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Thailand

PRODUCT LIABILITY

Contributor

Baker McKenzie



Yuthana Sivaraks

Partner | yuthana.sivaraks@bakermckenzie.com

Napatorn Dasananjali Termglinchan

Senior Associate | napatorn.termglinchan@bakermckenzie.com

Haruthai Chaisanee

Associate | haruthai.chaisanee@bakermckenzie.com

Pongtorn Jittapinijmas

Associate | pongtorn.jittapinijmas@bakermckenzie.com

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

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THAILAND PRODUCT LIABILITY



1. Please summarise the main legal bases for product liability

There are two main pieces of legislation governing product liability in Thailand, namely the Act on Liability for Injuries from Unsafe Products, B.E. 2551 (2008) (Product Liability Law), and the Act on Court Proceedings for Consumer Cases, B.E. 2551 (2008).

The legal basis for a product liability claim is the injured party suffering damage from an unsafe product, where that product has been sold to the consumer, regardless of whether such damage is a result of the wilful or negligent act of the relevant business operators.

“Business operators” refers to the product manufacturers or hirers, importers, sellers (if the products do not indicate the manufacturer, hirer, or importer), and persons who use the name, trademark, trade name, mark, or statement that would lead to the understanding that they are the manufacturer, hirer for manufacture or importer of the product in question.

The term “unsafe” means a product which causes (or may cause) damage as a result of a manufacturing or design defect; or because appropriate instructions for using or storing the product, warnings, or other information regarding the product, were not provided (or where it was provided but the information was inaccurate or insufficient). Consideration must also be given to the specific nature of the products, as well as the way that the products may be used or stored under normal and expected conditions.

Other than the above pieces of legislation, there are other legislations that provide some indirect protection against defective products, e.g. Consumer Protection Act, B.E. 2522 (1979), Food Act, B.E. 2522 (1919), Drug Act, B.E. 2510 (1967), Medical Device Act, B.E. 2551 (2008), Cosmetics Act, B.E. 2558 (2015), Hazardous Substance Act, B.E. 2535 (1992), and Industrial Product Standards Act, B.E. 2511 (1968).

2. How is "product" defined? In particular, does it cover software provided by way of a download only?

The term “product” is defined to cover all types of movable properties produced or imported for sale, including agricultural products and electricity, but excluding certain products as prescribed in the ministerial regulations. For software provided by way of a download, it would appear that software provided by download does not meet the definition of moveable property, and thus it is possible that it may not fall under the scope of the term “product” under the Product Liability Law, but there has not been a court precedent in this regard.

3. 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?

Damage or the likelihood of damage may arise from manufacturing defect, design defect, or warning defect. To determine whether a product is unsafe, the court will take into account the nature of the product and its ordinary use and storage.

The injured party has the burden to prove that under ordinary use or storage, the damage suffered has been caused by the product. However, the injured party does not have the burden to prove which particular business operator’s actions or omissions caused the damage (e.g. manufacturer, importer, or seller, etc.). The burden of proof is on the business operator to prove that it should not be liable for the damage that was caused by the product.

Additionally, under the Consumer Case Procedure Act, where there are any arguments regarding the facts related to the manufacture, design or composition of the product, if the court is of the view that such facts are known specifically by the party which is a particular business operator, then the burden of proof in relation to

such matters will fall on that particular business operator.

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

The liability sits with the “business operator,” which includes the manufacturers or hirers, importers, sellers of the products (if the products do not indicate the manufacturer, hirer, or importer), and persons that use the name, trademark, etc. of the manufacturer, hirer, or importer of the product in question. All relevant entities are jointly liable. The entity may not need to be at fault to be liable.

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

The defences available include the following:

- The product is not unsafe;
- The injured party was already aware that the product was unsafe; or
- The damage arose from improper use or storage of the product in a manner not in accordance with the directions, warning, or information reasonably, clearly, and correctly provided by the business operator.

Defences for particular business operators in certain circumstances are also available. For example, a manufacturer in contract manufacturing is not liable if it can prove that the unsafe products are a result of the hirer’s design, order or instruction. In addition, part manufacturers are not liable if it can prove that the unsafe products are as a result of the design, assembly, or the instruction on use, storage, or warning provided by the manufacturer of the final product.

6. What is the limitation period for bringing a claim?

The case must be brought to court within three years from the date on which the injured party becomes aware of the damage and the identity of the relevant business operators that must be liable, but in any case within 10 years from the date of the sale of the product in question.

However, where damage occurred to life, body, health, or hygiene, resulting from an accumulation of the substance within the injured party’s body or the case where time is taken before the symptom becomes

apparent, the case can be brought to court within three years from the date the injured party is aware of such damage and of the identity of the person bound to be liable, but not exceeding 10 years from the date the injured party is aware of the damage.

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

Any prior agreement between the consumers and the business operators, or any notification or announcement of the business operators, to limit or exclude liability of the business operators to the damage arising from unsafe products will not hold in court.

