

**International
Comparative
Legal Guides**



Practical cross-border insights into product liability

Product Liability
2022

20th Edition

Contributing Editors:

Adela Williams & Tom Fox
Arnold & Porter

ICLG.com

Expert Analysis Chapters

- 1** **No-Fault Compensation Systems for Medical Products**
Adela Williams & Tom Fox, Arnold & Porter
- 5** **Defective Products: Managing a Product Recall in the UK and Beyond**
Howard Watson & David Bennett, Herbert Smith Freehills LLP
- 12** **Sustainability Claims and Green Litigation in the UK**
Mark Chesher, Megan Goodman & Rosalind Davies, Addleshaw Goddard LLP
- 17** **Food Products: Regulation and Risks**
Sarah-Jane Dobson, Samantha Silver, Emilie Civatte & Elaine Barker, Kennedys
- 23** **Price Premium Damages in Product Market Litigation: Issues in Survey-Based Market Simulations**
Lisa Cameron, Daniel McFadden & Pablo Robles, The Brattle Group

Q&A Chapters

- 33** **Australia**
Clayton Utz: Colin Loveday & Andrew Morrison
- 44** **China**
Shihui Partners: Shirley Zhang, Jessica Foo & Yudi Wang
- 50** **England & Wales**
Arnold & Porter: Adela Williams & Tom Fox
- 65** **France**
PHPG société d'avocats: Françoise Hecquet & Jeanne Mercier
- 72** **Germany**
BLD Bach Langheid Dallmayr:
Dr. Martin Alexander & Carsten Höske
- 79** **Greece**
Bahas, Gramatidis & Partners:
Dimitris Emvalomenos
- 88** **India**
AZB & Partners: Anind Thomas & Anish Munu
- 98** **Italy**
Morri Rossetti: Giuseppe Francesco Bonacci,
Edoardo Tosoletto & Stephan Daniel Cascone
- 105** **Japan**
Iwata Godo Law Offices: Shinya Tago,
Landry Guesdon & Tomohiro Suzuki
- 115** **Korea**
Bae, Kim & Lee LLC: Tony Dongwook Kang & Yongman Bae
- 123** **Netherlands**
Legaltree: Antoinette Collignon-Smit Sibinga & Carolien van Weering
- 131** **Norway**
CMS Kluge Advokatfirma AS: Ole André Oftebro,
Hanne Olsen Kjellefold & Matias Apelseth
- 139** **Singapore**
Allen & Gledhill LLP: Dr. Stanley Lai, SC & David Lim
- 149** **Spain**
Faus & Moliner Abogados: Xavier Moliner & Juan Martínez
- 159** **Switzerland**
Kellerhals Carrard: Dr. Claudia Götz Staehelin & Dr. Eliane Haas
- 168** **Taiwan**
Lee and Li, Attorneys-at-Law: Patrick Marros Chu & David Tien
- 177** **USA**
Faegre Drinker Biddle & Reath LLP: Teresa Griffin,
Christine Kain & Michael C. Zogby

Japan

Iwata Godo Law Offices



Shinya Tago



Landry Guesdon



Tomohiro Suzuki

1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

A. Traditionally, product liability claims had been brought as tort claims under the Civil Code of Japan. However, since 1995, claims can also be brought under the Product Liability Act (Law No. 85 of 1994) (PLA), which gives a plaintiff more flexibility to seek compensation for damages caused by a defective product. The PLA covers movable property which is manufactured or processed (therefore excluding real estate, electricity or agricultural products). If a defective product causes any damage to the buyer's life, body or property (excluding the product itself), the buyer can bring a product liability suit against the "manufacturer" (see definition in question 1.3) (Article 3 of the PLA).

The plaintiff is not required to prove that the manufacturer owed a duty to the plaintiff and negligently or intentionally injured the plaintiff. The plaintiff only needs to demonstrate that the product was defective, and that the defect caused the injuries. A product can be deemed defective if it lacks the level of safety it should normally possess, taking into account its nature and characteristics, its ordinarily foreseeable uses, state of the art (scientific or technical knowledge at the time of delivery) and other relevant circumstances relating to the product.

B. Alternatively, if a claim cannot be brought or is unsuccessful under the PLA, the party injured by a defective product may still bring a tort claim under the Civil Code. An extensive reform of the Civil Code of 1896 has taken place to produce a more comprehensive and user-friendly version, with general principles of law derived from court precedents turned into statute. Amendments entered into force on 1 April 2020. Article 709 provides that a person who has intentionally or negligently infringed any right or legally protected interest of another will be liable for any resulting damage. In contrast with the PLA, the plaintiff must prove the defendant's intent or negligence, and the burden of proof is subject to a high standard. Causes of action under Article 709 include fraud and misrepresentation.

C. The Consumer Contract Act (Law No. 61 of 2000) (CCA) protects consumers in their dealings with merchants (business operators). Article 8 of the CCA provides that the following clauses are void if they are included in a contract made between a consumer and a business operator:

