



**COUNTRY
COMPARATIVE
GUIDES 2022**

The Legal 500 Country Comparative Guides

South Korea

PRODUCT LIABILITY

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

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SOUTH KOREA

PRODUCT LIABILITY



1. Please summarise the main legal bases for product liability

In Korea, it is possible to raise a product liability claim under the Civil Act, the Commercial Act, the Product Liability Act (PLA), the Framework Act on Consumers, the Framework Act on the Safety of Products, the Motor Vehicle Management Act, the Chemical Substances Control Act (K-REACH) depending on the subject matter. Most product liability claims are raised under the PLA or the Civil Act tort clause. The PLA mainly governs product liability litigation in Korea. Pursuant to Article 3(1) of the PLA, a manufacturer is responsible for the compensation of damages to life, persons and property caused by product defect, except for the damages incurred to the product itself. In addition, the Act on the Punishment etc., for Severe Accident, enacted on January 26, 2021, and which became effective on January 27, 2022, will enable holding a business operator liable for any severe accident caused by a product defect resulting to death, injury or disease of people ("Severe Accident Suffered by People"). Please see our response to question no. 23 below for more details.

2. How is "product" defined? In particular, does it cover software provided by way of a download only?

Article 2 of the PLA defines "product" as movables which are industrially manufactured or processed, including movables incorporated into another movables or immovables. The Supreme Court further explained that the "products" subject to PLA are movables manufactured or processed through design or processing of raw materials which are supplied for commercial distribution. The commercial distribution not only includes the distribution to an unspecified large number of consumers but also the supply of a custom-made product to a specific consumer. Real property or unprocessed agricultural and livestock products are excluded from the "products" under the PLA.

Whether software is a "product" for the purposes of the

PLA is still disputed as there is no established precedent. The majority view is that software is not a movable but a type of service or information and, therefore, does not fall under the definition of "product" under the PLA. However, embedded software that is stored in a semiconductor or other storing medium may qualify as a "product". Even in such case, not the software itself but the medium storing the software will be considered as a "product" subject to PLA.

3. 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?

The plaintiff to product liability litigation must prove (i) existence of the defect, (ii) damages to life, persons or property, (iii) causation between defect and damages. The PLA defines the term 'defect' as the defect of any products in manufacturing, design or warning falling under any of the following items or lack of safety that the product ordinarily should provide (Article 2(2) of the PLA). 1. Manufacturing defect: defect caused by deviation from the originally intended design due to the failure in the manufacturing process or processing of the product, regardless of whether the manufacturer faithfully performs the duty of care and diligence with respect to the manufacturing or processing. 2. Design defect: failure by the manufacturer to adopt reasonable alternative design where the damages or risks caused by the product could otherwise have been reduced or prevented. 3. Warning defect: failure by a manufacturer to give reasonable explanations, instructions, warnings and other indications on the product, where the damages or risks caused by the product could otherwise have been reduced or prevented. As explained above, the plaintiff has the burden to prove defect. Once the plaintiff is able to prove certain circumstantial facts, it is presumed that the product in question had a defect at the time the manufacturer supplied such product and the damages were incurred due to the defect. Please refer to question 8 below for more details.

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

The term manufacturer is defined as (Article 2(3) of the PLA): 1. a person who is engaged in the business of manufacturing, processing or importing any product; or 2. a person who presents him or herself as any person falling under (a) above by putting his or her name, firm name, trademark or any other distinguishable feature (his or her name) on the products, or a person who made a misleading indication that he/she is the person as described under (a) above. When a manufacturer is unidentifiable, the person who supplied the product for profit, in a form of sale or lease, etc., shall be liable for damages, if the supplier knows or could have known the manufacturer's identity but fails to inform the injured party (or legal representative) of the manufacturer's identity within a reasonable time (Article 3(3) of the PLA). Where there are two or more persons liable for the same damages, they must be liable jointly and severally for the damages (Article 5 of the PLA).

