I. Introduction

In Malta, prior to the amendments to the Consumer Affairs Act\(^1\) in 2000\(^2\) that transposed the Product Liability Directive into Maltese law, the law governing product liability was contained in the general tort and contract law provisions of the Civil Code\(^3\) promulgated in 1868 on the model of the Code Napoleon. All these provisions are based on fault liability while the provisions inserted in the Consumer Affairs Act introduce strict liability in line with the directive. However, though this is a notable improvement from the injured party’s perspective, it has not resulted in any marked increase in product liability claims before Maltese courts, as these cases remain very rare in Malta, most cases being settled amicably.\(^4\)

II. The Traditional Product Liability Regime

Until 2000 the product liability regime was based entirely on the general contract and tort law provisions of the Civil Code.

A. Contract

The Civil Code in Article 1125 lays down the general principle that failure to discharge any obligation contracted by a party leads to liability in damages. However, Article 1132 provides that the degree of diligence to be exercised in the performance of any obligation is merely that of a bonus paterfamilias. More specifically, in relation to contracts of sale, Article 1378 provides that the seller has two principal obligations, irrespective of whether the object of the sale is a movable or an immovable – to deliver the thing sold and to warrant the peaceful possession of the thing sold and against any latent defects. It is the warranty obligation that is most relevant for product liability purposes.

The warranty obligation subsists irrespective of whether or not it was expressly stipulated in the contract. Thus, Article 1409 prescribes that even in the absence of an

\(^1\) Chapter 378 of the Laws of Malta.
\(^2\) Act XXVI of 2000.
\(^3\) Chapter 16 of the Laws of Malta.
express stipulation of warranty in the contract of sale, the seller is still bound by law to warrant the buyer against any eviction which deprives him of the thing sold or against any easement or burden on it claimed by others. The remedies available to the buyer where the peaceful possession of the movable or immovable is lost are not only the repayment of the price paid but also the payment of damages by the seller for breaching the warranty against eviction (Articles 1412-1413, 1416, 1419-1420).

As for the warranty in relation to latent defects, Article 1424 provides that the seller is obliged to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them. The seller is answerable for latent defects even when they were not known to him unless he has stipulated otherwise in the contract in a clear and unequivocal way; but in any case he is not answerable for any apparent defects which the buyer might have discovered for himself (Articles 1425-1426). It has been established that for the purpose of determining whether or not a defect was apparent to the buyer the standard to be used is that of a buyer using ordinary diligence and attention. Moreover, it is not expected of the buyer that he should seek technical assistance to ascertain that the thing bought is free from any latent defects at the time of sale.

Where the seller is answerable for the latent defect, the remedy for the buyer is repayment of the price but where the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages towards the buyer (Article 1429). On the other hand, where the defect was not known to the seller, there is no liability in damages, though he would still be required to repay the price and refund the buyer for the expenses incurred in connection with the sale. The same applies if the defective thing perishes as a result of its defects, the loss being borne by the seller who must repay the price to the buyer and indemnify him. The action for repayment of the price is barred by the lapse of one year from the date of the contract in the case of immovable property and six years from the date of payment of the last instalment in the case of movable property.

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5 Bajada v Demajo et (Commercial Court Judgment of 7 November 1988).
6 Citazz Nru 528/94 C1 NA Debono et v Cutajar et (Civil Court Judgment of 5 October 2001).
7 Ibid.
months from the day of delivery in the case of moveable property except that where it was not possible for the buyer to discover the latent defect of the thing, the said periods of limitation shall run only from the day on which it was possible for him to discover such defect. The period of limitation for the action for damages is the same as for the action under tort law, discussed below.

B. Tort

The relevant tort law provisions (Articles 1031-1033) provide that every person is liable for the damages caused through his fault. A person is deemed to be in fault only if in his own acts he does not use the prudence, diligence or attention of a bonus paterfamilias; no liability is incurred for damages caused by want of prudence, diligence or attention in a higher degree. However, any person who, with or without intent to injure, voluntarily or through negligence, imprudence or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law is liable for any resulting damage.

