



Product Liability

in 31 jurisdictions worldwide

Contributing editors: Harvey L Kaplan,
Gregory L Fowler and Simon Castley

2013



Published by
Getting the Deal Through
in association with:

Ajumogobia & Okeke
Anderson Mōri & Tomotsune
Araque Reyna Sosa Viso & Asociados
Boyantov & Co
Bühlmann Attorneys at Law Ltd
CBM International Lawyers LLP
Čechová & Partners
Clayton Utz
Cliffe Dekker Hofmeyr
DWF Fishburns Solicitors
EBA Endrös-Baum Associés
Ersoy Law Office
Formosa Transnational Attorneys at Law
Gianni, Origoni, Grippo, Cappelli & Partners
Gorrissen Federspiel
I.L.A. Pasrich & Company
Jones Day
Londoño & Arango Abogados
Mayora & Mayora, SC
Noerr LLP
Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera SC
Rojs, Peljhan, Prelesnik & Partners
Shin & Kim
Shook, Hardy & Bacon LLP
Smith & Partners
Souto, Correa, Cesa, Lummertz & Amaral Advogados
Stikeman Elliott LLP
Tilleke & Gibbins
Yigal Arnon & Co

Product Liability 2013

Contributing editor

Harvey L Kaplan, Gregory L Fowler and Simon Castley
Shook, Hardy & Bacon LLP

Publisher

Gideon Robertson

Business development managers

Alan Lee
George Ingledew
Dan White

Account manager

Megan Friedman and Zosia Demkowicz

Trainee account managers

Cady Atkinson
Joseph Rush
Dominique Destrée

Media coordinator

Parween Bains

Administrative coordinator

Sophie Hickey

Trainee research coordinator

Robin Synnot

Marketing manager (subscriptions)

Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production

Adam Myers

Production coordinator

Lydia Geroges

Senior production editor

Jonathan Cowie

Subeditors

Timothy Beaver
Charlotte Stretch

Director

Callum Campbell

Managing director

Richard Davey

Product Liability 2013

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2013

No photocopying: copyright licences do not apply.

First published 2008
Sixth edition

ISSN 1757-0786

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2013, be advised that this is a developing area.

Printed and distributed by Encompass
Print Solutions
Tel: 0844 2480 112

Global Overview Harvey L Kaplan <i>Shook, Hardy & Bacon LLP</i>	3
Australia Colin Loveday <i>Clayton Utz</i>	4
Brazil Jorge Cesa, Roberta Feiten and Fernanda Girardi <i>Souto, Correa, Cesa, Lummertz & Amaral Advogados</i>	11
Bulgaria Kina Chuturkova and Stela Sabeva <i>Boyanov & Co</i>	17
Canada Douglas Harrison, Yves Martineau and Samaneh Hosseini <i>Stikeman Elliott LLP</i>	24
China Terence Lee and Karrie Cheung <i>Smith & Partners in affiliation with CBM International Lawyers LLP</i>	32
Colombia Maximiliano Londoño, Daniel Arango, Paulina Vélez and Natalia Tobón <i>Londoño & Arango Abogados</i>	38
Denmark Søren Stæhr and Christian Holm Madsen <i>Gorriksen Federspiel</i>	43
England & Wales Simon Castley and Jon Hudson <i>Shook, Hardy & Bacon International LLP</i>	49
France Florian Endrös <i>EBA Endrös-Baum Associés</i>	55
Germany Jörg Staudenmayer and Daniel Schulz <i>CBM International Lawyers LLP</i>	63
Guatemala María de la Concepción Villeda W <i>Mayora & Mayora, SC</i>	69
Hong Kong Terence Lee and Karrie Cheung <i>Smith & Partners in affiliation with CBM International Lawyers LLP</i>	75
India Amir Singh Pasrich, Paritosh Chauhan and Vinita Chhatwal <i>I.L.A. Pasrich & Company</i>	81
Ireland Aoife Gaughan <i>DWF Fishburns Solicitors</i>	90
Israel Barak Tal and Ruth Loven <i>Yigal Arnon & Co</i>	97
Italy Barbara Ferraris and Michela Turra <i>Gianni, Orioni, Grippo, Cappelli & Partners</i>	103
Japan Tetsuro Motoyoshi and Ryohei Ikeda <i>Anderson Mōri & Tomotsune</i>	110
Korea Ghyo-Sun Park, Gea Sung Yang and Bo Kyung Lim <i>Shin & Kim</i>	117
Mexico Ricardo Ríos Ferrer, David Guillén Llarena and Juan Pablo Patiño <i>Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera SC</i>	124
Nigeria Babatunde A Sodipo <i>Ajumogobia & Okeke</i>	129
Russia Sergei Volfson <i>Jones Day</i>	136
Slovakia Peter Bollardt and Tomas Rybar <i>Čechová & Partners</i>	140
Slovenia David Premelj, Sabina Novak and Jakob Ivančič <i>Rojs, Peljhan, Prelesnik & Partners</i>	144
South Africa Pieter Conradie <i>Cliffe Dekker Hofmeyr</i>	150
Switzerland Lukas Bühlmann and Adrian Süess <i>Bühlmann Attorneys at Law Ltd</i>	155
Taiwan Jackson Shuai-Sheng Huang <i>Formosa Transnational Attorneys at Law</i>	161
Thailand Michael Ramirez <i>Tilleke & Gibbins</i>	167
Turkey Yüksel Ersoy <i>Ersoy Law Office</i>	173
Ukraine Mansur Pour Rafsendjani and Volodymyr Yakubovskyy <i>Noerr LLP</i>	182
United States Gregory L Fowler and Marc E Shelley <i>Shook, Hardy & Bacon LLP</i>	187
Venezuela Pedro Ignacio Sosa Mendoza, Rodrigo Moncho Stefani and Nizar El Fakih <i>Araque Reyna Sosa Viso & Asociados</i>	195