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

A manufacturer can be relieved from its responsibility for damage compensation if it can prove any of the following (Article 4(1) of the PLA): the manufacturer did not supply the product; existence of the defect was not discoverable by the state of science or technical knowledge at the time the manufacturer supplied the Product Liability: South Korea PDF Generated: 14-01-2022 3/8 © 2022 Legalease Ltd product; the defect was because of compliance with any act or subordinate statute at the time the manufacturer supplied the product; or in the case of raw materials or components, the defect was attributable to the design of the product in which any raw materials or components have been fitted or to the instructions concerning manufacturing given by the manufacturer of the product using them. In addition, other possible defences include: (i) the risk within the permitted scope, (ii) costbenefit analysis, (iii) non-existence of reasonable alternative design, or (iv) non-specific diseases to prove against causation.

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

The PLA provides for a 10-year long-term statute of limitations and three-year short-term statute of limitations, and the statute of limitation runs with whichever occurs earlier. Specifically, a claim under the

PLA must be brought the earlier of (i) 10 years from the delivery of the defective product or (ii) three years from the plaintiff's discovery of damages and relevant liabilities. For the damages caused by harmful substances or the damages that become apparent after a certain latent period, the long-term statute of limitation will be calculated from the date the damage occurred.

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

First, consumers can only bring product liability claims against manufacturers before the applicable limitation period lapses. In a tort claim, the court must take into account any contributory negligence on the part of a plaintiff in determining the liability of the manufacturer and the amount of damages (Articles 763 and 396 of the Civil Act). The principle of contributory negligence also applies to product liability claims under the PLA (Article 8 of the PLA), provided that contributory negligence is not recognized in case the plaintiff's negligence is ordinary and foreseeable but is recognized only where there is gross negligent on the part of the plaintiff or it is found that the plaintiff used the product knowing the defect in the product.

8. 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?

Prior to the enactment of the PLA, a plaintiff was able to bring a product liability action by making a tort claim or a non-performance of liability claim under the Civil Act. In such case, the plaintiff had the burden to prove (i) the existence of defect, (ii) manufacturer's intentional tort or negligence, (iii) damages, and (iv) causation between the defect and damages. Pursuant to the amendment to the PLA which became effective in 2018, the existence of the defect and the causation between the defect and the damages are presumed, in the absence of proof to the contrary (Article 3-2 of the PLA), if the plaintiff can prove that the accident: occurred from the use of the concerned product under its normal operating conditions; happened within the realm of the manufacturer's exclusive control; and would not usually happen without the defect in the product.

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

Under the PLA, a manufacturer is liable for damages to life, persons and property caused by product defect. Damage to the product itself is excluded from the 'damage' under the PLA. The PLA provides that the Civil Act provisions for the compensation of damages must apply in the assessment of damages. Under the Civil Act, one may seek compensation for direct damages (e.g., property damage and medical expenses), indirect damages (e.g., loss of expected benefits or wages), and emotional distress. In principle, the damage is measured by comparing the value of the property it would have been without the product defect. The Civil Act categorises the damages caused by intentional or negligent torts into ordinary damages and extraordinary damages. Ordinary damages are normally expected to incur by an instance of illegal conduct, while extraordinary damages may incur owing to the extraordinary circumstances of the injured and can be compensated only if the offender could have foreseen such extraordinary circumstances. Punitive damage is generally not recognized in Korea and, therefore, no compensation is available under the PLA other than that for the damages to life, persons and property caused by a product defect. Provided, however, that with respect to the damage to life and persons caused by a product defect, the PLA allows courts to award exemplary damages not exceeding three times the amount of actual damages if the manufacturer was aware of the alleged product defect and failed to take appropriate measures to prevent the damage to life or serious bodily injuries to persons. In addition, under the Act on Punishment etc., for Severe Accident, which will become effective on January 27, 2022, any business operator will be held liable for the damages suffered due to Severe Accident Suffered by People. The liability of the business operator will be up to 5 times the actual damages suffered.

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

If two or more persons caused damages to another by their joint unlawful acts, they are jointly and severally liable for the damages (Article 760(1) of the Civil Act). Among the joint tortfeasors, the liability is apportioned in proportion to their degree of negligence. In case one tortfeasor has compensated an amount exceeding its proportion of liability, such tortfeasor is entitled to seek contribution from other tortfeasors by exercising its right to indemnity.

