The Legal 500 Country Comparative Guides

Japan: Product Liability

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

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1. **Please summarise the main legal bases for product liability**

The main legal basis for product liability is Article 3 of the Product Liability Act (Act No. 85 of 1994, ‘PLA’), which describes special provisions of tort liability pursuant to the Civil Code. Between contractual parties, contractual liability should also be a main legal base.

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?**

A claimant must prove the following elements to succeed in a strict liability type claim for damage caused by a defective product (Article 3 of the PLA):

1. The product was defective when the manufacturer, etc. delivered the product
2. Damages
3. Causal relationship between the alleged defect and the alleged damages.

The term ‘defect’ as used in the PLA means a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc. delivered the product, and other circumstances concerning the product (Article 2(2) of the PLA).

It is not necessarily clear whether the court in Japan has adopted either consumer expectation standards or cost-effective standards in determining defect and the outcome will depend on the products in question.

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

Liability rests with the ‘manufacturer, etc.’ The ‘manufacturer, etc.’ means the following (Article 2 (3) of the PLA):

1. any person who manufactured, processed, or imported the product in the course of trade;
2. any person who provides his/her name, trade name, trademark or other indication (‘representation of name, etc.’) on the product as the manufacturer of such product, or any person who provides the representation of name, etc. on the product which misleads the others into believing that he/she is the manufacturer (for example, an outsourcer of original equipment manufacturer products);
3. apart from any person mentioned in the preceding item, any person who provides any representation of name, etc. on the product which, in light of the manner concerning the manufacturing, processing, importation or sales of the product, and other circumstances, holds himself/herself out as its substantial manufacturer.

Hence, a party functioning as just a wholesaler or a lender will not correspond to the
manufacturer, etc. In addition, because the term ‘product’ as used in the PLA means movable items that are manufactured or processed (Article 2 (1) of the PLA), product liability will not sit with a software provider as long as said software provider does not deliver such software with movable items, such as CD-Rs, etc.

If more than one entity is liable, such liability is joint and several.

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

The PLA sets forth two types of defences against claims for damages based on product liability (Article 4 of the PLA):

(i) the defect in such product could not have been discovered given the state of scientific or technical knowledge at the time when the manufacturer, etc. delivered the product; or (ii) in case where the product is used as a component or raw material of another product, the defect occurred primarily because of the compliance with the instructions concerning the design given by the manufacturer of such another product, and that the manufacturer, etc. is not negligent with respect to the occurrence of such defect.

Both defences are high standards. In fact, we have never encountered any case in which the court ruled that product liability is exempted by (i) above.

In practice, the main defence is to deny the ‘defect’. Typical defences with regards to design defect cases, for example, are (a) the product provides the level of safety that such a product ordinarily should provide, taking into account the nature of the product, etc., (b) the alleged manner of use of the product is not ordinarily foreseeable, or (c) the alleged defect occurred after the delivery of the product, etc.

Claimants often argue that the manufacturer, etc. did not provide sufficient warning/instruction in addition to arguing for design defect or manufacturing defect. Although the defences against insufficient warning/instruction will vary depending on the product and the nature of the alleged risk, defendants often counterargue that (a) the alleged risk is obvious or (b) such warning should be provided by interpretation of the instruction handbook, etc.

In addition to this, the causal relationship between the alleged defect and the alleged damages and whether the amount of damages is reasonable are frequently the issues in question.

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

The limitation period under the PLA is three (3) years from the time when the claimant becomes aware of the damages AND the identity of party liable for the damages (Article 5 (1)
Under the amended PLA (which is in force from April 1, 2020), the three (3)-year limitation period for bringing a claim for death or physical injury is extended to five (5) years (Article 5(2) of the PLA). The starting-point of the limitation period will often be the issue and might be narrowly interpreted, especially in litigation that implicates a complex product between individual consumer and the manufacturer, etc.

