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Product Liability in Denmark

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General climate and recent developments

State of legal development

In general terms, how developed are the product regulation and liability laws in your jurisdiction?

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

The Products Liability Act was introduced in 1989 and it is based on an EU product liability directive from 1985. The product liability developed in case law is based on judgments and legal doctrines that have been developed over many years, since long before the Products Liability Act was introduced; in fact, judgments going back to the 1920s can be found.

The Products Liability Act applies to personal injury and consumer property damage. The product liability developed in case law includes all types of damage or injury caused by a defective product (ie, personal injury, consumer property damage and commercial property damage). The product liability developed in case law is based on the general law of damages but with a stricter basis of liability.

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

According to both legislation and case law, the rules on injury or damage caused by a defective product apply only to damage or injury to anything other than the product itself. Any damage to the actual product is not deemed to be damage caused by a defective product. Liability for such damage will typically be regulated by the parties' agreement and adjudicated based on the rules on defects in the service provided (eg, the Sale of Goods Act). The product liability rules are also delimited in respect of general commercial liability that falls outside the scope of the product liability rules.

Recent developments

Have there been any notable recent developments in relation to product liability law and product safety law in your jurisdiction, including any regulatory changes and case law?

The Products Liability Act was partly overturned by the European Court of Justice (ECJ) in 2006. The Products Liability Act in force at the time stipulated strict liability for both manufacturers and intermediaries. The ECJ held that the liability of intermediaries under the directive could not be strict, and thus the Danish rules were

adapted in such a way that intermediaries have presumption of negligence.

This means that an intermediary incurs liability under the Products Liability Act if there are any issues that can be blamed on the intermediary or a third party for which the intermediary is liable. If the intermediary can prove that damage or injury caused by a defective product was not caused by the intermediary's errors or neglect, claims for damage or injury caused by a defective product cannot be raised against the intermediary.

In such situations, the injured party must raise the claim against the manufacturer. The manufacturer has strict liability under the Products Liability Act.

The Supreme Court and the other Danish courts still apply the product liability rules developed by case law. There has been much debate over whether it is possible to maintain these rules because they go beyond the EU Product Liability Directive, but to date no amendments have been made in this respect.

Legal framework

Legislation

What primary and secondary legislation governs product safety and liability in your jurisdiction?

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

The Products Liability Act was introduced in 1989 and it is based on an EU product liability directive from 1985. The product liability developed in case law is based on judgments and legal doctrines that have been developed over many years, since long before the Products Liability Act was introduced; in fact, judgments going back to the 1920s can be found.

This means that the Danish product liability rules are well developed but complicated.

The Products Liability Act applies to personal injury and consumer property damage. The product liability developed in case law includes all types of damage or injury caused by a defective product (ie, personal injury, consumer property damage and commercial property damage). The product liability developed in case law is based on the general law of damages but with a stricter basis of liability.

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

The Products Liability Act does not restrict the right of an injured party to seek damages under the general rules on contractual damages or non-contractual damages, or under other legislation.

The product liability rules rank equally. In regard to whether damage or injury caused by a defective product is subject to both sets of rules, the adjudication of liability will often be the same regardless of which set of rules is applied, but there may be situations where that is not the case. The injured party can choose whether the claim will be raised under the Products Liability Act or according to product liability rules developed by case law. This means that the injured party can seek restitution under rules that give the most favourable result.

The Product Safety Act sets out the rules for product safety in Denmark. The act is based on the EU Product Safety Directive. Some product safety provisions are also set out in special legislation. The Product Safety Act makes it possible to impose punitive penalties if the product safety rules have not been complied with wholly or in part.

The product safety rules are intended to prevent any dangerous properties in a product from causing property damage or personal injury. Product safety has high priority in Denmark.

Regulatory and enforcement authorities

Which government authorities regulate and enforce product safety and liability laws in your jurisdiction, and what is the extent of their powers?

The Safety Technology Authority administers the Danish product safety rules. The authority supervises, monitors, issues orders and imposes fines for the violation of the product safety rules.

The authority may act both following a notification or on the basis of its own investigations, and its decisions may be appealed to the courts.

Liability.

Product defects

How is a 'product defect' defined in your jurisdiction?

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

A product cannot be found defective because other and better products have been brought into circulation or because new technical or scientific knowledge demonstrates that other products or materials would be better than the existing product (known as development damage). Such damage is generally exempt from liability in damages as the manufacturer cannot incur liability for knowledge that it did not have when use of the harmful product started.

