

Thailand's New 'Product Liability Act'

Introduction

The Thai legal system is a civil law system largely influenced by the legal traditions in continental Europe, especially Germany and Switzerland and in addition also by the Japanese legal system. One of the four basic codes of Thailand, the Civil and Commercial Code ('CCC') is the most significant law governing the civil and commercial relationships of its people. Until recently there was no general product liability law in Thailand and the main source of Thailand's product liability were the provisions on contracts and tort in the CCC and the Consumer Protection Act B.E. 2522 (1979). Section 420 of the CCC requires a person to compensate an injured party when they unlawfully injure the life, body, health or property of another person through a wilful or negligent act. In addition, there also exist statutes regulating product liability with regard to specific areas such as food, drugs, cosmetics etc. The focus of these statutes has been to control the manufacturers and provide certain safety standards, but there has been no emphasis on enabling consumers to seek redress and compensation for any product defects. The existing laws offer only limited recourse to injured persons. In particular, a consumer's ability to claim compensation under the CCC has been restricted by the need to prove the manufacturer had acted wilfully or negligently. This is rather difficult to accomplish in practice as often it involves sophisticated technical questions beyond the abilities of consumers.

Many unsuccessful attempts have been made by various Thai governments to introduce general product legislation. With surprisingly little notice to the general public in Thailand a new product liability act, the Unsafe Goods Liability Act B.E. 2551 (2008) ('the Act') was approved by the Thai Legislative Assembly in December 2007 and published in the *Law Gazette* on 20 February 2008. The new

Act comes into force on 20 February 2009.

The main feature of the Act is the increased consumer protection with respect to damages arising from defective products, by the imposition of strict liability for anyone involved in the production and sale of the products.

Unsafe Products Under the Act

The Act defines 'products'² rather broadly as movable properties of all kinds that are produced or imported for sale, including agricultural products as well as electric current, except products exempted under the relevant Ministerial Regulations.

Unsafe goods/strict Liability for business operators

The Act defines as 'unsafe goods'³ such products that cause or may cause injury as a result of defective manufacturing or because directions of use have not been properly labelled or they are incorrect or unclear. The injured person can then bring a suit under the Act against such persons that the Act introduces in s 41 under the general concept of the 'business operator'.

The circle of persons who qualify as 'operators' under the Act is very broad and includes the producer, outsourcer and even the importer of the defective product. It also includes a person using the product's trade name, trademark, logo, wording or showing by any means that he is the producer, an outsourcer or an importer (s 4). A seller who cannot identify the manufacturer, outsourcer or importer, or a person who uses a trade name, trademark or logo, in such a manner that consumers consider him the producer, outsourcer or importer, will also be held

liable to the same extent as the manufacturer of the product. The operator will be liable, regardless of negligence in manufacturing or selling on his part.

The Act imposes strict liability on a business operator involved in the manufacture and sale of a defective product which causes harm to a user. The novel feature is that the manufacturer will be held liable for the defects of the products, regardless whether the manufacturer was negligent in making the defective product. I.e. the manufacturer will not be excused even if he can show that reasonable care has been exercised in making and selling the product.

In addition, several parties (eg, producer and importer) will be held jointly liable to the injured party (s 54), irrespective of whether or not the injury occurs from deliberate action or actions amounting to negligence.

Defects covered by the act

The Act basically refers to three kinds of defects, namely:

- 1 Manufacturing defects;
- 2 Design defects; and
- 3 Warning defects (s 4).

Manufacturing defects occur where a product deviates from its intended design or specifications, while design defects are present when the product design itself renders the product dangerous or unsafe for its intended use. Warning defects refer to situations where directions for use or storage, warnings, or information about the product are not provided or are provided but not reasonably, properly or clearly, taking into consideration the nature of the product, as well as the ordinary usage and storage that may be expected of the product.

Concept of Strict Liability

Under the newly introduced strict liability rule (s 6), it is sufficient for an injured user to prove that he was injured or suffered damages from the operator's defective product while using the product in the way it was intended. Therefore the injured person does not have to establish any more that the damage is the result of an act of any particular operator involved. It is important to note that product liability cannot be waived or limited by way of contract or by any waiver or limitation of liability statement given by the operator (s 9).

Operators' Defences Against a Product Liability Claim

The Act expressly states that an operator will not be held liable if:

1. the operator can prove that the product is not defective;
2. that the injured party was already aware that it was defective but used it anyway; or
3. that the damage was due to improper use or storage, which was not in accordance with the directions on usage, warnings or information about the product that the operator correctly, clearly and reasonably provided.

Furthermore the Act provides defences for producers of custom-made products and component producers, who generally will not be liable for the damage to consumers if they can prove that the defect is due to the specifications or design of the final product provided to them by the outsourcer or producer; ie, that there was no manufacturing defect on their part and that they did not expect or should not have expected that the product would be defective.

Damages under the Product Liability Act

While awards of damages by the Thai courts have generally been on the lower side by international standards, the new Act does not impose any limit upon them. The damages under the new Act are significantly broader than the previous product liability law in Thai land (s 4 'damages').

Under s 11 of the Act, claimable damages consist of two components:

1. Damages for wrongful acts as provided under the Thai Civil and Commercial Code; and
2. Two additional categories of damages also available under the Act, ie, in addition to the damages available under the Thai Civil and Commercial Code, the court may also award compensation for mental damages such as anguish, agony, grief, humiliation and add on punitive damages.

