

GETTING THE DEAL THROUGH

Product Liability

in 37 jurisdictions worldwide

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Contributing editors: Harvey L Kaplan and Gregory L Fowler



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Thailand

Michael Ramirez

Tilleke & Gibbins International Limited

Civil litigation system

1 The court system

What is the structure of the civil court system?

Thailand is a civil law country, with litigation of disputes generally conducted by direct application of statutory law and procedure. Unlike the common law system, however, Thai courts are not obliged to follow judicial precedent in applying the law to a given case, although decisions of the Thai Supreme Court may be considered persuasive.

The Thai judiciary has a three-tier system: the Courts of First Instance, which are trial courts having general or special jurisdiction of all civil and criminal matters; the Courts of Appeal, which determine appeals from the Courts of First Instance; and the Supreme (Dika) Court, which determines appeals from the Courts of First Instance and the Courts of Appeal. In addition to these courts of first instance and the courts of appeal, Thailand has also established several courts of specialised jurisdiction.

Except where judgments have been declared final by statute, appeals from non-specialised courts are appealed to the Courts of Appeal. Should a second appeal be necessary, the second appeal goes to the Supreme Court. There is a consistent backlog of cases before the Supreme Court, with appeals at this level frequently taking between two and three years.

2 Judges and juries

What is the role of the judge in civil proceeding and what is the role of the jury?

The court plays an important role in civil law jurisdictions such as Thailand. The judge oversees the trial and makes all procedural decisions within the trial. Although the production of facts is left to the parties, the court may point out matters that appear to be of relevance to the claim or to related legal issues. In the course of these proceedings, the judge has the further discretion to act so as to ensure that the matter is addressed adequately by parties and that the hearings are held without interruption. In attending to this duty, the judge may also question witnesses and elicit necessary facts for the adjudication of the dispute.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Litigation is commenced when the aggrieved party, the plaintiff, files a 'plaint' (complaint), which pleads the facts and allegations constituting the basis of the claim. Although some facts must be included, most lawsuits in Thailand are pleaded in a generalised fashion and

without much particularity.

After the plaint is filed along with the deposit of the court costs, the case proceeds in the following manner:

Summons and service of process

After actions are filed in a written plaint and accepted by the court, the plaintiff requests the court to issue a summons. The plaintiff must then request and pay a fee to have the summons served by a court officer on the defendant together with a copy of the plaint after it is filed. After the request is made, the court officer then endeavours to effect service on defendant within a reasonable time or per court order.

If it is necessary to effect service on a defendant who is physically located and domiciled in a country other than Thailand, then service must be rendered through the Thai Ministry of Foreign Affairs. This is time-consuming and in some cases it may take up to a year or more to effect service through such diplomatic channels. Thailand is not a member of the Hague Service Convention.

Amending and adding claims

As a general rule, a claimant may request that the court permit an amendment to the claim after the action has been filed. Such requests must be made via motion filed before the preliminary hearing for settlement of issues or not less than seven days prior to the day of taking of formal evidence (trial), unless reasonable cause can be shown for failure to so file. As a matter of practice, amendments to complaints are usually permitted, provided they are relevant and do not unduly prejudice the answering party.

Form, content and timing requirements of response

Within 15 days after receiving proper service of the summons and complaint, the defendant must file an answer that clearly admits or denies the plaintiff's allegations, either in whole or in part. The answer must state the basis of any denials and set forth counterclaims, if any, that are related to the plaintiff's claims. If the counterclaims are deemed to be unrelated, the court will not accept the counterclaim. In such case, the defendant may bring a separate action.

The plaintiff must in turn answer any counterclaim within 15 days after he or she has been properly served with the defendant's answer. If there is reasonable cause, then these time frames may be extended.

If posting of the summons to the defendant's registered address is necessary, the law allows the passage of 15 days for service to be deemed effected before the 15-day period begins. Thus, non-acceptance of service is common in order to gain 30 days to answer.

As a general rule, all defences must be presented to the court as soon as possible. If a party fails to present a defence within the required court filing deadlines, then the defence can be admitted to the trial only if the court determines the admission will not result in

a delay of the trial or if the delayed party can present and prove a well-founded excuse for the delay.