Article 1045 provides that the damage to be made good by the person responsible shall consist of the actual loss suffered by the injured party directly caused by the act concerned together with the expenses incurred by the injured party in consequence of the damage and any loss in actual or future wages or other earnings arising from any permanent incapacity caused by the act. The latter computation is carried out by the court having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused and to the condition of the injured party. However, contributory negligence may lead to a reduction in the damages awarded. Thus, Article 1051 stipulates that if the injured party has by his imprudence, negligence or want of attention contributed or given occasion to the damage, the court, in assessing the amount of damages payable to him, shall reduce the amount of damage payable to him by the proportion of damages deemed to have been occasioned by his imprudence or negligence. This action for damages is barred by the lapse of two years (Article 2153).
III. Product Liability Law Under the Implemented EC Directive

The Product Liability Directive was transposed into Maltese law via Act XXVI of 2000 that amended the Consumer Affairs Act by introducing Articles 56 to 71. These provisions introduced the principle of strict liability into the product liability regime that as shown in Section II was hitherto based on fault liability. Generally the provisions follow closely the provisions of the Directive but their scope of application is wider as it includes gas apart from electricity. On the other hand, the provisions implement the definition of ‘producer’ incorrectly as, in the case of imported products manufactured outside Malta, they consider as a ‘producer’ the local importer of the product rather than the manufacturer in the Community in the case of products manufactured in the EU or the importer into the Community, wherever he may be, in the case of products manufactured outside the EU. The law was enacted prior to Malta’s accession to the EU but the legislator failed to amend it following accession to fall in line with the Directive. It seems the issue has still not arisen before the Maltese courts.

Article 59 provides that for the supplier to escape liability he must provide the injured party with the identity and full address of the producer, or, in the case of an imported product, of the local importer, or of the person who supplied him with the product within thirty days from when the injured party makes the request. The request must be made in writing and sent by registered mail or official letter to the place of business of the supplier and must contain the details prescribed in this provision.

The law does not set a ceiling in relation to the producer’s total liability for damages resulting from death or personal injury but neither does it provide for moral (non-material) damages. Generally under the Maltese legal system no moral damages may be awarded unless they are expressly envisaged by law.

In terms of the derogation allowed by Article 15 of the Directive, Article 62 of the Consumer Affairs Act allows the producer to raise the development risks defence. Moreover, contributory negligence on the part of the injured party will lead to a reduction in damages calculated on the basis of Article 1051 of the Civil Code as shown in Section II. However, when the damage is caused both by the defect in the
product and by the act or omission of a third party the liability of the producer is not reduced (Article 66).

IV. Co-existence of Both Regimes

Following the transposition of the Product Liability Directive into the Consumer Affairs Act, the remedies in the Civil Code remain available to the aggrieved person. In fact, Article 69 of the Consumer Affairs Act provides that its provisions on product liability do not exclude or limit any rights or remedies available to the injured person under the Civil Code or any other law.

Legislation

CONSUMER AFFAIRS ACT

PART VII
Liability for defective products
(Added by: XXVI. 2000.15.)

Interpretation.

56. In this Part, unless the context otherwise requires:

"personal injury" includes any disease and any impairment of the physical or mental condition of a person;

"primary agricultural products" means any product of the soil, of stock-farming and of fisheries and game;

"product" means any movable and includes:

(a) any movable incorporated into another product or into an immovable,
(b) electricity,
(c) gas, and
(d) primary agricultural products;

"producer" means:

(a) the manufacturer of a finished or processed product, or
(b) the manufacturer of a component part, or
(c) the producer of any raw material, or
(d) the producer of any products of the soil, of stock-farming and of fisheries and game, or
(e) any person who, by putting his name, trade mark or other distinguishing feature on the product, presents himself as its producer, or
(f) where the product is manufactured or produced outside Malta, any person who imports into Malta a product for sale, hire, leasing or any other form of distribution.
The producer shall be liable for the damage caused wholly or partly by a defect in his product.

The injured party shall only have the onus of proving the damage, the defect and the causal relationship between the defect and the damage and shall not have the onus of proving the fault of the producer.