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

Possible defences include: (i) the risk within the permitted scope, (ii) cost-benefit analysis, (iii) nonexistence of reasonable alternative design, or (iv) nonspecific diseases to prove against causation. In addition, the defences under Article 4(1) of the PLA are also available to the manufacturer. A manufacturer can be relieved from its responsibility for damage compensation by proving that (i) the manufacturer did not supply the product, (ii) the existence of the defect was not discoverable by the state of science or technical knowledge at the time the manufacturer supplied the product, (iii) the defect was because of compliance with any act or subordinate statute at the time the manufacturer supplied the product, or (iv) in the case of raw materials or components, the defect was attributable to the design of the product in which any raw materials or components have been fitted or to the instructions concerning manufacturing given by the manufacturer of the product using them (Article 4(1) of the PLA). Unlike product liability claims, manufacturer may also be relieved from liability by proving there was no intentional or negligent tort.

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

The limitation period lapses on the earlier of (i) three years from the date on which the injured party or his/her legal representative becomes aware of such damage and of the identity of the person who caused it, or (ii) ten years from the time the unlawful act was committed (Article 766 of the Civil Act).

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

First, consumers can only bring product liability claims against manufacturers before the applicable limitation period lapses. Pursuant to the principle of contributory negligence, the court must take into account any contributory negligence on the part of a plaintiff in determining the liability of the manufacturer and the amount of damages (Articles 763 and 396 of the Civil Act).

14. 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.

Although the law does not require including certain terms or conditions imposing liability in a situation where a product has caused damages, an agreement to exclude or limit any liability for damages recognized under the PLA is null and void, except where a person purchases a product to be used for his own business agrees to limit liability for damages caused by the product to his own business property (Article 6 of the PLA).

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

Unless the contract provides for a liquidated damages clause, the damage to be compensated is measured the same way as the case of non-contractual claim. That is, a manufacturer is liable for damages to life, persons and property caused by product defect, and one may seek compensation for direct damages (e.g., property damage and medical expenses), indirect damages (e.g., loss of expected benefits or wages), and emotional distress. In principle, the damage is measured by comparing the value of the property it would have been without the product defect.

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

An agreement excluding or limiting any liability for damages provided under the PLA is null and void, except where a person purchases a product to be used for his own business agrees to limit liability for damages caused by the product to his own business property (Article 6 of the PLA). Again, consumers can only bring product liability claims against manufacturers before the applicable limitation period lapses. In the context of a contractual claim, a 5-year limitation period applies to commercial claims (claims arising from commercial activities as defined under the Commercial Act), and a 10-year limitation period applies to other civil claims. Pursuant to the principle of contributory negligence, the court must take into account any contributory negligence on the part of a plaintiff in determining the liability of the manufacturer and the amount of damages (Article 396 of the Civil Act).

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

With respect to the manufacturer's duty to warn and the

legal standard governing design defect, the Korean Supreme Court found in its Agent Orange decision (2013) that: a manufacturer who designs and manufactures a chemical product containing a toxic substance that is harmful to the human body is subject to a higher standard of obligation to prevent risks; the manufacturer should thoroughly verify the safety of the manufactured product using the highest level of technology available at the time, and remove and minimise the risks that may occur through investigation and research; and if a manufacturer designs a chemical product with a risk of causing harm to human life and body, and manufactures and sells such product the way it is designed but in violation of the higher standard of obligation to prevent risks, it is reasonable to determine that, unless special circumstances exist, such chemical products have a design defect. In addition, with respect to whether statistical connection proves the causation in a product liability suit, the Korean Supreme Court found in its Agent Orange decision (2013) and the tobacco case decision (2014): with respect to non-specific diseases, even if an epidemiological correlation is found between a risk factor and a non-specific disease, the probability of causation between the risk factor and the non-specific disease cannot be seen to have been proven by mere proof of the fact that an individual was exposed to the risk factor and that the individual was diagnosed with the non-specific disease. The probability of causation between the risk factor and the non-specific disease must be proven by showing through a controlled epidemiological study on a group exposed to the risk factor and another group not exposed thereto that the incidence rate of the non-specific disease in the exposed group is significantly higher than that in the unexposed group and by additionally proving the time and extent of exposure to the risk factor, the time of occurrence of the non-specific disease, health conditions prior to exposure to the risk factor, lifestyle, progress of the non-specific disease and family history in respect of individuals in the exposed group. (Hence, the decisions were rendered that there was no proof of the connection between the Agent Orange and non-specific diseases such as diabetes or the connection between smoking and nonspecific diseases such as non-small cell lung cancer.) The humidifier disinfectant scandal has continued to be an issue much disputed in Korea. Recent court findings have been divided depending on the type of raw materials used in the disinfectant and the existence of product safety certification. Some disinfectants that used certain raw materials were found to have causation between the use of such raw materials and lung diseases whereas the causation was denied for other disinfectants that used different raw materials considering the respective raw materials' inhalation toxicity safety margin (NOAEL).

