



Product Liability

in 37 jurisdictions worldwide

2009

Contributing editors: Harvey L Kaplan and Gregory L Fowler



Published by
GETTING THE DEAL THROUGH
in association with:

A&L Goodbody
Advokatfirman NorelidHolm
Deneys Reitz Inc
Dorda Brugger Jordis
Drzewiecki Tomaszek & Partners
Formosan Brothers
Garcia & Bodán
Gianni, Origoni, Grippo & Partners
Hammarström Puhakka Partners, Attorneys Ltd
Kim & Chang
M & P Bernitsas Law Offices
Malleons Stephen Jaques
Marić Law Office
Mayora & Mayora SC
Noetinger & Armando
Nörr Stiefenhofer Lutz
Pérez Bustamante & Ponce
Pietrantoní Méndez & Alvarez LLP
Pinheiro Neto Advogados
PLMJ – Sociedade de Advogados, RL
Portilla, Ruy-Díaz y Aguilar, SC
Radnóczy & Mészáros – Nörr Stiefenhofer Lutz Iroda
Shook Hardy & Bacon LLP
S Horowitz & Co
Simmons & Simmons
Smith & Partners
Stikeman Elliott LLP
Tilleke & Gibbins International Limited
Walder Wyss & Partners Ltd



Product Liability 2009

Contributing editors

Harvey L Kaplan and
Gregory L Fowler
Shook Hardy & Bacon LLP

Business development manager

Joseph Samuel

Marketing managers

Alan Lee
Dan Brennan
George Ingledew
Edward Perugia
Robyn Hetherington
Dan White
Tamzin Mahmoud
Elle Miller

Marketing assistant

Ellie Notley

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistants

Nick Drummond-Roe
Charlotte North

Senior production editor

Jonathan Cowie

Subeditors

Jonathan Allen
Kathryn Smuland
Sara Davies
Laura Zúñiga
Ariana Frampton
Sarah Dookhun

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Product Liability 2009

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2009

No photocopying: copyright
licences do not apply.

ISSN 1757-0786

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2009, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law

Business

Research

Global Overview Harvey L Kaplan <i>Shook Hardy & Bacon LLP</i>	3
Argentina Miguel N Armando and Luis E Denuble <i>Sánchez Noetinger & Armando</i>	4
Australia Moira Saville and Robyn Chalmers <i>Mallesons Stephen Jaques</i>	10
Austria Georg Jünger <i>Dorda Brugger Jordis</i>	17
Bosnia and Herzegovina Marić Branko and Anisa Strujić-Tomić <i>Marić Law Office</i>	22
Brazil Júlio César Bueno <i>Pinheiro Neto Advogados</i>	29
Canada Douglas Harrison and Samaneh Hosseini <i>Stikeman Elliott LLP</i>	37
China Terence Lee and Gao Jie <i>Smith & Partners</i>	44
Czech Republic Philip Smitka <i>Nörr Stiefenhofer Lutz vos</i>	50
Ecuador Rodrigo Jijón <i>Pérez Bustamante & Ponce</i>	56
El Salvador Daniel Martinez and Geraldo Cruz <i>Garcia & Bodán</i>	62
England & Wales Simon Castley and Aaron Le Marquer <i>Shook, Hardy & Bacon International LLP</i>	66
Finland Pekka Puhakka and Johan Pråhl <i>Hammarström Puhakka Partners, Attorneys Ltd</i>	71
France Jacques-Antoine Robert and Alexandre Regnault <i>Simmons & Simmons</i>	77
Germany Michael Molitoris and Boris Handorn <i>Nörr Stiefenhofer Lutz</i>	83
Greece Christina Vlachtsis and George Atie <i>M & P Bernitsas Law Offices</i>	90
Guatemala Eduardo A Mayora <i>Mayora & Mayora SC</i>	96
Honduras Terencio J García Montenegro <i>Garcia & Bodán</i>	102
Hong Kong Terence Lee and Karrie Cheung <i>Smith & Partners</i>	106
Hungary Ákos Bajorfi <i>Radnóczy & Mészáros – Nörr Stiefenhofer Lutz Iroda</i>	112
Ireland Marcus Beresford <i>A&L Goodbody</i>	119
Israel Avi Ordo <i>S Horowitz & Co</i>	125
Italy GianBattista Origoni and Barbara Ferraris <i>Gianni, Origoni, Grippo & Partners</i>	132
Korea Sang-Ho Han and In-Hak Lee <i>Kim & Chang</i>	138
Mexico Carlos Fernando Portilla Robertson and Enrique Aguilar Hernández <i>Portilla, Ruy-Díaz y Aguilar, SC</i>	143
Nicaragua Margina Baca <i>Garcia & Bodán</i>	148
Poland Andrzej Tomaszek and Magdalena Łuczak-Golenia <i>Drzewiecki Tomaszek & Partners</i>	152
Portugal Tomás Pessanha, Diogo Duarte de Campos and Luís Vaz Bravo <i>PLMJ – Sociedade de Advogados, RL</i>	158
Puerto Rico Néstor M Méndez, Heidi L Rodríguez and María D Trelles Hernández <i>Pietrantoní Méndez & Alvarez LLP</i>	164
Romania Alexandru Ene and Diana Grigoriu <i>Nörr Stiefenhofer Lutz</i>	171
Russia Ekaterina Kalinina and Thomas Mundry <i>Nörr Stiefenhofer Lutz OOO</i>	177
Slovakia Pavol Rak <i>Nörr Stiefenhofer Lutz sro</i>	184
South Africa Donald Dinnie and Michael Hart <i>Deneys Reitz Inc</i>	189
Sweden Christer A Holm <i>Advokatfirman NorelidHolm</i>	196
Switzerland Dieter Hofmann and Jan Hoffmann <i>Walder Wyss & Partners Ltd</i>	201
Taiwan Wei-Chun Chen and Chih-Peng (Xavier) Chang <i>Formosan Brothers</i>	206
Thailand Michael Ramirez <i>Tilleke & Gibbins International Limited</i>	211
United States Gregory L Fowler and Marc E Shelley <i>Shook, Hardy & Bacon LLP</i>	217

