

Thailand

Tilleke and Gibbins International Ltd.

Michael Ramirez



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?**

Thailand, like some of its regional neighbors, is a civil law country, with litigation of disputes generally conducted by direct application of statutory law and procedure. Although Thailand's Civil Law regime has been influenced by European civil law systems, it has also developed some statutory law provisions which have their origins in the common law. Unlike the common law system, however, Thai courts are not obligated to follow judicial precedent in applying the law to a given case, although decisions of the Thai Supreme Court may be considered persuasive.

Strict Liability – The Product Liability Act

In February of 2008 Thailand joined a growing list of countries with specific product liability legislation, the Product Liability Act BE 2551 ("PL Act"). The PL Act, which came into effect in February of 2009, imposes *strict liability* on business operators involved in the manufacturing and sales of a defective product which causes harm to an individual. The operators are held liable if the product is defective, regardless of whether the operators have been negligent in making that product defective. It is sufficient for an injured customer to prove that he was injured or suffered damage from the operator's defective product while using the product in the way it was intended. A defendant-operator can therefore be held liable for the harm resulting from a defective product even if he has exercised reasonable care in its manufacture and/or sale.

Fault Based Liability

In addition to presumption of strict liability for the supply of defective products causing harm to individuals, Thailand recognises liability based upon fault. Most product liability claims filed in Thailand include claims based upon the tort of "wrongful act" (negligence) under Section 420 of the Civil and Commercial Code. This requires that the plaintiff prove to the satisfaction of the court that the defendant acted wrongfully by failing to exercise reasonable care in a product's manufacture, distribution, etc. Recourse may be limited, however, since it is historically difficult to prove a failure to act reasonably, particularly where access to evidence is limited.

Contractual Liability

Relief to individuals harmed by defective products may also be based upon traditional breach of contract principles for breach of specific terms, duties and obligations to contract. With regards to breach of contract claims, however, recovery is limited only to injury suffered by a party in direct contractual privity with the wrongdoer. There is no relief through contract for third parties injured as a result of a defective product.

Liability for Breach of Additional Statutory Obligations

Parties harmed by defective products may file claims for loss in value based upon Civil and Commercial Code Section 472, which provides relief for defect liability in cases of contract breach. In addition, Thailand's Consumer Protection Act of 1998 provides a means by which consumers may file complaints directly with the Consumer Protection Board. Generally, the Consumer Protection Board will review the complaint, seek resolution through possible mediation and, if it deems the case of particular importance, it is authorised to join the plaintiff as a co-plaintiff in claims against the defendant. As a matter of practice, the Consumer Protection Board reviews thousands of disputes, but only exercises its right to join as co-plaintiff in few actual cases. A plaintiff is free to proceed with civil claims in the courts regardless of the decision of the Consumer Protection Board.

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

No. The state does not operate any specific schemes of compensation for particular products.

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

In addition to those liable directly based upon contractual breach or tortious wrongdoing, Thailand's PL Act broadens the scope of potentially liable parties. Not only is the injured party able to sue the manufacturer of a defective product, he or she can sue any "operator". The PL Act defines an "operator" as the manufacturer or hirer, importer, or seller who cannot identify the manufacturer, hirer or importer. In addition, any person who uses a name, trade name, trademark, service mark, mark, statement or acts in any manner to cause an understanding that it is the manufacturer, hirer, importer or seller is also considered an "operator". Moreover, each "operator" is held jointly liable to the injured person for the damages caused by the unsafe products, regardless of whether the damages were intentionally or negligently caused.

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?

There is no statutory obligation to recall defective products under Thai law. While recall decisions are voluntary, some governmental organisations, such as the Food and Drug Administration, have considerable influence in encouraging prompt and effective recall actions from manufacturers and regional distributors.

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

Yes. Criminal liability for wilfully or deliberately placing a dangerous product known to cause imminent harm into the market may also be available in certain circumstances. In addition, Thailand's Hazardous Substance Act of 1992 may also extend criminal liability to producers, importers, and/or distributors of certain hazardous products for failure to comply with the terms and conditions for product manufacture and distribution.

2 Causation

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

The PL Act adopts the concept of "strict liability", which means that the burden of proof shifts from the plaintiff to the defendant. Under such a concept, the plaintiff must merely prove that he or she was injured by the product, and it is the defendant that must prove that he or she is without fault. This creates a presumption that the defendant was at fault, which defendants must successfully defend to avoid liability.

To prove liability in civil claims based upon a wrongful act a plaintiff must show that the actions of the defendant in manufacturing or distributing a defective product were negligent, wilful or unlawful and that such actions were the actual and proximate cause of the injury to the plaintiff or damage to the product.