- Clauses which totally exempt a business operator from liability to compensate a consumer for damages arising from the business operator's fault or which allow the business operator to determine whether it should bear any liability.
- Clauses which partially exempt a business operator from liability for damages arising from the business operator's fault (limited to default arising due to an intentional act or gross negligence on the part of the business operator, its representatives or employees) or which allow the business operator to determine the liability from which it should be partially exempted.
- Clauses which totally exempt a business operator from liability for damages to a consumer arising from a tort committed during the business operator's performance of a consumer contract or which allow the business operator to determine whether it should bear any liability.
- Clauses which partially exempt a business operator from liability for damages to a consumer arising from a tort (limited to cases in which the tort arises due to an intentional act or the gross negligence of the business operator, its representatives or employees) committed during the business operator's performance of a consumer contract or which allow the business operator to determine the liability from which it should be partially exempted.
- If a consumer contract is a contract for value, and there is a latent defect in the subject matter of the consumer contract (including a contract for services), clauses which totally exempt a business operator from any liability to compensate a consumer for damages caused by such defect or allow the business operator to determine whether it should bear any liability, except in the event that:
 - the consumer contract provides that the business operator is liable to deliver substitute products without the defect or to repair the products when there is a latent defect; or
 - the consumer contract is concluded between a consumer and a business operator simultaneously with, or after another contract is concluded between, the consumer

and another business operator entrusted by the business operator, or between the business operator and another business operator for the benefit of the consumer, whereunder the other business operator will compensate for all or part of the damage caused by a defect, deliver substitute products without defects or repair the defective products.

Although the CCA limits the extent to which the seller of a product may disclaim warranties relating to a product or restrict the remedies available to a buyer injured by a product sold by the seller, it does not offer any specific cause of action for damage caused by defective products.

D. A claim based on breach of contract must be made by a party to the contract. A plaintiff (generally a buyer) can bring a product liability claim against a seller who is his counterparty in a sale and purchase contract, either for breach of contract or breach of implied statutory warranties under the Civil Code, provided that there is a direct contractual relationship between the injured party and the seller of the defective product. Nowadays, in most consumer transactions, the end-user/buyer does not have a direct contractual relationship with the manufacturer as several intermediaries can be involved in the supply chain (manufacturers, suppliers, importers, wholesalers, retailers and so on). As a result, there is often no cause of action based on breach of contract by a consumer against a manufacturer. Depending on the circumstances, there may be other legal avenues allowing a buyer to seek remedies against a manufacturer under the PLA or based on tort as explained above.

The pre-reform Civil Code includes special rules on warranty for hidden defects. The revised Code takes a unitary approach to remedies for non-performance of the duty of conformity of description, quality and quantity under Articles 562 to 564 and 566. The seller is obliged to deliver goods that conform to the contract with respect to description, quality and quantity. When the seller's goods do not conform to the contract, the buyer can claim damages and termination for non-performance under Article 564, or demand repairs under Article 562 or a price reduction under Article 563. For ease of reference, we will refer to defects (as part of the non-conformity concept).

Article 415 of the Civil Code addresses liability for incomplete performance of obligations, while Articles 562, 563 and 564 govern warranties against defects. Also relevant in this context is Article 526 of the Commercial Code, an equivalent provision to Article 566 of the Civil Code, which applies to defects in transactions between business operators.

The parties to a contract can be released entirely or partially from their liability under the PLA or tortious/contractual liability under the Civil Code by entering into an agreement on indemnification excluding or capping such liability. However, liability exclusions and limitations are strictly limited by the CCA with respect to contracts between consumers and business operators. Notwithstanding any special agreement excluding statutory warranties, a seller's liability would not be excluded in case of fraud or concealment of known facts (Article 572 of the Civil Code).

1.2 Does the state operate any special liability regimes or compensation schemes for particular products e.g. medicinal products or vaccines?

The Government operates special compensation schemes for pharmaceuticals and products deemed to have specific risks. One scheme entirely funded by the Government and established under the Preventive Inoculation Law (Law No. 68 of 1948, as amended in 2020) compensates victims of injuries caused by inoculations (including COVID-19-related). Another scheme, industry-funded

and administered by the Pharmaceuticals and Medical Devices Agency (PMDA) under the Act on Pharmaceuticals and Medical Devices (Law No. 192 of 2002), provides compensation covering the medical and funeral expenses of individuals and their families in the event of illness, disability or death caused by the side effects of pharmaceuticals.

A further scheme is administered by the Consumer Product Safety Association under the Consumer Products Safety Act (Law No. 31 of 1973). The "SG-Mark" (safe goods mark) is a product certification system. The Association prescribes stringent safety standards covering products that could be dangerous and cause injuries or death, and only products complying with the safety specifications and requirements of the Association can bear the SG-Mark. The consumer compensation scheme operates for the benefit of persons injured by these products. Compensation from the Association is capped at 100 million yen per person and depends on the seriousness of the injury and the cause of the accident.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Any natural or legal person classified as a manufacturer under the PLA can be held liable. The PLA defines a manufacturer as:

- Any person who manufactures, processes, or imports the product as a business.
- Any person holding himself out to be the manufacturer of a product by putting his name, trade name, trade mark or other indication on the product, or any person who puts his name on the product in a manner that misleads others into believing he is the manufacturer.
- Any person who puts his name on a product and who, in light of the manner in which the product has been manufactured, processed, imported or sold, or any other relevant circumstances, may be deemed a "substantial manufacturer" (*de facto* manufacturer).

Unless they fall within any of the aforesaid categories, the PLA does not provide any cause of action against distributors or sellers of a product. Claims against these persons must be brought under the Civil Code on other grounds (breach of implied statutory warranty, breach of contract or tort).

1.4 May a regulatory authority be found liable in respect of a defective/faulty product? If so, in what circumstances?

The PLA does not exclude public bodies from its scope and would apply to public bodies acting as the manufacturer (within the broad meaning of the PLA), although a regulatory authority would rarely act in this capacity. Under the State Compensation Act, when a public official in a position to exercise public power has, in the performance of his duties, illegally inflicted losses on another person, intentionally or negligently, the State or public entity is liable to compensate such losses. When a defect in construction or maintenance of public property has inflicted losses on another person, the State or a public entity is liable to compensate such losses.

