Denmark: Product Liability

This country-specific Q&A provides an overview to product liability laws and regulations that may occur in Denmark.

For a full list of jurisdictional Q&As visit [here](#).
1. **Please summarise the main legal bases for product liability**

Denmark has a two-branch system where liability for damage or injury caused by a defective product may be established both under the Products Liability Act and under rules developed in case law.

The **Products Liability Act** was introduced in 1989 and it is based on an EU product liability directive from 1985. It applies to personal injury and consumer property damage.

The **product liability developed in case law** is based on judgments and legal doctrines that have been developed over many years, since long before the Products Liability Act was introduced. It includes all types of damage or injury caused by a defective product (ie, personal injury, consumer property damage and commercial property damage). It is based on the general law of damages but with a stricter basis of liability.

The concept of a product that has developed in case law is broader than the concept of a product under the Products Liability Act.

The product liability rules rank equally. The claimant can choose whether to raise the claim under the Products Liability Act or under the product liability rules developed in case law. This means that the injured party can seek redress under the rules that give the most favourable result.

2. **What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?**

Under the Products Liability Act, the decisive factor for establishing product liability is that the product is defective and the product’s harmful or dangerous properties caused the damage or injury.

Damage or injury caused by a defective product exists when a product causes damage to anything other than the product itself because of a defect or dangerous property when used normally.

The doctrine of damage to the product itself is a fundamental element of product liability law, also under the product liability rules developed in case law.

The **Products Liability Act** stipulates that in order to claim damages for damage or injury caused by a defective product, there must be a causal connection between the defective product and the damage or injury. It is for the claimant to prove the causal connection.

Where contributory negligence on the part of the claimant is established, the amount of
damages may be reduced.

3. **With whom does liability sit? If there is more than one entity liable, is liability joint and several?**

The manufacturer and all subsequent links in the chain of distribution (the intermediaries) may incur liability for the defective product.

The Products Liability Act stipulates that a manufacturer must compensate for damages caused by a defect in a product manufactured, imported or supplied by him. The manufacturer is strictly liable if the injured party has established that the product is defective and that the injury was caused by the defect.

Before 2006, the Products Liability Act stipulated strict liability also for intermediaries. In 2006, the European Court of Justice overturned this rule. The Act was amended, and intermediaries are now subject to a presumption of negligence. This means liability with a reversed burden of proof. The intermediary is liable for damage or injury caused by a defective product unless he can prove that his conduct or the conduct of a party for which he is liable does not give rise to liability.

However, an intermediary will be directly liable to the claimant and subsequent intermediaries in the chain of distribution if and to the extent that the damage or injury was caused by defects or negligence on the part of the manufacturer or previous intermediaries in the chain of distribution.

The Product Liability Act stipulates joint and several liability if two or more entities liable for the same damage or injury.

If several manufacturers are liable, the liability will be distributed between them with due regard to defined criteria, such as the cause of the defect and the liability insurance taken out.

The entities liable may raise claims for contribution against each other.

4. **Are any defences available? If so, please summarise them.**

Several defences against product liability claims are available to manufacturers and intermediaries. The doctrine of “development damage” might prevent liability, where it is found that a product was not defective when it was brought into circulation, but where subsequent knowledge has shown that, according to the current technical or scientific knowledge, it would give rise to liability to use the product.

The doctrine of “system damage” might prevent liability in cases where an inherent danger,
which is characteristic of the product, is accepted by users, e.g. tobacco’s tendency to cause cancer.

Where contributory negligence on the part of the claimant is established, the damages may be reduced.

However, in personal injury cases it is very often very difficult for the manufacturer or the intermediary to carry the burden of proof and to establish contributory negligence. In a recent judgement, the High Court awarded a young man full compensation for eye injuries caused by fireworks. When letting off, the fireworks exploded and injured his eyes. Although advised in the manual, which he did not read, in general by the safety technology authority, he did not wear protective eyewear. According to court appointed experts, such protective eyewear would have reduced the eye injury. The High Court found that the fireworks were defective and that there was no contributory negligence on the young man’s side.

5. **What is the limitation period for bringing a claim?**

The Products Liability Act contains special rules on the time-barring of claims for damages under both the Products Liability Act and the product liability rules developed in case law. These rules supplement and limit the general rules on time-barring laid down in the Limitation Act.

The general period of limitation is three years from the time when the party raising the claim became aware of the claim, and as a default rule and depending on the nature of the claim 10 or 30 years after the time of the cause of damage. However, an absolute limitation period for product liability of 10 years after the date when the product was brought into circulation applies.

6. **To what extent can liability be excluded (if at all)?**

The Products Liability Act is mandatory. The Act cannot be derogated from to the detriment of the claimant or any entity subrogated to the claimant’s rights.

Manufacturers and intermediaries may to a certain extent enter into contractual agreements on exclusion of liability vis-à-vis each other.