4 Trials

What is the basic trial structure?

Thailand's various civil courts adjudicate cases not on a jury trial basis, but instead by a panel of professional judges who hear the case, weigh the evidence, and ultimately issue judgment. The Thai court does not generally investigate matters relevant to the dispute, but leaves that responsibility to the parties. Notwithstanding that civil law proceedings in Thailand are generally adversarial in nature, it is important to note that judges have a more active role in fact finding than judges in many common law jurisdictions. As such, they may be involved in questioning of witnesses if related to legally significant issues in the dispute. With few exceptions, most civil proceedings are open to the public, but out-of-court access to court pleadings and documentary evidence is generally limited only to official parties to the dispute.

After the pleadings have been filed, the court then fixes a preliminary hearing date for the settlement of key issues in dispute, namely, a pre-trial conference, to specify those issues which must be proven to the court through the introduction of evidence, and those issues which do not require proof (such as accepted by the concept of judicial notice).

Following settlement of issues in dispute, the court sets trial dates for the taking of evidence on the issues that are still in dispute. In addition, the court usually schedules an initial settlement hearing. If the settlement hearing results in no agreement, the matter will proceed to the trial stage.

At the trial stage there are usually multiple and consecutive hearings per party, but separated by several weeks to several months, depending on the individual court's schedule and size and complexity of the dispute. At the first hearing, the lawyers bring forward their motions (this is rare), usually referring to the written pleadings and the judge discusses settlement prospects. Straightforward claims involving few parties and witnesses may result in scheduling and completion of witness hearings within eight months to one year, while multi-party complex claims can take significantly longer to complete through the trial stage.

During the main evidence hearings, the court reminds parties of the relevant questions of law and fact, before proceeding with the taking of formal evidence and witness testimony. It is important to note that recent changes to procedural court rules in Thailand now make it easier to allow for presentation of witnesses via affidavit and videoconferencing, although this is still at the discretion of the court. Even if such non-live testimony is permitted, it is expected that the respective witness be available for cross-examination by opposing counsel.

After concluding all witness and evidentiary hearings, parties submit their written closing statements, following which the court fixes a date for pronouncing the judgment. This date normally follows 60 days after formal submission of closing statements.

5 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

There are currently no specific class action provisions under Thai law allowing for certification of a class in product liability claims. However, multi-party claims are possible, as parties may seek to file claims as joint plaintiffs. Similarly, a party to a claim or an interested third party, through motion to the court, may wish to have addi-

tional plaintiffs added to the claim through the concept of joinder. Joinder of parties is allowed on motion or via court summons if the asserted right relates to a group of plaintiffs or defendants and they are obliged or entitled to enforcement or protection of same. A joinder of parties is also permissible if the claims of the parties are legally or factually similar. Requests for joinder are via petition to the court with jurisdiction of the claim, with appeals of the court's joinder ruling to the Court of Appeals. With few exceptions, joint plaintiffs are not deemed to represent each other, as each joint plaintiff's claim is considered an individual claim against the defendants.

Claims for recovery in product liability claims in Thailand can be brought by representatives of the injured party. For example, representative family members of a deceased or an otherwise incapacitated party injured from an allegedly defective product may pursue action on behalf of the injured party. In addition, the Consumer Protection Board and associations and foundations approved by the Consumer Protection Board under the Consumer Protection Law have the authority to make claims for damages on behalf of injured parties.

6 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

Timelines for adjudication of product liability claims depend on a number of factors, including complexity of the claim, number of parties and, above all, the individual court's current case backlog. With this in mind, experience suggests that a typical product liability claim, without significant motion practice, should reach the trial hearing stage between six to 10 months after acceptance of initial pleadings. Conclusion of lower court proceedings, including issuance of the lower judgment, should usually follow 12 to 18 months following acceptance of initial pleadings. However, with the August 2008 implementation of the Consumer Case Procedure Act, there has been a significant effort to both simplify and expedite proceedings in the courts. While it remains to be seen how significant a change there will be in case timelines as a result of the Consumer Case Procedure Act, it is expected that timelines from filing to lower court judgment will be reduced.

