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Denmark

PRODUCT LIABILITY

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This country-specific Q&A provides an overview of product liability laws and regulations applicable in Denmark.

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DENMARK

PRODUCT LIABILITY



1. What are the main causes of action upon which a product liability claim can be brought in your jurisdiction, for example, breach of a statutory regime, breach of contract and/or tort? Please explain whether, for each cause of action, liability for a defective product is fault-based or strict (i.e. if the product is defective, the producer (or another party in the supply chain) is liable even if they were not individually negligent).

In Denmark, the main causes of action within product liability matters are personal injury and property damage. Denmark has a two-branch system; while personal injuries and consumer property damage caused by a defective product are regulated by the Product Liability Act, all types of damage, i.e. commercial property damage, are regulated by the rules on product liability developed by case law.

Both the Product Liability Act and the rules developed by case law only apply to damage or injury to anything other than the product itself. Liability for damage inflicted on the product itself is regulated by the parties' agreement and by the Danish law of obligations, the Sale of Goods Act and standard contracts e.g. CISG and FIDIC.

According to the Product Liability Act, the producer is liable for damage if the claimant is able to prove the existence of a defect and causation between the damage and the defect. Thus, the producer is held liable despite the absence of fault or negligence.

According to the product liability rules developed by case law, a presumption of negligence applies. If the claimant is able to prove the existence of a defect, the producer must prove that the defect is not caused by the producer's negligence.

According to both the Product Liability Act and the product liability rules developed by case law, intermediaries are also subject to a presumption of

negligence. Therefore, the intermediary may incur liability for injury or damage caused by a defective product unless it can prove that it did not act intentionally or negligently.

2. What is a 'product' for the purpose of the relevant laws where a cause of action exists? Is 'product' defined in legislation and, if so, does the definition include tangible products only? Is there a distinction between products sold to, or intended to be used by consumers, and those sold for use by businesses?

According to the Product Liability Act, a 'product' is defined as all goods, both processed and natural products, and products incorporated as a component of another product. In addition, real estate is covered by the definition. Not only tangible products are included in the definition, as electricity, district heating, gas and water are also covered in the legal definition.

The definition of a product in the rules developed by case law is broader than the legal definition of a product under the Products Liability Act. Accordingly, services constitutes a product as well under the rules developed by case law.

In principle, no distinction is to be made between products sold to consumers and those sold to professionals or businesses. The decisive factor in determining which set of rules to apply is whether the damage in question occurred to consumer goods or to business goods, as only damage inflicted on consumer goods are covered by the Product Liability Act.

3. Who or what entities can bring a claim and for what type(s) of damage? Can a claim be brought on behalf of a deceased person whose death was caused by an

allegedly defective product?

The Product Liability Act applies to personal injury and consumer property damage. Therefore, the Product Liability Act only covers property damage if the product is of a type ordinarily intended for private use and was used by the injured person mainly for his own private use. If the death of a person is caused by a defective product, the dependants can claim compensation for funeral expenses and loss of dependency.

4. What remedies are available against a defendant found liable for a defective product? Are there any restrictions on the types of loss or damage that can be claimed?

The claimant can raise a claim for loss of earnings, medical expenses, loss or impairment of earning capacity, compensation for pain and suffering and permanent disability. The Danish Act on Liability contains detailed rules on the determination of damages for personal injuries. Regarding consumer property damage, the claimant is entitled to damages for the material loss caused by the defective product. The producer's liability for product liability damage is not limited.

5. When is a product defective? What must be shown in order to prove defect?

A product is defective when it fails to provide the safety that can be reasonably expected. The degree of safety that a product should offer in order not to be considered defective is determined according to general objective criteria and independently of the specific perception of the claimant as to the possible use of the product. Accordingly, a defect can be lacking product characteristics a product is expected to have or having product characteristics that it is not expected to have.

6. Which party bears the burden of proof? Can it be reversed?

According to the Danish Product Liability Act, the producer is strictly liable for damage caused by a defect in his product. To claim compensation for damage suffered, the claimant is required to prove the damage, the defect and the causal connection between the defect and the damage. Accordingly, the claimant does not have to prove negligence or fault of the producer. As regards for intermediaries, the burden of proof can be considered to be reversed, as the Danish Product

Liability Act states that an intermediary is liable for damage caused by a defective product unless it can be proved that the damage is not caused by negligence or fault of the intermediary. Danish law contains no formal rules in relation to the courts' assessment of evidence and the level of proof required. Accordingly, the court in each case must make an evaluation of the evidence provided and decide whether the claimant has discharged the burden of proof. Further, the court is not bound by expert evidence.

7. What factors might the court consider when assessing whether a product is defective? To what extent might the court account for a breach of regulatory duty, such as a breach of a product safety regulation?