Israel

Barak Tal and Ruth Loven

Yigal Arnon & Co

Civil litigation system

1 The court system

What is the structure of the civil court system?

Israel has a general court system and a number of specialised courts. The general court system is comprised of three instances: magistrates' courts, the district courts, and the Supreme Court. The Supreme Court is the highest court of appeal (and sits as well as a high court of justice having the original jurisdiction to adjudicate administrative matters as well as challenges to government action that are not under the jurisdiction of any other court or tribunal). Special courts, such as the labour courts and family courts have special jurisdiction in relevant limited areas.

In civil matters the district courts have residual jurisdiction over matters which do not fall within the jurisdiction of the magistrates' courts (the jurisdiction of magistrates' courts in civil matters generally depends upon the monetary value of the claim, which to date is up to a maximum of 2.5 million shekels), and general residual jurisdiction to hear any matter that is not under the exclusive jurisdiction of any other court or tribunal. District courts also serve as courts of appeal over the magistrates' courts.

2 Judges and juries

What is the role of the judge in civil proceedings and what is the role of the jury?

Juries are not used in the Israeli legal system. All questions of fact and law are determined by professional judges. The court system is adversarial, not inquisitorial. The judge's role is to determine the facts and apply the relevant law, not to investigate.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

A civil action is instituted by filing a statement of claim by the plaintiff. The defendant is required to file a statement of defence within 30 days of the date of service of the statement of claim (or a longer period if approved upon application to the court). The plaintiff is allowed (but not necessarily required) to file a statement of reply within 15 days thereafter (or a longer period if approved by the court).

There are additional procedures for instituting a civil action but in most cases those are inapplicable for product liability actions. In addition, the procedure for instituting a class action (including with respect to product liability cases) is different than that outlined above (see question 7).

4 Pre-filing requirements

Are there any pre-filing requirements that must be satisfied before a formal lawsuit may be commenced by the product liability claimant?

There are no pre-filing requirements. In some cases mandatory mediation is applicable after the filing of the action.

5 Summary dispositions

Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Under Israeli procedure there is one type of a dispositive motion: a motion to dismiss in limine (there is no tool similar to a US motion for summary judgment). In general, a motion to dismiss may be granted if the plaintiff is not entitled to the relief sought as a matter of law, assuming that all facts asserted in the claim are true and correct.

6 Trials

What is the basic trial structure?

