



ICLG

The International Comparative Legal Guide to:

Product Liability 2017

15th Edition

A practical cross-border insight into product liability work

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Indonesia

Agus Ahadi Deradjat



Herry N. Kurniawan



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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?

In addition to general provisions under the Indonesian Civil Code (“ICC”), product liability is specifically regulated under Law No. 8 of 1999 concerning Consumer Protection (“Law 8”). Both instruments adopt a system of fault-based product liability. As regulated under Article 19 (5) of Law 8, a business actor (any person or entity doing business in Indonesia) is not liable for the losses incurred by a consumer for consuming its products/services if the business actor can prove that the consumer was at fault.

Contractual liability under the ICC also applies where a valid contract exists between the business actor and the consumer.

If a business actor violates his/her statutory obligations, he/she will be subject to both civil and criminal sanction as stipulated under Law 8 and under other relevant laws and regulation.

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

No, it does not.

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

It depends on the circumstances of the case. Generally, the business actor is liable to pay compensation to the consumer for any losses incurred as a result of consuming the goods/services produced or traded. Law 8 stipulates the following provisions:

- a. The manufacturer is responsible for the products it has manufactured.
- b. An advertising business agent is responsible for the advertisements produced and also for all consequences incurred by such advertisements.
- c. An importer of goods is responsible (as if it is the manufacturer) for the goods imported if the importation is not conducted by an overseas agent or representative of the manufacturer.

- d. An importer of services is responsible (as if it is the provider of foreign services) if the said provision of foreign services is not conducted by an agent or representative of the provider of foreign services.
- e. A business actor selling goods and/or services to another business actor must answer a claim for compensation and/or a lawsuit filed by a consumer if:
 - i. the other business actors sell said goods and/or services without any modifications to the said goods and/or services; or
 - ii. the other business actors are unaware during the transaction that a change has been made to the goods and/or services by the first business actor or the goods and/or services do not conform to the specification, the quality and composition.
- f. The business actor is obligated to provide spare parts and/or after-sales services, fulfil the warranty in accordance with what is agreed upon, and must answer claims for compensation and/or lawsuits from a consumer if the said business actor:
 - i. fails or neglects to provide spare parts and/or repair facilities; or
 - ii. fails to fulfil the warranty.

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?

Article 8 of Law 8 stipulates that business actors are required to recall their products if they:

- do not fulfil or conform to the required quality standard and the prevailing laws and regulations;
- do not conform to the condition, warranty, superiority or efficacy as stated in the label or description of the said goods and/or services;
- do not conform to a certain quality, level, composition, processing, style, mode or use as stated in the label or description of the said goods and/or services;
- do not conform to the promise stated in the label, description, advertisement or sales promotion of said goods and/or services;
- do not comply with the provision to produce the goods according to halal methods, as denoted by the “halal” mark put in the label;
- do not have a label or provide an explanation of the goods including the name of the goods, the size, the net weight/volume, the composition, the direction of use, the manufacturing date, the side effects, the name and the address

of the business agent and other information which must be included in the label;

- do not mention the information and/or direction of use of the goods in the Indonesian language pursuant to the prevailing laws; or
- are goods for trade which are damaged, flawed or used, and contaminated without providing full information about such goods.

Further, it is also regulated under the Minister of Trade Regulation that a product can be recalled from distribution if it is proven to endanger the safety and health of the consumer, or the environment.

Law 8 does not expressly stipulate the specific procedure to be taken to file a claim for failure to recall such goods and/or services. However, failure to comply with Article 8 may result in imprisonment for a maximum of five years or a maximum fine of Rp 2 billion. As such, criminal procedures apply for breach of Article 8 of Law 8.

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

Yes, they do.

2 Causation

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

Pursuant to Article 28 of Law 8, the business actor must prove that there is no fault or negligence in relation to the 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? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?