Portugal

Tomás Pessanha, Diogo Duarte de Campos and Luís Vaz Bravo

PLMJ – Sociedade de Advogados, RL

Civil litigation system

1 The court system

What is the structure of the civil court system?

The Portuguese judicial system is complex and the competence of each type of court is defined considering the nature of the dispute to be settled. The main division established is between judicial jurisdiction and administrative and tax jurisdiction.

The territory is divided for judicial purposes and normally each municipality has its own judicial court with generic competence. Judicial courts have generic competence. However, in several municipalities (especially in the main cities) there are subtypes of judicial courts with specific competence to deal with specific matters such as civil, criminal, family, commerce, labour, etc.

Taking into account the economic value of the claim, the type of proceedings and other circumstances, there may be sub-types of courts within the civil and criminal courts.

A decision awarded by a judicial court may be challenged in an appeal court and since 1 January 2008, only in some cases can the decision of the latter still be disputed at the Supreme Court.

Binding precedent law does not exist, although the Supreme Court may be called to render a uniform understanding on a legal question. Nevertheless, this uniform solution may be disputed in future cases.

2 Judges and juries

What is the role of the judge in civil proceeding and what is the role of the jury?

The civil court does not investigate the facts relevant to the litigation, but leaves the presentation of facts to the parties. Therefore, judges may only decide on facts submitted by the parties and cannot go beyond them.

Nevertheless, once the facts are brought before the court, the judge has the power to take the necessary actions in order to find out if they are true or false. Therefore judges assess the relevance of the questions put to the witnesses and may even take the lead when questioning witnesses. Judges can also call in witnesses not listed by the parties or order other kinds of evidence to be produced, such as expert testimony. Nevertheless, only in criminal proceedings is it common to see judges taking the lead in this respect.

On the other hand, judges are solely responsible for giving the facts their proper legal interpretation and for applying the correct rule of law, provided that they have primarily requested comments from the parties. After the evidence is produced the parties may present their own legal interpretation to the court.

In Portuguese civil litigation, no jury is involved in the proceedings.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

A civil case to be decided in a Portuguese court passes through two phases: a written phase (pleadings), where almost all procedural activity is conducted by the parties with very little intervention from the judge; and a subsequent oral phase (hearings).