8. 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 to prove a tort claim under Thai law are that the perpetrator caused the damage by intent or negligence, and that the act resulting in the damage is an illegal act.

It should be noted that in the event of damage arising from unsafe product, the claim should be brought by the consumer under Product Liability Law as discussed in the questions above. This is because with a tort claim, the burden of proof would rest with the plaintiff (the consumer), and in cases involving product liability, the consumer would usually be at the disadvantage in proving the elements above, since the business operators, such as a manufacturer, would be the party that holds the relevant information, e.g. the design, manufacturing process, etc. There would be no advantage to the plaintiff in pursuing a claim under tort law as opposed to under Product Liability Law.

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

The type of damage/loss that can be compensated are in accordance with liability under the Civil and Commercial Code, namely death, injury to the body, wellbeing, and freedom, and damage to the property. Punitive damages are not available for tort claims.

However, it should be noted that, in the case of claim for liability under Product Liability Law as explained in the questions above, the court may determine additional

compensation for mental damage arising from damage to the body or wellbeing of the injured party. Punitive damages not exceeding two times the compensation granted may also be set in the case that it is found that the business operators have produced, imported, or sold the products knowing that the products are unsafe, or fail to be aware of such facts due to gross negligence.

Under the Consumer Case Procedure Act, if the actual damages do not exceed THB 50,000, the courts are empowered to fix punitive damages at not exceeding five times the actual damage.

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

The tortfeasors will be jointly and severally liable, unless otherwise ruled by the court. Contribution proceedings can be brought.

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

Defences available include the defence that the damage was not caused by an illegal act committed by the business operator, whether by intent or negligence.

12. What is the limitation period for bringing a claim?

One year from the date the injured party becomes aware of the tort and the identity of the perpetrator, but not exceeding 10 years from the date of the commission of the tort.

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

Generally, a consent given to the perpetrator by the injured party would rule out the existence of tort.

14. 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 Civil and Commercial Code imposes liability of the seller in a sale and purchase contract for defects of products causing impairment of value, or fitness for ordinary purposes or contractual purposes, whether or not the seller is aware of the existence of the defect.

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

The type of damage/loss that can be compensated would be compensation for the normal damage arising from failure to deliver the product in accordance with the contract. Damage arising out of special circumstance may also be compensated if the relevant parties can expect or should have been able to expect such a circumstance in advance.

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

The liability may be excluded in some cases, including that the buyer is aware of the defect or should have been aware of the defect had care expected from a reasonable person been exercised, or if the defect is clearly evident at the time of delivery and acceptance by the buyer without any reservation. However, note that an agreement excluding liability from gross negligence is void. In addition, the Unfair Contract Terms Act, B.E. 2540 (1997) also provides that unfair contract terms include terms that unfairly limit or exclude liability arising from breach of contract.

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

Beverage manufacturer case

In 2014, a waiter in a restaurant was about to serve bottled soft drinks to customers as usual. He normally took the bottles out of the refrigerator, without shaking the bottles (or hitting them), and would then place the bottles on a counter. Before serving these specific bottles to the customers, he grabbed a bottle in each hand. However, the bottle in his right hand unexpectedly exploded. Pieces of glass from the explosion blinded him.

The case was brought to the court in the following year. The soft drink manufacturer presented its manufacturing process to the court. To this end, it claimed that the process was safe and was certified by the government (and in accordance with international standards). However, the court was of the view that there were defects in the manufacturing process - i.e., the manufacturer's quality checks were insufficient (even though the manufacturer complied with several standards). The product was therefore deemed to be an

unsafe product due to this defect.

The court ordered the soft drink manufacturer to pay compensation of THB 1.41 million (approximately USD 44,000), with interest at the rate of 7.5 percent per year, plus THB 900,000 (approximately USD 28,000) as compensation for the claimant's work disability.

This case provides confirmation that compliance with governmental standards (or any other international standards) is not in itself sufficient to claim that a manufacturing process is without defect, and therefore that the product of that manufacturing process is safe.

Car manufacturer case

In 2017, the first class action case in Thailand was filed before the courts. This case was between a large number of car users and a car manufacturer group (the Manufacturer). Many car users found that their city-model cars, manufactured and assembled by the Manufacturer, were defective and had various problems. For instance, certain cars shook due to issues with the gear and clutch system, suffered from overheating caused by a defective radiator system, or had various other issues with the steering system, engine belt, shock absorber system, etc. Some of the car users decided to complain, individually, about these defects to the Office of the Consumer Protection Board (the OCPB), a consumer advocate government agency that has authority to protect consumer rights, but those complaints made no progress.

The damages were widely and publicly discussed; 308 car users assembled and filed the country's first product liability class action before the court for consumer protection. The car users complained that the cars bought from the Manufacturer were defective, did not meet appropriate standards, and were not in accordance with their advertisements (as discussed above); and claimed for compensation under the Product Liability Law. In the end, the court, however, decided that the cars in question did not fall under the Product Liability Law because the gears (and other relevant systems) did not have any defects in the manufacturing process, but the court was still of the view that these cars did not meet appropriate standards and were not in accordance with the Manufacturer's advertisements. Therefore, the court ordered the Manufacturer to compensate the car users for around THB 24 million (approximately USD 750,000) in total.

