



THE PROBLEM AND INADEQUENCY OF PRODUCT  
LIABILITY IN THAILAND

BY  
MR. ATHICHON ANGKINANTANA

AN INDEPENDENT RESEARCH PAPER SUBMITTED IN PARTIAL  
FULFILLMENT OF THE REQUIREMENT  
FOR THE DEGREE OF MASTER OF LAWS  
(IN BUSINESS LAW)

GRADUATE SCHOOL OF LAW  
ASSUMPTION UNIVERSITY

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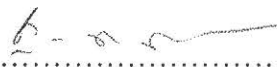
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Faculty of Law, Assumption University approves this Independent Research Paper as the partial fulfilment of the requirement for the Degree Master of Laws.

  
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## ABSTARCT

This study researches the concept of Product Liability Law in foreign countries and analyses the problems of the Product Liability in Thailand and surveying what would be the implication if the foreign Product Liability Law is applied in Thailand, in order to find out appropriate pattern of Product Liability Law in Thailand.

Accordingly, it is found that in the referenced foreign countries there are two measures used to regulate the product liability, namely the product liability law which is based on strict liability rules and Product Liability Insurance Fund. While the Strict Liability has pushed excessive accountability to business sector; the Product Liability Insurance Fund can reduce the risk of entrepreneurs, since it allows them to produce goods in competition. Moreover the Product Liability Insurance Fund can take part in the development of the economy of Thailand; so this measure may be used in combination with the modification of the current law of tort in the Civil and Commercial Code concerning the shifting burden of proof to the entrepreneurs who cause damage to the consumer. This concept of Res Ipsa Loquitur will help the Court to consider the liability of the entrepreneurs and make assessment the damages that incur to the consumer in a case by case basic since the different products can cause different level of damage to the consumers.

The Product Liability Insurance Fund is a way out for the problems of the product liability in Thailand. Even though Product Liability Insurance Fund will affect the price of products, but it allows consumers to have more confidence in product safety and the compensation of the damages that they are likely to receive.



The application of the concept of Res Ipsa Loquitur, the Punitive Damage together with the establishment of Product Liability Insurance Fund are the measures which recommended as guidance for the Draft of Product Liability Act.



## ACKNOWLEDGEMENT

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For the people who have been always teaching and giving instructions to the writer to have these every day, may all of inherent nobility and supreme glory of the my diligence of doing this research will be passed and praise to my mother, father and sister who give the opportunity to study in the excellent program. Any mistakes and defects shall become to the hand of the writer.

Athichon Angkinantana



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## **Chapter 1**

### **Introduction**

#### **1.1 Background of the problem**

Thailand is the country which has production for export purpose and import of foreign consumer products for safe consuming; and therefore its producers ought to be responsible for and its consumers receive the remedy for any defectiveness of the products which has occurred. So, the state government must provide the protection for the consumers, to increase the quality of the Consumer Protection Policy. The Thai government has conducted study into the product liability in foreign countries, in order to obtain the suitable and useful principle for the country's application. In fact, nowadays Thailand has "the Draft of Product Liability Act" for the protection of the injured persons but the Draft of Product Liability Act is still in the process for legislation. Therefore, the laws which can be used in Product Liability cases currently still have to rely upon fundamental provision of the Civil and Commercial Code.

Nowadays liability for damages caused by products has long been governed by the sale provisions as contained or the law of tort in the Civil and Commercial Code. According to the law, consumers who have bought problematic products will need to bring an action against the seller to claim for damages from the defects found in the goods purchased. However, a third person who has been injured by the goods cannot get compensation from the seller with an aid of the sale provision of the code simply because the third person has no contractual relation with the seller; the third party's relief is, therefore relegated to the law of tort, but the tort principle it is required to sue according to the Civil and Commercial Code section 420, and the injured consumer has burden of proof the defect, it increases responsibility to injured consumer because nowadays the production of goods is of greater complexity. Indeed, production processes are within the knowledge of the producer only



## **1.2 Research Objectives**

- 1) To study General Principles of Product Liability
- 2) To study the Product Liability in Foreign Countries.
- 3) To analyze the problems and solutions of Product Liability Law in Thailand.
- 4) To recommend new options for Product Liability in Thailand

## **1.3 Hypothesis**

Nowadays, Thailand does not yet have Product Liability Law. Liability for damage caused by the product has long been governed by the sale provision and tort provision as contained in the Civil and Commercial Code, but sale provision and tort provision are inadequate to solve this problem, for example, the problem of not being able to link the responsibility between the third person and the manufacturer by using the Contractual Liability thus being relegated to use the Tort Liability, by which nevertheless it is difficult for the injured person to prove the defects due to the complexity of production involved in the concerned product. This makes litigation under the Tort Liability and Contractual Liability appears inadequate in terms of consumer protection, because there is also the provision of disclaimer of liability in the law.

Notwithstanding, we should improve the Law in Tort Liability, and Contractual Liability, in order to support the solution of the problem.

## **1.5 Research methodology**

This research paper will analyze and research by the method of Documentary Research. It will collect related information in Thailand and in Foreign Countries. This information comes from textbooks, article, journal and thesis.

## 1.6 Scope of Research

This research focuses on the problems of and the inadequacy of Product Liability in Thailand. Especially, the system of liability impact on third person is concerned; it is the main issue in Product Liability.

## 1.7 Expectations of the Research

- 1) Knowing the General Principles of Product Liability
- 2) Knowing the Product Liability Law in Foreign Countries: For example the United States, the European and Scandinavian countries.
- 3) Finding the problems in Product Liability of Thailand
- 4) Bringing these principles to improve Product Liability of Thailand





## **Chapter 2**

### **The General Principle of Product Liability**

Product liability is principally concerned with manufacturer's liability. It is that the manufacturer shall be liable for the damages caused by defectiveness of the product, when he injured someone's life, body or property by his delivered products which he manufactured, imported, processed or put under his representation. The manufacturer shall also be liable for the diminution of the value of the product in the consequence of the defect.

Nowadays Thailand does not have the specific law to regulate Product Liability as the other countries do, such as the European countries and Japan etc. When the bystander has been injured arising from the defective product, the consumer must seek a remedy either through contract or tort acts. The difference between the contract and tort is, the principle of contract concerns only with the buyer and seller, and it is not concerned with third persons. In some cases, the consumer or third person cannot claim compensation from the manufacturer directly. So, the consumer can claim compensation from the manufacturer in other way; that is the principle of tort, although the injured person has no legal relationship with the manufacturer.

Based upon the foregoing discussion, it is necessary to investigate the law which supports Product Liability in order to inform the problems of enforcement of such law in Thailand and so as to explain the reasons and necessity to have Product Liability law.

The law which can be applied on Product Liability can be divided into 2 types

2.1 Civil and Commercial Code

2.2 Specific Law

## 2.1 Civil and Commercial Code

### 2.1.1 Contractual Liability Approach

#### 1) Seller's Warranty

Under the sections 472-473, it is the fundamental provision of the Civil and Commercial Code based on contract liability lawsuits. Section 472 provides that *"In case that any defect in the property sold which impair either its value or its fitness for ordinary purposes or for the purposes of the contract, the seller is liable."*

Under the section 472, it is the exception of general principle of law in "Caveat Emptor". It assumes that the seller is bound to deliver to the buyer the property sold (section 461)<sup>1</sup>; the seller is bound to deliver to the buyer without any defect in the property sold; so if the property sold have defect, the seller will be liable for any defect. In case of any defect in the property sold which does not impair either its value or its fitness for ordinary purposes such as small defect, the seller will not be liable under section 472 of Civil and Commercial Code. The warranty may lead into seller's liability; it covers only the damages in the product, but it does not cover the damages which the defective product has caused damages to bystanders. Apart from there still is exemption of seller's liability in the following situations: if the defect is apparent before the time of sale, or the defect is apparent at the time of the delivery; the buyer will be liable for such defect. But if the defect is apparent after the time of the delivery, the seller will not be liable. (Case law 459/2514) The seller is exempted of liability for the defective product in the following cases:

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<sup>1</sup> Section 461 of CCC

- (1) If the buyer knows of the defect at the time of sale, or would have known of it if he had exercised such care as might be expected from a person of ordinary prudence.
- (2) If the defect is apparent at the time of delivery, and the buyer accepts property without reservation.
- (3) If the property is sold by public auction.