1.5 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

There are several pieces of legislation governing product safety in Japan, including the Consumer Product Safety Act (CPSA), the

Electrical Appliances and Materials Safety Act, the Gas Business Act, the Act on the Securing of Safety and the Optimisation of Transaction of Liquefied Petroleum Gas, the Household Goods Quality Labelling Act, the Act on the Control of Household Goods Containing Harmful Substances, the Food Sanitation Act, the Poisonous and Deleterious Substances Control Act, the Industrial Standardisation Act (JIS Mark Labelling Act) and so on. In addition, separate laws apply to ships, road transport vehicles, cosmetics, quasi-drugs, pharmaceutical products and medical equipment. These types of products are not included in, or are excluded from, the definition of consumer products (products to be supplied mainly for use by general consumers for their routine everyday activities) regulated by the CPSA.

The PLA does not contain provisions that would force a manufacturer (including an importer, distributor and so on) to recall or repair a product found to be defective in a product liability lawsuit. However, the CPSA vests powers in the competent Minister (for the majority of consumer products, the Minister with regulatory oversight is the Minister of Economy, Trade and Industry) to investigate complaints relating to particular products, compel manufacturers and importers to disclose information relating to allegedly unsafe products, and order product recalls or other remedial actions if the Minister finds it necessary to prevent the occurrence or decrease the risk of a danger.

Under the CPSA, a person engaging in the manufacture or import of consumer products is legally obligated to investigate the cause of product accidents, and if he finds it necessary to prevent the occurrence and decrease the risk of a danger, he must endeavour to recall said consumer products or otherwise take preventive action (Article 38, Paragraph 1). In the event of a serious product accident, or where serious danger has occurred to the lives or bodies of general consumers or the danger is considered to be imminent, the competent Minister may order the manufacturer or importer of said consumer products to recall the consumer products or otherwise take measures to prevent occurrence (Article 39, Paragraph 1).

Separate statutory rules apply to road transport vehicles, pharmaceutical products and other products which are not treated as consumer products regulated by the CPSA, for example: Article 63-2 of the Road Transport Vehicle Act; and Article 68-9 of the Pharmaceutical and Medical Devices Act.

Under the CPSA, a manufacturer/importer must report the occurrence of a “serious product accident” to the competent Minister (Article 35). The competent Minister may publicly announce the serious incident (Article 36). Those that are not serious may be reported to the National Institute of Technology and Evaluation (NITE).

1.6 Do criminal sanctions apply to the supply of defective products?

Generally not, except under the Penal Code (Law No. 45 of 1907) in the case of death or injury caused by a failure to exercise due care. Moreover, certain violations of the CPSA can give rise to criminal sanctions.

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

A. As a general rule, the party bringing a liability claim (buyer or injured party) bears the burden of proof.

Under the PLA, the manufacturer’s liability is strict once it is found that the product sold was defective. Proof of the manufacturer’s fault/negligence or wilful misconduct is not required in order to seek monetary compensation. A plaintiff seeking monetary damages under the PLA must prove that the manufacturer’s product is defective and that the defect has caused the plaintiff’s injuries or damage. In practice, the plaintiff must at least prove that:

- The defendant is a manufacturer (see question 1.3).
- There is a defect in the product that the defendant has manufactured, supplied, placed on the market, or delivered.
- The plaintiff’s life, body or property has been injured or damaged as a result of the defect in the product.
- A damage has occurred and the amount claimed as damages.
- A causal link exists between the product defect and the injury or damage.

B. In a claim under Article 709 of the Civil Code, the plaintiff must prove that:

- The injury was caused by a defect in the product.
- The manufacturer negligently or intentionally breached a duty owed to the plaintiff and this breach of duty caused the plaintiff’s injuries or damage.

In practice, the plaintiff is at least required to prove:

- The existence of the plaintiff’s right or legally protected interest.
- The existence of a breach of the plaintiff’s right or interest.
- The defendant’s intention or negligence in relation to the breach.
- The occurrence of damage and the amount claimed.
- The causal link between the breach and the damage.

C. For breach of contract claims, the plaintiff must prove that the manufacturer has breached the contract through the supply of a defective product in breach of an express or implied warranty and that such breach has caused some damage to the plaintiff.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?

The PLA does not prescribe any specific test for proof of causation. Instead, the courts will apply the standard test for causation used under the Civil Code. Under Article 709 of the Civil Code, the plaintiff must prove causation between the defendant’s negligence and the resulting damage. The requirement has been somewhat relaxed over time, especially as a result of mass tort cases such as environmental pollution, where causation has been almost presumed in light of circumstances (namely serious disease and contamination, and inexperienced victims at a loss to show causation), thereby shifting the burden of proof onto the defendant. The Supreme Court sought to define the degree of proof necessary for causation in *Minura et al. v. Japan et al.*, Supreme Court, 29-9 MINSHU 1417, 24 October 1975, a medical malpractice case, indicating that proving causation in litigation differed from proving causation in a scientific context and that it was sufficient to show a high probability of causation between facts and the occurrence of a specific result.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

There is no market-share liability in Japan and one or more specific manufacturers must be sued. When several manufacturers are involved in a product liability suit, they are jointly and severally liable under the PLA or based on tort. A named defendant who has compensated the victim in excess of the share of damages he is otherwise required to bear is entitled to seek indemnification from the other tortfeasors.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of 'learned intermediary' under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

A defect may be found where the manufacturer has failed to warn consumers about the risks associated with the products, in particular by failing to provide adequate instructions or warnings that can minimise or eliminate foreseeable risks. Japanese courts do not recognise the "learned intermediary" doctrine, but some lower court rulings seem to have admitted a similar defence in relation to prescription medicine.