7. **What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?**

Under the product liability developed in case law, the decisive factor for establishing product liability is that the product is defective, and the product’s harmful or dangerous properties caused the damage or injury. It is for the claimant to prove the causal connection.
The basis of liability in the product liability developed in case law is dual, meaning that both fault giving rise to liability and a defect must be established.

A product is found to be defective if it is not as safe as reasonably expected. The basis for the assessment is the point in time when the use of the product started after it was brought into circulation. The assessment also takes into account the use of the product that can reasonably be expected and the marketing of the product.

Damage or injury caused by a defective product exists when a product can cause damage to anything other than the product itself because of a defect or dangerous property when used normally.

The claimant must prove a causal connection between the damage or injury and the product, and that the damage or injury was caused by the defect in the product. This burden of proof applies under both the Products Liability Act and the product liability rules developed in case law.

The Act applies only to personal injury and consumer property damage, whereas the scope of application of the product liability developed in case law is broader. The claimant is free to decide which set of rules to rely on in support of its product liability damage or injury claim (provided that both sets of rules apply to the damage or injury in question).

8. **What types of damage/loss can be compensated and what is the measure of damages? Are punitive damages available?**

Both claims for property damage and claims for damages or compensation for personal injury caused by product liability may be raised.

The various claims are subject to various calculation rules. Liability for property damage is subject to no cap. In regard to personal injury, the Act on the Liability to Pay Compensation stipulates certain caps as to the amount of the claim for damages.

The Act contains a general mitigation rule which stipulates that damages may be reduced in respect of both property damage and personal injury in special circumstances.

The Products liability Act applies only to personal injury and consumer property damage, whereas the scope of application of the product liability developed in case law is broader. The injured party is free to decide which set of rules to rely on in support of its product liability damage or injury claim (provided that both sets of rules apply to the damage or injury in question).

Punitive damages are not allowed under Danish law. Damages are paid only for the loss
suffered, and loss arising out of a fine is not compensated.

9. **How are multiple tortfeasors dealt with? Is liability joint and several? Can contribution proceedings be brought?**

With regard to the product liability developed in case law, the claimant may raise its claim against both the manufacturer and the intermediary. They are jointly and severally liable. No secondary liability applies as such. However, the intermediary will be liable for product liability if the claimant can provide evidence of fault on the part of the manufacturer (provided that the other conditions are satisfied, including the existence of a defect which caused the damage/injury, etc.)

Manufacturer(s) and intermediary/intermediaries having been obliged to pay damages to the claimant may bring contribution proceedings against the other entities liable. This means that if the claimant has decided to raise its claim against an intermediary who has not acted negligently, the intermediary may bring contribution proceedings against the manufacturer who did act negligently.

In the case of multiple entities who are jointly and severally liable, the provisions of the Act on the Liability to pay Compensation may be applied in certain cases in connection with the distribution of damages to be paid by the entities liable.

With regard to remedies available to claimants under the Products Liability Act, reference is made to the answer to question 3 above.

10. **Are any defences available? If so, please summarise them.**

There are various defences available and possible damages may be reduced or cancelled as a result of the injured party’s contributory negligence or acceptance of risk.

Both “system damage” and “development damage” are generally considered to be defences for the manufacturer (see the answer to question 4). In such situations, the cases are often complex in terms of evidence.

Where the defendant can prove contributory negligence on the part of the claimant, the damages may be reduced.

11. **What is the limitation period for bringing a claim?**

The general period of limitation is three years from the time when the party raising the claim became aware of the claim, and as a default rule and depending on the nature of the claim 10 or 30 years after the time of the cause of damage. However, an absolute limitation period for product liability of 10 years after the date when the product was brought into circulation.
applies.

12. **To what extent can liability be excluded (if at all)?**

The Products Liability Act is mandatory. The Act cannot be derogated from by prior agreement to the detriment of the claimant or any entity subrogated to the claimant’s rights.

Manufacturers and intermediaries may to a certain extent enter into contractual agreements on exclusion of liability vis-à-vis each other.

13. **Does the law imply any terms into B2B or B2C contracts which could impose liability in a situation where a product has caused damage? If so, please summarise.**

No, neither as regards B2B, nor B2C. There is in general freedom of contract under Danish law.

B2C contracts will as a general rule be interpreted to the detriment of the business in case of ambiguities. In addition, the Products Liability Act cannot be derogated from by prior agreement to the detriment of the claimant or any entity subrogated to the claimant’s rights.

14. **What types of damage/loss can be compensated and what is the measure of damages?**

Claims for property damage and damages or compensation for personal injury caused by product liability may be raised.

The various claims are subject to various calculation rules. Liability for property damage is subject to no cap. In regard to personal injury, the Act on the Liability to Pay Compensation stipulates certain caps as to the amount of the claim for damages.

The Act contains a general mitigation rule which stipulates that damages may be reduced in respect of both property damage and personal injury in special circumstances.

The Products Liability Act applies only to personal injury and consumer property damage, whereas the scope of application of the product liability developed in case law is broader. The claimant is free to decide which set of rules to rely on.