The consumer must prove that the product was utilised in accordance with the product manual and that the damages suffered were caused by the use of the products. It is necessary to prove that the product to which the claimant was exposed has actually malfunctioned, but not necessary to prove that the malfunction caused injury.

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?

Market-share liability is not commonly applied in Indonesia. Generally, the business actor who makes the product available to customers (the ultimate manufacturer) will be held liable unless the business actor can prove that another party was negligent/at fault.

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?

There is no single regulation regarding the requirement to put warnings on labels. Article 7 of Law 8 simply stipulates that business actors must provide correct, clear, and honest information as to the condition of the goods/services and the direction for the use, repair, and maintenance of the goods/services.

Warning requirements are regulated specifically pursuant to the kind of goods to be traded. Commonly, warnings are required for goods which might be dangerous to the consumer, such as food products, drugs, technology products, cigarettes. The warning is usually required to be put on the label of the goods in a readable position so that the consumer is able to read it carefully. Failure to comply with this requirement may cause the business actors to be liable for damages/losses caused to the consumer from using the goods.

The term of “learned intermediary” is not adopted under Law 8. In this regard, unless the intermediary makes changes or additions to the goods/services, the manufacturer is liable for any damages arising from the use of the goods/services.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The ICC provides a defence for strict contractual liability. A party cannot be held liable for unforeseeable harm or foreseeable harm if it has taken all reasonable care. Further, no liability arises in the event of a *force majeure* event which prevents the contracted party from carrying out its contractual obligations, or forces a breach of contractual duty.

Law 8 provides the following defences for manufacturers of goods:

- the business actor has not been negligent/is not at fault;
- the goods were not intended to be distributed;
- the flaw in the goods emerges later;
- the flaw emerges as a result of compliance with provisions on the qualification of the goods;
- the damage is caused by the negligence of the consumers; or
- the claiming period of four years after the purchase of the goods, or the passage of the period agreed upon, has lapsed.

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?

There is no such defence stated in the regulations.

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?

Yes, this can be used as a defence for the manufacturer. However, the acceptance will be based on the judge's discretion.

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?

Indonesia does not acknowledge the concept of issue estoppel as adopted in the common law system. As such, every disadvantaged consumer may file a claim against a business actor regardless of previous actions taken by other claimants.

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?

Yes. The defendant may seek contribution or indemnity from a third party on the basis of general civil law procedures. The defendants may also include the third party in the same proceedings under a procedure called *vrijwaring*, or they can submit a subsequent claim against the third party.

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

Yes. However, the defendants must prove the allegations.

4 Procedure

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

Indonesia adopts the Civil Law system. As such, trials are conducted by a panel of 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)?

No, the procedures do not recognise the concept of expert assessors.

However, the court or the parties (the plaintiff or the defendant) may summon an expert witness to state their opinion regarding the case based on their expertise.

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?

Yes. The basis for class action procedures is regulated under Article 46(1)(b) of Law 8 and Regulation of the Supreme Court No. 1 of 2002 regarding Procedures for Class Action Lawsuits ("Perma"). Pursuant to Law 8, a group of customers who have the same concern or interest may file a class action lawsuit against a business actor. Pursuant to the Perma, a claim may be filed via class action procedures if:

- the number of class members is so large that it is ineffective and inefficient to make a claim severally or jointly in one claim;
- there are common questions of fact or situation and common questions of law that are substantial, and there are typical claims among class representatives and their class members; and
- a class representative fairly and genuinely protects the interests of the class members being represented.

The formal requirements for a class action petition should follow the formal requirements of the applicable law of civil procedure, in addition to those requirements sets out under the Perma.

At the beginning of the hearing, the judge must examine and consider the requirements for a class action. If it is a valid class action claim, a notice is issued containing a description of the possible class members belonging to the class definition. The notice provides further details on how class members can opt-out of the class membership and the address to submit the opt-out. The party who has stated to opt-out of the class action will not be legally bound by any judgment of the class action concerned.