The trial is not necessarily confined to one concentrated period of time or consecutive days and may consist of a series of sessions taking place over a period of several weeks or even months (the absence of a jury makes this possible). Testimony of experts is filed in written form and in most cases the court will order the parties to submit the testimony of their witnesses in affidavit form as well. The affiants and experts are then subject to live cross-examination before the court at the scheduled evidentiary hearings, as well as redirect examination. The cross-examination and redirect examination are performed by the parties' respective attorneys, and the judge's role is adversarial, namely the judge observes the cross-examination and redirect examination and rules on objections of the parties' attorneys (although the judge may pose his or her own questions to the witnesses and experts).

The Basic Law: The Judiciary provides for inter alia the public nature of the trial, unless otherwise provided by law or unless the court directs otherwise under law. There are certain limited cases in which the court may rule that the trial or a part thereof is held behind closed doors but those are generally inapplicable for product liability actions.

7 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

The Class Actions Law 2006 (Class Actions Law) allows for the filing and adjudication of class actions, and defines a class action as 'an action managed in the name of a class of people, who have not empowered the class plaintiff for this purpose, and which raises material questions of fact or law that are shared by all members of the class'. The filing of a class action is subject to the court's

approval and discretion, and is subject to meeting several conditions:

- the action must raise material questions of fact or law that are shared by all members of the class;
- there must be a reasonable possibility that those legal or factual questions will be decided in favour of the class;
- a class action must be the efficient and fair way of resolving the dispute under the circumstances of the case; and
- there must be a reasonable basis to assume that the interest of all members of the class will be represented and managed properly and in good faith.

These requirements are examined by the court in the scope of a preliminary motion to approve the action as a class action (motion for class certification).

The Class Actions Law sets forth a closed list of issues and subjects with respect to which a class action may be filed, some of which may be applicable to product liability actions, for example a claim against a 'dealer' (as defined in the Consumer Protection Law, 1982: a person selling products or providing services by way of occupation, including a manufacturer) in regard to a matter between it and a client.

The following may bring a class action in the name of the class:

- (i) a person possessing a personal cause of action that raises material questions of fact or law that are shared by all members of the class;
- (ii) a public authority with respect to a claim in the scope of one of its public goals, that raises material questions of fact or law that are shared by all members of the class; and
- (iii) an organisation (typically a non-governmental organisation) with respect to a claim in the scope of one of its public goals, that raises material questions of fact or law that are shared by all members of the class, and in the event of an organisation other than the Israeli Consumer Council, provided that under the circumstances there would be a difficulty in filing the action by a person possessing a cause of action as per point (i).

As part of adjudicating the motion for class certification, the court examines whether the action raises material questions of fact or law which are shared by all members of the class, and whether there is a reasonable possibility that they will be decided in favour of the class. Consequently, at this preliminary stage, the court examines the alleged cause of action on its merits with respect to both legal and factual aspects.

In its decision certifying the class, the court is required to define the class in whose name the class action will be managed, including sub-classes. The Class Actions Law provides for an 'opt-out' mechanism, namely, any person or entity that falls under that definition becomes a member of the class, unless they provide a withdrawal notice within the time frame provided for by the court. The court is allowed, under special circumstances, to apply an 'opt-in' mechanism.

8 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

The duration for adjudicating a product liability action depends on its complexity, for example whether jurisdictional issues arise (eg, where foreign entities have been sued); whether there are complex discovery proceedings; the complexity of expert testimonies; and other factors. An individual action (as opposed to a class action) usually takes over a year to get to trial and in some case several years. As stated above, the trial is not necessarily confined to one concentrated period of time or consecutive days and may consist of a series of sessions taking place over a period of several weeks, and in some cases several months.

Evidentiary issues and damages

9 Pretrial discovery and disclosure

What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

The Israeli Rules of Civil Procedure provide a number of pretrial discovery devices that enable disclosure of information among the adverse parties to a lawsuit. These include interrogatories, and disclosure and inspection of documents. Unlike the US system, however, there is no provision for conducting pretrial depositions.

10 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

Testimony of experts is filed in written form. In most cases the court will order the parties to submit the testimony of their witnesses in affidavit form as well. The affiants and experts are then subject to live cross-examination before the court at the scheduled evidentiary hearings, as well as redirect examination.