However under the provisions of the Civil and Commercial Code, it seems that the primary obligation of a seller is to deliver to the buyer of the property sold in good condition and without any defect. If the seller delivers a defective product to the buyer without awareness, then the seller would be in default of the obligation in accordance with the true intent and purpose of the same, as in section 215<sup>2</sup> of the Civil and Commercial Code. The buyer has the right to claim compensation for any damage caused thereby. But no action for liability for defect can be entered later than one year after the discovery of the defect, section 474 of the Civil and Commercial Code.

It can be said that, under the principle of privity of contract, contracts are binding exclusively the contracting parties. If a person has suffered damage from the defective product which he did not directly buy from the seller,<sup>3</sup> such as the buyer's friend gets damage, he is not counted in the contracting parties, so he cannot exercise right to claim from the seller. He cannot use the contract for the right of third person in section 374 of the Civil and Commercial Code either, because it depends on the contract by which the parties in the contract agrees to be liable for third persons which is not always written down in

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<sup>2</sup> Section 215 of CCC

<sup>3</sup> Anan Chantara-opakorn, "Product Liability Law in Thailand," Botbundit 4(December 2544): p.49.



contracts. Therefore we cannot bring the contractual provision to apply with the product liability case.

## **2) Independent Contractor's Warranty**

In the case of hire of work, the liability of contractor depends on the supply of material. If the defect or the delay in the work arising from the nature of the material supplied by the employer or from instruction given by the employer, the constructor will not be liable, unless the contractor knows of the unfitness of the materials or the improprieties of the employer's instruction and the contractor does not give notice of them to the employer, as in the section 591<sup>4</sup> of the Civil and Commercial Code.

If the materials have been supplied by the contractor, the contractor's liability for defect will be the same as a seller in a sale contract in section 595 of the Civil and Commercial Code. Moreover, if the employer has accepted a defective work without reservation either expressly or impliedly, the contractor will not be liable unless that defect is such that it cannot be discovered when the work is accepted or it has been concealed by the contractor, as in section 598 of the Civil and Commercial Code.

Regardless of whether the defect of work arises from the nature of the material used or not the contractors are only liable within the general warranty period for the defect of one year after delivery of the work; but if the work is the construction of a structure on land other than a wooden building, the warranty period is five years. Such limitation period of warranty will not apply in the event that constructor has concealed the defect as stipulated in the section 600 of the Civil and Commercial Code, in which cases, the employer did not have

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<sup>4</sup> Section 591 of CCC

action against the contractor can enter legal action no later than one year after the defect appears as in the section 601<sup>5</sup> of the Civil and Commercial Code.

The principle of the law regulating hire of work can be applied in Product Liability; according to it, it is another way that the injured person can bring an action against the contractor/seller in the case that the contractor/seller knows of the unfitness of the material or the impropriety of instructions, and does not give notice of it.

### 3) The Recoverable Damage

There are some significant limitations of the contractual liability approach. Firstly, under the claim of damage in the section 222 of the Civil and Commercial Code which states that the debtor will be liable for any damage as usually arises from non- performance of his obligation. The debtor will be liable for damage, even though it arises from special circumstances if the party concerned foresees or should have foreseen such circumstances. Actually, it is a base of recoverable damage under contractual liability claim, it is the “foresee- ability”. The definition of “foresee- ability” means to see or to be ware of beforehand. It is the concept applied to the typed of damage for which compensation may be claimed. In the case where the seller has sold the defective product to the buyer, the economic loss suffered by the buyer because of the reduction of the value of the product or of the fitness of the product for its use is certainly the damages “usually arise” from the non-performance of the seller’s obligations to deliver non-defective product to the buyer<sup>6</sup>. These damages may be recoverable according to the section 222 of the Civil and Commercial Code. However, in the case where the defective product

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<sup>5</sup> Section 601 of CCC

<sup>6</sup> Anan Chantara-opakorn, “Product Liability Law in Thailand,” Botbundit 4 (December 2544): p.48.

causes personal injury or damage to property of the buyer, the buyer's damages may not be recoverable if the seller does not foresee or should have foreseen it. It deems that, under the section 222 of the Civil and Commercial Code, the provision of special circumstance may be applied into the seller's liability. But it depends on seller, whether the buyer's damage may be recoverable or not. If the seller does not foresee or ought to have foreseen it, the damage is not recoverable. According to the seller, such circumstances may not be foreseen sometimes.

Secondly, it is the lack of privities. The last – user who does not directly buy the product from the seller cannot bring action against the seller, because a contractual claim requires privities of the parties to a contract<sup>7</sup>

In the case if the buyer brings a contractual claim against the seller for product liability. The indemnification of purchases, the seller may recourse against the manufacture; actually the retailer may not have a lot of money to pay compensation for damages to the purchasers in product liability cases. It is possible for the buyer to subrogate the right of the right of the seller against manufacturer or the whole- seller, if the retailer neglects to exercise such claim; the creditor may exercise in his own name or behalf of the debtor. (Section 233 of the Civil and Commercial Code)

Therefore, in a contractual claim, if he has no legal relationship with the manufacturer. He will not be righted to the benefit of any warranty given by the manufacturer. It clearly suggests that contractual liability is inadequate for solving the problem of product liability.

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<sup>7</sup> Ibid., p.48.



### 2.1.2 Tort Liability

When the consumer or the third person has suffered damage from using the defective product, the manufacturer should be liable for such damage. Even if the third person cannot bring an action against the manufacturer basing on the principle of contract, but the third person may claim against the manufacturer on the principle of tort.

#### 1) The general rules of liability

Section 420 provides that *“A person who, willful or negligently, unlawfully injures the life, body, healthy, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.”*

The manufacturers have duty to take precautionary measures which are reasonably necessary in manufacturing and marketing of the product. The manufacturers have to adopt and observe precautionary measures to a greater extent, if the product is potentially dangerous. If a manufacturer does not comply with the general duty of care with respect to the product and the product causes injury to any person, he is said to commit a wrongful act in section 420 of the Civil and Commercial Code. Tort liability will consider from the respects of willfulness and negligence:

## (1) The wrongful act by willfulness

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“Willfulness” means intentionally causing injury to any persons. For example: the manufacturer use the low quality of raw material which may cause damages to customers<sup>8</sup>.

## (2) The wrongful act by negligence

It means damages arising from a lack of proper care and attention by the manufacturer such as in transportation, design or preservation. For example: the manufacturer does not make safety belt up to the safety standard and it has caused Mr. A get injury.

**2) Burden of Proof**

It is the duty of the customers or the injured persons when they have suffered damages from using the products. They have to prove the followings:

- (1) The damage arises from a wrongful act.
- (2) Willfulness or Negligence of the manufacturer
- (3) The result of the damage arises from a wrongful act by willfulness or negligence of the manufacturer.

It is hard for the injured persons to prove the negligence of manufacturer or prove the defect of production. It is deemed to be heavy burden for the injured persons, because the manufacturer is the one who knows better about the production. Even though the consumer can prove that damage arises from the defective product, they cannot prove how the defect can happen. Therefore, it

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<sup>8</sup> Somsri Rujitviwat, “Tort Liability of The Manufacturer”, (Master’s Thesis, Thammasart University, 2526), p.41.

can be said that the proceeding of consumer is difficult or some cases are not worth paying for.