The same applies to cases where ten (10) years have elapsed from the time when the manufacturer, etc. delivered the product (Article 5 (1) (ii) of the PLA), but the period is calculated from the time of the occurrence of the damages where such damages are caused by substances which become harmful to human health when they accumulate in the body, or where the symptoms which represent such damages appear after a certain latent period (Article 5(3) of the PLA).

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

   If the limitation period has elapsed, the right to seek damages is extinguished.

   Also, reduction of damages due to comparative negligence might be available (See Article 722 (2) of the Civil Code).

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?**

   The main elements for general tort liability pursuant to Article 709 of the Civil Code are as follows:

   1. intentional or negligent act or failure to act
   2. infringement of any rights of others
   3. damages
   4. causal relationship between alleged act or failure to act and the alleged damages.

   In Japan, the plaintiff must provide concrete details of the alleged negligence in the complaint.

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

   Both direct and indirect damages/loss can be compensated, but only actual damages/loss can be compensated. Mental suffering also can be compensated. Punitive damages are not available under Japanese law. Reasonable attorney’s fees (about 10% of total actual damages) can be included in a victim’s award of damages, even though the general rule in Japan is for each party to bear its own fees and costs.
Damages will be measured whether such damages would ordinarily arise from such alleged acts or from a failure to act (Article 416 (1) of the Civil Code). Also, damages that arise from special circumstances may also be demanded, if the party foresaw or should have foreseen such circumstances (Article 416(2) of the Civil Code).

Although there are no clear objective standards for calculation of damages, etc., calculation standards for damages in traffic accident cases will often be referenced.

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

If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages (Article 719 (1) of the Civil Code).

If a tortfeasor has compensated the victim for damages in excess of the portion to be borne by the accident, the tortfeasor may exercise the right to recover contribution against the other tortfeasors with respect to that excess portion. Therefore, if one manufacturer has compensated the victim for the total amount of damages, the person who provided the compensation may recover contribution from the other manufacturers liable, based on the degree of liability. In Japan, there is no specific procedures for contribution.

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

The main defence will relate to whether the defendant acted negligently or failed to act where required. In concrete terms, the main issues are whether such accident or the manner of use of the products, etc. are ordinarily foreseeable, and, if so, whether the defendant is legally responsible and able to prevent such accident or result under the circumstances, etc. In short, foreseeability and the possibility of avoiding the results will be the key issues.

As a claimant owes the burden of proof of all the elements for general tort liability pursuant to Article 709 of the Civil Code, defendants will often counterargue that plaintiff has not satisfied its burden of proof.

In addition to the above, the causal relationship between the alleged defect and the alleged damages and whether the calculation of damages is reasonable can frequently be the issues.

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

The limitation period is three (3) years from the time when the claimant comes to know of the damages AND the identity of the perpetrator. Under the amended Civil Code (which is in force as of April 1, 2020), the three (3)-year limitation period for bringing a claim for damages for a tort harming the life or body of another is extended to five (5) years (Article
724-2 of the Civil Code). The starting-point of such limitation period will often be the issue and might be narrowly interpreted, especially in litigation that implicates a complex product between individual consumer and manufacturer, etc.

The same applies to case where twenty (20) years have elapsed from the time the tortious act occurred.

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

If the limitation of period has elapsed, the right to seek damages is extinguished.

Also, reduction of damages due to comparative negligence might be available (See. Article 722 (2) of the Civil Code).

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.**

The Consumer Contract Act (Act No. 61 of May 12, 2000, ‘CCA’) applies to the interpretation of the B2C contracts. For example, consumer contract clauses that totally exempt a manufacturer, etc. from compensating a consumer for damages arising from a product defect, etc. will likely be invalid (Article 8 and 10 of the CCA).

In a B2B contract, the Commercial Code (Act No. 48 of March 9, 1899) applies. Article 526 (2) of the Commercial Code sets forth that if a buyer, as a result of an inspection discovers a nonconformity of the contract or shortfall in the quantity of the object of the sales transaction, it may not cancel the contract nor demand a reduction of the purchase price or compensation on the grounds of said nonconformity or shortfall unless it immediately issues notice of the nonconformity or shortfall to the seller. The same applies if the object of a sales transaction has a nonconformity that is not immediately obvious that the buyer discovers within six (6) months.