Under Danish law, the decisive factor for establishing product liability is that the defective product's harmful or dangerous properties caused the damage or injury. This means that product liability cannot be established if the damage or injury was caused by the incorrect use of the product. Damage or injury caused by a defective product exists when a product can cause damage to anything other than the product itself because of a defect or dangerous property when used normally.

In general, damage or injury caused by an inevitable risk of damage or injury to anything other than the product is not deemed to be a defect under the product liability rules (known as development damage). An example of development damage is the use of the contraceptive pill, as it is known that there is a risk that the pill can cause blood clots. Another example is tobacco, which could cause cancer. In both examples, the injured user knew that there was a known risk of serious personal injury because of the product's side effects. Nevertheless, the user decided to use the product because of its value. In other words, the known risks were accepted. Thus, the manufacturer does not incur liability for damage or injury in such situations.

This means that damage or injury caused by a defective product is conditional on damage to anything other than the product and that such damage or injury was caused by 'normal use' of the product, meaning use of the product that does not go beyond what could reasonably be expected. If the damage or injury is to anything other than the product despite normal use of the product, the product will often be defective. The product liability rules do not include liability for defects. In such situations, the rules on liability for defects apply. In addition to the injury caused by a defective product, the injured party can receive cover for the loss of the actual harmful product.

When assessing the damage or injury caused by a defective product, it is important that the manufacturer ensure that good and comprehensive instructions on normal use are enclosed with the product. By doing so, the manufacturer can influence the definition of what is considered to be reasonable use of the product. This also means that the manufacturer can prove how the product was marketed in respect of use.

The manufacturer can limit potential product liability by ensuring that the use of the product is described in detail and is delimited in the instructions. The manufacturer should also ensure that the product is not marketed in a manner that conflicts with reasonable use.

Causation and burden of proof

How is causation of loss or damage established in relation to product liability claims and where does the burden of proof lie? Can this burden be shifted in any way?

The Products Liability Act and the product liability rules developed by case law stipulate that in order to claim damages for injury caused by a defective product, there must be a causal connection between the defective product and the injury.

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

The same burden of proof applies to claims for product liability against the manufacturer and the intermediary.

However, if the injured party can discharge the burden of proof, there are different bases of liability depending on the liable body and whether the claim was raised under the Products Liability Act or the product liability rules developed under case law.

Legal bases for claims

On what legal bases can a product liability claim be brought?

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

However, there are significant exceptions to the manufacturer's strict liability and Danish law offers several defences.

The defences include development damage, where it is found that the product was not defective when it was brought into circulation, but where subsequent knowledge means that according to current technical or scientific knowledge, it would give rise to liability to use the product. One example could be if over time it has been discovered that a certain composition of materials is not sufficiently wear-resistant to be used as roofing. However, if such knowledge is available and a manufacturer still brings a product into circulation, any damage or injury to anything other than the product will be considered to be injury caused by a defective product, as the manufacturer has acted in bad faith.

Intermediaries are subject to a presumption of negligence under the Products Liability Act, meaning liability in damages with a reversed burden of proof. Therefore, the intermediary may incur liability for injury caused by a defective product unless it can prove that its conduct or the conduct of a party for which it is liable gives rise to liability.

According to the product liability rules developed by case law, a presumption of negligence also applies, but this has tended towards strict liability for both the manufacturer and the intermediary in many situations, which are consequently liable for injury caused by a defective product unless the manufacturer can prove that it did not act intentionally or negligently.

In 2006 the European Court of Justice overturned the rule on the intermediary's strict liability in the Danish Products Liability Act. The act was amended and intermediaries now have the presumption of negligence.

This means that an intermediary incurs liability under the Products Liability Act if there are any issues that can be blamed on the intermediary or a third party for which the intermediary is liable. If the intermediary can prove that the injury caused by a defective product was not caused by the intermediary's errors or neglect, a claim for injury cannot be brought against the intermediary.

In such situations, the injured party must raise the claim against the manufacturer, which has strict liability under the Products Liability Act.

The product liability rules developed by case law still apply. There has been debate in legal literature as to whether, after the amendment to the Products Liability Act, it is still possible to maintain the product liability developed in case law where the liability goes beyond the rules of the EU Product Liability Directive. However, to date no measures have been taken in such respect and the Supreme Court still applies the rules.