### 3) Presumption of Fault

In theory of fault in Thai Wrongful act, there is still another liability; it is called Presumption of fault. According to it, a person who might have fault in doing damage to other persons, that person has responsibility for the damage, and he may be a part of fault under section 422 and 437.

Under section 422 provide that *“if damage of results from an infringement of statutory provision intended for the protection of others, the person who so is presumed to be in the fault.”*

This section has benefit for injured persons. In the case where a manufacturer violates the statute having the objectives of protection other persons from injury, such as the Food Act, the Consumer Protection Act, the Drug Act, etc., the Court may resort to a kind of presumed negligence under the section 422 of the Civil and Commercial Code<sup>9</sup> to shift the burden of proof of the injured persons to the manufacturer. It is similar to the Doctrine of Res Ipsa Loquitor, because the injured person will not adduce willfulness or negligence of the manufacturer. But it can be presumed that manufacturers are the liable parties. It is deemed that the burden of proof of the injured persons is relieved.<sup>10</sup>

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<sup>9</sup> Section 422 of Civil and Commercial Code

<sup>10</sup> Monchai Taka-Aumnuaychai, “Product Liability Law: Appropriate Pattern for Thailand”, (Master’s Thesis, Chulalongkorn University, 2002), p.79.



#### 4) Strict Liability

Under the section 437 of CCC, it provides that *“if damage of results from an infringement of statutory provision intended for the protection of others, the person who so is presumed to be in the fault.”*

This section is based on the idea that a person who possesses or controls conveyances propelled by mechanism, such as objects of potential dangerous and automobile, should have greater duty of care. According to the section 437, it is a concept of strict liability, even though strict liability can solve the burden of proof; it is limited for some injured persons. The offenders will be able to evade the liability in the following cases:

- 1) The injury is resulted from force majeure
- 2) The injury is resulted from the fault of the injured person

The section 437 does not directly involve product liability claim against the distributor or manufacturer of dangerous things or defective automobiles. Because the operator or possessor of automobile is liable to pay compensation to the injured person as under the section 437, the operator or possessor can also recourse against the distributor or the manufacturer of defective automobile. Therefore, strict liability enables the injured persons to claim the compensation from these people without establishing the guilt.

## 2.2 Specific Laws of Liability

Apart from contractual liability, tort liability, Thailand also has specific law<sup>11</sup> in order to apply to specific products. Even though, they are not the product liability, because the special law does not state damages arising from the use of product. But it is

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<sup>11</sup> Anan Chantara-opakorn, Product Liability Law for damage arising from the defective product (Bangkok: Thammasart University Press, 2545), p.103.

commonly presented in specific products, such as food, medicine, damage product, including cosmetics.

### **2.2.1 Drugs Act B.E. 2510**

The main proposal of Drugs Act B.E. 2510 is to manage the manufacture, sale or import to Thailand of drugs,<sup>12</sup> for example: section 72 provide that “It shall be prohibited to produce, sell or import the following drugs:

- 1) Fake drugs
- 2) Sub-standard drugs
- 3) Deteriorated drugs
- 4) Drugs which has not been registered
- 5) drugs whose formula registration has been cancelled for the licensee to produce drugs or the license to import drugs into the Kingdom of drugs with the drug formula registry has been withdrawn for more than 6 months for licensee to sell drugs.
- 6) Drugs whose formula registration has been ordered to be cancelled by the Minister.

Therefore, Drug Act B.E 2510 imposes the duty to manufacturers that they have to produce the standard drugs and high-quality drugs. If the manufacturers do not comply with the statute, they will have fault. Even though, the Drug Act is similar the product liability law, it is not cover other products.

### **2.2.2 The Consumer protection Act B.E 2522**

The law provides protection to consumers in relation to contract for sale or purchase of goods or services, and in relations to advertising and labeling of goods.

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<sup>12</sup> Ibid., p.104.

In this case, the consumer means the person who consumes the product or gets the service from the business sector.

Right of Consumers a consumer has the right to

#### 1) Right to be informed

The consumers shall be provided adequate and correct information in the choice of goods or services. If they receive incorrect and inadequate information, it makes them misunderstand in the choice of goods or services.

#### 2) Right to safety

The business operators must consider safety and efficiency in the use of goods and services, or the product must be to standard.

#### 3) Right to fair contract

If the products or services cause damages to the injured person, they must have the losses considered and to receive compensation therefrom.

Although, the consumer protection Act does not identify the product, the consumer cannot exercise the claim of compensations from the manufacturers or the sellers. According to this statute in providing protection from damage, it does not impose the standard of damage for injured persons. When the damage occurred from the product, it cannot be applied with this statute.

### 2.2.3 Food Act

The Food Act is the major law that has the purpose of preventing and protecting consumers from health hazards occurring from food consumption. According to the Food Act, the Ministry of Public Health is designated to be in charge of the execution of this act. The act also empowers the Ministry of Public Health to promulgate ministerial regulations, to appoint the Food Committee and competent



officers, and to carry out other activities in order to carry out the provisions of the Act.

The ministerial regulations establish the procedures of applications for manufacturing licenses, importation licenses, and registration including the rates of fees, the identification cards of the competent officers and the labeling of food products for exports.

The Food Act can divide food into three main categories as follows:

- 1) Specially Controlled Foods – Registrations are required for foods in this category. Legal provisions are related to food standard quality, specifications, packaging, and labeling requirements, as well as other aspects of good manufacturing practices. The Food Committee may make recommendations to the Minister of Public Health specifying specially controlled foods.
- (2) Standardized Foods – Standard foods do not require registration but their quality and labeling have to meet the standard requirements as specified in the Notification of the Ministry of Public Health.
- (3) Other Foods – Foods, raw or cooked, preserved or non-preserved, processed or non-processed, if not listed under category 1 or 2 (see the list in the annex) will be considered as general foods. Although registrations are not required, general food products are controlled and monitored with regard to hygiene, safety, labeling and advertisement. Foods in this category may be subdivided into (a) foods that must bear standard labels and (b) other general foods.

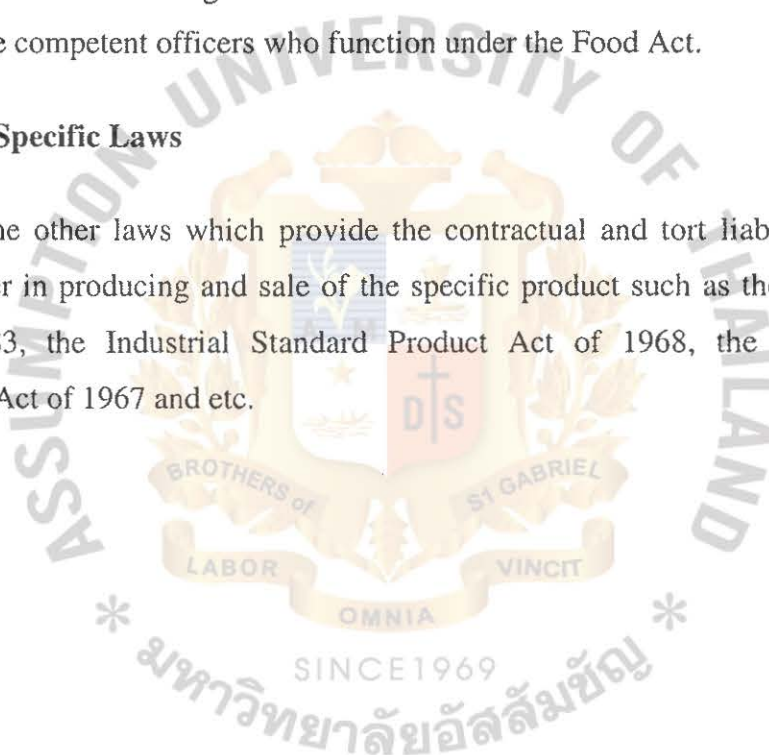
The control measures for each category of foods differ; specially controlled foods are strictly controlled. Before producing or importing such foods, the application for product registration is required. For standard foods, the application for such permission is not required, but they must be produced up to the prescribed quality or standard. For labeled foods, however, the main objective is to control the labeling in order to do away with misleading or

cheating of consumers; thus, there will be fewer problems of quality standard compared with foods in other categories. According to the food act it is imposed that manufacturers should be careful in the products, in order to not cause damages to the consumers. Although, the Food Act is similar to Product Liability, but Food Act is more specific in meaning than Product Liability, thus limiting the Food Act in covering other products.