3 Defences and Estoppel

3.1 What defences, if any, are available?

A. Defences can be asserted under both the PLA and the Civil Code to avoid liability or to transfer all or part of the liability to another party.

A common defence available under the PLA and the Civil Code (Articles 418 and 722) is comparative negligence, which may be a partial or complete defence. Comparative negligence can also be claimed in relation to product defect claims brought under the PLA where the manner in which the plaintiff has handled, used or stored the product can be deemed to constitute unforeseeable misuse.

Statute of limitations may also provide a valid defence under Article 5 of the PLA and Article 724 of the Civil Code if the claim is time-barred and brought beyond the applicable three- (or, where applicable, five-) or 10/20-year statute of limitations (see question 5.2).

Article 4 of the PLA provides for two more defences:

- A manufacturer will not be liable if he could not have discovered the product defect given the state of scientific or technical knowledge at the time of delivery of the product. The manufacturer must prove that the state of knowledge at the time of delivery was such that the existence of a defect could not have been known. Basing a manufacturer's defence on

the then current state of the art is rather difficult, as Japanese courts have generally interpreted it very narrowly as knowledge meeting the highest scientific or technical standards then in existence.

- A manufacturer of products to be used as a component of, or raw material for, another product is not liable when the defect has occurred primarily because he has complied with the design specifications and instructions given by the final product manufacturer, and he is not negligent with respect to the occurrence of the defect. The component manufacturer (e.g., a subcontractor) must prove that he could not have foreseen or prevented the defect in the product integrated into the final products.

B. For breach of contract claims, customary defences are available. The seller may argue that a claim is time-barred under the applicable statute of limitations (see question 5.2).

The other defences available to the seller are:

- Lack of simultaneous performance of the buyer's payment obligations in a contract where the parties' duties are concurrent (the seller is not under an obligation to perform its duty if the buyer has failed to fulfil its own obligations under the contract).
- Buyer's knowledge of the defect (or negligence in failing to spot the defect; see comparative negligence below).
- A special agreement between the parties disclaiming warranties and liability.

In addition, and without limitation, the seller may seek to rely on:

- Comparative negligence where the plaintiff can be shown to have assumed a certain level of risks, and the plaintiff's own negligence contributed to the injury. The Japanese courts have adopted a comparative negligence approach as opposed to strict contributory negligence, where each party's negligence for a given injury is considered by the judge when determining damages.
- An agreement between the parties limiting compensation (for instance, the provision of liquidated damages) and liability.
- The absence of fault attributable to the seller.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

See question 3.1. The development risk defence is available but narrowly interpreted, as the state of technical and scientific knowledge is determined by reference to the highest standards available at the time. As a result, manufacturers may not easily avail themselves of this defence.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

Compliance with applicable laws and regulations is an important factor in determining whether a product is defective. However, compliance or the failure to comply with applicable laws and regulations is not decisive and does not *per se* rule out or trigger liability.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Claims may be brought by different claimants having suffered a damage caused by the same product. Unless there are new grounds to re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, the court might dismiss the case under the doctrine of *res judicata*.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings, is there a time limit on commencing such proceedings?

The defendant can seek a contribution or indemnity from a third party for damages incurred by the defendant in subsequent (or concurrent) proceedings if the third party is liable for the delivery of a defective product by the defendant.

Filing a motion asking for the consolidation (“*beigo*”) of actions pending between two parties while actions are pending between a third party and either party is allowed as long as the following requirements are satisfied: (i) the existence of a nexus and commonality between claims sufficient to justify a common judgment (Article 38 of the Code of Civil Procedure (CCP)); and (ii) the handling of claims through similar proceedings or the satisfaction of other objective consolidation requirements (Article 136 of the CCP). Based on this procedural option, a defendant can initiate proceedings against such third party and then seek to combine the proceedings with the original product liability suit.

There are time limits for claims against a third party, depending on the type of claim: under the PLA, these are based on tort or breach of contract (see question 5.2).

3.6 Can defendants allege that the claimant’s actions caused or contributed towards the damage?

Comparative negligence is a defence available under the PLA and the Civil Code (under Article 722 of the Civil Code) (see question 3.1). To mitigate the damages, a defendant may have to pay; the courts have adopted a proportionality rule under which a portion of damages may be borne by the plaintiff if the defendant is able to prove his comparative negligence claim. The proportionality rule can go beyond comparing the negligence of the tortfeasor and the victim to reflect the role of, e.g., family members partially at fault in the resulting injury.

3.7 Are there any examples in your jurisdiction of legislation providing exemptions from product liability in respect of products produced and/or deployed in the context of a public health emergency?

In Japan, there are no exemptions from product liability in respect of products produced and/or deployed in the context of a public health emergency. This the case even if a product liability issue arises during such an emergency, including as a result of the COVID-19 pandemic.

4 Procedure

4.1 In the case of court proceedings, is the trial by a judge or a jury?

Judges preside over civil trials and there is no jury system.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

The court may order the appointment of expert witnesses (see question 4.8) but, in principle, such experts do not sit literally with judges. Yet, under the expert commissioner (“*senmon iin*”) system (Article 92-2 of the CCP), expert commissioners can be appointed to support judges and provide support in arranging the contested issues, taking charge of and assisting in reconciliation, conducting research and providing opinions on issues requiring specialised knowledge, participating in the examination of evidence, etc. in their own specialised field.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure ‘opt-in’ or ‘opt-out’? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

There are currently no US-style class actions in Japan. The Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage suffered by Consumers (Law No. 96 of 2013) introduced a special procedure known as the Japanese class action system. This system provides for a two-tier opt-in procedure. During the first stage, a qualified consumer organisation files a lawsuit requesting the court to confirm the liability of a business operator for a common obligation arising under a consumer contract on behalf of potential consumer claimants. If the action is confirmed, the quantum of damages will be determined based on individual claims filed by consumers having elected to opt in.