However punitive damages will be awarded only if it can be shown that the operator produced, imported or sold the product despite being aware that it was defective or was unaware that the product was defective due to gross negligence, or became aware of its defect after production, importation or sale but failed to take proper action to prevent such damage, such as by failing to act in recalling the defective product. Punitive damages are limited to twice the amount of the actual damages. Furthermore, if the injured party dies, the husband, wife or heirs of the deceased are entitled to damages for mental injury.

The provisions of the Act shall not prejudice the right of the injured party to claim for damages under any other laws.

Who Can File a Claim

Under the Act, any person who is injured from using an unsafe product can file a suit. The Consumer Protection Committee and any association certified by the said Committee pursuant to Thailand's Consumer Protection Act are entitled to file lawsuits on behalf of the injured persons.

Statute of Limitations

The injured party has three years to seek compensation. This period begins on the date the injured party becomes aware or should reasonably have become aware of the injury and could identify the business operator, but shall not exceed ten years from the date of the sale of the products.⁵

Additional Legislation to Enhance Effects of the Act

The Act's enforcement is made more efficient through the recently enacted Consumer Case Procedure Act B.E. 2551 (2008) ('CCP') that became effective on 23 August 2008. The CCP seeks to simplify the procedures and reduce the cost for consumers wishing to file a suit against business operators by eliminating filing fees and costs during the preliminary phase of litigation. This process is further simplified in that complaints may be filed by interested third parties, such as the Consumer Protection board or associations acting on behalf of their members. Also under the CCP the consumer needs only to prove the fact of injury or damage. It is not necessary to prove fault or negligence on the business operator's part.

The ambit of the CCP is broader than the Act, because it covers all matters arising from consumption of products, services in the field of banking, medical, hotel, accounting, insurance etc.

Consequences from the Act

The implications of the Act could be serious and ought to be attracting attention from anyone with a possible product exposure in Thailand. The Act has the potential to alter radically the low-risk legal environment in which business operators have been accustomed to operate in Thai land. The Act will significantly broaden the scope of liability of operators and make it easier for consumers to bring liability claims under the concept of strict liability. In addition the amounts awarded under the Act are also likely to considerably increase (actual damages plus punitive damages). Further, due to the fact that not only injured consumers can commence suits under the Act, but also the Consumer Protection Board (s 10), an increase in product liability lawsuits may be expected.

A number of issues in the new Act, however, are less than clear:

1. Many product liability laws of other jurisdictions allow a defense that at the time a product was manufactured, it corresponded to the state of the art at that time. The Thai Act, however,

does not allow such a defense and it remains to be seen how Thai courts will handle this issue.

- 2 Another aspect that is not clear is what effect it has when a product has received government approval prior to being marketed. Maya product then still be considered as unsafe despite the government approval?
- 3 Unlike in other jurisdictions, the Act also does not contain any definitions of various crucial terms, ie what exactly constitutes a manufacturing defect, a design defect or an instructions/warning defect.

Conclusion

In view of the new Act it is recommended that manufacturers review and reevaluate production and quality control processes, product designs, packaging and product usage instructions. In addition, it should be ensured that any warning

information is clear and comprehensive and includes a notice of all potential risks involved in the use of the product in order to provide consumers with reasonable notice. Manufacturers and importers should pay special attention to appropriate product warning labels that should be in Thai. Given the strict liability rule, business operators who distribute their products to licensees, retailers or resellers should also assess if these companies are doing anything that would expose them to a suit under the Act. If so, these business operators should review their agreements with these companies to determine if these agreements have to be revised to incorporate the necessary protections and preventive measures. Retailers should make sure that they clearly identify the manufacturers or importers of all the goods they sell. If they can identify the manufacturer or importer they will be able to avoid liability, unless some conduct on their part has caused or

contributed to the injury. In view of the increased risks and higher damages to be awarded under the Act, it may also be advisable for companies engaged in business transactions in Thailand to review their existing product liability insurance policies.

Dr Andreas Respondek⁷
Respondek & Fan, Bangkok
E-mail: respondek@rfllegal.com

Notes

- 1 An English translation of the Act can be found at <http://www.Thailawforum.com/database1/Thailand-Product-Liability-Act.html>
- 2 Section 4 of the Act: 'Product' means all assets produced or imported for sale, including agricultural products and electricity, the exception being products proscribed in the Ministerial Regulations.
- 3 Section 4 of the Act: 'Unsafe product' means products that cause or may cause damage, regardless of whether it was caused by negligence during the production process or the design process. No guidelines being given for storage, or warning, or information related to the product,

or guidelines being given but in an incorrect manner or vaguely so as to be improper when considering the condition of the product, including the normal method of use and storage for the product.

- 4 Section 5 of the Act: 'All entrepreneurs shall be jointly liable for damages occurring to the damaged party from an unsafe product sold to the consumer. This shall apply to intentional damages or damages arising from the negligence of the entrepreneurs'.
- 5 Section 6 of the Act: 'For the entrepreneurs to be liable according to s 5, the damaged party or his prosecuting representative, based on s 10, shall prove that the damaged party sustained damages from the product of the entrepreneurs, and the use or storage of the product was done in a normal manner. However, evidence shall not be required to the effect that the damages occurred from the Action of a particular entrepreneur'.

6 Section 12 of the Act: 'The right to demand compensation arising from unsafe products according to this Act will expire after three years counting from the date the damaged party became aware of the damages and became aware of the entrepreneurs responsible, or after 10 years counting from the date the product was sold'.

⁷ Rechtsanwalt (0), Attorney At Law (USA), Chartered Arbitrator (FCI Arb)