11 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

The parties are allowed to file expert testimony on their behalf. The court may also appoint experts, after providing the parties an opportunity to present their position. Expert testimony is filed in written form.

The Israeli Rules of Civil Procedure provide that in the event the court appoints an expert and the parties have also filed expert testimony on their behalf with respect to the same matter, the parties' experts shall not be cross-examined, unless requested by a party and in such case they shall be cross examined in a manner and scope determined by the court in accordance with the circumstances of the case, and in view of the opinion of the court-appointed expert and his or her testimony.

In the event that a court-appointed expert was appointed with the consent of the parties, such consent constitutes a procedural stipulation providing as follows (unless otherwise directed by the court):

- the parties shall not file expert testimony on their behalf; and
- expert testimony filed by the parties prior to the appointment of the court-appointed expert shall be deemed as if not filed as evidence.

The parties may stipulate not to cross-examine the court-appointed expert, whether or not the expert was appointed with their consent, and in the event they do so, the court-appointed expert shall not be cross-examined unless the court finds that it is required for adjudicating the dispute.

12 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

Under Israeli law product liability may arise under several areas of law, including liability under tort, contractual liability, the Consumer Protection Law, 1981 (Consumer Protection Law) and the Defective Products Liability Law, 1980 (Defective Products Law).

The Defective Products Law applies only to bodily injuries and does not extend to indirect, consequential, or pure economic damages.

The Torts Ordinance [New Version] (Torts Ordinance) provides that the injured party is entitled to compensation for damages that

may be caused in the natural and regular course of events and that were directly caused by the tort. The term 'damage' is defined in the Torts Ordinance in a wide manner and includes loss of life, assets, comfort, physical welfare or reputation. This definition includes both direct and indirect damages as well as pure economic damages. The remedies provided for under the Torts Ordinance are applicable to the Consumer Protection Law as well.

The remedies for breach of contract cover damages that were caused as a result of the breach and which the defaulting party foresaw or should have foreseen as a probable outcome of the breach. The term 'damage' is defined in the Contracts (Remedies for Breach of Contract) Law, 1970 (Remedies Law) to include loss of profits. This definition includes both direct and indirect damages as well as pure economic damages.

The Defective Products Law provides that for purposes of calculating loss of earnings and loss of earning ability, the court may not take into account a level of earnings higher than three times the average earnings in Israel. The damages for pain and suffering pursuant to this law are limited. The remaining bases of claim generally do not provide for a maximum amount of liability.

13 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

In general, the Israeli courts do not award punitive, exemplary, moral or other non-compensatory damages (although some case law provides that they are authorised to do so).

Litigation funding, fees and costs

14 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

State legal aid is available pursuant to the Legal Aid Law, 1972. The eligibility for legal aid depends on the applicant's economic resources, including income and property, pursuant to criteria set forth in regulations enacted pursuant to the Law.

In addition, in 2002 the Israeli Bar Association established a pro bono programme to complement the Legal Aid Law. In 2009, the Israeli Bar Association Law, 1961 was amended to include a section which provides that one of the functions of the Israeli Bar Association is to provide legal aid to those of limited means who are not eligible for state legal aid pursuant to law.

With respect to class actions, the Class Actions Law established a statutory fund for financing class actions aimed at assisting plaintiffs in bringing class actions of public or social interest. In addition, consumer organisations assist in some cases in bringing class actions relating to consumer rights.

15 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party litigation funding is permissible and there are generally no limitations or restrictions with respect thereto. In general, third-party funding of class actions is required to be disclosed to the court.

16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Contingency or conditional fee arrangements are permissible in civil cases and there are generally no limitations or restrictions with respect thereto.

17 'Loser pays' rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

As a general rule, a losing party will be required to pay costs and attorneys' fees to the prevailing party, in amounts subject to the court's discretion.

Sources of law

18 Product liability statutes

Is there a statute that governs product liability litigation?

The Defective Products Law provides a non-exclusive cause of action, and imposes strict liability on manufacturers (as defined therein) to compensate consumers who suffered bodily injury as a result of using the manufacturers' defective products. The main purpose of this law is to protect consumers and facilitate their claims for bodily injury by exempting them from proving any fault or negligent act on the manufacturers' part.