In the assessment the court takes all circumstances into account, including product information provided by the parties such as information regarding the presentation and marketing of the product, the expected use of the product and the scientific and technical knowledge available when the product was put into circulation. An objective and individual assessment is made by the court, disregarding the subjective expectations of the individual user. According to the Danish Product Liability Act, a product is presumed to be defective if the product is capable of causing damage during normal use and if the risk of damage by using the product goes beyond what can normally be expected of the type of product in question. However, this does not mean that the producer in order to avoid liability simply can prove that the product is no worse than most other products of the same type. For some products, safety regulations or authorisation requirements have been issued by public authorities. If a product does not comply with safety regulations or authorisation requirements established for the product in question, it can be considered defective as a consumer is entitled to expect the degree of safety provided by the applicable product legislation. Some products are known to have some negative side effects in advance. For example, the harmful effects of tobacco are well known. Similarly, it is common knowledge that certain products may have allergenic effects. Damage caused by an inevitable risk of damage by using the product is not deemed to be a defect. This is primarily because the harmful effects of the product are generally known and accepted as a negative side-effect that society is willing to live with – known as so-called 'system damage'. Thus, in the case of a system damage the producer does not incur liability. Furthermore, a product is not defective because other and better products has been developed afterwards or because new

scientific or technical knowledge implies that other products is better or safer than the existing product – known as so-called ‘development damage’.

8. Who can be held liable for damage caused by a defective product? If there is more than one entity liable, how is liability apportioned?

The Danish product liability Act states that producer and subsequent intermediaries in the distribution chain can be held liable for damage resulting from a defective product. According to The Product Liability Act, a producer is the manufacturer of a finished product or a component part. Further, any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer, is seen as a producer. Persons who import a product into the EU for sale or any form of distribution in the course of his business can also be held responsible as a producer. Furthermore, any intermediary is treated as a producer if the claimant cannot identify the producer of a product or the person who has imported it into the EU. An intermediary may also be held liable for product damage if not seen as a producer. However, different basis of liability apply to a producer and an intermediary. When there is more than one party liable for the damage, they are jointly and severally liable for damage caused by the defective product. EU importers or distributors of anonymous products who are held liable for damage are subrogated to the claimant’s claim and can therefore bring an action under a right of recourse against former links in the distribution chain.

9. What defences are available?

There is various defences available. For example, the producer may prove that the product is not defective or that the product has not been put into circulation in the course of a commercial activity. The producer is not liable if he can prove that the cause of the defect is due to the fact that the product has to comply with mandatory public regulations. Furthermore, a producer cannot be held liable if he can prove that it, on the basis of scientific and technical knowledge at the time the product was put into circulation, was not possible to detect the defect. Also, the producer is not liable if the defect occurred after it was put into circulation. Finally, proof of the claimant’s contributory negligence or acceptance of risk may result in the discharge of liability.

10. What is the relevant limitation

period(s) for bringing a claim? Does a different limitation period apply to claims brought on behalf of deceased persons?

There is a period of limitation of 3 years from the time when the claimant became aware or should have become aware of the claim. However, there is an absolute limitation period of 10 years from the date on which the producer put the product into circulation. Thus, claims based on the rules of the Product Liability Act are time-barred after 10 years.

11. To what extent can liability be excluded, if at all?

The Product Liability Act prohibits prior agreements with the claimant regarding exclusion or limitation of liability. However, the warnings, instructions and information – which accompany a product – may have the same effect as an actual disclaimer, as the assessment of whether a product is defective is influenced by such information. A warning that the product must not be used by persons suffering from certain illnesses will generally mean that a person suffering from one of the illnesses mentioned will not be able to claim compensation if he nevertheless uses the product. However, a warning in an instruction manual does not necessarily exonerate the producer from liability. If a danger can be countered by a design improvement without significant difficulty and without increasing the cost of the product, a warning or instruction cannot exempt the producer from liability.

12. Are there any limitations on the territorial scope of claims brought under a strict liability statutory regime?

The claimant can initiate a product liability action where the injury occurred, which will often be the place where the claimant lives, regardless of whether the liable producer is domiciled in Denmark, the EU or outside the EU.

13. What does a claimant need to prove to successfully bring a claim in negligence?

According to the general rules developed by case law in Denmark, a claimant needs to prove that the defendant has acted negligently, that the claimant has suffered a loss and the causal connection between the negligence and the suffered loss.

14. In what circumstances might a claimant bring a claim in negligence?

The product liability developed by case law is based on the general rules developed by case law but with a stricter basis of liability. Thus, the claimant must prove the existence of a defect in the given product and a causal connection between the claimed damages and the defect in the product.

In addition to the regime under the Liability Act, a claimant can bring a product liability claim in negligence for both defect tangible products as well as services under the general rules developed by case law.