The supplier of the product shall be treated as the producer if –

(a) the producer cannot be identified and the injured party has asked the supplier to provide the identity and full address of the producer or of the person who supplied the supplier with the product, or

(b) in the case of an imported product where the importer cannot be identified even if the name of the producer is indicated and the injured party has asked the supplier to provide the identity and full address of the importer or of the person who supplied the supplier with the product,

and the supplier fails do so within thirty days from when the request was made to him.

A request under subarticle (1) shall –

(a) be in writing and sent by registered mail or official letter to the place of trade or business of the supplier; and

(b) indicate the product that caused the damage, the place from where and, if possible the approximate date, when it was acquired.

The supplier has the burden of proving that he provided the injured party with the information required under subarticle (1) within the period therein indicated.

A product is defective if it fails to provide the safety which a person is entitled to expect, taking all circumstances into account including:

(a) the presentation of the product, how it was marketed, and any directions and warnings provided,

(b) the use to which it could reasonably be expected that the product would be put, and

(c) the time when the product was put into circulation.

A product shall not be considered defective only because a better product is subsequently put into circulation.

A product shall be considered defective if it does not provide for the safety which is usually provided for by other models of the same type.

Damages that may be recovered under this Part are:

(a) damages caused by death or by personal injury, or
(b) loss of, damage to, or destruction of, any item of property other than the defective product itself, having a value of at least two hundred liri, or such other value that the Minister may prescribe:

Provided that –

(i) the item of property is of a type ordinarily intended for private use or consumption, and

(ii) the item of property was used by the injured party mainly for his own private use or consumption.

Defences a producer may raise.

Added by: XXVI. 2000.15.

62. The producer shall not be liable under this Part if he proves-

(a) that he did not put the product into circulation, or

(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards, or

(c) that the product was neither manufactured by him for sale or for any form of distribution for an economic purpose nor manufactured or distributed by him in the course of his business or trade, or

(d) that the defect in question is due to compliance with a mandatory requirement imposed by law or by a public authority, or

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered, or

(f) in the case of the manufacturer of a component or the producer of a raw material, that the defect is attributable to the design of the product in which the component has been fitted or the raw material has been incorporated or to the instruction given by the manufacturer of the product.

Provisional payment of referee.

Added by: XXVI. 2000.15.

63. The court may, notwithstanding any provisions of the Code of Organization and Civil Procedure, order that the fees of a referee be provisionally paid or deposited by the producer if there is prima facie evidence that the damage was caused by a defect in the product.

Joint and several liability.

Added by: XXVI. 2000.15.

64. Where under this Part, two or more persons are liable for the same damage, they shall be liable jointly and severally.

Contribution to damage by injured person.

Added by: XXVI. 2000.15.

65. Article 1051 of the Civil Code shall apply in determining the liability of the producer where the damage is caused by a defect in the product and by the fault of the injured person or by a person for whom the injured person is responsible.

Liability if there is an act or omission of a third party.

Added by: XXVI. 2000.15.

66. The liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.
Limitation of action.
Added by: XXVI. 2000.15.

67. (1) The action for damages under this Part shall be barred by the lapse of three years commencing from the day when the injured party became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

(2) Notwithstanding subarticle (1), the action for damages under this Part shall in any case be extinguished upon the expiration of the period of ten years from the date on which the producer put into circulation the actual product which caused the damage unless the injured party has in the meantime instituted legal proceedings against the producer.

(3) Sub-titles I, II and III of Title XXV of the Civil Code concerning the causes which prevent, suspend and interrupt prescription shall apply to actions made under this Part.

(4) The burden of proving when the actual product which caused the damage was put into circulation shall lie on the producer.

Prohibition of exclusion of liability.
Added by: XXVI. 2000.15.

68. The liability of a producer under this Part may not be limited or excluded whether by any term of contract, by any notice or in any other manner whatsoever.

Other rights of action not precluded.
Added by: XXVI. 2000.15.

69. The provisions under this Part shall not exclude or limit any rights or remedies available to the injured person under the Civil Code or any other law.