The institution of a product liability action starts with the filing of the pleading (*petição inicial*), which must be addressed to the competent court and accurately identify the parties, the facts and their legal grounds, as well as the amount in dispute and the documentary evidence through which the plaintiff intends to prove the truthfulness of (all or part of) the alleged facts. However, under the principle of *jura novit curia*, the plaintiff is not required to set out the legal grounds in thorough detail, and such indication of legal grounds is not binding upon the judge, who may uphold the action based on alternative legal grounds.

Once the claim has been filed, the defendant is notified so that he or she may present a defence (and, eventually, a counterclaim) within, generally, a term of 30 days. The answer of the defendant must contain all the arguments available, either factual or legal, as the defendant will not have another occasion to do so (unless he or she presents a counterclaim).

As soon as the exchange of pleadings is complete, the terms of the dispute are defined and, save for exceptional situations, cannot be altered.

The court may then schedule a preliminary hearing (this is an optional phase) in which the legal obstacles to the claims (and any possible counterclaims) shall be discussed (although no evidence is yet presented), which may lead to the dismissal of the case. If the judge considers that all the relevant facts are already evidenced in the file (through documents) he or she may also decide to rule on the merits of the case.

If the court decides that the case should undergo trial (and this is the normal outcome of the preliminary hearing), it will prepare – in principle with the cooperation of the parties' attorneys – a list of the facts that are already proved and a list of the facts that will be discussed in trial. Thereafter, the parties will be invited to indicate all the additional evidence they wish to produce – lists of witnesses, requests for expert evidence, requests for the production of documents not in their possession, among other evidence, must be submitted at this stage, since afterwards only the list of witnesses may be amended.

4 Trials

What is the basic trial structure?

While the parties must provide proof to support their respective positions, judges may order certain actions to clarify the alleged facts,

provided they preserve the right of defence of both parties.

At the end of the trial, attorneys will produce oral allegations on the facts presented in the trial, explaining which of them (and why) should or should not be considered proved. Afterwards the judge will pass a decision on the facts, explaining which facts (of the list prepared in the preliminary hearing) are considered to have been proved by the court, why and on which grounds.

The parties will subsequently be allowed to file written submissions containing their final legal allegations, through which they will describe their understanding of the law applying to the facts evidenced.

The court is then expected to render its award on the case. The court is bound by the facts alleged by the parties and by the relief sought, but is free to apply the law to the facts as it deems more correct; in particular, the court shall not be limited by any legal qualification given to the facts by the parties.

As a general rule, trials run on consecutive days.

It is a fundamental principle of Portuguese procedural law that court sessions are open to the public. In exceptional circumstances, the public may be excluded from hearings, to protect parties' dignity or to guarantee the normal working of the court. Court documents are not available to the public. However, third parties may access court records if they are able to show a legitimate interest.

As written statements are not generally foreseen in the law – except for cases where it is impossible or difficult to have the witness appear in court – all the testimonies are made live and orally.

5 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

Portuguese law provides a wide range of collective actions. Depending on the particular situation there are four kinds of collective actions. Depending on the subject, a person or a representative body can use two class actions – the people's action (*acção popular*) and the action for the protection of collective interests (*acção para defesa de interesses difusos*). The Consumer Protection Law (Law 24/96, of 31 July, as amended) also establishes another collective action, the inhibitory action (*acção inibitória*), to prevent or cease any action concerning the health and safety of a consumer, the use of prohibited clauses or other commercial praxis. Lastly, the Portuguese regime admits that people with different claims that are originated by the same facts may file a group action.

6 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

The first stage of the proceedings generally runs swiftly, mainly because the court has little intervention in the exchange of the written pleadings. Upon the exchange, the preliminary hearing should be scheduled promptly but in most cases several months can lapse before that occurs.

Similarly, it is not possible to estimate a fixed time for an action to get to trial. The duration of this last procedural step depends on the nature and complexity of the case. The two possible degrees of appeal will postpone even more the rendering of a true final decision. Notwithstanding, in 2008 a reform of the civil procedure code was approved making the dispute of case laws at the Supreme Court much more difficult.