Criminal liability

Can a defendant be held criminally liable for defective products?

The Product Safety Act stipulates that the Safety Technology Authority may order a manufacturer to remedy a defect in the product or to destroy the product. The authority may also order the manufacturer to withdraw or recall the product, and may fine the manufacturer.

It is possible to incur criminal liability under the Criminal Code (eg, for wilful or gross actual personal harm). This is the case if, for example, a manufacturer withholds information about products or continues to bring products into circulation that it knows could involve a risk of injury.

Liable parties

Which parties can be held liable for defective products?

The manufacturer and all subsequent links in the chain of distribution (the intermediaries) may incur liability for the defective product. However, different bases of liability apply to a manufacturer and an intermediary, respectively.

Limitation of liability

Can liability be excluded or mitigated in any way?

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

Both system damage and development damage are generally considered to be defences for the manufacturer. In such situations the cases are often complex in terms of evidence.

Litigation

Procedure

What is the procedure for filing a product liability claim before the courts in your jurisdiction?

Any party which believes that it is entitled to damages under the product liability rules is entitled to raise a claim against the manufacturer or the intermediary. The proceedings before the courts are instituted by the injured party lodging a writ of summons with the district court. The writ of summons is subject to certain requirements, including that:

- the claim is clear;
- the statement of facts is adequate; and

- the claim is supported by the party's allegations.

If these requirements are not met, the court will dismiss the case.

According to the Danish rules on jurisdiction laid down in the Administration of Justice Act, legal action may be brought before either the tortfeasor's home court (ie, where the manufacturer or the intermediary has its registered address or branch) or the court for the place where the harmful event occurred.

The court will ensure that the injured party's writ of summons is served on the defendant manufacturer or intermediary with a request to submit its defence to the court. If necessary, both parties may ask for an expert survey and appraisal and may use relevant evidence (ie, documents, statements prepared before the legal action was brought and witness statements).

When the case has been clarified, it will be set for trial, and in general judgment will be delivered four weeks after the end of the trial.

The parties can still agree to settle the case even after legal action has been brought.

Interlocutory motions

Can the court issue interlocutory orders or judgments in product liability cases? If so, what rules and procedures apply?

Yes, in cases of withdrawal or recall of defective products, interlocutory orders may be issued against the sale or circulation of the products, or an order may be issued to remedy the defect in the products.

The rules are laid down in the Product Safety Act. The Safety Technology Authority is authorised to impose penalties in cases regarding the lack of product safety.

Pre-trial disclosure

What pre-trial disclosure/discovery mechanisms are available in product liability cases, if any?

There are no pre-trial disclosure or discovery mechanisms under Danish law.

Each party may rely on the documents in its possession. During legal proceedings each party may ask the opposing party to produce the documents in its possession. Each party may also ask the court to order a third party to make documents available if they are in the third party's possession. If the opposing party in the legal proceedings refuses to produce the requested document, the court may draw adverse inferences from this.

A party is entitled to request an expert survey and appraisal through the court even if legal action has not yet been brought. This means that it is possible for the party to get information about, for example, the cause of the damage. The expert opinion is usually used to determine whether there is any basis for bringing a legal action or entering into a settlement.

Evidence standards

What evidence is accepted to support claims in product liability cases? What formalities apply to evidence submission?

Under Danish law, a party is entitled to produce evidence that may be important to the case. Typically, an expert survey and appraisal of the defective product will be carried out (ie, an expert opinion about the product or the extent of the damage).

Typical evidence includes:

- technical reports and opinions by experts to describe the product, the alleged defect and the property damage; and
- medical records, medical reports and statements from the Danish Medico-Legal Council (the authority charged with giving medical opinions for legal proceedings) to describe the personal injury.

Both parties may also call witnesses.

Expert evidence

Under what circumstances will the court appoint an expert to assist it in examining the merits of the case? What rules and procedures apply?

All parties to a legal action may request an expert survey and appraisal. Both parties may also question the expert. A party may request a specific expert or may propose a specific expert or an organisation to provide an expert. The court will then appoint the expert.

The court will send the parties' questions to be answered by the expert, who will then estimate his or her fee for drafting an opinion and appearing in court. The parties must pay the expert costs as allocated by the court. The court may decide that the parties are to provide security for the expert survey and appraisal expenses.