15. What remedies are available? Are punitive damages available?

Both consumers and companies can bring a claim in respect of damages according to the Danish Act on Liability and the common Danish principles on liability as well. In general, damages are only awarded for the loss suffered. Accordingly, punitive damages are not awarded according to Danish law.

16. If there are multiple tortfeasors, how is liability apportioned? Can a claimant bring contribution proceedings?

If multiple tortfeasors, the apportionment of the liability for damages shall be made according to what may be considered reasonable considering the nature of the negligence in question and the circumstances in general. If one of the tortfeasors has a liability insurance or is self-insured, this may also be taken into account in the apportionment of the compensation.

The claimant may choose to bring an action against all of the tortfeasors at once, but may also choose to bring action against the producer or intermediary who, due to his financial position, will be in the best position to pay damages.

17. Are there any defences available?

In addition to the defences in the Product Liability Act (see question 9) which also applies under the rules developed by case law, a presumption of negligence applies under the rules developed by case law. In principle, the producer or the intermediary therefore has the possibility to prove that a proven defect is not caused by negligence of the producer or the intermediary.

Further, a frequently used defence is expert evidence, including expert opinions on the producer's safety and quality control of the product. However, this presupposes an adequate description and documentation of the producer's safety and control measures.

Finally, proof of the claimant's contributory negligence or acceptance of risk may result in the discharge of liability.

18. What is the relevant limitation period(s) for bringing a claim?

Outside the scope of the Product Liability Act, the Act on Limitation applies. Thus, a claim is statute-barred after 3 years. However, the 3-year limit can be put on hold if the claimant neither had, or should have had, knowledge of the claim. In any case, the absolute limitation period for a claim is 10 years for property damages and 30 years for personal injuries. Finally, the limitation period can be suspended in various ways.

19. To what extent can liability be excluded, if at all?

In general, disclaimers and limitations of product liability are accepted under the rules developed by case law if they are concluded between two professionals and are clearly formulated. Disclaimers and limitations are, however, generally considered to be onerous in such a way that a general principle of restrictive interpretation is presumed to apply. The more unusual and onerous the conditions, the more rigorous the requirements for acceptance is. As a general rule, liability for intentional and grossly negligent behaviour cannot be excluded.

20. Do the laws governing contractual liability provide for any implied terms that could impose liability where the product that is the subject of the contract is defective or does not comply with the terms of sale?

Liability may be imposed if the product is considered to be non-conforming according to the contract or its terms. A proven defect will usually also be seen as non-conforming. However, the assessment of defects and the assessment of non-conformity may differ. Thus, a product may be non-conforming without being defective, just as a product may be defective without being non-conforming.

21. What remedies are available, and from whom?

Non-conformity may justify a claim of specific performance, termination or damages. Non-conformity may also lead to other damages (consequential damages) which may also justify compensation.

22. What damages are available to consumers and businesses in the event of a contractual breach? Are punitive damages available?

If the producer is liable for a breach of contract, consumers can claim damages according to the Sale of Goods Act or the law of contracts and torts. Businesses may claim damages computed on an expectation basis or reliance basis according to the law of contracts and torts. In both cases, compensatory damages are the only form of damages awarded. Accordingly, it is not possible to claim punitive damages.

23. To what extent can liability be excluded, if at all?

As mentioned above, freedom of contract in both private and commercial matters applies. Freedom of contract is, however, limited by mandatory rules regarding consumer contracts. In commercial contracts, disclaimers or limitations of liability may only be overridden to a limited extent.

24. Are there any defences available?

As a presumption of negligence applies, the producer may prove that non-conformity is not caused by negligence of the producer. Furthermore, the producer may prove that the usage of the product, notwithstanding the fact of non-conformity, was widely acknowledged in the branch of business at the time of delivery resulting in exclusion of liability. This principle is, by way of example, manifested within construction law. Finally, the producer may argue that the damages in question could have been avoided by the claimant by taking reasonable measures to minimise the claimant's loss.

25. Please summarise the rules governing the disclosure of documents in product liability claims and outline the types of documents that are typically disclosed.

The Danish rules regarding disclosure differs a lot from the rules on discovery used in common law jurisdictions. Thus, the Danish rules are much less extensive than a discovery process.

If the claimant wants to disclose documents in the possession of the producer during legal proceedings, the claimant may request the producer or intermediary to disclose the documents in its possession. If the producer or intermediary refuses to produce the requested document, the court may draw adverse consequences from this. Both pre-trial and during legal proceedings, each party may also make a formal request to the court for the disclosure of documents in the opposing party's possession. Upon such a request, the court may order the opposing party to submit the requested documents available.

In cases regarding product liability the most common documents being disclosed are the given products manuals, directions for use and data registers etc. Further, the parties will often obtain an expert opinion regarding whether the product has a defect and the casual connection between such a defect and the claimed damages, i.e. compensatory damages.