For the food control efforts in Thailand, assigned personnel of the Food Control Division, the Food and Drug Ports Division and Provincial Public Health Offices comprise the competent officers who function under the Food Act.

### 2.3 The Other Specific Laws

There are the other laws which provide the contractual and tort liability of the manufacturer in producing and sale of the specific product such as the Cosmetic Act of 1983, the Industrial Standard Product Act of 1968, the Hazardous Substances Act of 1967 and etc.



### Chapter 3

## The Product Liability Law in Foreign Countries

Since Product Liability Law of Thailand has not been adequately developed, Learning Product Liability in Foreign countries is another way to support the Product Liability Law in Thailand. There are different laws in different countries; we can divide the legal systems into 2 categories:

#### 1) Common Law

It is the legal system which is applied in England, and after that it expands into the countries which were dependencies of England; for example Australia, the United States, Canada etc. The Common Law is formed out of case law, and then the Common Law takes the reason in human mentality combined with the complex reason of lawyers. Product Liability Law has been developed for 100 years<sup>1</sup>, by developing from Contractual Liability and Tort Liability. The Common Law is formed out of fairness of law. It makes Common Law flexible which depending on the circumstances. So, Product Liability Law of Common Law will keep growing.

#### 2) Civil Law

Civil Law has received influence from the Roman law which has a long history. It has been developed into the Written Law. It has wide application in European, Latin America and Asia. Civil Law accepts that the Written Law is projecting force of law and can be adapted with the facts in all the cases. The Case Law of Civil Law assumes that the description of using law applies with the cases<sup>2</sup>. The

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<sup>1</sup> Predee Kasemsab, "The basic of Civil Law," Description of Faculty of Law Thammasat University (2522): pp.112-129.

<sup>2</sup> Ibid.



expansion the Written Law is difficult. So, it makes the Civil Law less developed than the Common Law.

### 3.1 The European Community Directive

#### 3.1.1 Condition of Responsibility

The Directive assigns that responsibility arise from a defective product under Section 1 of the EU Directive “The producer shall be liable for damage caused by a defect in his product.

The foregoing rules, responsibility arise from the defective product consist of many conditions of responsibility. It may be divided into following three factors.<sup>3</sup>

##### 1) Product

The Directives have definition of “product” that it means all movables, although incorporated into another movable or into an immovable”.

The products that are excluded from EU Directive are;

- (1) Immovable
- (2) Primary agricultural products

“Primary agricultural products” means products of soil, of stock farming and the fisheries, excluding products which have undergone initial processing.

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<sup>3</sup> Manit Vongsari, “Product Liability” (Research Methodology Chulalongkorn University, 2000), p.12.

A part from this, it includes damages from nuclear, because Member States have specific law already.

In the EU Directive the definition of “defective product” is that a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstance into account. Furthermore under this definition, courts are called upon to make a factual determination as to whether a defect exists. All circumstances include, but are not expressly limited to, the following three factors;

- (1) The presentation of the product
- (2) The use to which it could reasonably be expected that the product would be put;
- (3) The time when the product is put into circulation.<sup>4</sup>

And the existence of a defect shall not include any reference to a subsequent improvement of product: “A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.”<sup>5</sup>

## **2) Person of Responsibility**

Under Section 1 it is imposed on persons qualified as “producer”. Actually this key term is defined in Directive. It can extend into other persons who are related in production process and distribution. Under article 3(1) it is provided: “‘Producer’ means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade

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<sup>4</sup> Section 6-1 of Directive

<sup>5</sup> Section 6-2 of Directive

mark or other distinguishing feature on the product, presents himself as its producer”<sup>6</sup>.

However, importers of a product for hire, leasing, sale or any form of distribution in the course of his business, they shall be deemed to be producers. So consumers shall not be bringing an action against producers in foreign countries if the injured persons get damages rising from consuming the products which are imported. The reason is that if you bring an action in a foreign country, there may be many obstacles or you may not be protected from their legislation. It is also said that the injured person can be remedied without referring to the original geography of product.

Therefore the EC Directive states that the names of manufacturers shall be indicated on the products unless they inform the injured persons. In the case that the producer cannot be identified, the injured person sues the supplier of the product, in order that the supplier of product can help the injured person to find the producer. Unless he informs the injured person within the reasonable time, the supplier of the product shall be liable for the damage. If there are two or more persons who are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of distribution or recourse<sup>7</sup>.

### 3) Covered Damage

Damage caused by the product which is protected in the Directive is divided into two categories of damage:

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<sup>6</sup> Section 3-1 of Directive

<sup>7</sup> Section 5 of Directive



- (1) Damage caused by death or by personal injuries;
- (2) Damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item is of property:

- a) Is of a type ordinarily intended for private use or consumption, and
- b) Has been used by the injured person mainly for his own private use or consumption.

In case of damage to any item of any of property, only consumption may claim indemnification. But damage to life can claim indemnification in every case. No liability is required under the Directive for damage to commercially used property<sup>8</sup>.

In case of damage to the immaterial, the member states shall provide in their legislations, actually it may be different from the other countries especially, the moral damages.

### 3.1.2 The Principles of Remedy of Damage

Article 4 of the EU Directive provides: *"the injured person shall be required to prove the damage, the defect and the casual relationship between defect and damage"* If the injured persons want to obtain remedy, they have to prove that they suffer injury from the defective product<sup>9</sup>. In the case of a manufacturing defect, the claimants have burden to prove that there has been no misreading or misuse of the product, when the product defects happen. Since such case will be considered negligence whether it is the negligence of claimant (which will be considered as an exception of the manufacturer

<sup>8</sup> William C. Hoffman and Susanne Hill-Arning, Guide to Product Liability in Europe (Denver-Boston :Kluwer Law and Taxation Publishers,1994),p. 4.

<sup>9</sup> Ibid., p.7.

liability) or the negligence of the manufacturing process; as it is the requirement of the EU Directive that it is not due to fault of the claimant that remedy or compensation from the manufacturer can be claimed.

The EU Directive has a number of defenses for producers in Article 7, 8, 9, 10, 11 and 17. Article 7 which provides that: *“a producer shall not be liable as a result of this EU Directive if he proves any of the following:*

- a) That he has not put the product into circulation;*
- b) That under any circumstances it is probable that the defect does not exist at the time the product is put into circulation;*
- c) That he did not manufacture the product for sales or distribution or any other economic purposes;*
- d) That the defect is due to compliance with mandatory regulations;*
- e) That the state of scientific and technical knowledge does not permit the producer to detect the defect's existence;*
- f) That, in the case of a component part, the defect is attributable to the design of the finished product or the instructions given by the producer of the finished product.*

According to Article 7, “shall not be liable”, indicates that these are affirmative defenses against liability. The REU Directive is silent on how broadly the defenses of compliance with mandatory regulations and development risk will be construed. Arguably, they are hard to apply, but are nonetheless the absolute defenses. This would distinguish them from the United States’ Law, in which the compliance of a product with government regulations or with the current state of the art is not generally regarded as an absolute defense.