Damages arising from nuclear accidents.
Added by: XXVI. 2000.15.

70. The provisions under this Part shall not apply to injury or damage arising from nuclear accidents which are governed by any international agreement to which Malta is a party.

Application of this Part.
Added by: XXVI. 2000.15.

71. This Part shall apply to products which are put into circulation in Malta after the coming into force of this Part.

CIVIL CODE

Title IV
Of obligations in general
Sub-title II
Of quasi-contracts, torts and quasi-torts
§ II. Of torts and quasi-torts

Fortuítous damage.
1029. Any damage which is produced by a fortuitous event, or in consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs.

Proper use of one's
1030. Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.

Liability for damage caused through one's fault.

1031. Every person, however, shall be liable for the damage which occurs through his fault.

When a person is deemed to be in fault.

1032. (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.

(2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.

Culpable negligence.

1033. Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.

Measure of damages. Amended by: III.1938.2; XXI.1962.17.

1045. (1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.

(2) The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.

Sub-title IV

Of the effects of obligations

Liability in case of non-fulfilment of obligation.

1125. Where any person fails to discharge an obligation which he has contracted, he shall be liable in damages.

Degree of diligence required in the performance of an obligation.

1132. (1) Saving any other provision of this Code relating to deposits, the degree of diligence to be exercised in the performance of an obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a bonus paterfamilias as provided in article 1032.

(2) This rule, however, is applied with a lesser or a higher degree of strictness in certain cases specified in this Code.

Title VI

Of sale

Sub-title IV

Of the obligations of the seller

Obligations of seller.
1378. The seller has two principal obligations, namely, to deliver, and to warrant the thing sold.

§ II. Of warranty

Warranty.
1408. The warranty which the seller owes to the buyer is in respect of the quiet possession of the thing sold and of any latent defect therein.

Of warranty of the quiet possession of the thing sold

Implied warranty.
1409. Although no stipulation of warranty has been made in the contract of sale, the seller is in law bound to warrant the buyer against any eviction which deprives him, in whole or in part, of the thing sold, and against any easement or burden on the same, claimed by others, and not stated in the contract.

Special agreement.
1410. It shall be lawful for the parties, by special agreement, to add to, or diminish the effects of such implied warranty, or to stipulate that the seller shall not be liable to any warranty.

Liability of seller, where warranty has been negatived.
1411. Although it is agreed that the seller should not be subject to any warranty, nevertheless he shall be liable to that warranty which arises from his own act; and any agreement to the contrary is void.

In case of eviction, seller to return price.
1412. Even in case of a stipulation of no warranty, the seller, in case of eviction shall, in the absence of an express agreement to the contrary, be bound to return the price.

Rights of buyer on eviction, when warranty is promised or implied.
1413. Where there is a promise of warranty or where no stipulation has been made in regard thereto, the buyer shall upon eviction be entitled to claim from the seller -

(a) the return of the price;
(b) the return of the fruits, if the buyer has been obliged to return them to the owner who has recovered the thing;
(c) all judicial costs, including those for giving notice of the suit to the person from whom he derives his title;
(d) damages, including the lawful expenses of the contract and any other lawful expense incurred in connection with the sale.

Decrease in value of thing at time of eviction.
1414. (1) Where, at the time of eviction, the thing sold has decreased in value or has considerably deteriorated, either through the negligence of the buyer or by irresistible force, the seller is still bound to return the full price.

(2) Where, however, the buyer has derived a benefit from the deterioration occasioned by him, the seller shall be entitled to deduct from the price a sum corresponding to such benefit.

Increase in value.
1415. If, at the time of eviction, the thing sold has increased in value, even irrespective of the act of the buyer, the seller shall be obliged to pay to the buyer the amount exceeding the price of the sale.

Repayment of expenses.
1416. (1) The seller is bound to repay to the buyer or to cause to be repaid to him by the person who has recovered the tenement all expenses incurred by him in connection with any repairs or useful improvements made on the tenement.

(2) Where the seller has sold the tenement of another person in bad faith, he shall be bound to pay to the buyer all expenses, even decorative expenses, which the latter may have made on the tenement.