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

There is no pre-filing requirement or steps (e.g., mandatory mediation) to be satisfied before a formal lawsuit may be commenced. A product liability claim can be filed directly to the court. Before a product liability claim is filed, it is important to make a preliminary assessment of the merit of the claim. A party needs to confirm whether there is manufacturing or design defect through technical analysis. If it is determined based on the technical analysis that the product in question has an inherent risk, it must be determined whether the manufacturer satisfied its duty to warn under the applicable regulations, and whether it was possible to make any further warnings. It is also important to assess the damages, costs associated with recall, if any. There is also the need to analyse whether there is any other cause of damages.

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

Korean courts played an important role in creating and applying important legal doctrines with respect to presumption of defect, causation, and scope of damages, among others, which led to the enactment of the PLA in 2002. Korean courts have ruled on various product liability cases, including tobacco cases, Agent Orange cases, automobile emission cases, humidifier disinfectant cases, etc. Since January 2008, Korea has implemented the system for citizen participation (jury trial) in criminal cases on a limited basis. However, citizen participation in trials is not available for civil litigations such as product liability litigation. Therefore, product liability cases are heard by judges. In Korea, the court's decision is highly revered and the judges are recognized for their impartiality and high standards.

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

Although the Securities-Related Class Action Act (Act No. 7074 of 20 January 2004, as amended), which may apply to certain illegal acts (e.g., false or insufficient filing of securities reports or business reports, etc.), has been effective since January 2005, there is no general class action system in civil proceedings in Korea (including product liability cases). The 'appointed-party' system in

Korea has some similarities with the class action system but is different in that, under the 'appointed-party' system, only those participating in the trial are entitled to the benefit of the court's findings and award. In addition, if the rights and obligations subject to a lawsuit are relevant to two or more persons or an identical factual or legal cause gives rise to a claim, it may be possible for several persons to become the plaintiffs or defendants to a lawsuit (there are not many cases where there are several plaintiffs or defendants because it is difficult to satisfy the requirements under the law). The court's decision on such case only applies to the parties to the lawsuit which is different from a class action or group action. The Korea Department of Justice recently proposed a class action bill which is currently under review by the Ministry of Government Legislation. Whether the bill will pass remains to be seen. In practice, in case there are several victims to a product liability case, it is common for the victims to appoint one legal representative to represent them in the lawsuit.

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

The legal costs are generally funded by the plaintiff. Unless it is proven that a party has no chance of winning the case, upon the request by a party or at its own discretion, the court may grant legal aid to a party unable to pay for the litigation costs. A party applying for legal aid must submit to the court the evidence of its financial status. Legal aid includes deferred payment of court fees and attorneys' fees and exemption from the deposit for court fees. In addition, Korea Legal Aid Corporation, a public organisation, provides legal assistance (including representation during trial) to individuals with financial difficulties at a minimal fee or free of charge. There is no law or regulation specifically prohibiting third-party litigation funding in Korea. In principle, in a lawsuit where the property right is disputed, an entrustment of the litigation to a third party by the person who owns the respective property right or who has the authority to manage or dispose of such property rights is not allowed as arbitrary entrustment of litigation. Entrustment of litigation may be allowed in limited circumstances where there are reasonable needs or reasons. In any event, entrustment of litigation must not take place in order to avoid the principle of representation by attorneys or in violation of the Trust Act. Contingency or conditional fee arrangements are permitted in Korea and there is no legal restriction on the maximum amount of such fee. It is not required for a party to inform the other party of such fee arrangement.