In order to base a claim on this law, the injured party only needs to prove that the product was defective and that he or she sustained bodily injury as a result of the defect. The law provides the manufacturer with a few limited defences:

- the defect was created when the product was no longer under the manufacturer's control (in which case it is presumed that the injury was caused by a defect that was created after the product was no longer under the manufacturer's control, if the manufacturer proves that the specific product was tested by reasonable safety tests before it left its control);
- a 'state-of-the-art' defence, where pursuant to the available scientific and technological knowledge available when the product left the manufacturer's control, it could not have known that the design of the product did not comply with reasonable safety standards;
- the product was released beyond the control of the manufacturer contrary to its desire and the manufacturer took reasonable measures to prevent such release and to warn the public; and
- assumption of risk – the injured party was aware of the defect and the risk involved and voluntarily assumed such risk (the last defence is not applicable to an injured party younger than 12 years).

19 Traditional theories of liability

What other theories of liability are available to product liability claimants?

Under Israeli law product liability may arise under theories of both tort and contract.

The two most relevant torts for product liability cases are negligence and breach of statutory duty. The tort of negligence pursuant to the Torts Ordinance imposes liability on any person or entity that performed a negligent act or omission that caused damage to any person or entity towards which the former owes a duty of care. This tort is general in nature and it may be applied in various circumstances and relationships. Thus, this tort is shaped by the courts based on proper legal policy considerations, determining inter alia in which circumstances a duty of care between the opposing parties exist, and the acts or omissions which constitute negligence.

The tort of breach of statutory duty may also be applicable in product liability cases. It imposes liability on any person or entity that breached a statutory duty imposed on it (excluding the duties imposed by the Torts Ordinance itself), which is intended for the benefit or protection of another person, and the breach caused that person damage of the nature intended to be prevented by that statute, unless that statute intended to exclude the remedy provided for by the Torts Ordinance. This tort is also general in nature and may be applied in various circumstances and relationships and with respect to various statutory duties. Like the tort of negligence, this tort is shaped by the courts based on proper legal policy considerations,

determining inter alia which statutory duties are intended for the benefit or protection of the injured party

In contract, the breaching party is obliged inter alia to compensate the injured party for damages he or she sustained as a result of the breach, as detailed above.

The Sale Law, 1968 (Sale Law), and the Sale Law (International Sale of Goods), 1999 (International Sale Law) may also be applicable. The Sale Law governs the sale of goods (as well as the sale of lands and rights), and applies in the absence of legislation that applies to the specific issue at hand and in the absence of contrary intent apparent from the contract between the parties. This law sets out the obligations of the parties to a sale contract and specific remedies for breach of such obligations (in addition to the remedies provided for in the Remedies Law). This law provides, for example, that the seller breached its obligations if he or she delivered goods that are not of the quality or type required for their regular or commercial use or specific purpose apparent from the contract.

The International Sale Law implements the provisions of the United Nations Convention on Contracts for the International Sale of Goods, 1980 (Convention). This law governs contracts for the sale of goods between parties whose principle places of business are not in the same country, including contracts with a party whose principle place of business is in a country that is not a party to the Convention. This law does not apply to goods that were purchased for personal, family or domestic use and does not apply to the liability of the seller for death or bodily injury to any person that was caused by the goods. This law is therefore applicable with respect to the internal relationship between the entities in the chain of distribution and supply of the product, and is also applicable in certain circumstances to product liability cases. This law is dispositive in nature and the parties may agree that it or any of its provisions will not apply to the contract between them.

20 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The Consumer Protection Law imposes various obligations on dealers of products and services (including manufacturers) toward consumers that purchase their products for personal, family or domestic use such as a prohibition on misrepresentation, duties of disclosure, duties concerning product labelling and other various duties and prohibitions. The Consumer Protection Law provides that violation of certain of the prohibitions and duties imposed by it, including the prohibition on misrepresentation and duties of disclosure, constitute a tort pursuant to the Torts Ordinance (as well as a criminal offence). The Consumer Protection Law is also applicable in certain circumstances to product liability cases, particularly with respect to cases involving alleged misrepresentation or violation of duties of disclosure.

21 Criminal law

Can criminal sanctions be imposed for the sale or distribution of defective products?

