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Hong Kong

PRODUCT LIABILITY

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

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HONG KONG PRODUCT LIABILITY



1. Please summarise the main legal bases for product liability

Civil liability arises under the tort of negligence, breach of contract, or breach of statutory duty (only if the legislation itself enables a civil claim to be made). The main legislations governing product liability in Hong Kong include: i. Consumer Goods Safety Ordinance (Chapter 456 of the Laws of Hong Kong), ii. Control of Exemption Clauses Ordinance (Chapter 71 of the Laws of Hong Kong), iii. Sale of Goods Ordinance, iv. Toys and Children's Products safety Ordinance (Chapter 424 of the Laws of Hong Kong), v. Pharmacy and Poisons Ordinance (Chapter 138 of the Laws of Hong Kong), and vi. Dangerous Goods Ordinance (Chapter 295 of the Laws of Hong Kong). Criminal liability for defective products in Hong Kong is established by statutory provisions. For example, section 6 of the Consumer Goods Safety Ordinance (Cap 456) provides that a person shall not supply, manufacture, or import into Hong Kong consumer goods unless the goods comply with the general safety requirement or the applicable approved standard for those particular consumer goods. Punishment for an offence may be by way of a fine, imprisonment, or both. A person who is found guilty under the provisions of the Consumer Goods Safety Ordinance is liable for a fine at level 6 (i.e. HK\$100,000) and for imprisonment for one year upon the first conviction, and a fine of HK\$500,000 and imprisonment for two years upon any subsequent conviction.

2. What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?

Hong Kong does not yet have a specific legal regime relating to product liability, particularly in relation to civil proceedings, nor does it have a statutory regime of "lemon law" or strict liability regime as in some other countries, such as the United States or the United Kingdom. However, there is a very limited exception in the context of the Sale of Goods Ordinance (Cap 26)

("SOGO"). Section 16 of the SOGO provides for an implied condition that the goods supplied are of merchantable quality. This means, amongst others, that the goods should be free of defects (including minor defects) as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. Here, there is no question of fault - the seller will not be able to avoid liability by proving he neither knew, nor ought to have known, of the defect. It has been said that this effectively amounts to strict liability in respect of merchantable quality. The buyer (consumer) need only show that the product is defective. This implied terms of merchantable quality cannot be excluded or restricted by a contract terms as against a person dealing as a consumer (section 11(2), Control of Exemption Clauses Ordinance (Cap 71).

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

Under the SOGO, generally, the party entering into the contract with the consumer is the retail seller. Only the party to the sale and purchase contract is liable. The buyer cannot claim against the other parties down the supply chain (such as the manufacturer, distributor, importer, etc.) because there is no privity of contract between them and the buyer. Claims against them can only be made in tort. Liability may be joint and several depending on the terms of the contract, though it is rare to encounter one involving joint parties that does not provide for both joint and several liability.

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

Apart from the defences that are available under the usual principles of contract, the seller may avoid liability under the SOGO by establishing that: a. the defect(s) was specifically drawn to the buyer's attention before the contract was made; b. the buyer examined the

goods before the contract is made, as regards defect(s) which that examination ought to reveal; or c. if the contract is a contract for sale by sample, the defect(s) which would have been apparent on a reasonable examination of the sample.

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

The Limitation Ordinance (Cap. 347) provides that no action in contract may be brought after the expiration of six years from the date on which the cause of action accrued.

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

This implied terms of merchantable quality under the SOGO cannot be excluded or restricted by a contract terms (section 11(2), Control of Exemption Clauses Ordinance (Cap 71)).

7. What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?

Civil liability for the supply of defective products arises under the tort of negligence for a breach of a duty of care. To make a claim in negligence, it must be established that: a. The defendant owed the plaintiff a duty of care. There are three criteria considered by the Courts when determining if a duty of care arises in a given situation: Firstly, whether it was foreseeable that a failure by the defendant to take care could result in harm being suffered by the claimant: Secondly, whether the relationship between the claimant and defendant was sufficiently close or "proximate" that the defendant should be held responsible for the damage caused, and Thirdly, whether it is reasonable to impose a duty in the circumstances. This is often referred to as a policy factor - is there any reason why a duty of care should not be imposed? b. That duty of care was breached. This is a question of law, not fact, and the standard of care is that of the reasonable man, taking into account factors including the likelihood of harm, the seriousness of the risk, the utility of the act of the defendant, the cost of avoiding harm, etc. c. Causation and Loss/Damage That the defendant's breach of duty resulted in the claimant's loss or injury - the damage must not be too remote a consequence of the breach, a question which can be complicated by a particularly vulnerable victim ("egg-shell skull rule"), or some intervening acts or events.