Article 8 provides that the liability of a product is disallowed if the injury is resulted from both a defect in the product and the fault of the injured person or of any person for whom the injured person is responsible. In the civil law of

the Member States, this contributory negligence provision will be applied on a comparative basis. In the United Kingdom, a comparative rule will be applied as well.

Article 10 provides a three-limitation period for bringing a claim. The claim must be brought within three years from “the day on which the claim became aware or reasonably should have become aware, of the damage, the defect and the identity of the producer.” Member State law of tolling or suspension applies.

Article 11 provides a ten year period of repose. The rights conferred upon the injured person pursuant to regime envisaged by the EU directive “shall be extinguished up on the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage.” The commencement of an action stops the period of repose from running.

Finally, Article 17 provides that the EU Directive “shall not apply to products put into circulation before the date on which the provisions of the national legislation implementing the EU Directive enter into force.” So, a producer may defend an action on the ground that the product was put into circulation before the effective date of the EU Directive<sup>10</sup>.

### 3.1.3 Reduction or Liberation of the Responsibility

Producers may refer the cause of reduction of responsibility, if the injured person has participated in damage or procedure the producer may be liberated from responsibility, also if the damage is caused by the action of the injured person or other persons who are not producers. Moreover, some case, the parties make a provision limiting his liability or exempting him from liability, actually producers cannot be liberated from responsible.

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<sup>10</sup> Ibid., p.8.



## 1) Reduction of the responsibility

### (1) The cause of reduction of the responsibility

Under article 8-2 of directive it is provided that “the liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible”<sup>11</sup>. So the exemption of liability of the producer can be both of partial or whole by the consideration from damage arising from product and default of the injured person.

### (2) The exemption of reduction of the responsibility

Third person means the person who participated in production and sale of the product.

Actually the liability of producer shall not be reduced, when the damage is caused by both of a defect in product and by the act or omission of a third person.

## 2) Liberation of Responsibility

### (1) The reason for liberation of the responsibility

Directive can divide the reasons for liberation of the responsibility into categories:

- a) In the case where product does not come from the management of producer

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<sup>11</sup> Section 8-2 of Directive

It means that product has been distributed without permission from the producer<sup>12</sup> or he does not put the product into circulation<sup>13</sup>, or having regard to the circumstances, it is probable that the defect which causes the damage does not exist at the time when the product is put into circulation by him or that this defect comes into being afterwards.<sup>14</sup>

b) In the case of external causes

The cause of the defect is due to compliance of the product with mandatory regulations issued by the public authorities<sup>15</sup> or the state of scientific and technical knowledge at the time when he puts the product into circulation is not such as to enable the existence of the defect to be discovered<sup>16</sup> or in the case of a manufacturer of a component that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product<sup>17</sup>.

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<sup>12</sup> Section 7 (a) of Directive

<sup>13</sup> Section 7 (b) of Directive

<sup>14</sup> Section 7 (c) of Directive

<sup>15</sup> Section 7(d) of Directive

<sup>16</sup> Section 7(e) of Directive

<sup>17</sup> Section 7(f) of Directive

## 2) The exemption of liberation of the responsibility

Although the Directive assigns the liberation of the responsibility, but producers may be liable. According to the Directive it is given an opportunity to the Member States to provide in their legislations that producers can be liable even though he proves that the state of scientific and technical knowledge at the time when he puts the product into circulation is not such as to enable the existence of the defect to be discovered.

### 3.2 Product Liability Law in United State

The United States of America is the first country, which uses strict liability. Strict liability imposes that producers shall be liable for damage. It is a popular way for an injured person. The United States of America is a big market. The consumers are important for them. So United State of America takes care of consumers, since it will affect for their markets, if the consumers do not consume. Punitive damage makes manufacturers afraid, so manufacturers have to produce high quality products for consumers<sup>18</sup>.

#### 3.2.1 Tort Liability

In the past, Tort Liability Acts could be enforced on the litigants only if the defendant had legal duty with the plaintiff by legal binding, such as being contracting parties. The American courts deem that any parties who do not have legal relation with the sellers or manufacturers cannot indict the latter. Further, there is criterion in judging that sellers or manufacturers have the responsibility for the damage of consumers." In 19th century the United States courts have policy to protect manufacturers; the purpose is to protect

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<sup>18</sup> Monchai Tadaumnuychai, "Product Liability law: appropriate pattern for Thailand"(Master's Thesis, Chulalongkorn University,2524), p.26.



consumers. In 19th century the United States courts have policy to protect manufacturers; the purpose is to protect consumers<sup>19</sup>. Tremendous damages due to production system make consumer want to protect themselves in the 20<sup>th</sup> century. It makes producers or manufacturers responsible for the Ultimate Consumers. This idea deems that manufacturers or sellers have to be liable for their productions or sales. If manufacturers expect a product to make damage because it is a defective product, they may be responsible for everybody who is damaged including persons who are expected to be damages from the defective product.

Furthermore manufacturers may be responsible partially of product in negligence cases even though sellers do not know that these products are dangerous. It deems that sellers have duty to watch out for their products in order to warn consumers, especially if that product is not famous, the sellers have to check a product carefully, and because we cannot be confident the product is safe. In the case of defective product having complicated defect, the sellers could not find it, in practice most American lawyers agree that sellers are not to be responsible for such cases. But in cases where sellers have told a wrong fact and consumer believed that, the consumer is unnecessary to prove that sellers know the fact, or not? However seller must be liable for the damage.

Therefore, an injured person can proceed to manufacturer or seller for negligence of production. The plaintiff have burden of proof.

- (1) A plaintiff who has been injured by goods.
- (2) It was damage because of it arising out of the product.
- (3) In event of damages arising out of the product during the period the plaintiff does not have the possession.

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<sup>19</sup> Ibid., p.26.

(4) A plaintiff is negligent in production<sup>20</sup>.

### 3.2.2 Contractual Liability

By the theory of Warranty, warranty contract is the basis on which litigations are dependent; it requires that the plaintiff have privities of contract with the defendant; and therefore without contract there is no basis for any litigation. By "Warranty" it means that the guarantor states clearly about the features of the product and guarantees that what have been stated of the product are true; therefore it is regarded as contract. In the United States, to the principle of the theory of warranty is applied on either Express Warranty or Implied Warranty<sup>21</sup>.

Warranty comes from Contract, such as sale. If you are not the contracting party, you can't use Warranty. But later they use this Warranty to adapt with Tort, and the Court can use the Warranty to protect third persons.

The Uniform Commercial Code can cover every case. And The Uniform Commercial Code prescribed by Express Warranty in Section 2-313 that when sellers guarantee about the product or promise about the product or a kind of product it is deemed to be essence of the contract. If the product is not be Warranted and makes damage to buyer, the seller shall be liable.

The main points of the liability according to this principle depend on statements in the Warranty and the trust that the plaintiffs have in the manufacturer's warranty. In enforcing the law on the defendant, the plaintiff has to prove that he/she knows the fact about the product stated within the defendant's Warranty and has believed in it. Furthermore, he/she must prove

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<sup>20</sup> Ibid., p.28.

<sup>21</sup> Graham, Stephenson, Source book of Torts, (England: Cavendish Publishing Limited, 2001), p.297.

that the statements are misleading, and consequently it has injured to the plaintiff. If the plaintiff can prove that, the defendant shall be liable.

Implied Warranties can be divided into 2 kinds

### 1) Express Warranty

Means Warranty or Guarantee of the seller or manufacturer expressed in the contract or expressed by statements or writing. If that product does not fit for the purpose for which the product is to be used, and it makes buyer believe and injured, the seller shall be liable in the contract. So the buyer has right to claim the compensation from the seller directly.