In product liability claims based upon a breach of contract, the plaintiff has the burden of proving contract formation, such as proof that there was an enforceable contract and that parties were in consensus, implied or otherwise, on the specific terms and obligations of the contract. Assuming that the plaintiff meets its initial burden of contractual formation, then he or she must also prove that the defendant breached its obligations under contract and that such breach was the actual and proximate cause of the plaintiff's injury.

The burden of proof for civil claims in Thailand is that of proof by a preponderance of the evidence. Because of the extreme consequences resulting from criminal convictions, the burden for criminal proceedings is proof beyond a reasonable doubt.

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?

Thai courts recognise a plaintiff's obligation to prove actual causation. This is the recognised "but for" test for causation. Essentially, this requires the plaintiff to show to the court's satisfaction that the injury sustained or damage suffered was the

actual and proximate result of the defective product or actions of the wrongdoer. There must be a reasonable link between the defective product and/or actions of the wrongdoer (whether under strict, contractual or fault based liability schemes) and the harm for which relief is sought.

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?

Thailand does not recognise the concept of "market share liability" in cases where it cannot be established which of several possible producers manufactured a defective product. Rather, the PL Act imposes a presumption of strict liability to all operators in the supply chain, requiring each to prove why he or she should not otherwise be jointly or severally liable. Thailand's joint and several liability rules provide that where two or more people are liable for the same injury or damage, each liable party is responsible for payment of the entire damage award, regardless of his or her relative fault. If a joint tortfeasor pays compensation in an amount representing more than his or her actual fault, then he or she has the right to seek contribution from the other joint tortfeasor.

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?

Generally speaking, manufacturers of products sold in Thailand are not held liable for perfectly designed and manufactured products where the risks associated with the products are or should reasonably be apparent to the user. If a product is not unreasonably dangerous and the degree of danger is generally understood, then an obligation to warn of such dangers does not constitute a defect. Neither is there a duty to warn where the dangers are actually known by the user. Where there is a duty to warn, the adequacy of warnings depends on the particular facts. For example, the level of potential harm/danger and the information expected of a reasonable consumer/user under the circumstances are factors for consideration.

As for the use of the learned intermediary defense, neither Thai statutory nor case law has, to date, actively dealt with this issue. As such, it is highly speculative as to how courts would treat this defence. It is our opinion that application of the defence could be successful where a manufacturer has employed all reasonable measures to ensure that the market is controlled and that the intermediary is fully informed about the risks and warnings of product use and is informing target customers.

3 Defences and Estoppel

3.1 What defences, if any, are available?

In addition to the traditional defences available under civil tort and contract claim principles, there are a number of available defenses to liability under the PL Act. For example, the PL Act expressly states that an operator will not be held liable if he can prove that the product is not defective, that the injured party was already aware that it was defective but used it anyway, or that the damage was due to improper use or storage, which was not in accordance with the directions on usage, warnings, or information about the product that the operator correctly, clearly, and reasonably provided. Furthermore, there are defences for producers of custom-made products and component producers, who generally will not be liable for the damage to consumers if they can prove that the defect is due to the specifications or design of the final product provided to them by the outsourcer or producer, i.e. that there was no manufacturing defect on their part and they did not expect or should not have been able to expect that the product would be defective.

Finally, a standard defence to either claims under tort (including under the PL Act) or contract is that plaintiffs failed to exercise their right to file action within the proscribed statutory prescription (statute of limitations) period.

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 specific recognised state of the art/development risk defence to claims brought under the PL Act. However, for claims of negligence, courts do employ the standard of reasonable care in assessing whether a defendant has met his or her obligations in a given case. If a defendant can show that he or she acted reasonably given the information and technology available, there is a chance that a successful defence could be raised.

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?

No. It is not 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.

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?

Yes. Issues of fault, defect or the capability of a product to cause a certain type of damage may be re-litigated in separate proceedings brought by a different claimant. While litigants may seek to introduce findings of fact from other proceedings to establish issues of fault, etc., admissibility and relevance is at the discretion of the individual court. Courts do not frequently place considerable weight on such introduced evidence, however. At most, the court

might find it persuasive in its evaluation of the separate facts in a subsequent claim.

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. A defendant has the right to seek joinder of a potentially liable third-party to an underlying claim if claim for relief is based upon the same general facts and evidence. Permissible joinder is made at the discretion of the court. In addition, claims for indemnity or contribution can be made against a third-party where the third-party is liable for the same damage claimed against the defendant. Claims for contribution and indemnification must be made within 10 years of the date of judgment or settlement of a claim.

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

Yes. Claims of contributory negligence are permissible and can effectively reduce a defendant's liability obligations to an injured party for a defective product. This is not a complete defence to wrongful act claims, but allows the defendant to limit its liability based upon a court valuation of the degree to which the plaintiff's actions contributed to his or her own injury.

4 Procedure

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

Trials are conducted by judges. There is no trial by jury system in Thailand.

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)?