There are several avenues for imposing criminal sanctions for the sale or distribution of defective products. The violation of the Consumer Protection Law may constitute a criminal offence. In addition, the sale or distribution of defective products which resulted in bodily injury may be subject to several potential offences, including wrongful death.

22 Novel theories

Are any novel theories available or emerging for product liability claimants?

In one of the most interesting product liability cases in Israel, it was discovered in 1995 that an Israeli manufacturer of various food prod-

ucts added silicone (dimethylpolysiloxane) to its low-fat long-life milk product in order to prevent its foaming, in violation of official standards and in contradiction of certain statements it made. There was no question that the addition of this substance did not pose a threat to the well-being of the consumers. The manufacturer and certain of its officers were convicted of violation of an official standard and misrepresentation pursuant to the Consumer's Protection Law. A motion for certification of a class action was filed and the class action was certified and approved in a decision of the Israeli Supreme Court in 2003, for compensation of the class members for injury to their 'autonomy of will'. This was a precedent-making decision that ruled that this type of damage is also covered by the definition of 'damage' in the Torts Ordinance, and is recoverable in a class action.

This decision led to widespread allegations of the above-mentioned type of damage (injury to the consumer's 'autonomy of will') in various cases, such as allegations that the mere non-disclosure of certain information to the consumer constituted injury to the consumer's 'autonomy of will' that should be compensated, since it deprived them of their right of free choice.

In a decision rendered by the Israeli Supreme Court in December 2011, it was ruled that injury to the consumer's 'autonomy of will' is not caused by the mere non-disclosure of certain information to the consumer, other than when actual subjective injury is caused by emotions of anger, frustration, disgust or other negative emotions resulting from the conduct of the defendant. As a result the Supreme Court affirmed in part and reversed in part, ruling that compensation for such injury should be granted only with respect to those consumers who actually suffered such injury (as was deduced from statistical evidence filed by the parties).

23 Product defect

What breaches of duties or other theories can be used to establish product defect?

The Defective Products Law provides that a product is defective if:

- it may cause bodily injury due to a deficiency; or
- warnings or safety instructions were not provided or were inappropriate given the risk involved with the product.

There are no strict limitations or restrictions on the circumstances that may establish a product defect. In general all circumstances that result in the product causing an undesired injury by normal use thereof may establish product defect including deficiencies in design, manufacturing, warning and safety instructions.

24 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

In general, a product causing an undesired injury by normal use may be deemed defective. The plaintiff bears the burden of proving that the product was defective, with the applicable standard of proof being the balance of probabilities (namely, by a higher than 50 per cent probability).

The Defective Products Law provides that a product is presumed to be defective if the circumstances of the case fall more in line with the conclusion that the product was defective than with the conclusion that it was not, thus assisting plaintiffs in meeting this burden in the appropriate cases.

The Torts Ordinance establishes several presumptions with respect to claims based on negligence which shift the burden of proof to the defendant. For example, the defendant bears the burden to prove that there was no negligence on his part if:

- the plaintiff has no knowledge and cannot have any knowledge as to the actual circumstances that led to the event that caused the damage;

- the damage was caused by an asset that was under the full control of the defendant; and
- the court is of the opinion that the event that caused the damage falls more in line with the conclusion that the defendant did not act with reasonable precaution than with the conclusion that he did act with reasonable precaution.

In addition, Israeli law recognises the doctrine of ‘evidentiary damage’. In the appropriate cases the court may decide to shift the burden to the defendant if the defendant by its conduct caused evidentiary harm or damage to the plaintiff.

25 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

In general, all persons and entities in the chain of manufacture, distribution and sale may be found liable for injuries and damages caused by defective products, provided that the elements of a recognised cause of action are met in their case.

The Defective Products Law defines the term ‘manufacturer’ as follows:

- the manufacturer of the product (or any component thereof), including any person or entity that presents itself as the manufacturer of the product (by permitting use of its name or trademark with respect to the product or in any other manner);
- an importer that imported into Israel for commercial purposes a product that was manufactured outside of Israel (or any component thereof); or
- a supplier of a product whose local manufacturer or importer is not labelled on the product.