26. How are product liability claims usually funded? Is third party litigation funding permitted in your jurisdiction and, if so, is it regulated?

Product liability claims are typically funded solely by the claimant. Under certain circumstances the claimant can, however, get funding from either insurance based or public legal aid.

Third party litigation funding is unregulated in Denmark and must be considered legal, as long as both the general rules of procedural law and the rules of legal ethics are complied with.

27. Can a successful party recover its costs from a losing party? Can lawyers charge a percentage uplift on their costs?

Normally, the court will decide which party shall recover the costs of the case in question, which will normally be the losing party. The costs awarded by the Danish courts do not, however, normally reflect the actual legal costs of the court proceedings. Therefore, the parties will bear a lot of their own legal costs.

Lawyers are allowed to calculate their fees as a share of a compensation. However, any agreement including a

percentage uplift must not affect the lawyer's independence in the performance of his or her duties. Traditionally, the Lawyers Association has been reluctant in permitting percentual uplifts.

28. Can product liability claims be brought by way of a group or class action procedure? If so, please outline the mechanisms available and whether they provide for an 'opt-in' or 'opt-out' procedure. Which mechanism(s) is most commonly used for product liability claims?

In principle, product liability claims can be brought by way of class action. However, some extensive inclusion criteria has to be met in order to bring a class action suit.

Danish law allows for both opt-in and opt-out class action suits. The opt-in model is the main rule. The court can, however, decide that the class action suit should be opt-out if the court finds the opt-out model more beneficial to the class action suit in question.

29. Please provide details of any new significant product liability cases in your jurisdiction in the last 12 months.

The Western High Court has recently rendered a judgment in a case concerning electricity supplied by a electricity distribution system operator being overvoltage when delivered to a number of consumers. As a result of the overvoltage, damage was inflicted on the to the consumers' properties.

With the judgment, the Western High Court establishes that electricity distribution system operators are considered as producers of electricity within the meaning of the Danish Product Liability Act, as it changes the voltage level of electricity before its distribution to the final customer.

Furthermore, the Western High Court establishes that it is at the connection point, the demarcation line between the operator's supply network and the consumer's property, where the electricity is put into circulation. Accordingly, it is at the connection point that the assessment on whether the electricity can be considered as defect must be made.

Since the electricity in the specific case was overvoltage at the connection point, the grid operator was therefore liable under the Danish Product Liability Act.

In addition, the Eastern High Court has also rendered a converging judgement. Thus, the recent judgements is expected to have adverse consequences for all companies distributing electricity and its insurers.

30. Are there any policy proposals and/or regulatory and legal developments that could impact the current product liability framework, particularly given the advancements in new technologies and increasing focus on the circular economy?

The European Commission published the initial draft of a revised EU Product Liability Directive in September 2022. By the end of 2023, the EU Parliament and the Council reached a political agreement to revise the EU Product Liability Directive, which was adopted in 1985, making it nearly 40 years old. The new EU Product Liability Directive aims to align the directive with the digital age and the circular economy, including the increased reuse of previously traded products.

The General Product Safety Regulation came into effect in June 2023 and is a new key instrument in the EU product safety legal framework and will apply to products placed on the market from December 2024. The regulation covers all products without specific EU regulation and replaces the General Product Safety Directive from 2001. The main purpose of the regulation is to improve the safety of products sold both offline and online, strengthen market surveillance against illegal products, and improve consumer rights for those who have purchased an unsafe product. Products placed on the market without complying with the safety regulations or approval requirements, will generally be considered defective.

31. What trends are likely to impact upon product liability litigation in the future?

Innovation through the use of technology and AI is poised to continue impacting product liability regulation and litigation in Denmark. Essentially, introducing a presumption of causality and new rules on discovery, the revision of the Product Liability Directive will most likely lead to an increase in product liability claims in Denmark.

Growing concerns about the potential environmental and health risks linked to PFAS-substances, commonly referred to as "forever chemicals", has led to a recent, notable rise in PFAS-related claims in the EU. This raises the questions as to whether Denmark can expect to face similar litigation.

As seen in the US, PFAS claims can be brought on a number of grounds, including product liability where the presence of PFAS substances is alleged to render a product unsafe. Such claims could also be seen in Denmark as consumers are becoming increasingly prepared to hold corporations accountable for their actions.

Further, cybersecurity risks continue to rank highly on

the list of concerns of businesses and their insurers. Thus, devices used by consumers and businesses are at risk of unauthorized access to data or malicious interference, i.e. ransomware and malware attacks, resulting in data breaches and the potential infringement of privacy rights of consumers, as well as reputational and brand damage to businesses. This can give rise to a variety of intangible risks to providers of such devices and technically complex systems.

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