Yes, although this right is rarely exercised. Some courts, such as the specialised Intellectual Property and International Trade Court and the Tax Court, have appointed panels of judges who have general expertise in certain technical areas. More frequently, courts consider the appointment of trial experts in assisting in the explanation of issues of importance.

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?

No. There is no class action provision under Thai law. As such, litigants must seek to join parties or consolidate similar or identical actions subject to the court's approval.

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

In addition to claims brought by the Consumer Protection Board on

behalf of aggrieved or injured parties under the Consumer Protection Act, the PL Act provides that a separate Consumer Protection Committee, which is set up under the PL Act, as well as any consumer advocacy group recognised under consumer protection laws, can sue on behalf of injured parties.

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

On average, it takes between eight to twelve months from the date of filing for a claim to get to evidentiary hearings. These timeframes can vary and depend largely on the individual court's case backlog as well as on the complexity and size of the claim. Conduct of parties in seeking tactical delays may also play a role in determining timeframes.

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?

Yes. The court has the right to try preliminary matters of law and fact. However, exercise of this right is exceedingly rare, with most courts exhibiting a preference for adjudicating the entire claim on its merits through a full trial.

4.7 What appeal options are available?

Appeals from judgments of non-specialised civil courts are to the intermediate Court of Appeals as a matter of right. Subsequent appeals of the rulings of the intermediate Court of Appeals and certain specialised courts, such as the Intellectual Property and International Trade Court, are to the Supreme Court and are also permitted as a matter of right.

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?

Courts are empowered with the right to appoint, at their discretion, independent experts with specific qualifications to assist in understanding key issues of importance. This right is typically exercised in situations in which litigants are unable to reach agreement on appointment of independent experts.

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?

No. Comprehensive pre-trial discovery concepts and procedures are, as of yet, unknown in Thailand, as is declaratory relief. However, subpoenas *duces tecum*, or summonses, are available to force opposing parties or witnesses to produce known documents. It should be cautioned that a formal motion for discovery must be filed and good cause shown. Parties are required to exchange witness statements and expert reports, if introduced as evidence at trial, seven days prior to their introduction at trial.

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

Other than standard notice requirements or the requirement to respond to court orders and subpoenas, parties have a general obligation to act in good faith and preserve evidence. Where a party refuses to give testimony or otherwise produce evidence as requested by the court, the court may summon the responsible official or person to the court to provide an explanation as to why such evidence or testimony cannot be given. If the court believes the explanation is unsatisfactory, it may order the testimony or presentation of evidence or permit a negative inference from its failure to produce.

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

Yes. Arbitration is available as an alternative dispute resolution mechanism and parties can agree to enter into same, either at the time of contract or any time after a dispute arises. In addition, *ad hoc* and court sponsored mediation options are available, subject to the cooperation and willingness of parties to engage in mediation. As for court sponsored mediation, most civil courts will encourage parties to engage in mediation before a separate assigned mediation judge prior to scheduled trial court hearings in an effort to clear the case from the court docket and otherwise resolve the dispute for parties' benefit.

5 Time Limits

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

Yes. Parties should be aware of the time limitations for filing suit in Thailand, since failure to file within the prescribed statutory period can result in loss of the right to file a claim.

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 prescription period for filing claims under the PL Act is three years from the day an injured party became aware of the damage and the operator responsible for same, but in no case more than 10 years. Claims for wrongful act and defect must generally be filed within one year from the date that the injured party became aware of the injury or of the person responsible for such injury. Prescription periods for breach of contract claims vary depending on the nature of the transaction and party classification, but two years is common for many product liability claims.

Special rules may apply on a case by case basis to those claimants under a disability, such as lacking in the capacity to evaluate time limitations.

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

Courts have the discretion to toll the prescription period in cases of deliberate concealment or fraud.

6 Remedies

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

Monetary compensation, injunctive and declaratory relief are all available remedies under Thai law.

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

Damages available in Thailand for both contractual and tortious injury are compensatory in nature and aimed at restoring the injured party to the state that he or she would have been had the injury not occurred. Damages to the defective product are also available. Claims for monetary damages have traditionally resulted only in recovery of *actual* and foreseeable damages, such as medical expenses, loss of wages, provable loss of profits, and out-of-pocket loss. However, with the passage of the PL Act injured parties can now claim for mental damages, not just to a party directly injured by the defective product, but also to those indirectly damaged, such as surviving family members of the deceased.

Liquidated damages provisions in contracts are enforceable under Thai law, although the courts have discretion to reduce unconscionably high or unreasonable damage provisions. Courts may also look to whether the liquidated damages provision is contrary to the public order and good morals of Thailand in determining enforceability.

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?

While damages for future economic losses are allowable, claims for medical monitoring are likely speculative and, as such, it is unlikely that the conservative Thai courts would allow for such awards.

