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Global Legal Group

The International Comparative Legal Guide to: Product Liability 2011

A practical cross-border insight
into product liability work

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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

15 general chapters. These are designed to provide readers with a comprehensive overview of key product liability issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 31 jurisdictions.

All chapters are written by leading product liability lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Ian Dodds-Smith of Arnold & Porter (UK) LLP and Michael Spencer QC of Crown Office Chambers, for all their assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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1 Liability Systems

- 1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?**

Strict Liability – The Product Liability Act

In February 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 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 Section 472 of the Civil and Commercial Code,

which provides relief for defect liability in cases of a 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?**

The state does not operate any 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?**

Thai Law does not allocate the recall of defective products or notification of safety issues to local authorities as the responsibility of manufacturers. Since entrepreneurs are not obliged to order voluntary or mandatory recalls, a claim for failure to recall cannot be brought. However, relevant authorities and organisations possess the authority to recall faulty products. Furthermore, under

the Consumer Case Procedure Act 2008, courts are designated recall powers such as ordering the replacement of goods, product recalls and buy-backs etc.

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 the 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 defence, 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 defences 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 prescribed 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?

There is no class action procedure enforced by Thai Law. Class Action laws have been prepared and have been passed by the cabinet. However, with parliamentary elections approaching, the future of the Class Action Bill is cloudy.

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

Yes. The Product Liability Act and the Consumer Case Procedure Act support that claims can be brought by the Consumer Protection Board on behalf of consumer claimants in product-related claims.

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. Furthermore, for questions of fact to be appealed, the dispute must exceed 50,000 Baht for the appeals court and 200,000 Baht for the Supreme Court.

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?

When there are technical issues which are critical to the outcome of the case, courts often appoint independent experts to clarify said issues. The court utilises this power when the opposing parties cannot agree on a designated expert. These experts assist by simplifying technical issues for the court to make a well-informed decision.

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?

Parties are obligated to act in good faith and preserve evidence. Additionally they are required to disclose standard notice requirements and must respond to court orders and subpoenas.

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

Forms of alternative dispute resolution (ADR) include court annexed arbitration, out of court mediation, negotiation and, the most common, court-supervised mediation. There are no requirements that must be satisfied for ADR, as courts strongly encourage its use.

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?

Issues such as concealment and fraud can alter the prescription period. This is determined at the judge's discretion.

6 Remedies

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

Injunctive and declaratory relief are available through specific performance orders and permanent injunctions which bar certain conduct to continue. Financial compensation, however, is the primary remedy and is awarded through monetary damages.

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

Successful claims in Thai Law are rewarded with compensation to restore the claimant to their state before the harmful act. Under this concept, damage that can be recoverable includes bodily injury, mental damage and damage to property. The scope of mental damages has been broadened due to the introduction of the PL Act which entitles both the directly and indirectly harmed victims.

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?

Claims for medical monitoring are unlikely to be granted as Thai

courts operate in a conservative manner. Such awards may compromise the nature of courts, although damages for future economic losses can be given.

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

Punitive damages are unrecoverable under Thai law. Although the Civil and Commercial Code recognises damages on the basis of pain and suffering, under Section 438, punitive damages are not a well-established concept.

The PL Act, however, offers claimants a chance for punitive damages under Section 11/2. This Section provides that if the defendant's conduct involves knowledge of danger of the product or severe negligence, punitive damages can be awarded to the point where it is less than double the actual amount.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

There is no maximum limit on the damages recoverable from one manufacturer; however, there is a limit on the total amount awarded in damages.

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?

Only cases involving minors and the incapacitated require special rules when settling 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?

There are no conditions that allow governmental authorities to claim 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?

Awards are inclusive of court costs, attorney fees, service fees and witness fees. Additionally court filing fees can be awarded by the court. It should be noted that awards, which are given at the court's discretion, infrequently exceed US \$5000.

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

Public funding is available to parties requiring assistance in court administrative costs and filing fees only, although private funding is usually the more common course of action.

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

For a party to gain legal aid, they must indicate that there is a likely chance of success and that legal aid is necessary for the case to be filed. However, failure to obtain legal aid does not correlate to the success of the case; complaints can still be carried out regardless.

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

Contingency fees in Thailand are risky and dangerous due to their unenforceable nature. The Supreme Court submits that courts should only use such arrangements in cases that are relevant to good public morals.

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

Third party funding is only acceptable as long as the funding party is not a stakeholder to the claim. A third party must be free of any financial and legal interests.

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.

The most prominent developments in Thai Product Liability law, due to lack of authoritative court judgments, have been the recent introduction of ministerial regulations. Ministerial regulations are complimentary to acts as they assist in clarifying ambiguous provisions of respective acts; they do this by specifying the conditions in which sections of the act apply. The recent regulations exempt particular agricultural produce from PL laws. This is because said products are essential to Thailand's income and their dangers discern from the typical good that is regulated in the PL Act. Such produce includes goods produced through rice milling, plant seed husking and plant sifting. We suspect that such a course of action acts to protect producers and limit the power and greed of consumers. An additional ministerial regulation goes on to exempt specific medical products from product liability. These products have only recently been passed but such medical goods must be created for a very specific purpose that is not widely recognised. Hence, it is evident that product liability has readily immersed itself into the Thai community. The addition of ministerial regulations aims to curb the power of consumers and protect producers in the hope of designating appropriate justice to product-related claims.



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