As such article is not necessarily appropriate or practical to current business practices, companies almost always set forth detailed clauses with regards to defects or other lack of specifications.

In addition, in some industries and B2B contracts for original equipment manufacturer products, parties sometimes agree to a contribution rate of recall costs in advance.

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

Please refer to the answer to Question No. 8.
15. **To what extent can liability be excluded for contract liability (if at all)?**

If the limitation period has elapsed, the right to seek damages is extinguished.

As mentioned in Question No. 13, in B2C contracts, for example, consumer contract clauses that totally exempt a manufacturer, etc. from compensating a consumer for damages arising from a product defect, etc. will likely be invalid (Article 8 and 10 of the CCA).

The Article 8 of the CCA sets forth the following consumer contract clauses as void:

1. Clauses which totally exempt a business operator from liability to compensate a consumer for damages arising from default by the business operator;
2. Clauses which partially exempt a business operator from liability for damages arising from default by the business operator (limited to default which arises due to an intentional act or gross negligence on the part of the business operator, the business operator’s representative or employee);
3. Clauses which totally exempt a business operator from liability for damages to a consumer which arise from a tort pursuant to the provisions of the Civil Code committed during the business operator’s performance of a consumer contract;
4. Clauses which partially exempt a business operator from liability for damages to a consumer arising from a tort (limited to cases in which the same arises due to an intentional act or gross negligence on the part of the business operator, the business operator’s representative or employee) pursuant to the provisions of the Civil Code committed during the business operator’s performance of a consumer contract; and
5. Where a consumer contract is a contract for value, and there exists a latent defect in the subject matter of the consumer contract (including where a consumer contract is a contract for work, and there exists a defect in the subject matter of a consumer contract for work; the same shall apply in the following paragraph): Clauses which totally exclude a business operator from liability to compensate a consumer for damages caused by such defect.

In B2B contracts, the seller often limits the scope of contractual liability to the extent and within the scope of actual and direct damages and limits the amount of damages to a certain amount of money (for example, the total price of the products, etc.).

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

Although there are no key court judgements that have had a ‘significant’ impact on the approach to product liability, there have been some important cases recently. Theoretically, a claimant owes the burden of proof that the product is defective. Although the law has not shifted the burden of proof to the defendant, the burden of proof seems to be lightened, and defendant need to submit rebuttal evidence, in view of the recent court cases. For example, the Tokyo District Court ruled that the burden of establishing facts and proof with regards to
'defective' of the product will be satisfied if a claimant argues and proves that the ignition source of a fire is the product (i.e. a claimant does not need to identify the defective part of the product, specific embodiments of the alleged defect, or the specific mechanism of fire or accident) on August 5, 2016 (Tokyo District Court August 5, 2016 [Hanta] 1446, 237 (Japan)).

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

The important initial step is to collect all related facts and circumstantial evidence related to the accident. For example, if a claimant argues that a fire occurred due to a defect in the product, one will need to collect a report regarding the cause of fire from the fire station, etc., pictures of the burned products and the place of fire, etc. As there is no discovery system for civil procedures in Japan, collecting evidence is one of the most important initial steps to take.

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

As there is no jury system for civil procedures in Japan, all cases are heard by one or three professional judges who have passed the Japanese bar exam. A chief judge will have extensive experience as a judge and will be well trained. Also, it will generally take more than one year, possibly even two or more years, to receive a decision in the first instance. As such, fact finding is generally precise.

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

No. There are no class action permitted in product liability lawsuits.