However, the scope of claims under this Act is limited and only covers claims arising from consumer contracts and certain categories of property damage, including claims for performance based on contractual obligations, for unjust enrichment, breach of contract, warranty against defects, and claims for damages arising out of unlawful acts. However, damage to property other than the subject matter of the consumer contract, lost profits, personal injury, and pain and suffering are expressly excluded by the Act.

There is also the so-called “appointed party” mechanism under Article 30 of the CCP, which allows certain plaintiffs (or defendants) appointed by other claimants (or defendants) to act on their behalf in pursuing (or defending) civil actions. Appointments can be made when there are enough claimants/defendants sharing a “common interest” (i.e., the main allegations or defences are common amongst them). The appointed party can pursue the case on behalf of the appointing parties and the result will be binding upon the appointing parties, including a settlement.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

See question 4.3. There is no such mechanism under the PLA.

4.5 May lawyers or representative bodies advertise for claims and, if so, does this occur frequently? Does advertising materially affect the number or type of claims brought in your jurisdiction?

As per question 4.3, the Japanese class action is useless in this context (to reach out to potential claimants, it is more common and “socially acceptable” to publicise claims through news media coverage rather than through paid advertising; consumer organisations often use victim emergency hotlines and free consultation sessions).

Advertising by lawyers is otherwise permissible but strictly regulated under Regulation No. 44 of 24 March 2000 and related guidelines. Advertising which is false, misleading, exaggerated, illegal or that infringes rules of the national or local bar associations, or impairs the good repute of the profession, is prohibited. There is no media restriction but the wording, placement and methods are limited (and even more stringently regulated when dealing with ongoing matters).

4.6 How long does it normally take to get to trial?

The Act Concerning the Speeding up of Trials enacted in 2003 provides that legal proceedings must be closed within two years. First instance proceedings can last eight months on average but complex cases can take longer to resolve. Generally, the courts schedule the initial hearing within one to one-and-a-half months after the plaintiff has submitted a statement of claims, and require the defendant to submit an answer around a week before the hearing.

4.7 Can the court try preliminary issues, the results of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Significant authority and powers to conduct the proceedings are vested in the courts, and the judges may decide to close the proceedings and enter a judgment at any time. Unless the matter is straightforward, various procedures are available under the CCP which are designed to facilitate pre-trial arrangements relating to points at issue (preliminary proceedings, preparatory proceedings for oral argument and preparatory proceedings by document such as briefs).

4.8 What appeal options are available?

A “*kouso*” appeal can be filed with the appellate court against a final judgment rendered in trial by a court of first instance (a District Court or Summary Court). In principle, it is possible to appeal judgments twice. The first appeal is for the *ex post facto* review of judgments entered by the first instance courts, and whether claims made in the first instance courts are right or wrong is not directly reviewed. In a sense, the first level appeal is a continuation of the first instance trial. The parties may introduce new evidence or new arguments not previously raised. The appellate court (most often the High Court in a product liability context) may conduct its own fact-finding, within the scope of the complaint, based on lower court materials or those submitted to the appellate court.

A “*joukoku*” appeal against the final judgment rendered by a lower court (against “*kouso*” judgments; i.e., rendered by a District Court or the High Court) lies to the Supreme Court (or the High

Court) as a second appeal. A “*joukoku*” appeal is permitted only when filed for a limited number of reasons (matters of law, excluding questions of fact) such as a violation of the Constitution, serious misinterpretation of laws and regulations, lack of sufficient legal basis and inconsistency of reasoning. The period during which a “*kouso*” or “*joukoku*” appeal can be filed is 14 days from the date on which the judgment has been served.

4.9 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The CCP contains a number of provisions governing the appointment and examination of court-appointed experts (Articles 212 to 218). These expert witnesses who have experience and technical expertise can assist the court in understanding any issue in dispute by providing explanations and dealing with fact-finding. Expert opinions can be delivered in writing or verbally, and expert witnesses can be called to testify (and be challenged) before the judges at the hearing. In the Japanese litigation practice, the parties often appoint their own experts, who can also be summoned as witnesses to testify before the court. These experts are more willing to testify in support of the party that has hired them as opposed to court-appointed experts.

4.10 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

In principle, there are no restrictions on admissibility of evidence. Any person or item, including hearsay evidence and expert opinions, can be called or submitted as evidence, and judges determine whether or not evidence is admissible at their own discretion. Evidence that violates confession agreements made between the parties or agreements restricting methods of evidence gathering is not admissible. Examination of witnesses is performed in open court after the parties have filed petitions with the court and after the court has designated the witnesses to be admitted and summoned them in order to be examined on the examination date (Articles 180 and 181 of the CCP). Although there is no law or ordinance regarding witness statements, written witness statements are often exchanged instead of direct oral examination at the hearing.

4.11 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In Japan, there are no disclosure obligations or an extensive discovery process, in contrast with common law jurisdictions. Documents submitted as evidence by the parties are typically collected by the parties through their own efforts. Accordingly, if a manufacturer is not cooperating, critical evidence may be concealed from the plaintiff, which is both relevant and admissible in a product liability case, including, but not limited to, notice to the manufacturer of the existence of a defect in one or more of its products, causation, the existence of a defect, and the feasibility of safer alternate designs.