Even though the court decided that the cars in this case did not fall under the Product Liability Law, this case was a significant one and it drew the public's attention to the Product Liability Law and class action lawsuits.

Cosmetics manufacturer case

Another recent class action was initiated by a group of consumers who had used a whitening cream against a cosmetic manufacturer (the Cosmetic Manufacturer). The Cosmetic Manufacturer advertised that its whitening cream would help whiten skin and that its products are safe; with these advertisements, the injured consumers bought and used the whitening cream manufactured by the Cosmetic Manufacturer. Unfortunately, the consumers suffered from rashes, pruritus, causalgia, skin fractures, and lesions caused by a prohibited steroid substance in the whitening cream. These symptoms are not curable, and they caused not only physical injuries but also mental ones. The injured parties gathered and filed a class action suit against the Cosmetic Manufacturer. The court ultimately decided that the whitening cream in this case was an unsafe product under the Product Liability Law and ordered the Cosmetic Manufacturer to compensate the injured consumers for more than THB 10 million (approximately USD 310,000) in total.

The significance of this whitening cream case is that it is one of the first cases in which the court has ordered punitive damages. According to the judgment, the Cosmetic Manufacturer knew that the prohibited steroid substance used in the whitening cream was unsafe, but the Cosmetic Manufacturer still unfairly used it. The court was therefore of the view that the Cosmetic Manufacturer willingly exploited consumers and consequently ordered punitive damages of THB 200,000 (approximately USD 6,000). The amount of punitive damages in this case might not be large compared to the total compensation, but it was an important warning and example for other business operators to act responsibly with regard to their products.

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

The initial steps include gathering facts, conducting internal investigation, reviewing R&D and production lines, and consulting with relevant persons and/or legal team.

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

As there are specific laws governing product liability for unsafe products, generally, courts should therefore have the ability to deal with complex cases. Cases are heard

by judges.

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

Class actions are available in product liability cases and have started to be used in practice, per the notable cases given in question 17. To file a class action suit, the plaintiffs must have the same legal claims arising from the same facts and legal grounds, and must have the specific condition of being of the same group.

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

There is no prohibition or requirement regarding funding of cases, including third-party funding. With regard to the charging of success fee by lawyers, there are currently no express legal prohibition against this practice. However, it should be noted that based on court precedents, charging success fees, including by way of charging a percentage of the award, charging extra amount upon winning, etc., is considered to be against public order and good morals.

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

Under the Consumer Case Procedure Act, the court fees will generally be exempted for the consumer (or the legal representative of the consumer). The OCPB (as well as associations or foundations that have been certified by the OCPB) also has the authority to bring a claim on behalf of the consumer. These factors could influence consumers to make product liability claims.

Notwithstanding the above and the fact that it has been over a decade since the introduction of the Product Liability Law and the Consumer Case Procedure Act, B.E. 2551 (2008), we have still seen only a limited number of cases involving product liability claims in Thailand.

Nevertheless, more recent cases (including those discussed above) suggest that Thai consumers and the relevant consumer-advocate organisations are more

sophisticated, and keen to seek the remedies available under this specific law as well as to demand greater responsibility from the manufacturers or relevant business operators. From this development, it is possible that cases involving product liability claims in Thailand will increase, even if slowly, in the future.

23. 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?

There are no likely future developments in product liability law and practice that we are aware of. However, as technology advances, the interpretation and application of the law may need to be adapted to suit the current situation.

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

There have been no recent significant developments in Thailand's product liability landscape, specifically in terms of changes (or potential changes) to the actual laws related to such matters.

However, it is worth noting that the awareness of the public in general - with regard to their rights and possible claims they can make in the event that any products received are not in line with advertisements or claims that appear on product labels or inserts - has increased. While there have not been many cases going before courts that have reached all the way to the Supreme Court, and which have therefore led to new precedents, there are many cases in the realm of consumer products that have been highlighted in the media, both traditional media (such as TV and newspaper) and social media. This type of development does not create significant changes in term of legal consumer protection or precedents interpreting terms in the Product Liability Law, such as "design defects" or "warning defects". These developments have, however, certainly created public awareness about the rights and protections consumers have and, more importantly, about importers' and manufacturers' responsibilities for their products and to the public.

Contributors

Yuthana Sivaraks
Partner

yuthana.sivaraks@bakermckenzie.com



Napatorn Dasananjali
Termglinchan
Senior Associate

napatorn.termglinchan@bakermckenzie.com



Haruthai Chaisanee
Associate

haruthai.chaisanee@bakermckenzie.com



Pongtorn Jittapiniymas
Associate

pongtorn.jittapiniymas@bakermckenzie.com