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

Punitive damages are unavailable in Thailand for contract and wrongful act claims, but damages for pain and suffering are theoretically available under Civil and Commercial Code Section 438. Although there has been a recent trend in the courts towards allowing occasional recovery for pain and suffering, generally such awards are far less frequent than in most Western jurisdictions and are left to the discretion of the individual court.

However, plaintiffs filing claims under the PL Act have the right to claim for punitive damages of up to two times actual damages fixed by the court if it can be shown that the behaviour of the defendant was egregious, such as knowingly supplying a dangerously defective product or otherwise acting in a grossly negligent or criminal manner.

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?

No. There is no maximum limit on the damages recoverable from a single manufacturer.

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?

Special court approval is required for settlements involving minors and the incapacitated. Otherwise, there are no special rules applying to settlement of claims.

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?

No. There are no provisions that allow governmental authorities to claim from damages on the basis of a concern for health and social security matters.

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?

Court costs, along with a portion of the attorney fees, service fees, and witness fees, may be awarded to the prevailing party by the court. The court may also award the full or partial return of the prepaid court filing fees from the losing party. This is a discretionary decision of the court, but awards of attorney fees are normally low by Western standards, and rarely exceed US \$5,000 for even the most complex litigation matters.

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

A party to civil proceedings that cannot afford legal fees may request assistance with court administrative costs and filing fees only. There is no public legal aid for attorney fees.

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

A party seeking legal aid must show that the action in question has sufficient prospect of success. It is also required that there be an adequate showing of need. Such in *forma pauperis* requests are governed by section 155 of the Civil Procedure Code, which generally provides the court with discretion in determining need requests on a case-by-case basis and in assessing the nature and merits of the claim. An applicant may appeal against the ruling and may otherwise still file a lawsuit without the benefits of legal assistance, if his or her request for legal assistance is denied.

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

Generally, pure contingency fee agreements are risky and potentially unenforceable under Thai law. There is Supreme Court precedent stating that the court should consider such agreements case by case to determine whether a particular arrangement is against good public morals. The court has indicated that while

contingency fee agreements may not be unethical under Thai law, they may still be against good public morals and subject to court review if they do not provide a fixed fee amount from the outset.

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

Third-party funding of claims is permitted under Thai law, but only if the funding party is a non-interested party to the claim. This includes both financial and legal interests. Further, third-parties seeking to provide funding to litigation cannot directly or indirectly solicit potential or actual plaintiffs.

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 Thailand.

Recent passage of the PL Law has resulted in a fundamental change to litigation of product liability claims in Thailand, substantially lowering the burdens for claimants and increasing those for defendants. In addition, recent passage of the Consumer Case Procedure Act has simplified filing of product liability and consumer claims, improving direct access to the courts for individual claimants

While we have not yet seen Supreme Court cases considered under the PL Act, we have seen a marked increase in the number of consumer and product liability claims, a trend that we expect will continue in the foreseeable future.



Michael Ramirez

Tilleke and Gibbins International Ltd.
Supalai Grand Tower, 26th Floor
1011 Rama 3 Road, Chongnonsi, Yannawa
Bangkok 10120
Thailand

Tel: +66 2653 5555
Fax: +66 2653 5678
Email: michael.r@tillekeandgibbins.com
URL: www.tillekeandgibbins.com

Michael Ramirez is a senior consultant in Tilleke and Gibbins' Dispute Resolution Department where he assists clients in domestic and international dispute resolution matters. Mr. Ramirez has held office management and consulting positions with Authur Andersen LLP and practiced with Sedgwick, Detert, Moran and Arnold in San Francisco, California, where he concentrated in areas of products liability, environmental and general civil litigation defence. In addition to serving as corporate litigation counsel, Mr. Ramirez counsels clients in risk prevention, warnings and compliance. Mr. Ramirez has authored several articles on dispute resolution and is a regular presenter on the subject. Mr. Ramirez earned a BA in Economics from the University of California, Berkeley and his JD from the University of California Hastings College of the Law in San Francisco, California.

Tilleke & Gibbins

Tilleke & Gibbins is the oldest and largest independent multiservice law firm in Thailand with offices in Bangkok and Phuket, as well as in Hanoi and Ho Chi Minh City, Vietnam. Established in 1890, the firm takes great pride in its 120-year history of providing high-quality advice, knowledge, and judgment to best accomplish its clients' objectives.

Tilleke & Gibbins engages in a diversified general commercial, corporate, intellectual property, and litigation practice, with over 12,000 clients ranging from large multinational corporations and financial institutions to privately held companies, not-for-profit entities, and individuals in Thailand and abroad. When compared with other international firms in Thailand, Tilleke & Gibbins is unique because it has the expertise and legal sophistication to handle complex legal matters, yet it is local and possesses the cultural understanding and community base necessary to deliver practical and cost-effective results.