### 2) Implied Warranty

#### (1) Implied Warranty of Merchantability

The Uniform Commercial Code Section 2-314 states that the seller has Implied Warranty that the product is appropriate with the objective of the product<sup>22</sup>; for example; if I bought a banana, that banana have to be safe to eat.

#### (2) Implied Warranty of Fitness for a particular purpose

The Uniform Commercial Code Section 2-315 states that the seller should know the objective, because buyers believe in the skill of seller<sup>23</sup>.

<sup>22</sup> Monchai Tadaumnuychai, "Product Liability law: appropriate pattern for Thailand". (Master's Thesis, Chulalongkorn University, 2524), p.36.

<sup>23</sup> Ibid., p.36.



For example; Mr. DEN wants to buy a jacket, because Mr. DEN is going to go to England. He asks seller to choose the jacket for him. Therefore the seller shall be liable, if the jacket is not appropriate to the weather in England.

### 3.2.3 The Specific Law Liability

Apart from the Liability according to the principles of Contract and Warranty - the United States have released a special law, the Uniform Commercial Code, which is enacted to demand for Express Warranty and Implied Warranty from the sellers. But this law is enacted for general commercial relations but not specifically for regulating the relation between merchants and consumers; therefore there are many shortcomings as for merchant-consumer relation. This makes this law unable to protect consumers; especially it allows the freedom in modifying the contents of warranty, like the adding of exceptions in Warranty, conditions of compensation due to breaching Warranty and damage claim limits. . This results in the injured consumers being in a disadvantaged position, because the merchants will refer to the exceptions or restrictions of the warranties of which consumers do not have power to make bargain.

The essence of the principle is defined in the exception of liability in Implied Warranty

- 1) We should resort compromise between the injured consumer and the warrantor, if the consumer is unsatisfied, the consumer can bring the case to the Court.
- 2) Class Action can do it.
- 3) The Federal-Trade Commission proceeds, in order to protect from the Deception of Warranty and to punish the breaching persons. And they can be the agents of Class Action claim compensation from Warrantor.

### 3.2.4 Punitive damage

Punitive or exemplary damage are awardable in addition to compensatory damages in order to punish a defendant for extremely egregious conduct. In recent years there has been much litigation regarding punitive damages because of the excessiveness of some awards and the lack of definable standards for their imposition. In response, the US Supreme Court recently ruled that whether a punitive damage award is excessive or not is judged by the three standards

- 1) The degree of reprehensibility of the defendant's conduct;
- 2) The ratio between the plaintiff's compensatory damage and the amount of the punitive damages and
- 3) The difference between the amount of punitive damage and the civil or criminal sanctions that could be imposed for comparable misconduct<sup>24</sup>.

### 3.2.5 Res Ipsa Loquitur

A doctrine of law that one is presumed to be negligent if he/she/it has exclusive control of whatever causes the injury even though there is no specific evidence of an act of negligence, and without negligence the accident would not have happened. Examples: a) pieces of bricks on the roof of a building constructed by ABC Co. falls and injure Mani, and ABC Co. shall be liable for Mani's injury even though no one saw the brick fall<sup>25</sup>.

- For *Res Ipsa Loquitur* to apply, the accident in the question must not be due to any voluntary action or contribution by the plaintiff. The doctrine has

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<sup>24</sup> Merton E Marks, "US Product Liability Law," International Business Lawyer, 26 (Feb1998):71.

traditionally required that a defendant have exclusive control over the instrumentality of an injury, but now it is commonly applied when multiple defendants have joint or sometimes successive control (as by the manufacturer and retailer of a defective product). In addition to the control requirement, and sometimes superseding it, is the requirement that a defendant have responsibility for the instrumentality as well as responsibility to the plaintiff. In order for *Res Ipsa Loquitur* to succeed in a medical malpractice suit, the fact that the accident is one that ordinarily does not occur without a failure to exercise due care must be readily apparent to the layperson as common knowledge. The accident alone should afford reasonable evidence of negligence, as when a foreign object is left inside a surgical patient.

Under the old common law rule, to use *Res Ipsa Loquitur* in the context of negligence the plaintiff must prove that:

- 1) The injury occurred under circumstances such that in the ordinary course of events the injury would not have occurred if someone had not been negligent.
- 2) The injury must be caused by something in the exclusive control of the defendant.
- 3) The injury must not have been due to any voluntary action or contribution on the part of the plaintiff.<sup>26</sup>

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<sup>26</sup> *Res Ipsa Loquitur*, Dental damage during anesthesia. In <http://www.aana.com/legal/legbrfs/1997/02lb97.asp>, Access date June 4, 2005.



### **3.3 The Product Liability Law in Scandinavian countries**

Nowadays the Litigation System is not the good way out for the consumers because any proceeding would spend a long time. If the consumer could not prove the fact, the consumer shall not receive damage compensations. Actually the Law should seek appropriate solution for protect the injured persons.

On the side of manufacturers, they don't want to be sued, because they must pay compensation, and may be impaired of the reputation in business. So the manufacturers have to look after and check the quality of their products. Even though, it shall be good for the consumer, but the manufacturers must pay a high price also for that. Then these expenses will combined with the product prices in order to push the Burden of Care (due Care) to the consumers. Consequently consumers have to buy expensive products, which they do not like. It is like that the consumers do not need real protection.

#### **3.3.1 Tort Liability in Scandinavian countries**

Scandinavians apply the principle of strict liability to decide the cases such as in Sweden. In the case where a teacher wanted to recover damage from the owner of a restaurant, the court did not decide the defendant had negligence, but the court decided the damage arose from his food. Therefore, the defendant shall be liable for the damage. After this case, the courts decide the other case basing on this case.

#### **3.3.2 Contractual Liability in Scandinavian countries**

Scandinavians can solve this problem by providing express warranty in contract. Even though, the seller did not make warranty in the contract or the seller did not make warranty in writing, the person who makes damage shall be liable for the damages. When the sellers guarantee products, the sellers have to prove that products are fit for the purpose for which the products are to

be used. In case the contract does not specify the express warranty, if the sellers promise the products, it is deemed to have warranty of the products. The sellers will be liable in warranty of products. The sellers will be liable in warranty; the consumers can thus get benefit from the warranty.

### 3.3.3 The Product Liability Insurance Funds

The Product Liability Insurance Funds can make the consumer confident from the Government in consuming products. With damages caused by defective products, they can receive the compensation without litigation. The manufacturers also have confidence in investment for the funds lower their product liability since the risk of manufacturer decreases. However the country that uses The Product Liability Insurance Funds cannot develop economy as quickly because the Government has to share some budget into Funds.

Scandinavians use The Product Liability Insurance Funds in the results from

- 1) Damage caused by defective product. Even though the consumer has been injured by goods, the Law could not protect them. So the consumer protection does not cover the damage.
- 2) There is an idea which is appropriate and fair for both manufacturer and consumer in liability, so anyone will not get too much liability for damage,<sup>27</sup> because the consumer can get benefit from consuming, and manufacturer can get benefit from trading. Therefore it is the rescue which is the best way for each other.

Scandinavians use The Product Liability Insurance Funds due to the fact that some products have risk to damage. The manufacturers cannot predict of the damage; while the consumers do not know which product can injure them.

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<sup>27</sup> The Changing Social Security Policy Context. In <http://www.anu.edu.au/caeprawepapers/saunder.pdf/>, Access on 28 May, 2005.

Therefore, everybody must share the risk, the Law should distribute the risk to all people, not only to manufacturers or consumers. The manufacturers pay to funds by taxes, and Government contribute to the funds from personal income taxes of consumers.

However, The Product Liability Insurance Funds may make product more expensive. But consumers have to share risk with manufacturers in order not to creating more liability to manufacturers.