Evidentiary issues and damages

7 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

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 an opposing party to produce known documents. It should be cautioned that a formal motion for discovery must be filed and good cause shown. Discovery 'fishing expeditions', which happen occasionally in the United States, are not experienced in Thailand.

There is a general obligation for parties to act in good faith and to preserve evidence. Where a party has refused 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.

8 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by opposing party?

Witnesses are generally presented live before the court, through written affidavits or, in some cases, through videoconference. In addition to providing direct testimony, witnesses must authenticate documentary evidence. Proceedings are conducted in the Thai language with rare exception and testimony must be in Thai or translated into Thai. Translators are permitted under the Civil Procedure Code, but must be provided by the party concerned. Testimony is recorded by the judges in summary form, typed by a clerk from the judge's taped dictation, read back to the witnesses in open court, corrected, and then signed by witnesses and the attorneys for both parties, as well as the attending judges. Cross-examination is permitted, but generally limited to the scope of direct testimony with few exceptions.

9 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Generally, parties are free to present their own expert witnesses at trial. However, where, upon request of parties or the court, it is determined that an independent expert is required, the court may appoint one. In many cases parties nominate proposed experts and agree on a single or group of experts to provide an opinion, or testimony, or both to the court. Such expert must then be approved by the court. Where parties are unable to agree on an expert after submission of nominated experts, then the court may approve and assign an expert or experts.

The expert assists the court in understanding and evaluating given facts and to draw concrete conclusions from those facts. The court asks the expert to produce an opinion (which may be written or oral) and, if so ordered, the expert will appear to explain his or her opinion. Where a court is not satisfied with the quality or comprehensiveness of the expert opinion, it may order further analysis or appoint another expert altogether.

Under Thai law, parties may challenge the results of the expert directly to the court. The petition may include requests for clarification, further review or analysis, or the appointment of another qualified expert. It is in the court's discretion whether to grant the request.

10 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

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. However, traditional claims for monetary damages generally result only in recovery of actual and foreseeable damages, such as medical expenses, loss of wages, provable loss of profits, and out-of-pocket loss. There has been no traditional remedy in Thailand for most 'general damages,' such as mental distress and loss of consortium.

However, with implementation of both the Consumer Case Procedure Act in August 2008 and the Product Liability Act in February 2009, courts adjudicating product liability claims may now award, in addition to compensation for actual damages pursuant to the Civil and Commercial Code, compensation for mental damages (eg, anguish, agony, anxiety, fright, grief, humiliation) as a result of damage to the body, health or sanitation of the injured party.

As for agreements by parties to limit liabilities, these are generally permitted, although subject to heightened judicial scrutiny. However, agreements made in advance exonerating a debtor from his or her own fraud or gross negligence are unenforceable.

11 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

A court adjudicating product liability claims may now award punitive damages on top of the actual damages granted. In so doing the court has the authority to award punitive damages if it can be shown that the defendant produced, imported or sold the product despite being aware that it was defective or was unaware that the product was defective due to gross negligence, or became aware of its defect after production, importation, or sale, but failed to take proper action to prevent such damage, such as by prompt product recall. In such case, the court has the discretion to award punitive damages in an amount the court may deem appropriate, but no greater than twice the amount of the actual damages suffered.

Litigation funding, fees and costs**12 Legal aid**

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

A party to civil proceedings that cannot afford legal fees may request assistance with court administrative costs and filing fees only if he or she can show that the action in question has sufficient prospects 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, 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 was denied.

13 Third-party litigation funding

Is third-party litigation funding permissible?

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.

14 Contingency fees

Are contingency or conditional fee arrangements permissible?

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.

15 'Loser pays' rule

Can the successful party recover its legal fees and expenses from the unsuccessful 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 100,000 baht (approximately US\$3,000) for even the most complex litigation matters.

Sources of law**16 Product liability statutes**

Is there a statute that governs product liability litigation?