Evidentiary issues and damages

7 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

Unlike legislation of Anglo-Saxon influence, there are no disclosure proceedings under Portuguese law. However, after the proceedings are commenced, a party may request the other party to present specific documents, identifying as thoroughly as possible the document and explaining which facts are to be proved through that same document.

Refusal to provide the documents could result in a negative influence being drawn by the court, imposition of fines against the non-complying party and the inversion of the burden of proof.

8 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by opposing party?

Generally, evidence is presented in the court room through live testimony.

As already explained, written statements are normally not allowed in court, thus examination of witness (or of the parties themselves when called to the stand) is undertaken orally.

Parties should present all relevant documents with their pleadings. Nevertheless, a document that is considered relevant by the judge may be filed at a later stage (namely during the trial), even if the party that presents it was previously aware of its existence – in which case, the court will apply a fine.

The contradictory principle is a fundamental principle of Portuguese procedural law, therefore the parties have the right to refute each other's evidence and to provide counter evidence.

The trial starts with the examination of plaintiff's witnesses, conducted by the attorney. At the end of each testimony, the attorney of the other party may cross-examine the witness, although he may only put questions to the witness in respect of the explanations provided by the witness during the direct examination (this means that the cross examination must focus on the same subjects that the witness was already asked). Witnesses may be challenged and documents may be filed in order to discredit a statement or a witness.

9 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Expert reports produced outside of the scope of an examination or investigation ordered by the court, either legal or technical, may be filed at any stage of the lawsuit. The signatories of said reports are not obliged to go to court to defend their reports, but they may appear as witnesses.

Parties may also request to the court an expert investigation, usually conducted by three experts – typically, each party nominates one expert and the court nominates the third. Medical investigations are performed by state authorities.

The experts receive a list of technical questions that they should answer. The parties are obliged to cooperate with the experts, providing all information they request. In view of the outcome of the investigation the parties or the court are allowed to request a second investigation. In any case, the court shall not be bound by the answers given by the experts, but in this case the court shall justify its grounds for not answering in accordance with the experts. Lastly, the parties can demand that the experts deliver additional details orally in the courtroom.

10 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

The Portuguese law on compensation is based on the principle of restitution in kind. The injured party is, by means of compensation, to be placed in the position in which he or she would have been if the damaging event had not occurred. Only when such specific replacement is not possible the obligation to indemnify will be converted into the obligation to pay compensation in money.

The compensatory damages available in Portugal can be divided in two groups, material (patrimonial) and moral damages.

Material damages encompass damages suffered and loss of profit (the benefits that the damaged party did not obtain in consequence of the damaging fact or event).

Moral damages (pain, suffering, death) are recoverable but compensation granted is usually relatively low, although the amount of indemnification paid has continued to increase for some years now.

11 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Portuguese law does not recognise punitive damages as a third type of damages, with its own specific characteristics and requisites, in addition to material and moral damages.

Litigation funding, fees and costs**12 Legal aid**

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Legal aid may be granted on the grounds of economical insufficiency and may imply different solutions, from exemption of court costs to the appointment of an attorney.

The other party can, at any time during the proceedings, request the national insurance (social security) services to revoke the benefit, if it is proven that the condition necessary for granting it no longer exists.

13 Third-party litigation funding

Is third-party litigation funding permissible?

Legal costs may be defrayed by a third party. However, to the extent that such a third party is not a party to the proceedings, his or her right to recover such costs is limited to the agreement reached with the party who is lawfully entitled to recover this money under the terms of the court order.

14 Contingency fees

Are contingency or conditional fee arrangements permissible?

The rules of the Portuguese Bar Association forbid contingency fees (quota litis). It is therefore impossible to establish that fees will amount to a certain percentage of the value of the claim in dispute or that they will entirely depend of the outcome of the case.

Attorneys' fees may, however, be composed of a fixed part (charged according to defined criteria such as the time spent, the complexity of the issue under discussion, the importance of the service provided and the wealth of the client) that may (or not) be supplemented by a success fee in view of the results obtained (which should be established within reasonable limits).

15 'Loser pays' rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

During the lawsuit, both parties shall be called to make payments on account for costs and, upon rendering its decision, the court determines the total amount of costs.