## **Chapter 4**

### **Analysis of the Research Problems**

#### **4.1 The Problems of Product Liability in Thailand**

##### **4.1.1 Contractual Liability**

- Liability for damage caused by the defectiveness of product has long been governed by sale contract as contained in section 472-474 of Civil and Commercial Code. In sales contract, the sellers have duty to deliver goods to the buyers. However, if such defect is apparent at the time of delivery, the seller will not be liable for such defect. But if such defect is apparent after the time of delivery, the seller will not be liable for defect as in section 472 of Civil and Commercial Code. There are the disclaimers of liability of seller in the following case:

1) In cases where the defect has occurred by the intension of the contract, the seller shall be liable for the defect. Since the seller has legal relationship with the manufacturer, and he directly buys the product from the manufacturer, but a third person lacks privity of the contracting parties, he cannot claim the compensation from the manufacturer. Therefore, contractual liability law does not provide for claiming right of third persons, even if the defective product has caused personal injury or damage to the third person. For example: A passenger of boat gets accident because of the defectiveness of the boat. The third person cannot bring an action against the seller basing on the sale contract. And he cannot use the contract of third person in section 374 of the Civil and Commercial Code because this section provides that a party by a contract agrees to make a performance to a third person.

Apart from the fact that the buyers want to claim the compensation, they can claim it only from the seller but not manufacturer, because the buyer do not directly buy the product from the manufacturer. Most sellers are retailers, so if there are a large amount of damages, the retailers may not be in a strong financial position to enable it to pay large amount for the damages. Therefore, it can be said that purely contractual provision as such does not offer adequate protection for consumers in product liability claim.

Nowadays, there are the statues that can solve this problem, resulting from this study. It identifies that the United States solves the problem by bringing in the Contract of the Third party beneficiaries in section 2-318 of the Uniform Commercial Code.

In the past, the United States has established the Doctrine of Privity for Product Liability. This rule can be enforced with the contracting parties only. So it is an obstacle for protection of consumers. But this section covers the injured person, both natural individual and the juristic person. Although he has suffered damage to his property but he did not get the personal injury, he can bring an action against the seller, if the seller provides express warranty to the public; even though that person has not directly bought a product from the manufacturer. It can be said that the in-bringing of the "*Contract of the Third party beneficiaries*" can solve this problem of third person's right to compensation without having to have legal relationship with the seller.

2) Under the contractual claim, the rule regards the extent of recoverable damage to buyer. Under the section 222 of Civil and Commercial Code "The seller will be liable for damage as usually arising from non-performance of obligation to deliver the non-

defective product to buyers, but such damage may not be recoverable if the seller does not foresee or ought to have foreseen it. However, the seller will be liable for damage arising for special circumstances in which only the seller foresees or ought to have foreseen defect happening in such circumstances.

In practice, defective products cause personal injury or damage to property of the buyer, and it is difficult to see which one is damage arising under general circumstance and which is the damage arising under special circumstance. Because the damage arising from special circumstance will be considered recoverable, if the seller foresees or ought to have foreseen it; there are always problems of which fault is not foreseen or ought to have been foreseen. The injured people therefore have not been protected in some cases. We will have to consider them one by one.

Actually there is solution to this problem by asserting Strict Liability to solve it. Since the seller shall be liable for damage arising under some special circumstances only under the condition that the seller foresees or ought to have foreseen such circumstances. The foresee-ability is difficult to prove against a seller, but if we apply Strict Liability to claim the compensation, the damage shall be recoverable without seller's foresee-liability.

#### **4.1.2 Tort Liability**

In cases where the injured person has no legal relationship with the manufacturer, the injured person can claim the compensation by applying tort liability. The Civil and Commercial Code contains a number of provisions regarding civil liability for the principle of tort in section 420-452. The main factor of tort liability is the indemnification.



## 1) Section 420

The main point of problem is the proceeding of enforcement on the tortfeasor, because the injured person must carry the burden to prove that there is casual connection between the defective product and damage suffered by him, and negligence on the part of the manufacturer. It can be said that a burden of proof is heavy for the injured person due to the fact that the manufacturing of the goods are so complex that the outsiders cannot know of the detailed manufacturing like the manufacturers do.

Findings from the study indicate that in the United States, *Res Ipsa Loquitur* can reduce the burden of proving causation by shifting it to the defendants to prove he is not the liable party. It enables the plaintiff not to bear the burden of proof, and get the advantage from this statue.

## 2) Section 437

This provision is presumption of fault of a person who possesses or controls conveyances propelled by mechanism, such as an object of potential danger. In cases where the property has suffered damage as a result of product use, without consideration about willfulness or negligence, it still poses a problem of indemnification of buyer regarding the damage caused by the defective product. Especially under the section 437(2) of Civil and Commercial Code, a person is responsible for injury of a third person caused by any conveyances propelled by mechanism, which is in his possession or control. So, in cases where injury is caused to the consumer by the consumption of the product which is for sales on the market place; apparently, consumers or the injured persons have possessed most of the products. Therefore they cannot get benefit from provision in the section 437 of

Civil and Commercial Code. Also this section has the disclaimers of liability of 2 types

- 1) This section can provide for injured persons in the damage arising from the conveyance propelled by mechanism and the dangerous thing.
- 2) The person who will be liable for the damage must be the person who possesses or controls the conveyance propelled by mechanism, or the persons who possess the dangerous thing.

In practice, this section can relieve liability in the cases of the damages arising from the conveyance propelled by mechanism and the dangerous thing. However, it is not enough for Product Liability in Thailand. Therefore, Thailand should devise solution by bringing in principle of strict liability from the United States and Scandinavian countries in order to remedy for damages caused to injured persons or consumers. to the major reason is that it is hard for the injured persons to prove the negligence of the manufacturers. It can be said that by strict liability we can get rid of the problems and disadvantage of consumer in burdening the proof in litigations of product liability.

## Chapter 5

### Conclusion and Recommendations

#### 5.1 Conclusion

Due to the problem from the Thai Civil and Commercial Code, there is solution provided by studying Product Liability Law in Foreign Countries, such as the United States, Scandinavian and European countries. For example, it is found that by bringing in *Res Ipsa Loquitur* of United States to apply with Tort Liability, we can ease consumers' burden of proof as to the negligence of the manufacturers. While *Res Ipsa Loquitur* can relieve burden of proof for consumers, Scandinavian's Product Liability Insurance Fund can support the litigation in Product Liability Law, since some product are in risk of being dangerous and both producer and consumer cannot foresee the damage in the future. For example when the consumers buy a plane, the consumer never knows when the damage is going to happen.

Everybody has his own share of risk, so the law should spread out the risk to everybody, not just to leave the burden to either entrepreneurs or consumers. So, while everybody must have the burden of risk, we should bring the Product Liability Insurance Funds to share the burden of risk.

However, bringing in the Product Liability Insurance Funds, for supporting the litigation in Product Liability Law, makes the products are more expensive due to payments to the fund. Consumer should accept that to live is to participate in risk. Although consumers have to buy more expensive goods, they will be safer.

From the part of European countries, Thailand should bring in EC Directive to be the model of Product Liability Law, because the European Countries can solve the problem by using EC Directive. Given the definitions in the EC Directive, the consumers; the sellers and the manufacturers are able to understand and comply with the rules accordingly.



However, the Civil and Commercial Code establishes no specific concept of Product Liability or Consumer Protection for the Product Liability cases with the plaintiff seeking remedy either on contract or tort action. There also are other statutes, such as Food Act B.E 2522(1979), Consumer Protection Act B.E 2522(1979), Dangerous Product B.E 2510 (1967) that are applied to protect consumers. But they are not enough for seeking remedy in nowadays' Product Liability cases, because these laws do not specify the concept of Product Liability. However, the Cabinet of the Government has certified the Draft of Product Liability Act in July 2000. But the Draft of Product Liability Act is still in the process of legislation.