In the case of a personal injury, usually the Medico-Legal Council gives expert opinions on the extent of the injury and its cause. The Medico-Legal Council is made up of specially selected doctors whose task is to give medical opinions to other public authorities (typically the courts) about the health of individuals.

Opinions obtained by one party before the trial hearing may be produced during the trial hearing in many instances. Correspondingly, the opposing party can obtain its own opinions.

The court must also progress the hearing of the case under the Administration of Justice Act.

Can the parties rely on expert witness testimony to support their claims? If so, what rules and procedures apply?

Danish law does not use the term 'expert witness'. If an expert opinion is needed in a case, under Danish law it is possible to commission an expert survey and appraisal.

Class actions

Are class actions or any other collective proceedings available for product liability claims in your jurisdiction? If so, what is the procedure for their formation and what benefits do they afford claimants? Are class actions formed on an opt-in or an opt-out basis?

Yes, collective proceedings are possible in Denmark. The parties to collective proceedings must be identified in a document to the court (eg, a writ of summons) and must then individually join the collective proceedings.

The following requirements apply:

- all parties to collective proceedings must be able to be identified;
- the claims must be identical;
- the claims should be heard together; and
- a group representative should be appointed.

The judgment is binding on all the parties to the collective proceedings.

*Appeals***What rules and procedures govern appeals of court decisions?**

Under Danish law, almost all decisions made during the case may be appealed to a higher court.

The Administration of Justice Act provides that Denmark has appellate jurisdiction, which means that a procedural party is entitled to have its case tried by two courts. Deadlines apply to appealing a court's decisions and these must be observed in order not to forfeit the right to have the case tried by two courts. However, cases with a value of DKK20,000 or less may be brought before a higher court only with prior permission from the Danish Appeals Permission Board.

In special cases a procedural party may ask to have the case adjudicated by the Supreme Court. In order for this to happen, the district court must send the case to the high court to be heard at first instance and both courts must hold that the case is of general public importance. If that is the case, it is possible to appeal the judgment to the Supreme Court. The losing party before the high court can also ask the Danish Appeals Permission Board for leave to appeal the case to the Supreme Court (leave to appeal to a third instance); the Appeals Permission Board will grant such leave if the case is of general public importance. Special deadlines apply to the requests to the Appeals Permission Board and these must be observed in order not to forfeit such right.

*Statute of limitations***What is the statute of limitations for filing product liability claims?**

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

The general period of limitation is three years from the time when the party raising the claim became aware of the claim, and 10 years for claims for monetary loans. However, an absolute limitation period for product liability of 10 years after the date when the product was brought into circulation applies.

*Timeframe***What is the typical duration of proceedings in product liability cases?**

The hearing of a product liability action by a first-instance court often lasts at least one year. The time taken depends on individual issues, including the scope of the case and the complexity of the technical evidence and evidence regarding personal injury. It is possible to appeal the judgment to a higher court, which will naturally further prolong the final conclusion.

*Costs, fees and funding***Can the successful party to the litigation recover court and attorneys' fees and any other related expenses from the losing party? If so, what rules and procedures apply?**

Yes, as a general rule the courts will order the losing party to pay the legal costs (ie, compensation for the legal fees and other costs to the successful party). Any compensation for the legal fees will be fixed independently of the parties' actual costs, but according to special rules.

The court may decide in special situations that a party is not to pay the legal costs or that each party is to pay its own legal costs.

It is possible for the parties to appeal the court's order as to costs to a higher court; however, special rules apply.

What rules and restrictions (if any) govern contingency fee arrangements?

According to the Administration of Justice Act and the Code of Conduct of the Danish Bar and Law Society, an attorney may charge a reasonable fee for work on the case. In business relationships, the attorney will typically enter into an agreement with the client on the fee before starting the work. If the client is an individual, the attorney must always prepare a fee estimate before starting the work. If the client is successful in the legal proceedings, the court may order the opposing party to pay the legal fees as a part of the determination of the legal costs. The determination is independent of the actual costs but subject to special rules.

Is third-party litigation funding permitted in your jurisdiction? If so, do any rules or restrictions apply?

There are no Danish rules preventing or restricting the possibility of third-party funding.

Is legal aid (ie, public funding) available to claimants in product liability cases? If so, what rules, restrictions and procedures apply?