However, at the end of the proceedings, the court shall determine the proportion of costs to be borne by each party. As a general rule the losing party shall bear the full amount of the costs. Notwithstanding, each party shall bear the fees of its respective lawyers, except when the parties agreed otherwise or, to a limited extent, if the judge decides to sanction the losing party for litigating in bad faith.

Sources of law**16 Product liability statutes**

Is there a statute that governs product liability litigation?

Further to the Consumer Protection Law, product liability is specifically governed in Portugal by Decree-Law 383/89 of 6 November, which implemented Directive 85/374/EEC of 25 July 1985, as amended by Decree-Law 131/2001 of 24 April, implementing Directive 1999/24/EC of 10 May 1999.

The above Decree-Law (the Product Liability Statute) provides statutory basis for no-fault liability (strict liability) by the producer (or importer or supplier) if a person suffers death, personal injury or material damage to an object due to the defect. In respect of material damage, this applies only if objects, other than the defective object, are damaged and the said objects according to their nature are in private use and mainly used by the person who suffers the damage. Damages to goods are only recoverable to the extent they exceed the value of €500.

This type of liability may not be excluded or limited in relation to the injured party, being deemed as non-written, any provisions to the contrary, and the same shall not set aside liability arising from other legal provisions. In other words, the Product Liability Statute does not replace the existing general liability rules, it merely supplements them.

17 Traditional theories of liability

What other theories of liability are available to product liability claimants?

Product liability is provided for under the general tort provision (set forth in the Portuguese Civil Code), as well as the strict liability under the Product Liability Statute.

Notwithstanding the comprehensive special statutory provisions, general tort liability remains of considerable significance. In fact, the Product Liability Statute does not apply to all claims for damages based on defective products. This Statute is, for example, not applicable in relation to damaged products which are not consumer products. Furthermore, liability under the Product Liability Statute also requires that the damage is caused by a defect in the product. Apart from these cases, the person claiming damages may claim compensation under the basic provision on tort liability, provided by the Civil Code.

However liability under the general tort provision depends on the existence of fault (culpa) (along with other prerequisites: the fact, the unlawfulness, the attribution of the fact to the injuring party, the damage and the adequate causation between the fact and the damage) and therefore is associated with more onerous conditions compared to liability under the Product Liability Statute.

There can also be contractual liability according to which the debtor guilty of breaching his or her obligation becomes liable for

the damages caused to the creditor. Fault is also a general prerequisite of contractual liability, although in this case its existence is presumed, causing the shifting of the burden of proof, which therefore belongs to the breaching party (provided that there was a breach of contract).

18 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The Consumer Protection Law defines the legal regime of consumer protection, which provides that the seller is liable to the consumer for any lack of conformity on the delivered goods within the contract. In this case, the consumer shall be entitled to the remedy of the lack of conformity, either by repair or replacement of the goods, to an appropriate reduction of the price or to the termination of the contract.

One may also refer to Decree-Law 67/2003 of 8 April, which implemented in Portugal the European Directive 1999/44/EC of 25 May 1999, as amended by the Decree-Law 84/2008 of 21 May, on certain aspects of the sale of goods to consumers and associated guarantees, approving a new legal regime governing compliance of goods with the respective sale and purchase contract.

This specific regime applying to sale and purchase contracts executed between a professional seller and consumer, derogates the traditional general regime of contractual liability based on fault (even if presumed) foreseen by the Portuguese Civil Code and detailed in question 17.

19 Criminal law

Can criminal sanctions be imposed for the sale or distribution of products determined to be defective?

Under the Portuguese Criminal Code, anyone who, in an item's use, production, making, manufacturing, packaging, transportation or processing, or in any other activity, creates a danger to life or physical integrity by corrupting, counterfeiting, altering, reducing the nutritional or therapeutic value of any substances intended to be consumed by others (by eating, chewing, drinking or using for medical purposes), may be sentenced to one to eight years in prison. If the action is the result of negligence, the sentence is reduced to a maximum of three years in prison or a fine. The same applies to anyone who creates a danger to life or physical integrity by importing, concealing, selling, displaying for sale, and holding in deposit for sale or, in any way, delivering substances that are subject to the actions referred above, or that have expired, are damaged, corrupted or altered. If danger is created by negligent conduct, the sentence is reduced to a maximum of five years in prison.