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

Yes, this is regulated under Article 46(1) (c) of Law 8. Pursuant to Article 46(1)(c), a lawsuit may be filed by a non-governmental institution to protect consumers' interests if the non-governmental institution fulfils certain requirements. Namely: that the institution is a legal entity or a foundation; the institution's articles of association clearly state that its purpose of establishment is to protect consumers; and that the institution conducts its activities in accordance with its articles of association.

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

The time for a lawsuit to get to trial varies depending on whether it is a civil or criminal case. The time for civil cases to get to trial is usually less than the time taken for criminal cases. This is because the steps required prior to commencing a civil action are simpler than the necessary investigative steps required in criminal cases.

Pursuant to the Decision of the Head of the Supreme Court of the Republic of Indonesia No. 026/KMA/SK/II/2012 regarding the Standard of Judicial Services ("Kepma"), the court should determine the date of a civil trial at least three working days after the receipt of the claim by the court. Aside from this, there is no exact

timeline on how long after the receipt of the claim the trial should commence. However, the Kepma regulates that the procedures of the trial should be finished within six months as of the registration date of the lawsuit.

As for criminal cases, the timeline to get to trial, from the time the alleged crime was reported to police is necessarily longer in order to account for the proper investigation and inquiry which must occur prior to trial. However, the Kepma regulates that the procedures of the trial for criminal cases should be finished within:

- six months from the date of registration of the indictment by the prosecutor (if the defendant is not arrested);
- ten days before the end of a temporary detention period; or
- a special period as regulated under the prevailing laws and regulations for specific cases.

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 Indonesian Civil Law system does not conduct a preliminary issues hearing for civil or criminal cases.

4.7 What appeal options are available?

The appeal options in the Indonesian court system are divided into: (i) Ordinary Legal Remedies; and (ii) Unordinary Legal Remedies, as follows:

Ordinary Legal Remedies:

- Appeal to the District Court pursuant to the decision of the agency for the settlement of consumers' disputes (this appeal option is available to consumers who attempt to settle disputes outside of court via the agency for the settlement of consumers' disputes).
- *Verzet*: Appeal for a *Verstek* ruling (shall be filed by defendants who appeal a court ruling which implied that the defendant was not present at the trial).
- Appeal: Appeal to challenge a District Court ruling.
- Cassation: Cassation is a legal remedy to challenge the ruling of a court of appeal. Cassation can only be submitted if the petitioner has been through the appeal process, unless stipulated otherwise by law.

Unordinary Legal Remedies:

- Civil Review: Civil review can be filed to the Supreme Court against a ruling/decision of the Supreme Court which has become final and binding. The civil review can be filed as long as there is a *novum* (new evidence) related to the case which had not been discovered at the previous level of proceedings.

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?

The court or the parties (the plaintiff or the defendant) might summon an expert witness to give their opinion regarding the case based on their expertise. The expert witness must not have a conflict of interest with the subject and/or object of the case.

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?

Under the Indonesian civil law system, there is no concept of pre-trial deposition. Witness statements/expert reports are exchanged during the trial and not before the trial.

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

As for civil cases, there is no obligation to disclose documentary evidence. In general, the evidence is disclosed by the plaintiff as an attachment to the claim. This evidence is further investigated during the proceedings. As for criminal cases, the evidence is investigated during the inquiry and the investigation phase. Later, this evidence is attached to the indictment by the prosecutor and is further verified during trial.

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

No, Article 45 (2) of Law 8 stipulates that the disputing parties may voluntarily choose the method of dispute resolution, either through the court or outside of the court. Arbitration and mediation methods are available as an alternative to litigation and, in addition to this, Law 8 also provides an alternative mechanism for product liability claims via an agency for the settlement of consumer disputes outside of the court.