Until recently there was no specific products liability legislation in Thailand. However, in December 2007 Thailand enacted the Thai Product Liability Act, which became effective on 20 February 2009. Together with the August 2009 implementation of the Consumer Case Procedure Act, the Product Liability Act significantly changes the legal landscape for product liability claims in Thailand, shifting and reducing plaintiffs' current evidentiary burdens by providing an exclusive, strict liability standard. Thai product liability law now allows specifically for punitive damages and damages for mental anguish, which were historically unavailable in product liability claims. Neither Act will apply retroactively, however, and any products sold to consumers before the effective date of the Acts will not be subject to strict liability.

17 Traditional theories of liability

What other theories of liability are available to product liability claimants?

Historically, most product liability claims filed in Thailand have been based upon the tort of 'wrongful act' (negligence) under section 420 of the Civil and Commercial Code. This requires that the plaintiff prove 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 under Thailand's civil law regime.

In addition to claims brought under Thailand's recently enacted strict liability laws, claims for injury caused by allegedly defective products may also be brought under the theory of contract breach. With regards to breach of contract claims, 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.

18 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The Consumer Protection Act provides a means by which consumers may file complaints 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 as viable or of particular importance, it may 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 a few cases. A plaintiff is free to proceed with standard tort and contract claims in the courts regardless of the decision of the Consumer Protection Board.

The Consumer Protection Act also permits any association that has as its objective consumer protection or combating unfair competition to request recognition to represent the interests of the consumer in civil or criminal proceedings.

19 Criminal law

Can criminal sanctions be imposed for the sale or distribution of products determined to be defective?

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 distributors of certain hazardous products for failure to comply with the requirements for manufacture and distribution.

20 Novel theories

Are any novel theories available or emerging for product liability claimants?

The mere enactment and implementation of a strict liability legal regime in Thailand is both a major and novel development, resulting in legal burden shifts, simplifying plaintiffs' evidentiary obligations and increasing the scope and amount of permitted damages. Other than those changes drafted directly into the statutes, there are no other novel theories emerging for use in Thai product liability claims.

21 Product defect

What breaches of duties or other theories can be used to establish product defect?

Additional theories that are available for product liability claims include, among other things, design, warning and manufacturing defect claims under the Civil and Commercial Code 472.

22 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

For claims brought under the Consumer Case Procedure Act or the Product Liability Act, Thai law 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 only that he was injured or suffered damage from the operator's defective product while using the product in the way it was intended. Once this initial low burden is met, the burden then shifts to the defendant operator to prove that he should not otherwise be held liable. 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 sale.

In contrast to the strict liability standard and burden shifting introduced under the Consumer Case Procedure Act and the Product Liability Act, traditional theories of tort recovery require a plaintiff to bear the primary burden of proof in liability claims. The burden of proof in a civil action is 'preponderance of the evidence' and must first be met by the plaintiff. If the plaintiff meets its burden, then the burden shifts to defendant to prove why he or she should not otherwise be liable.

In product liability claims based upon 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. The plaintiff must also prove that the defendant breached its obligations under contract. In claims for defect under section 472 of the Civil and Commercial Code, plaintiff must also prove actual defect. In wrongful act negligence claims a plaintiff must show that the actions of the defendant in manufacturing or distributing a defective product were negligent, wilful or unlawful.

23 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

Under traditional theories of recovery only the wrongdoer, his or her agent or employer, (negligent party) or a party in contractual privity can be held liable for most product liability claims. However, under the Consumer Case Procedure Act and the Product Liability Act, liability extends to additional defendants, including 'operators' as defined by the Act. Operator liability under the Act can extend to an entity involved in the manufacture, distribution, sales, import, or in the granting of licences for others, should a product sold contain a defect that then causes harm to the user.

24 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

Regardless of legal theory pursued by plaintiffs, the standard of proof for damage causation, once liability has been established, is the standard of actual and proximate causation.

25 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Generally, there are no specific post-sale duties imposed upon potentially responsible parties. However, there is a general duty of all parties to act in good faith and in a responsible manner. Failure to promptly recall or remedy known or suspected defects can therefore lead to imposition of additional liability.

Limitations and defences

26 Limitation periods

What are the applicable limitation periods?

