the documents that must be submitted to prove the title.

The class action has been a failure in Italy since the beginning and only 8 class action proceedings have been instituted since 2021 but a great expectation exists for the new European representative action.

29. Please provide details of any new significant product liability cases in your jurisdiction in the last 12 months.

The Supreme Court, in application of Article 267 TFEU, requested the Court of Justice to provide for clarifications on the interpretation of European Union law in respect of the extension of the producer's liability to suppliers, which have not put their names to the product, merely because the suppliers' name, trade mark or other distinctive sign is wholly or partly identical with that of the producer (Supreme Court n. 6568/2023). Such extension may create a sort of 'group product liability' imputing to the subsidiaries the responsibility existing on the controlling companies for the defective products marketed in Europe.

30. Are there any policy proposals or regulatory and legal developments that could impact current the product liability framework, particularly given the advancements in new technologies?

In September 2022 the European Commission adopted a proposal for a Directive on liability for defective products, replacing Directive 85/374/EEC required by the changed social and technological context.

Such Proposal introduces innovations of both substantive and procedural nature which should ensure a greater protection for consumers and, more generally, end-users and which may impact on the existing Italian rules governing product liability with respect to new technologies. In particular, changes are expected:

i. in the definition of 'products', so as to include '*electricity, digital manufacturing files and software*' and to contemplate, among the safety requirements, also '*safety-relevant cybersecurity requirements*'; and
ii. in the burden of proof, by introducing certain presumptions for technically complex products to make it easier to prove product defects and causal link.

Significant changes are also expected once the new rules on the representative actions contemplated by EU Directive 2020/1828 will come into force but, at the moment, only a draft of the new legislation is available (https://www.senato.it/leg/19/BGT/Schede/docnonleg/45900.htm).

31. What trends are likely to impact upon product liability litigation in the future?

In the near future, we could expect that a large number of product liability claims will involve systems, machines, vehicles, etc., whose functioning is based on AI. The implications of the commercialisation of AI-based products have been addressed by the European Commission, which in September 2022 published a proposal for an AI Liability Directive, not yet implemented in Italy.

Contributors

Maria Rosa Galletti
Senior Partner

mrgalletti@rinaldilawf.com

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Senior Partner

alazzaretti@rinaldilawf.com

Silvio Severino
Associate

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