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

In an action in tort, the court will award damages to compensate the claimant for the harm or losses arising from defendant's actions. The basic principle is to try to put the claimant in a position where the tort had not occurred. Losses arising from personal injury (including mental injury), death or damage to property other than the product itself are recoverable. As for pure economic loss (financial loss suffered by a claimant that does not flow from any damage to his own person or property), the courts have taken a conservative approach - such loss is normally irrecoverable unless it is fair to do so. Punitive damages, also referred to as exemplary damages, are designed to punish and deter the wrongdoer. Unlike the United States, punitive damages are available only in very limited circumstances. The three key considerations for which punitive damages may be awarded are: (1) oppressive or arbitrary or unconstitutional acts by government servants; (2) the defendant's conduct has been calculated to make a profit for himself which might well exceed compensation payable to claimants; and (3) an express statutory provision. In practice, the Hong Kong courts hardly, if ever, award exemplary damages.

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

A plaintiff is entitled to name any number of defendants he considers to be potentially liable, jointly or severally, for the damage or injury he sustained. Liability can be joint and several depending on the facts of each case. Contribution proceedings can be brought against a fellow tortfeasor. The relevant principles are all set out in the Civil Liability (Contribution) Ordinance (Cap 377).

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

A defendant to a claim may avoid liability by establishing that: (1) it was not negligent or the damage was one that which was not foreseeable, and that even if the supplier had taken all reasonable care, the defect could not have been prevented; (2) the claimant was, at all material times, aware of the risks associated with the product and chose to accept those risks (the defence of *volenti non fit injuria*); (3) there was contributory negligence or fault on the part of the claimant; or (4) the "state of the art defence" - the defendant had exercised

all reasonable all reasonable care and precautions in light of the state of scientific and technical knowledge at the time of distribution.

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

The Limitation Ordinance (Cap. 347) provides that no action in tort may be brought after the expiration of six years from the date on which the cause of action accrued. In any action relating to personal injuries, the time limit for bringing an action is three years from the date on which the cause of action accrued or the date (if later) of the claimant's knowledge. For latent damage other than personal injuries, the period is either six years from the date on which the cause of action accrued or, if later, three years from the date when the claimant had the necessary knowledge required to bring an action for damages for the relevant damage. Generally, the age or condition of the claimant has no effect on the calculation of time limits and the court rarely exercises its discretion to extend the time limits.

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

The exclusion of certain types of liability for negligence and for contract is governed by the Control of Exemption Clauses Ordinance (Cap. 71). For example, under the Section 7, any liability for death or personal injury resulting from negligence cannot be excluded or restricted. For other loss or damage, this is determined by the principles set out in the Unconscionable Contracts Ordinance (Cap. 458). Please also see the Misrepresentation Ordinance (Cap. 284).

13. Does the law imply any terms into B2B or B2C contracts which could impose liability in a situation where a product has caused damage? If so, please summarise.

Generally, under common law, terms might be implied into a contract for a number of reasons, including to reflect the intentions of the parties at the time the contract was entered into, to achieve fairness between the parties or to fill a gap in a contract so that the contract works in practice. The court may imply a term into a contract based on: Usage or custom The parties' previous course of consistent dealing The intention of the parties, known as a term implied "in fact" Common law, where the implied term is a necessary part of a particular type of contract Statute, such as the SOGO. This is particularly so in B2C contracts. Please see

discussion at Questions 2-6 above.

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

In an action in contract, damages are intended to place the claimant in the position he or she would have been had the contract been properly performed. This entitles the claimant to compensation for loss that arises as a natural result of breach of contract. This is subject to the proviso that the damage satisfies the requirements of remoteness of damage, then subject to the consumer's duty to take reasonable steps to mitigate loss. Apart from injury to person and damage to property, the claimant is also entitled to compensation for mental distress under common law. However, generally, these tend to be limited to situations where the contract is one for enjoyment, peace of mind or freedom from distress, such as holidays.

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

Under common law, parties are generally free to exclude and limit their liability under a contract. The exclusion of certain types of liability for negligence and for contract is governed by the Control of Exemption Clauses Ordinance (Cap. 71). For example, under the Section 7, any liability for death or personal injury resulting from negligence cannot be excluded or restricted. For other loss or damage, this is determined by the principles set out in the Unconscionable Contracts Ordinance (Cap. 458). Please also see the Supply of Services (Implied Terms) Ordinance (Cap. 457) and the Misrepresentation Ordinance (Cap. 284).

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

No, there has not been any recent key court judgments which have had a significant impact on the approach to product liability. The greater emphasis is on the promulgation of laws and regulations, primarily in the area of consumer protection.