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

In theory, whenever someone (either a citizen or foreigner) conducts an unlawful act on Indonesian territory, the Indonesian court has the jurisdiction to hear and decide the case. Claimants that are not domiciled in Indonesia can file a claim before an Indonesian court. Further, defendants that are not domiciled in Indonesia can be summoned to appear before an Indonesian court. However, in practice, it is difficult to enforce the court's decision if the defendant or claimant is not domiciled in Indonesia.

5 Time Limits

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

Yes, there are.

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 on bringing or issuing proceedings vary between criminal law and civil law.

In criminal law, as regulated under Article 78 Criminal Code:

- for violations/crimes committed by means of printing tools, the expiration period is one year;
- for crimes carrying a penalty of less than three years' imprisonment, the time limit is six years;
- for crimes carrying a penalty of over three years' imprisonment, the time limit is 12 years; and
- for crimes punishable by death or life imprisonment, the time limit is 18 years.

In civil law cases, pursuant to Article 1967 of the ICC, the time limit to submit a claim is 30 years counting from the date of the dispute. However, a shorter period may apply in specific types of civil litigation.

Aside from the above, please note Law 8 stipulates that a claim brought under Law 8 will only be valid for four years from the date of the purchase of such goods/services.

The age of the claimant will not affect the calculation of time limits.

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

The issues of concealment or fraud do not affect the running of any time limit.

6 Remedies

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

The available remedies are, among others: refund or replacement of goods and/or services (similar or equivalent); medical expenses; and/or compensation for damages.

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

There are no specific types of recoverable damages under the applicable law. As long as the consumers can prove that the damages are caused by the use of goods/services, the consumer may claim damages from the business actors.

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?

No. A party can only claim for damages which have been suffered.

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

Indonesian courts do not acknowledge the concept of 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?

There is no maximum limit for the damages recoverable from one

manufacturer in a civil claim. However, in criminal claims, Law 8 stipulates a maximum fine and imprisonment period that can be imposed on business actors.

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?

For settlement in a class action, the judges conduct a preliminary hearing to review whether the requirement of a class action has been met. If the requirements are met, the class action procedure can continue. As for claims relating to infants, the claim is usually made by their legal guardian/s.

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 government authorities concerned with health and social security are not listed as legitimate claimants under Law 8. Hence, they cannot claim from the settlement or awarded damages.

Pursuant to Law 8, the government can only submit a claim if the use of goods/services causes a substantial material loss and/or victims.

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?

The winning party can request to recover the court fees from losing parties. However, under Article 182 of the Indonesian Civil Procedural Code, the winning party cannot request to recover lawyers' fees.

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

Legal aid funding is recognised under the Legal Aid Law, Law No. 16 of 2011, as supplemented by its implementing regulation, Government Regulation No. 42 of 2013. In practice, legal aid funding is implemented by means of the establishment of legal aid posts in Indonesian district courts.

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

The beneficiary must be economically poor in order to receive legal aid services.

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

No, it is not.

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

Yes. It can be in the form of a grant or a donation.

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

No, it does not.

8 Updates

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

Lately, the number of flight delays has increased in Indonesia, especially carried out by the low-cost airline. For some crucial routes and in the midst of the holiday seasons, some passengers may experience more than five hours of delay. This is obviously very harmful for the consumers.

Under Law 8, these incidents can be assumed as the violation of the consumer rights.

Violation to the above provisions is subject to imprisonment, fines and/or administrative sanctions in the form of, among others, payment of compensation, revocation of business licence, etc.

In addition to the above, when flights are delayed, passengers are entitled to compensation under the Regulation of Ministry of Transportation Number PM 89 of 2015 regarding Flight Delay Management on Scheduled Commercial Air Transport Business Entity in Indonesia (“**Regulation 89**”). Regulation 89 specifies that passengers are entitled to certain reimbursements depending on the six categories of delay. However, in practice, the enforcement of the reimbursements has yet to be executed properly and, moreover, the reimbursements are still considered inequitable than the losses suffered by the consumer.

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