It is nonetheless possible to petition a court to issue an order to submit documents after an action has commenced by providing valid reasons to compel the counterparty or a third party keeping certain documents, listed in Article 220 of the CCP in his possession, to submit said documents (Article 221 of the CCP). The

person who is filing a motion must indicate (insofar as possible) the document, the identity of the person keeping it, its significance, what needs to be proved with it and the reasons it is necessary.

The obligation to produce documents has been recognised in the following situations: (i) documents to which a party has referred for the purpose of presentation of assertion of proof; (ii) documents whose delivery or inspection a party submitting evidence has the right to require while they are in the possession of another person; (iii) documents showing legal relations which support the rights or legal position of the person filing a motion, or documents showing a legal relation between the person filing a motion and the holder of the documents; or (iv) documents that are not excluded. Excluded documents include documents exclusively prepared for use by their possessor and documents that contain confidential technical or professional information (there are a few other exceptions listed under the CCP).

Before filing an action, if the (future) plaintiff has given advance notice of the filing to the (future) defendant, the plaintiff or the recipient of the notice may, within four months of the date of the notice, make inquiries to the other party on matters necessary to substantiate his allegations or collect evidence (Article 132-2 of the CCP). In addition, the court may order the submission of documents and the commissioning of examinations before a motion is filed by a party when it is difficult for a party to collect documentary evidence from the other side that would be clearly necessary to prove his case (Article 132-4).

4.12 Are alternative methods of dispute resolution required to be pursued first or available as an alternative to litigation e.g. mediation, arbitration?

There is no obligation to pursue alternatives to litigation. Japanese people and corporates typically prefer amicable settlement of disputes through negotiation over court litigation. Even then, a negotiated settlement (“*wakai*”) can be made at any time before or during the court proceedings.

ADR is available on a voluntary basis in the form of civil mediation under the Law Concerning the Promotion of the Use of Alternative Dispute Resolution Procedures (the ADR Law). The ADR Law has introduced an accreditation system (although not mandatory) for private dispute resolution services. If the parties can reach an agreement, this agreement is put on record by the court and becomes enforceable in the same manner as a final judgment. Civil mediation procedures are simple and cost-effective (costs are fixed) and proceedings are confidential.

Civil litigants can also agree to refer their dispute to civil conciliation (“*chotei*”) under the Civil Conciliation Law (CCL). Conciliation under the CCL is conducted by a conciliation committee composed of one judge and two or more civil conciliation commissioners appointed from a group of knowledgeable and experienced citizens. The committee assists the parties in finding an amicable settlement and usually submits a settlement plan to the parties. If the parties can reach an agreement, this agreement is put on record by the court and has the same effect as a court judgment, and can be enforced accordingly. If the parties are unable to reach an agreement, the plaintiff must file a suit before the ordinary courts to pursue their claims.

Although commercial arbitration (“*chusai*”) has not been used actively as a means of resolving domestic disputes in Japan, it has gradually become an important option, especially in an international context.

A number of industry-associated (product-specific) trade associations have established permanent dispute resolution organisations: the Federation of Pharmaceutical Manufacturers

Associations of Japan; Japan Chemical Industry Association; Japan Heating Appliances Inspection Association; Association for Electric Home Appliances; Japan Automobile Manufacturers Association, Inc.; Center for Housing Renovation and Dispute Settlement Support; Consumer Product Safety Association (in charge of the SG-Mark), which established the Consumer Product PL Center; Japan General Merchandise Promotion Center; Japan Cosmetic Industry Association; Fire Equipment and Safety Center of Japan; Japan Toy Association; Japan Paint Manufacturers Association; and Japan Construction Material & Housing Equipment Industries Federation.

4.13 In what factual circumstances can persons that are not domiciled in your jurisdiction be brought within the jurisdiction of your courts either as a defendant or as a claimant?

The CCP lays down international jurisdiction rules applicable to litigation in the Japanese courts without expressly referring to product liability claims. According to the prevailing view, they are classified and treated as tortious claims.

Pursuant to the CCP general forum rules, a claimant may initiate legal proceedings based on tortious liability or product liability before the Japanese courts against any manufacturer whose principal place of business or business office is located in Japan. Under special forum rules, a claimant can generally file a lawsuit in Japan against the manufacturer if the tortious act has occurred in Japan, even if the manufacturer has no office in this country. A tortious act is deemed to happen where the tortious act was committed (including the place where the product was manufactured) or where the results occurred (unless the occurrence in Japan of the results of a wrongful act committed abroad was unforeseeable).

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes, there are time limits.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

A. Limitation periods for bringing a claim under the PLA and based on tort

Under the PLA, the right to seek damages based on product liability is extinguished by prescription if:

- The victim or his legal representatives do not exercise such right within three years (five years in case of damage due to bodily harm or death) from the time they became aware of the damage and identified the party liable for the damages (the responsible manufacturer).
- The victim or his legal representatives do not exercise such right within 10 years from the time of the delivery of the product by the manufacturer.

In the event that damage or injuries are caused by substances which become harmful to human health after accumulating in the body, or where the symptoms linked to damage or injuries only appear after the passage of time, claims become time-barred after 10 years from the time of occurrence of the damage.

Claims brought under Article 709 of the Civil Code follow a similar prescription pattern of three years and 20 years, respectively.

Under Article 724 of the Civil Code, the right to demand compensation for damages in tort is extinguished by prescription if it is not exercised by the victim or his legal representative within three years (five years in case of bodily harm or death under Article 724-2) from the time when he became aware of the damage and identified the perpetrator. The same applies if it is not exercised by the victim or his legal representative within 20 years from the time when the tort was committed.

Notwithstanding the above rules, a court may still decide to set aside the statute of limitations in the interest of justice in cases of fraud or concealment of evidence.