If claimants are willing to bring lawsuits collectively, all of them should be co-plaintiffs and satisfy the requirements under the Code of Civil Procedure in Japan. Pursuant to Article 38 of the Code of Civil Procedure, if rights or obligations that are the subject matter of the suits are common to two or more persons or are based on the same factual or statutory cause, these persons may sue or be sued as co-parties. The same shall apply where rights or obligations that are the subject matter of the suits are of the same kind and based on the same kind of causes in fact or by law.

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

Systems, such as the judicial aid system and the civil legal aid system, will cover judicial costs and lawyers’ fees, etc. for persons below a certain level of income.
Lawyers can charge success fees. Third-party funding is permissible.

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

   The enacting of the PLA, which adopts strict liability (a special provision for a tort), makes it easier for a claimant to assert a product liability claim against the manufacturer, etc. In addition, the awareness of product safety issues on the part of manufacturers has also been increased, and prompt and appropriate responses to claims have been made to customers. Also, it is becoming popular for manufacturers, etc. to purchase product liability insurance. As a result, the number of product liability lawsuits has not increased significantly.

   When a manufacturer, etc. recognizes a product deficiency that harms consumers or a deficiency that may cause harm to consumers, the manufacturer, etc. must prevent said consumer harm by implementing corrective measures, including recalls, as necessary, which may lead to preventing the occurrence and the increase of complaints.

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?**

   Product liability for autonomous vehicles (vehicles with driving assist system) is likely to be a problem in future product liability law and practice, due to advances in technology. Until now, in a car traffic accident, the victim usually will make a claim for damages against the other party in the accident (or the insurance company of the other party). However, as the number of autonomous vehicles become widespread in the future, depending on the level of the auto-drive, it may be difficult to pursue tort liability against the “driver” of the vehicle that injures the victim, and the insurance company may claim for damages against the manufacturer in subrogation of the victim under the PLA. In such cases, the product liability of autonomous vehicles manufacturers and manufacturers of ITS devices, etc. could become problematic.

   The manufacturers providing the so-called Level 1 or more autonomous vehicles should include appropriate explanations and warnings to the purchaser in the instruction manual, including the functional limitations of the vehicle, and should consider ensuring that direct explanations by the dealer are thoroughly carried out in an easy-to-understand manner using simulators, etc.

23. **Please provide an update of any interesting developments which have taken place in your jurisdiction over the last 12 months.**

   Autonomous driving technology is also being developed in Japan, and early commercialization of autonomous vehicles is expected. In introducing autonomous vehicles, discussions are also ongoing as to the civil liability of drivers and autonomous vehicle manufacturers in the event of an accident. The “Outline of System Development Related to Autonomous Driving” (the
‘Outline’), released on April 17, 2018, by the Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society (an organization established by and under the Cabinet), also describes the interpretation of the PLA in the event of an accident involving an autonomous vehicle that occurs due to a defect in the software embedded therein.

As noted in the answer to Question No. 3, the term ‘product’ as used in the PLA refers to movable items that are manufactured or processed (Article 2(1) of the PLA), and, therefore, the software itself is not a “product”; however, an autonomous vehicle that is embedded with the software is a “product.” Therefore, the ‘Outline’ provides that, in the event of an accident caused by an autonomous vehicle due to a defect in the embedded software, the autonomous vehicle manufacturer will be liable as long as the autonomous vehicle itself is evaluated as containing a defect, and the software developer may be liable to the victim for tort liability rather than product liability. Coordination between the software developer and the autonomous vehicle manufacturer will therefore be made regarding, for example, claims for compensation or the seeking of responsibility for the default.

In addition, the ‘Outline’ assumes that there may be defects contained in the updated software installed in an autonomous vehicle after such vehicle is sold; however, in the PLA, the time of delivery constitutes one criterion for judging defects, so the PLA may not be applied to updates made after the time of delivery. For this reason, the issue of software updates is subject to continuous discussion based on technical trends.

Furthermore, in the discussions of the ‘Outline’ Sub-Working Group of April 2019, the group again stated, “The vehicles assumed to be in existence in 2020 can be covered under the current PLA. However, continuous discussion will be needed in view of technological developments in the future.”