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. Under the Consumer Case Procedure Act and the Product Liability Act the prescription period is three years from the date of becoming aware of the damage and of the operator who is held liable. In no case is prescription longer than 10 years from the date of becoming aware of the damage.

27 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

As of yet, there is no active use of the state-of-the-art or development risk defences in Thailand.

28 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

It is a general defence that the product complied with standards or requirements, but such a defence is not total, as liability for contract breach or negligence may still stand regardless. Further, the Consumer Case Procedure Act and the Products Liability Act impose a strict liability standard and compliance with standards is therefore not relevant to a determination of strict liability.

29 Other defences

What other defences may be available to a product liability defendant?

Under Thai law, a defendant has a number of traditional defences to claims of wrongful act. For example, although the plaintiff has the burden of proving that the defendant acted without due care, a defence exists where it can be shown that the injury could not have been prevented even where such due care was exercised by defendant. In addition, a defence to liability exists where a defendant can show that the injury claimed was not the proximate cause of the action of the defendant or was otherwise unforeseeable. It is also a defence to claims of wrongful act where the defendant can show that the plaintiff was contributorily negligent or knowingly and voluntarily assumed the risk of using the product.

In breach of contract claims, traditional defences revolve around the general defence of non-existence of contract, thereby seeking to remove contractual obligations upon which the plaintiff's claim is based. It is also worth noting that under the Thai Civil and Commercial Code, parties may agree to contract for specific limitation of their liability. However, contractual limitation must be reasonable and liability will not extend for actions of gross negligence or fraud.

The Product Liability Act provides several defences for a defendant-operator to claims of defect liability. The 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. Furthermore, the Act provides defences for producers of custom-made products and component producers, who generally will not be liable if they can prove that the defect is due to the specifications or design provided by the outsourcer or producer. Defences may also exist where an operator can clearly identify the manufacturer of the defective product. In addition to the foregoing, a defendant-operator may invoke other traditional tort defences available under other laws that apply in a particular case.

Jurisdiction analysis

30 Status of product liability law and development

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Overall, product liability litigation, as is common in many Western jurisdictions, is in its infancy in Thailand with most claims historically brought through traditional tort or contract theories. However, passage of the Consumer Case Procedure Act and the Thai Product

Liability Act will create a more favourable plaintiffs climate to litigation of claims, the result of which will likely be a push for legal development of product liability claims.

31 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

There are no seminal events or cases that have significantly shaped the development of product liability law in Thailand. This is set to change, however, as implementation of strict product liability laws is recent and legal development in its infancy. At the time of writing, Thailand has already seen an increase in the number of product and consumer claims brought under the Consumer Case Procedure Act. We expect this trend to continue in 2009 with the implementation of the Product Liability Act.

32 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

Currently, the level of consumerism is relatively low in comparison to many other jurisdictions. Over the past few years, however, there has been continued growth in activist legal and public interest organisations. This has resulted in more active participation in efforts to preserve and protect consumer rights. We believe this climate will continue to develop and will contribute to more active litigation, particularly under the Consumer Case Procedure Act and the Product Liability Act.

Update and trends

With the implementation of the Product Liability Act of 2551, 2009 promises to be a year of significant change in Thailand's product liability regime. The Act, which became effective on 20 February 2009, represents strict product liability legislation modelled on European and US product liability laws, with modifications to limit the perceived problems promoting calls for tort reform in some Western jurisdictions. Along with the equally liberal Consumer Case Procedure Act, which provides both procedural and substantive provisions to ease plaintiffs' historical burdens, it is expected that it will become easier for plaintiffs to meet their evidentiary burdens of proof in product liability claims. This, combined with the possibility of increased damage awards, is set to create a climate in which product liability claims will increase, ultimately increasing the cost and burden on business operators.



Michael Ramirez

michael.r@tillekeandgibbins.com

Supalai Grand Tower, 26th Floor
1011 Rama 3 Road
Chong Nonsi, Yannawa
Bangkok 10120
Thailand

Tel: +66 2 653-5555
Fax: +66 2 653 5678
www.tillekeandgibbins.com