26 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The Plaintiff bears the burden to prove causation between the defect and injury. Certain doctrines which require a decreased degree of proof have been advanced in some cases, but in general the applicable standard of proof is the balance of probabilities.

The presumption and rules outlined in question 24 may be applicable in certain circumstances to causation as well. See also question 36.

27 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

The Consumer Protection Law and regulations enacted pursuant thereto contain various post-sale duties, mainly with respect to warranty including warranty information, periods and terms; repair of defects; technical service and more.

In addition, in appropriate cases failing to meet certain reasonable post-sale duties may create liability under the tort of negligence, for example the duty to recall or to supplement warnings.

Limitations and defences

28 Limitation periods

What are the applicable limitation periods?

The general statute of limitation period for civil claims is seven years. This period is applicable to claims based on the Torts Ordinance and in contract.

The Torts Ordinance provides that in cases where the cause of action is based on damage caused by an action or omission (such as

the tort of negligence), the limitation period starts to run on the date on which the damage was caused. In cases where the damage was not discovered on the date on which it was caused (a case of concealed damage), the limitation period starts to run on the date on which the damage was discovered, provided, however, that in such case a claim may not be filed after the expiry of 10 years from the date on which the damage was caused. The practical meaning of this provision is that the statute of limitation expires upon the earlier of seven years from the discovery of the damage or 10 years from the causation of the damage.

The statute of limitation period for claims based on the Defective Products Law is three years. A claim under the Defective Products Law may not be filed after the expiry of 10 years from the end of the year during which the product was no longer under the manufacturer’s control. The practical meaning of this provision is that the statute of limitation pursuant to the Defective Products Law expires upon the earlier of three years from the discovery of the damage or 10 years from the end of the year during which the product was no longer under the manufacturer’s control.

29 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

A state-of-the-art defence is explicitly provided for under the Defective Products Law (and may be applicable in other bases for liability, such as the tort of negligence). The defendant bears the burden of proving this defence, and in general the applicable standard of proof is the balance of probabilities.

30 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Compliance with mandatory (or voluntary) standards or requirements does not constitute in and of itself a full defence (and such defence is not provided for in the Defective Products Law). Israeli case law provides that compliance with mandatory (or voluntary) standards or requirements does not preclude the possibility of imposing liability for negligence in appropriate cases.

31 Other defences

What other defences may be available to a product liability defendant?

See question 18 with respect to the defences provided for by the Defective Products Law. In addition, the following defences may be applicable:

- assumption of risk;
- contributory negligence;
- the fault of a third party was the decisive reason for the injury or damage;
- de minimis; and
- where the act or omission constituting the tort was pursuant to the provisions of law and in accordance therewith, or in the scope of lawful authorisation, or in a reasonable and good faith belief in the existence of a lawful authorisation (this last defence is generally inapplicable for negligence).

32 Appeals

What appeals are available to the unsuccessful party in the trial court?

A judgment in a civil action of the first instance is appealable, as of right, to the appellate court. A judgment rendered by the appellate court may be appealed to a higher instance only if leave of court is granted.

Jurisdiction analysis**33 Status of product liability law and development**

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

The various bases under Israeli law for product liability have been in force and effect for many years, including The Defective Products Law which was enacted over 30 years ago. As a result the Israeli legal system and judiciary are familiar with this area of law, and are well equipped to adjudicate product liability cases. Although the population of the state of Israel is relatively small, Israel is a litigious society and Israeli product liability case law is robust.

34 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

The enactment of the Class Actions Law in 2006 has led to a substantial increase in product liability cases. The Class Actions Law now allows the filing of class actions under various circumstances, relationships and causes of action (while prior to the enactment of the Class Actions Law, one could only use several specific laws for the filing of a class action, and such laws permitted the filing of a class action only under specific causes of actions). In general, a class action is typically not applicable to bodily injury claims, however, a court may also grant compensation for other damages resulting from the defective products. The Class Actions Law has also led to a substantial development of substantive case law on consumer rights, duties of disclosure, duty to warn, product labelling, causation and other matters related to class actions.

35 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs?