Bringing in the principle of the Product Liability Law from Foreign Countries to amend the faults is a good way out. But I think we should establish Product Liability Law like the other countries. It will be more appropriate for the manufacturer and the consumers.

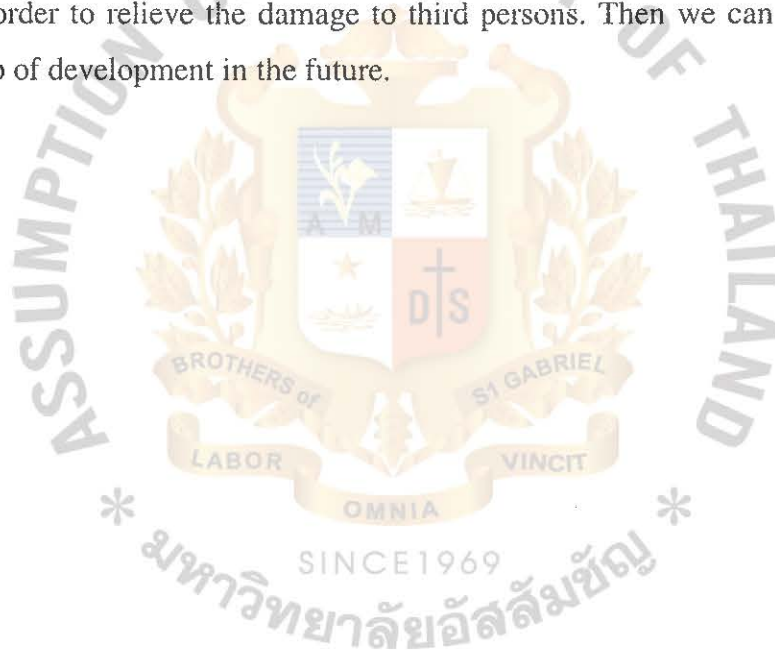
## **5.2 Recommendations and Suggestion**

We should study the concept of foreign Product Liability Law and the problems of the enforcement of Law in Foreign Countries and what would be the implication if this law is applied in Thailand, in order that we can find the appropriate pattern of Product Liability Law in Thailand. If we applied the concept of foreign Product Liability Law to improve the Thai Civil and Commercial Code directly, it is hard to amend the law, because if we amend some sections, it would affect other sections. Sometimes we have to consider the law which is related, and it will consume us a lot of time for amendment. If the Civil and Commercial Code establishes the concept of Product Liability, I think it is a good way, because if we separate the specific statutes from the general provisions we can estimate the compensation.

Apart from those aforementioned we should bring in the punitive damage to apply with Product Liability of Thailand. The Court may use the judicial discretion to estimate the compensation to the plaintiff, even though the plaintiff cannot prove that

he suffering injury is from the defective product. The Court must provide the injured person that he/she can claim the compensation. Especially the Court may exercise discretion to estimate the emotional distress by considering circumstance, fact and the gravity of tort.

Nowadays, Thailand tries to solve the problem of Product Liability, but the Draft Product Liability Act is still in the process of legislation. I agree with the Drafting of Product Liability Act. However, during the period of Drafting the Product Liability Act, we may use the suggestions such as *Res Ipsa Loquitur*, *Product Liability Insurance Funds* and *Punitive Damage* to help mitigate the problem for the time being, also in order to relieve the damage to third persons. Then we can expect see another big step of development in the future.



## Bibliography

### Textbooks

Anan Chantara-opakorn. Legal Textbook: Product Liability Law for damage arising from the defective product. Bangkok: Thammasart University Press, 2547.

Elliot and Quinn. Tort Law (3rd ed). London: Longman Publishing, February, 2001.

Geraint Howells. Comparative Product Liability. London: Dartmouth Publishing Company, 1993.

Graham Stephenson. Source book of Torts. London: Cavendish Publishing Limited, 2001.

Mark Mildred. Product Liability Law and Insurance. London: Lloyd's of London Pr., 1994.

Prapon Sataparn and Paijit Punnapan. Legal Textbook of sale Contract (9<sup>th</sup> ed.). Bangkok: Nitibannakarn Press, 2532.

Predee Kasemsab. Description of Faculty of Law Thammasat University. Thailand: Thammasat University Press, 2522.

Sansom Suppanitaya. Legal Textbook: Product Liability. Bangkok: Winyuchon Publishing, 2001.

William C. Hoffman and Susanne Hill-Arning. Guide to Product Liability in Europe. Denverter-Boston: Kluwer Law and Taxation Publishers, 1994.



## Thesis

Manit Vongsari. Product Liability. Research Methodology, Chulalongkorn University, 2000.

Monchai Taka-Aumnuaychai. Product Liability Law: Appropriate Pattern for Thailand. Master's Thesis, Chulalongkorn University, 2002.

Panya Dhanpattanamongkol. Liability of the Defectiveness in Sale-Purchasing Agreement. Research Methodology, Thammasart University, 1994.

Saisuda Pingsanon. Strict Liability in Tort Law. Master's Thesis, Chulalongkorn University, 1981.

Somsri Rujitviwat. Tort Liability of the Manufacturer. Master's Thesis, Thammasart University, 2526.

Surasak Tansoranprasert. The right of Outsider in Remedy Arising from the Defective Products without Consumed. Master's Thesis, Thammasart University, 1990.

Tanawat Sung-Thong. The Return of Dangerous Defective Products. Master's Thesis, Thammasart University, 1999.

## Journals

Anan Chantara-opakorn. Product Liability Law in Thailand. Botbundit, Vol. 4, No.57 (December 2001).

David McIntosh. What is Product Liability. International Business Law, Vol. 26, No. 2 (February 1998).

Irene C. Warshauer and Catherine Plunkett. The True about Product Liability Insurance Coverage. Risk Management, Vol. 41, No. 6 (January 1996).

Joseph R. Alberts; Jason K; Bria. Survey of Recent Developments in Product Liability Law. Indiana Law Review, Vol. 37 (September 2004).

Lord Griffiths; Peter Deval; R.J. Dormer. Development in English Product Liability Law: a comparison with the American system. Tulane Law Review, Vol. 62, No. 2-3 (February 1988).

Merton E Marks. US Product Liability Law. International Business Lawyer, Vol. 26, No. 2 (February 1998).

Nuttajakra Pattamasing Na Ayutthaya. Manufacturer Liability. Auyakarn Journal, Vol. 39, Year 4 (March 1981).

Professor Peter Zablotsky. The Appropriate Role of Plaintiff Misuse in Product Liability Causes of Action. Touro Law Review, Vol. 10, No. 4 (January 1994).

Valerie M. Benkert. Status and Trends in State Product Liability Law: comparative negligence. Journal of Legislation, Vol. 14 (January 1987).

Wolf-kung Fire Fond Marshall. Product Liability: The idea in Comparative Law. Nitisart Journal, Vol. 1, Year 18 (March 2541).

### Internet Network

[http://www.kfia.or.kr/pl\\_center/pl\\_orin2.asp](http://www.kfia.or.kr/pl_center/pl_orin2.asp), Product Liability Act, Access date May 28, 2005.

<http://www.canlii.org/nb/laws/sta/c-18.1/20041104/whole.html>, Consumer Product Warranty and Liability Act, Access date May 28, 2005.

<http://www.anu.edu.au/caepr/iwepapers/saunder.pdf/>, The Changing Social Security Policy Context, Access date June 1, 2005.

<http://www.aana.com/legal/legbrfs/1997/021b97.asp>, Res Ipsa Loquitur: Dental Damage during Anesthesia, Access date June 4, 2005.



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