In addition, Decree-Law 28/84 of 20 January approved the legal regime applying to anti-economic infringements and infringements against public health.

According to this Decree-Law (as amended to date), anyone who, with the intent of deceiving another party in their relations, inter alia manufactures, transforms, imports, exports, re-exports, holds in deposit or exhibition for sale, sells or puts in circulation by any way goods of a different nature, or of a lower quality than presented or appeared, shall be punished with up to one year of prison (or six months in case of negligence) or a fine. The act lists several other criminal offences and misdemeanours, including situations that may be relevant for the subject matter under analysis, like offences dealing with defective food products; however, due to the specificity of these offences, they shall not also be considered further in this work.

20 Novel theories

Are any novel theories available or emerging for product liability claimants?

Novel theories for product liability claimants are not known.

21 Product defect

What breaches of duties or other theories can be used to establish product defect?

It is generally accepted that there are three main types of defect:

- manufacturing defects, resulting from faults in the production process, which usually affect isolated products belonging to a series;
- engineering or design defects, resulting from errors in technical drawings previous to manufacturing (ie, the technical engineering or design of the product), which usually affect all manufactured units; and
- information defects, resulting from erroneous, incomplete or insufficient information that misleads the consumer on how to use the product or the product's level of safety.

22 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

Under the Product Liability Statute, a product is considered defective when it fails to provide the safety that a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product will be put, and the time when the product was put into circulation. Nevertheless, a product will not be considered defective for the sole reason that a better product is later put into circulation.

Although no specific provision exists in the above statute on the burden of proof, under the general rule of Portuguese law, the injured party must produce evidence of the damage, the defect and causal relationship between the defect and the damage. The only prerequisite that the injured party does not have to prove is the fault of the producer, once there is a strict liability regime.

In Portugal there are no standards by which the defect must be proven. In order to consider a fact proven the judge has to be convinced. The judge will freely analyse the evidence brought and will then render a grounded decision. Nevertheless, one can say that to convince a judge it is necessary to demonstrate the fact, and not enough to demonstrate a mere probability.

23 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

For the purposes of the Product Liability Statute, a 'producer' is taken to mean the manufacturer or producer of a finished product or any component of it; the importer (into the EU) of the product, any person who by putting his or her name, trademark or other distinguishing feature on the product, has held himself or herself out to be the producer; or any person supplying the product where the producer cannot be identified.

The representative of the producer, in the area of residence of the consumer is jointly liable with the producer towards the consumers. For the purposes of the future Consumer Code, a 'representative of the producer' shall mean any person or entity acting as a commercial distributor of the producer and/or authorised centre of after-sales service, with the exception of independent sellers who act only as retailers.

Update and trends

Indeed, the legislation published in recent years has been immense, due to the constitutional imperative of consumer protection and to the various European Community Directives with the same objective.

In order to address the inconveniences arising from the proliferation of consumer protection laws in recent years, the Portuguese government appointed a task force (Commission) to which the preparation of a Consumers Code was committed.

This Commission has already published the project of Consumers

Code, which is currently under public discussion. This Code will revoke most (if not all) existent acts in the field of consumers rights, fully replacing the legal framework presently in force.

However, the Code will not lead to a material change of the principles and rules applicable nowadays; in fact, it mainly aims to compile all the current legislation into a single act, with clear advantages in terms of rationality and systematic unity.

If several entities respond for the damages, they shall be liable jointly and severally.

Without prejudice to the above, the liability of the producer shall not be reduced when the damage is caused both by a defect in the product and by the act or omission of a third party.

However, in cases when faulty conduct of the injured party contributes to cause the damage, the court may, having regard to all the circumstances, reduce or disallow the liability of the producer.

24 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The defect must be an adequate condition to cause damage. The plaintiff must prove the causality. However, in some circumstances regarding product liability, Portuguese legal authors and courts state that, whenever the defect of the product is demonstrated, then causality between defect and damage may be proved according to rules of social experience and rules of probability, instead of the scientific evidence of causality between defect and damage.

On the other hand, the courts only demand that the plaintiff proves the existence of the defect at the time the damage occurred, since there is an *iuris tantum* presumption that the defect already existed at the time the product was put into the market.