B. Limitation periods for bringing a claim for breach of contract

Under Article 166 of the Civil Code, the right to demand compensation for damages based on liability for fault and liability for defects expires if it is not exercised by the victim or his legal representative within five years from the time when he became aware that he could claim damages in relation thereto. The same applies if it is not exercised by the victim or his legal representative within 10 years (20 years in case of damage due to bodily harm or death under Article 167) from the time when he could claim damages.

With respect to defects, unless the sale and purchase contract provides otherwise, the buyer must give notice of the defect within one year from the time it becomes aware of the defect (Article 566 of the Civil Code). This shall not apply where the seller had knowledge of the defect or had no knowledge of the defect due to his or her gross negligence.

In a transaction between merchants, unless the sale and purchase contract provides otherwise, the buyer may not bring a claim against the seller for a defect that is not immediately obvious unless he gives notice of the defect to the seller within six months of receipt of the goods. The buyer may not pursue remedies against the seller for other defects unless the buyer notifies the seller of the defect immediately after receiving the goods (Article 526 of the Commercial Code). This shall not apply where the seller had knowledge of the defect.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

In cases of concealment of evidence or fraud by the manufacturer, the court can set aside the statute of limitations in the interest of justice.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

A. Only monetary compensation is available as a remedy under the PLA and the Civil Code for claims brought under Articles 3 and 709, respectively. Damages can be awarded for monetary and non-monetary damage.

Under the PLA, the manufacturer is liable for damage and injuries to the life, limbs or property of the victim. The manufacturer is not liable when the damage only occurs to the product itself. In addition to physical injuries, compensation for mental pain and suffering resulting from the injury caused

by the defective product can be recoverable, as well as medical expenses and lost wages. Similar remedies are available under the Civil Code. Monetary damages encompass both actual loss and anticipated profits. The scope of damages permitted for breaches of civil obligations is set out under Article 416 of the Civil Code and covers losses that would normally arise from non-performance, plus losses arising from special circumstances that parties had foreseen or should have foreseen.

B. A buyer can ask a court to rescind the sale and purchase contract and demand compensation for damages if there is a defect in the product (Articles 415, 541, 542 and 564 of the Civil Code) or otherwise a breach of contract (Articles 415, 541, 542, 562, 563, 564, 566, and 570 of the Civil Code; as explained above, more generally lack of conformity with respect to description, quality and quantity which, conceptually, includes a defect). If the contract cannot be rescinded, the buyer may claim compensation for damages. The plaintiff does not have to prove the manufacturer's or seller's negligence or intent. In addition, although only monetary compensation is available as a remedy under the Civil Code, the buyer can ask the seller to repair the defective goods or provide a substitute for the goods or to reduce the price of the defective goods as an alternative to rescinding the sale and purchase contract and making a compensation claim in the case of non-conforming products (Articles 562 and 563). Orders to void contracts entered into with consumers, as well as prospective orders to prevent unlawful solicitations for new business, can also be applied for under the CCA.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

See question 6.1.

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

No, recovery is not possible in this case.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

Punitive or treble damages are not available as a remedy under Japanese law.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

There is no cap on the damages recoverable.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

There are no special rules.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the claimant in respect of the injury allegedly caused by the product? If so, who has responsibility for the repayment of such sums?

Japanese Government authorities (e.g., the Japan Pension Service, etc.) have no right to claim any part of the compensation received by the claimant.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

The losing party generally bears the litigation expenses (court costs such as filing fees, fees paid to witnesses and interpreters and the travel expenses paid to the aforesaid and the prevailing party, document preparation fees, etc.). For other costs, in the absence of an attorney fees clause, the general rule applies that litigation costs are borne by the party incurring the expense, even if they prevail in the dispute. In a tortious liability context, the court may still award a (usually small) part of the prevailing party's attorneys' fees as part of the damages when there is a reasonable causal relationship between a tort and the attorneys' fees (but will usually limit the recovery of fees to a maximum of 10% of the recoverable damages).

7.2 Is public funding, e.g. legal aid, available?

The Japan Legal Support Center, an independent public institution, provides civil legal aid services, including free legal consultations and loans for attorneys' fees, for people who require the assistance of legal experts but who for economic reasons are unable to pay for attorneys' fees and court costs. Criminal matters are excluded.

7.3 If so, are there any restrictions on the availability of public funding?

To obtain public funding, the applicant must have financial resources below a certain amount, have some reasonable chance of success, and pursue aims consistent with the purposes of legal aid.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Attorneys' fees may be freely agreed upon between attorneys and clients, and lawyers are allowed to charge part of their fees on a contingency basis under the Bar Association rules. Many law firms continue to determine their fees based on a combination of retainer fees and success fees listed in the now repealed legal fee table of the Japanese Federation of Bar Associations.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding is not prohibited *per se*, although there are very few court precedents on this issue. The assignment of

claims or causes of action is generally permitted but the entrustment of a claim for litigation purposes is prohibited under the Trust Act (Law No. 108).

7.6 In advance of the case proceeding to trial, does the court exercise any control over the costs to be incurred by the parties so that they are proportionate to the value of the claim?

The court generally does not exercise any control regarding the cost of proceedings or proportionality.

8 Updates

8.1 Please outline the approach taken to date by the courts in your jurisdiction in relation to product liability for new technologies such as artificial intelligence, machine learning, and robotics, and identify the ways in which this approach differs (if at all) from the approach taken with other products.