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

A product liability claim will more likely be settled between the manufacturer and the consumers before a claim is filed with the court. There are, however, cases raised before the court continuously. The factors such as the number of people injured or dead due to product defect (e.g. the humidifier disinfectant case), the level of criticism, continuous issue raising by the consumer groups, new legislation emphasizing consumer safety, court decisions alleviating plaintiff's burden of proof would influence the frequency of product liability claims.

23. 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 recent trend has been to implement more consumer friendly regulations, such as presumption of defect or alleviation of the burden to prove causation, which can also be found in court decisions. There is increased concern on consumer safety which is expected to lead further legislations and court decisions to such direction. There is a possibility that an amendment to the PLA imposing the burden to prove product defect on the manufacturer or allowing group action in product liability case may be proposed. Although the burden to prove causation will stay with the plaintiff, it is possible that the legislation or the courts accept the presumption of causation or statistical causation analysis in the future. In addition, there are continued efforts to expand application of punitive damages in the product liability cases. Due to the fast technology development in Korea, there are increasing concerns on the safety of consumers which lead to new legislations. One example is the heavy regulation on the chemical substances. In order to balance technology development and consumer protection, the Regulatory Reform Committee continuously monitors the market and how the regulations are implemented. According to the class action bill proposed by the Department of Justice, a group of 50 or more people would be eligible for class action regardless of the industry. It will further alleviate the victims' burden of proof and introduce discovery system which is similar to the discovery in the U.S. Once passed, the class action bill is expected to bring a legal environment favourable to the victims. The Department of Justice also proposed an amendment to the Commercial Code which will broaden the applicability of punitive damage clause. According to the proposed

amendment, a person involved in business or trade who causes damages to another wilfully or gross negligently, will be liable for compensation up to 5 times the actual damages. This may also be applicable to a product liability case. On January 26, 2020, the Act on Punishment etc. for Severe Accident was introduced. The initial bill was proposed in response to repeated workplace accidents. However, the concept of "Severe Accident Suffered by People" was introduced last minute as a subcategory of "Severe Accident". Severe Accident Suffered by People refers to accident caused by product defect resulting in (i) death of one or more persons or (ii) injury or disease of 10 or more persons. The Act on Punishment etc. for Severe Accident requires the business operator to take protective safety measures. The business operator may be subject to criminal sanctions (incarceration of up to 7 years or fine of up to KRW 5 billion) or may be held liable for compensatory damages for an amount not exceeding 5 times the actual damages for failure to comply with the obligations under the Act on Punishment etc. for Severe Accident. The issues surrounding the Act on Punishment etc., for Severe Accident and how it would affect the businesses of the companies operating in Korea are currently the most hotly debated legal issues in Korea.

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

Energy storage system (ESS) facility fire case There were 23 ESS facility fire incidents between 2017 and 2019. Due to the disagreement between the battery manufacturer and the facility management company on which party is liable for the fire incidents, the publicprivate joint investigation committee was established to investigate into the fire incidents. There are still disputes over the cause of fire and there are on-going disputes among the battery manufacturer, the facility management company, and their respective insurance companies. Several lawsuits have been filed in 2020 in connection with ESS. Starting early 2020, Vietnam War Veterans and the widows of the veterans refiled the defoliant case before the Korean courts. The cause of action is similar to that of the cases previously filed. As for the tobacco case filed by the National Health Insurance Service (NHIS) against the tobacco companies, the trial court dismissed the claims made by NHIS on November 20, 2020. The court found that there is no legal basis for NHIS to make a direct claim against the tobacco companies and no sufficient ground to find causation between smoking and lung cancer. NHIS appealed the decision of the trial court, and issues including the hazard or risks of additives are being

intensely disputed among the parties. The submission of the class action bill, proposed introduction of punitive damages and the concept of Severe Accident are the results of heated debates on consumer safety and

protection which may potentially burden the relevant industries. Against such backdrop we expect to see more consumer friendly legislation and court rulings in the coming years.

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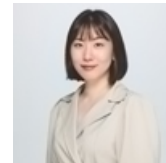
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