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

a. First Steps : Understand the nature of the complaint being made; Appoint external lawyers with experience in the subject matter of the dispute. Conduct an internal investigation in conjunction with external lawyers (to cloak the investigations in privilege) into the incident. For example, work with technical staff to look into defect allegations. Is there proof of any defect? Is this an isolated incident or a pattern? If it is not, consider potential reporting obligations and recall matters. Crisis management. Product liability claims often being reported in the media. Consider PR strategy and whether external help needed with the proper messaging.

b. Other Considerations - Has the limitation period to initiate an action expired? Check procedural matters such as service, parties, jurisdiction. Any legal options such as interlocutory applications, mediation or settlement? Check insurance policies; will it cover the claim? When does the insurer have to be notified and of what? Should any third parties be brought in or notified of the product liability claim to share liability, for example, the manufacturer, supplier or distributor? Are there any governmental bodies/ authorities involved?

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

There are no specialty courts for product liability claims, so the court is as much able to handle a complex product liability claim as it is able to handle a complex claim in any subject of law before it. Generally, the parties can each appoint their experts, who can be subject to cross-examination by the other parties. Further, the court can sometimes appoint experts to assist it in considering technical or other issues which the judge may not be familiar with. All civil trials in Hong Kong are heard by a judge without a jury.

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

The sole machinery for dealing with multi-party proceedings in Hong Kong is a rule on representative proceedings, whereby a claimant may bring a representative action on behalf of a group of claimants where those claimants have the same interest in the proceedings. A judgment of order given in representative proceedings will be binding on all persons so represented. However, claims cannot be brought by a representative body (e.g. a consumer association) on behalf of claimants. Parties may also choose to have

their cases consolidated or heard together or the court itself may do so and have them tried together. Nevertheless, all claims even after consolidation remain individual actions in their own right.

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

Generally, the parties fund themselves in an action. Costs are strictly at the discretion of the court. Success fees or contingency fees arrangements with lawyers are impermissible. Third party litigation funding is also not allowed. However, a fairly recent court case that highlighted two categories excluding the application of public policy - "common interest category" and "access to justice consideration" seems to suggest that the court may choose to adopt a more liberal attitude towards the support of litigation by third parties in the future.

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

Product liability claims will continue to grow as new products come into the market. Increasingly, regulators are engaging with each other, sharing best practices and experiences and information about specific product risks. Similarly, consumers around the world are sharing information and opinions about their product experiences. Through social media, information about product risks travels very quickly around the world and are shared easily, especially when major brand names are involved. The advent of class action suits will add to the many challenges faced by manufacturers, importers and dealers in due time. All of above means that companies need to take a new approach to managing their product risks.

22. What are the likely future developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?

The continual emphasis on the consumer, with the plethora of laws and regulations will lead to more and more legal, regulatory and financial burdens on the manufacturers and importers. This coincides with the speed of development of the Internet of Things in the last few decades, which the law struggling to keep up. In some areas, such as autonomous and electric vehicles, it is clear that at least some regulatory reform is required

in order to accommodate the technology and enable societies to take advantage of the potential benefits.

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

For some time, the Government of the People’s Republic of China (“PRC Government”) has been taking steps to facilitate Hong Kong and Macao residents to work and live in the Guangdong-Hong Kong-Macao Greater Bay Area (“the Greater Bay Area”). One of the key initiatives has been with regards to the provision of healthcare services in the Greater Bay Area. In late November 2020, the *Work Plan for Regulatory Innovation and Development of Pharmaceutical and Medical Device in the Guangdong-Hong Kong-Macao Greater Bay Area* was promulgated by the PRC Government (“Healthcare Plan”). The Healthcare Plan provides a regime where local medical institutions in the Greater Bay Area to use drugs and medical devices that are already sold on Hong

Kong and Macao markets. Conversely, there will also be support of the development of the traditional Chinese medicine industry, in particular, the registration and approval procedures of traditional Chinese medicines for external use in Hong Kong and Macao will be simplified. The initiatives contemplate the formulation of a series of related systems and rules to strengthen the supervision of quality and safety of drugs and medical devices, and the allocation of responsibility for the use of such drugs and medical devices, which will lie largely with the medical institutions. For example, the medical institutions will need to have consent forms for patients which will inform and clarify the dispute resolution methods to patients. Accordingly, the initiative also contemplates the use of internationally acceptable insurance compensation mechanism to protect the rights and interests of patients in the event of a medical malpractice accident after using the imported drugs and medical devices. Apart from getting the attention of local and multinational pharmaceutical, biomedical and health technology companies, legal practitioners (especially in Hong Kong, Macao and mainland China) will also be watching closely how the law in relation to product liability develops going forward.

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