Individuals can apply to the state for free legal aid. The decision is based on the applicant's income base as well as on the reasonableness of litigating the case. As an exception, an individual may apply to the state for free legal aid in respect of cases arising out of an individual's business enterprise.

Danish insurers offer legal expenses insurance that wholly or partly covers the litigation costs. Legal expenses insurance is subject to special rules and takes precedence over free state legal aid.

Settlement

What rules and procedures govern the settlement of product liability cases?

Settlements are not subject to any special rules in Denmark. The parties can usually settle a case, but subject to the invalidity rules of the Contracts Act. The parties may settle the case both before and during the legal proceedings (eg, after the production of evidence).

The settlement will typically include the product liability claim, the legal costs and interest. If the parties wish to be able to enforce the settlement, either this should be specified in the settlement text or the settlement text must be entered into the court records.

How common are settlements in product liability cases?

It is not unusual to settle product liability cases. The parties may settle the case both before and during the legal proceedings.

Alternative dispute resolution

Are any alternative dispute resolution (ADR) methods required or advised before or in lieu of proceeding with litigation?

Under Danish law there is no requirement that the parties try alternative dispute resolution before bringing a legal product liability action. The parties are also free to bring such legal action before the district court.

When a legal action is brought before the courts, the parties can always ask for court-based mediation, but both parties must agree to participate. If it is not possible to settle the case by court-based mediation, the legal action will continue.

The parties themselves can arrange mediation both before and during legal proceedings, but a party is under no obligation to participate in mediation. The mediation costs are to be paid by the parties and mediation requires that both parties participate actively. Mediation is conducted independently of the court.

How commonly is ADR used in relation to product liability cases in your jurisdiction?

ADR is rare in product liability cases as they are often complex and involve difficult evidential issues. However, ADR is allowed and is becoming more common in Denmark.

Defences

Available defences

What defences are available to defendants in product liability cases?

The defendant should engage an attorney. Sometimes both the plaintiff and the defendant have legal expenses insurance that covers attorney fees or provides an attorney. Legal expenses insurance also usually makes it possible to get coverage for the party's own attorney fees.

Under Danish law, it is also possible to be a *per se* litigant to a wide extent. As product liability cases are often complex, it is not generally recommended to be a *per se* litigant.

Preliminary actions

What preliminary procedural mechanisms are available to defendants, if any?

It is possible to ask the courts for an expert survey and appraisal without bringing a legal action. The expert opinion is used to determine whether there is a basis for legal action or whether there is a basis for entering into a settlement without bringing a legal action.

If a legal action is subsequently brought, the expert opinion may be used as evidence in the legal proceedings.

Remedies

Damages

What types of damages may be awarded in product liability cases? What rules and standards govern their calculation? Are damages capped?

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

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

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

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

Are punitive damages allowed?

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

Other remedies

Are any other remedies available?

No, not in respect of the specific damage or injury, but preventive measures may be used going forward. One example is the possibility of interim decisions with an injunction against the product or an obligation to withdraw or recall the product. The Product Safety Act contains various rules on this subject which are enforced by the Safety Technology Authority.

Product recalls

General requirements

Are there any statutory criteria under which a product must be recalled or other corrective action be taken?

Yes. If a product is dangerous or defective or if there is a risk of damage or injury, the Product Safety Act stipulates that the manufacturer must remedy the condition or withdraw, recall or destroy the product. The act stipulates that the Safety Technology Authority should determine the remedy to be used to ensure that the product does not cause any damage or injury.

Notification

What rules and procedures govern notification of the product recall to government authorities and the public?

Various rules apply, for instance the Product Safety Act. For example, orders to recall, withdraw or destroy a product are issued by the Safety Technology Authority.

The remedy depends on the seriousness of the situation.

Repairs, replacements and refunds

What rules and procedures govern repairs, replacements and refunds for defective products?

It depends on whether the damages are contractual damages or non-contractual damages. If the damages are contractual, the issue is regulated by the parties' agreement or the Sale of Goods Act. If the damages are non-contractual, the general law of damages is used.

Non-compliance

What penalties apply for non-compliance with the legal provisions governing product recalls?

It depends on the circumstances and the Safety Technology Authority determines the possibility of a sanction under the Product Safety Act, which contains applicable penalty clauses.

Kammeradvokaten/Poul Schmith - Henrik Nedergaard Thomsen, Christian Bo Kolding-Krøger, Sigrid Majlund Kjærulff and Ann Aavild

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