15. **To what extent can liability be excluded for contract liability (if at all)?**

The Products Liability Act is mandatory. The Act cannot be derogated from by prior agreement to the detriment of the claimant or any entity subrogated to the claimant’s
Manufacturers and intermediaries may to a certain extent enter into contractual agreements on exclusion of liability vis-à-vis each other.

16. Are there any recent key court judgements which have had a significant impact on the approach to product liability?

For several decades, the Danish courts of law have had the opportunity in several cases to interpret the doctrine of damage to the product itself according to which physical damage caused by a product to the product itself does not constitute product liability, whereas physical damage caused by the product to anything other than the product itself is subject to product liability.

In 2018, in a precedent-setting appeal, the Supreme Court overruled a judgment by the Maritime and Commercial Court and maintained a judgment delivered in 2010 making it definitively clear that when applying the doctrine of damage to the product itself, focus is exclusively to be on what the claimant purchased, and that the issue of what was sold is not to be given different answers depending on the link in the chain of distribution against which the claim was raised, and that the aspects of the marketing of the product are not of relevance to the doctrine of damage to the product itself.

17. What are the initial litigation related steps you should take if you are facing a product liability claim or threatened claim?

Provided the claimant or the defendant respectively does not have an in-house legal department, parties would normally consider instructing an attorney.

The both the claimant an the defendant may also consider whether to apply to the court for permission to take evidence out of court in order to quickly seize and preserve evidence.

18. Are the courts adept at handling complex product liability claims? Are cases heard by a judge or jury?

Yes, the Danish courts of law are well adept at handling complex product liability claims and are used to do so.

Product liability cases are brought before the ordinary courts, the Maritime and Commercial Court and, in B2B cases, also before arbitration tribunals.

The Danish judicial system is a two-tier system. This means that all cases as an overriding
general rule may be reviewed by two tiers: usually a city court with a right to appeal to a high court. In addition, it is possible to apply to the Appeals Permission Board for permission to appeal the case to a third tier so that the case is finally decided in the Supreme Court. City court cases are heard by 1 or 3 judges with the possible assistance of two expert lay judges.

High Court product liability cases are as a general rule heard by three judges or in certain cases by five judges.

In product liability cases, the parties will often request that a court-appointed expert be commissioned, and the court will then appoint an expert to draw up an expert report to be used as evidence in the case. The expert may be summoned to the court for examination.

19. **Is it possible to bring a product liability related group action? If so, please summarise the types of procedure(s) available**

Yes, group action (opt-in) is possible in Denmark. The parties to group action must be identified in a document to the court (e.g., a writ of summons) and must then individually join the group action.

The following requirements apply:

- all parties to group action must be identifiable;
- the claims must be identical;
- the claims must be heard together; and
- a group representative must be appointed.

The judgment is binding on all the parties to the group action.

20. **How are cases typically funded? Can lawyers charge success fees? Is third party funding permissible?**

Sometimes both the claimant and the defendant have legal expenses insurance that covers attorney fees or provides an attorney. In particular, this applies to private persons. Legal expenses insurance also usually makes it possible to get coverage for the party’s own attorney fees. In addition, many businesses have taken out liability insurance which, in addition to the liability aspect, also cover the costs of bringing the case in certain circumstances.

Under the Danish Administration of Justice Act and the Code of Conduct for the Danish Bar and Law Society, whether charged on basis of time spent or set on a discretionary basis, the fee shall not be higher than what may be regarded as fair and reasonable. It is prohibited to agree to receive a share of any result achieved by the client upon conclusion of the case, but it is permitted to take to account to certain factors including the outcome of the case.
There are no Danish rules preventing or restricting the possibility of third-party funding.

21. **How common are product liability claims and what factors influence their frequency?**

   Product liability claims are not rare in Denmark.

   The raising of claims not only on the basis of the defects rules under the Sale of Goods Act, but also under the Product Liability Act or the rules on product liability developed in case law has received increased attention.

   The opportunities of claiming contribution are also focused on, in particular by the insurance companies providing liability insurance.

22. **What are the likely future developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?**

   The attention to product liability disputes, including possible contribution claims, is likely to continue. The advances in technology will probably cause new and complex product liability disputes. Moreover, there seems to be increased focus on product liability in connection with the provision of services.

   In 2020, cyber incidents and the break-out of COVID-19 pandemic may result in product liability disputes. The cyber risk ranks in the top of the risk barometer and it remains to be discussed whether certain losses related to cyber crime are in fact product liability losses. The COVID-19 pandemic has increased the need for vaccine, safety masks and hazmat suits and although the doctrine of “development damage” might prevent liability such claims cannot be excluded.

   The Danish Administration of Justice Act allows the possibility of obtaining permission from the court, if both parties agree and as a supplement to the court-appointed expert, to produce statements on matters of a technical nature obtained from experts by each party. In step with the technological developments, which make matters more complex, this opportunity is likely to be exercised more in future.