Eviction from part of thing.
1417. (1) Where the eviction is only of part of the thing, and such part is of such importance in relation to the whole that without it the buyer would not have bought the thing, he may within a year from the day on which the judgment as to the eviction has become final and absolute, demand the dissolution of the sale.

(2) The said time shall run as provided in sub-article (2) of article 1407.

Valuation of part.
1418. Where, in the case referred to in the last preceding article, the buyer does not elect to dissolve the sale, the value to be refunded to him by the seller in respect of the part affected by the eviction shall be determined not in proportion to the entire price of the sale but in accordance with a valuation in which regard will be had to the time of the eviction, irrespective of any increase or decrease in the value of the thing sold.

Warranty in regard to easements not declared.
1419. (1) Where the tenement sold is subject to non-apparent easements whereof no declaration was made and such easements are of such importance that it may be presumed that the buyer would not have bought the tenement if he had been given notice of them, he may demand either the dissolution of the sale or compensation.

(2) The provisions of this article shall not apply in the case of a judicial sale by auction.

Rights of buyer, where tenement is sold as free from easements or burdens.
1420. Where, however, a tenement has been sold as free and exempt from any easement or other burden, or where the warranty has been otherwise expressly promised, in such cases the buyer may demand either the dissolution of the sale or compensation, if the seller shall not cause any easement or other burden not declared in the contract to cease, even though such easement or other burden be apparent, and it be proved that it was known to the buyer at the time of the sale, unless it is clearly shown that it was not the intention of the parties to include such easement or burden in the promise of warranty.

Of warranty in respect of latent defects of the thing sold

Warranty in respect of latent defects.
1424. The seller is bound to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended, or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them.

Seller not liable for apparent defects.
1425. The seller is not answerable for any apparent defects which the buyer might have discovered for himself.

Seller answerable for latent defects.
1426. Nevertheless, he is answerable for latent defects, even though they were not known to him, unless he has stipulated that he shall not in any such case be bound to any warranty.
Actio redhibitoria
and actio aestimatoria.

1427. In the cases referred to in articles 1424 and 1426, the buyer may elect either, by instituting the actio redhibitoria, to restore the thing and have the price repaid to him, or, by instituting the actio aestimatoria, to retain the thing and have a part of the price repaid to him which shall be determined by the court.

Where defect is in one of two or more things sold together.

1428. (1) Where two or more things are sold together, so that one would not have been sold or bought without the other, and one of such things has a defect which gives rise to the actio redhibitoria or aestimatoria, the buyer may not institute the actio redhibitoria but in respect of all the things sold, although a price was specified in respect of each.

(2) Where, however, the things sold together are independent of one another, the said action may not be instituted but in respect of the defective thing, although all the things had been sold for a single price; and in such case the seller is bound to repay the price of such thing according to a valuation to be made on the basis of the total price agreed upon.

Where defects were known or not to the seller.

1429. (1) If the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages towards the buyer.

(2) If the defects were not known to the seller, he is only bound to repay the price and to refund to the buyer the expenses incurred in connection with the sale.

Where defective thing perishes.

1430. (1) If the defective thing perishes in consequence of its defects, the loss is borne by the seller, who shall be bound to repay the price to the buyer and to indemnify him as provided in the last preceding article.

(2) If the thing perishes by a fortuitous event, the loss is borne by the buyer.

Limitation of action.

1431. (1) The actio redhibitoria and the actio aestimatoria shall, in regard to immovables, be barred by the lapse of one year as from the day of the contract, and, in regard to movables, by the lapse of six months as from the day of the delivery of the thing sold.

(2) Where, however, it was not possible for the buyer to discover the latent defect of the thing, the said periods of limitation shall run only from the day on which it was possible for him to discover such defect.

(3) The said periods of limitation shall run as provided in sub-article (2) of article 1407.

Title XXV
Of prescription
Sub-title IV
Of the time required for prescription

Actions for damages not arising from criminal offence.

2153. Actions for damages not arising from a criminal offence are barred by the lapse of two years.