Manufacturers (see definition in question 1.3) can be liable for damage caused by a defect in a product under the PLA and if new technologies such as AI are defective, i.e., lack the safety they should ordinarily provide, the AI manufacturer may be liable under the PLA. In this regard, the PLA does not provide for specific procedures. Therefore, the approach taken in relation to product liability resulting from the use of new technologies is no different from that taken with other products. No clear view and practice have been established yet as to when AI should be regarded as lacking the safety it should ordinarily provide, and the debate on this topic, and on the specific rules and principles to apply in the future, goes on.

8.2 Please identify any other significant new cases, trends and developments in Product Liability Law in your jurisdiction.

Although the number of court cases has not increased dramatically, the PLA has helped to establish a more level playing field for plaintiffs and victims of product liability accidents. The development of product liability insurance might be one of the reasons for this. Another reason might be the Japanese legal system itself, which is largely based on the German and French civil law models and lacks the main ingredients of a robust plaintiff-driven practice compared with what is available in the US: jury trials; punitive damages; and contingency fee agreements. Severe limitations on pre-trial discovery, high attorneys' fees, costly court filing fees and protracted trials have curbed the expansion of product liability litigation.

The Japanese class action system is still in its infancy and does not offer attractive options in this context. In addition, many manufacturers have been quick to settle complaints and claims with individual consumers rather than risk bad publicity and litigation. Product recalls have nonetheless increased in number and publicity. Another lasting consequence of the PLA has been the manufacturers' emphasis on warnings and instructions across all industries. Labelling and marking requirements have also become stricter in many industries.



Shinya Tago is a Japanese attorney at law, admitted to the New York State Bar Association, and is the Managing Partner of Iwata Godo. His practice includes: general commercial litigation; securities litigation; shareholder derivative litigation; arbitration (domestic and international), conciliation and mediation; and tort claims (including product liability disputes). Shinya is also a professor at the Hitotsubashi University Law School.

Iwata Godo Law Offices

Marunouchi Bldg., 15th Floor
2-4-1 Marunouchi, Chiyoda-ku
Tokyo 100-6315
Japan

Tel: +81 3 3214 6205
Email: stago@iwatagodo.com
URL: www.iwatagodo.com



Landry Guesdon is a Registered Foreign Attorney (Tokyo Bar) and Avocat (Paris Bar) and is a member of the International Practice Committee of Iwata Godo. Based in Japan since 1997 and with more than 20 years' service in a Magic Circle firm, Landry has extensive experience in mergers & acquisitions, joint ventures and general corporate matters and antitrust spanning numerous industries (pharmaceuticals and medical devices, cosmetics, defence and aerospace, food and agriculture, consumer and retail, general industrial, energy and utilities). Landry gained a B.A. in Law from the University of Kent in Canterbury and an LL.M. from the University of Paris.

Iwata Godo Law Offices

Marunouchi Bldg., 15th Floor
2-4-1 Marunouchi, Chiyoda-ku
Tokyo 100-6315
Japan

Tel: +81 3 3214 6205
Email: lguesdon@iwatagodo.com
URL: www.iwatagodo.com



Tomohiro Suzuki is a Japanese attorney at law and an Associate at Iwata Godo. His practice mainly focuses on dispute resolution and corporate law. His diverse dispute resolution practice includes commercial disputes between companies, product liability disputes and international arbitration. Tomohiro graduated from Keio University (LL.B.).

Iwata Godo Law Offices

Marunouchi Bldg., 15th Floor
2-4-1 Marunouchi, Chiyoda-ku
Tokyo 100-6315
Japan

Tel: +81 3 3214 6205
Email: tsuzuki@iwatagodo.com
URL: www.iwatagodo.com

Iwata Godo is one of Japan's premier and oldest law firms. It was established in 1902 as one of the first business law firms by Chuzo Iwata, an attorney-at-law who subsequently held various positions, including serving as Minister of Justice and president of the Japan Federation of Bar Associations. It is a full-service firm with around 90 attorneys and each of its practice areas is highly regarded. The firm's litigation practice is among the most prominent and accomplished in Japan and the practice handles a broad range of disputes in all sectors. Our product liability attorneys have taken on challenging cases and achieved excellent results with claims for compensation relating to a broad range of defective products.

www.iwatagodo.com

IWATA GODO
Established 1902

ICLG.com



Current titles in the ICLG series

| | |
|--|--|
| Alternative Investment Funds | Franchise |
| Anti-Money Laundering | Gambling |
| Aviation Finance & Leasing | Insurance & Reinsurance |
| Aviation Law | International Arbitration |
| Business Crime | Investor-State Arbitration |
| Cartels & Leniency | Lending & Secured Finance |
| Class & Group Actions | Litigation & Dispute Resolution |
| Competition Litigation | Merger Control |
| Construction & Engineering Law | Mergers & Acquisitions |
| Consumer Protection | Mining Law |
| Copyright | Oil & Gas Regulation |
| Corporate Governance | Patents |
| Corporate Immigration | Pharmaceutical Advertising |
| Corporate Investigations | Private Client |
| Corporate Tax | Private Equity |
| Cybersecurity | Product Liability |
| Data Protection | Project Finance |
| Derivatives | Public Investment Funds |
| Designs | Public Procurement |
| Digital Business | Real Estate |
| Digital Health | Renewable Energy |
| Drug & Medical Device Litigation | Restructuring & Insolvency |
| Employment & Labour Law | Sanctions |
| Enforcement of Foreign Judgments | Securitisation |
| Environment & Climate Change Law | Shipping Law |
| Environmental, Social & Governance Law | Technology Sourcing |
| Family Law | Telecoms, Media & Internet |
| Fintech | Trade Marks |
| Foreign Direct Investment Regimes | Vertical Agreements and Dominant Firms |