Israeli law, as well as its legal and judiciary systems are well aware of the need to protect consumer rights. There are various causes of action for imposing product liability; a wide variety of types of damages which can be recovered; the injured party may sue various entities in the chain of manufacture, distribution and sale of the product; particular legislation of consumer rights pursuant to the Consumer Protection Law is broad and extensive; and the statute of limitation is substantially long (in comparison to other western states). In addition, the fact that consumers have easy access to filing class actions has led to increased awareness of consumer rights, increased enforcement thereof and, simultaneously, a dramatic increase in consumer-related litigation. In addition, the ex post threat of a potential class action substantially impacts the considerations and conduct of commercial entities ex ante, thus leading in practice to increased enforcement of consumer rights.

Update and trends

Issues of collection, retention and use of consumer information have recently been the subject of consumer-related cases in Israel, including certain class actions. These issues raise precedential questions relating to consumer privacy in the modern environment.

36 Efforts to expand product liability

Please describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

Over the past few years, lengthy discussions have been held in the case law and within the legal community with respect to the rules of causation under Israeli law, and whether they are currently appropriate to address modern cases of 'vague causation' and mass torts. These discussions stem from the plaintiff's burden to prove causation pursuant to a balance of probabilities standard which is satisfied if the plaintiff proves that there is greater than 50 per cent chance that the injury was caused by the defect (otherwise known as the 'more probable than not' standard). Modern cases of vague causation and mass torts have raised a question as to whether it would be more appropriate to apply a more flexible standard for proof of causation, such as a 'relative liability' standard (pursuant to which the courts will grant, by way of example, compensation for 30 per cent of the damage if causation is proven at a 30 per cent probability).

In 2005 the Israeli Supreme Court ruled (in CA 7375/02 *Malul v Carmel Medical Center*) that the court may apply the relative liability standard in cases of vague causation, where several potential factors may have led to the injury and damage, but causation cannot be proven with respect to any of the factors beyond 50 per cent. In such cases, compensation will be structured in a way that is appropriate to the level of probability of the causation that has been proven. This rule will be applied if certain conditions are met, mainly if applying the balance of probabilities rule would result in substantial injustice.

However, this decision was later overturned in 2010 by an expanded panel of the Supreme Court (CAD 4693/05 *Carmel Medical Center v Malul*). It was then ruled that the relative liability rule may not be adopted as an exception to the rule of balance of probabilities in cases of vague causation. However, a majority of the expanded panel of the Supreme Court in said case seem to have been in agreement that the court may deviate from the balance of probabilities rule and apply the relative liability rule in cases of 'systematic repeating diversion', where the tortfeasor created a joint and repeated risk to a group of injured parties, in circumstances where it is impossible to prove causation pursuant to the balance of probabilities standard due to a repeating systematic diversion in the application of that rule.

As a result, there have been voices (including among the judiciary) calling for the legislator to enact more flexible rules of causation for the appropriate cases.

YIGAL ARNON & Co.

L A W F I R M

Barak Tal
Ruth Loven

barakt@arnon.co.il
ruthl@arnon.co.il

1 Azrieli Center
Tel Aviv 67021
Israel

Tel: +972 3 6087 835
Fax: +972 3 6087 716
www.arnon.co.il

GETTING THE DEAL THROUGH®

Annual volumes published on:

Acquisition Finance	Life Sciences
Air Transport	Mediation
Anti-Corruption Regulation	Merger Control
Anti-Money Laundering	Mergers & Acquisitions
Arbitration	Mining
Asset Recovery	Oil Regulation
Banking Regulation	Outsourcing
Cartel Regulation	Patents
Climate Regulation	Pensions & Retirement Plans
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Client
Corporate Immigration	Private Equity
Data Protection and Privacy	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Enforcement of Foreign Judgments	Restructuring & Insolvency
Environment	Right of Publicity
Foreign Investment Review	Securities Finance
Franchise	Shipbuilding
Gas Regulation	Shipping
Insurance & Reinsurance	Tax Controversy
Intellectual Property & Antitrust	Tax on Inbound Investment
Labour & Employment	Telecoms and Media
Licensing	Trademarks
	Vertical Agreements



**For more information or to
purchase books, please visit:**
www.gettingthedealthrough.com



The Official Research Partner of
the International Bar Association



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Strategic research partners of
the ABA International section