25 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

According to Decree-Law 69/2005 of 17 March, which implemented Directive 2001/95/EC of 3 December 2001, thereby regulating the general safety of the consumer goods and services, the producers are obliged to adopt measures commensurate with the characteristics of the products that they supply enabling the consumers to be informed of risks which these products might pose and to take appropriate action including withdrawal from the market, adequately and effectively warning consumers or even recall from consumers.

However, the recall or withdrawal may be ordered by the Portuguese Commission for the Safety of Services and Goods if the actions carried out by the producers or distributors are not sufficient or when such recall or withdrawal is determined by the European Commission.

Both producers and distributors are obliged to pass on to the Consumers' Institute (Instituto do Consumidor) information on products that they have placed on the market, whenever these products might be dangerous to the consumers.

The breach of these obligations may result in imposition of fines against the non-complying party.

Limitations and defences

26 Limitation periods

What are the applicable limitation periods?

The limitation period for claims under the Portuguese Liability Statute is three years. The period begins with the point at which the injured party acquires knowledge (or should reasonably acquire knowledge) of the damage, the defect or the person who is liable for compensation.

Claims under the Product Liability Statute are extinguished, however, at the latest, 10 years after the manufacturer of the product that has caused the defect has brought the product into the market. The filing of the claim prior to the expiry of the limitation period prevents the extinction of the claim.

27 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

Producer liability is excluded if the state of scientific and technical knowledge at the date on which the producer put the product on the market did not lead to the product being considered as defective. However, a manufacturer's personal knowledge must not be taken into account; the impossibility must be absolute and objective.

According to the Portuguese general law, the producer bears the burden of proof.

28 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

In principle the mere compliance with mandatory (or voluntary) standards is not a defence, as Portugal has a strict liability regime. Nevertheless, if the defect is due to the compliance with mandatory legal rules or a binding measure the producer is not liable.

29 Other defences

What other defences may be available to a product liability defendant?

The producer can only invoke the exemptions expressly set out under the Product Liability Statute, on the basis of which liability is excluded:

- if the producer did not put the product on the market;
- if the defect which caused the damages did not exist when the producer put the product on the market;
- if the producer did not manufacture the product for sale or for any other form of distribution for payment, and did not manufacture or distribute the product in carrying on its business activities; or

- if, in the case of a component, 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.

Jurisdiction analysis

30 Status of product liability law and development

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Introduction in Portugal of a product liability statute, along with a new consumer's law approved in 1996, triggered a double perspective in the legal analysis of product liability-related issues: the general or traditional regime, comprising contractual and tort liabilities, and the special regime of liability without fault of the producer and supplier. The co-existence of these regimes raises problems of interpretation and application of the different set of rules.

The efforts in the development of the protection granted to consumers still continue, namely with the implementation of Directive 2001/95/EC by means of Decree-Law 69/2005 of 17 March, to guarantee a bigger general safety of products.

Thus, from a legislative point of view, the Portuguese product liability law guarantees parties injured by a defective product an adequately broad protection, in line with EU standards.

31 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

With the exception of a case in which the Supreme Court decided that the sale of animals infected with brucellosis corresponds to a sale of defective products, no major events or milestones in product litigation can be mentioned in Portugal so far.

32 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

In the past three decades Portugal has changed profoundly. Besides the obvious changes in the political sphere, social and economic changes are also remarkable. The country has awakened to the rights of citizens as consumers, a revolution in attitudes to which the Portuguese consumers association 'DECO' has contributed decisively.

However, in general, there has been no significant activism relating to product liability in Portugal. The claims experience of Portugal, one of the EU countries that prior to the Directive did not have a national product liability law, has not reported any appreciable change as a result of the implementation of the Directive.



A.M.PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS
SOCIEDADE DE ADVOGADOS, RL

Tomás Pessanha

ttp@plmj.pt

Edifício Passeio da Boavista
Avenida da Boavista, 2121, 4º andar Sala 407
4100 – 134 Porto
Portugal

Tel: + 351 22 607 47 00
Fax: + 351 22 607 47 50
www.plmj.pt

GETTING THE DEAL THROUGH®

Annual volumes published on:

Air Transport	Merger Control
Anti-Corruption Regulation	Mergers & Acquisitions
Arbitration	Mining
Banking Regulation	Oil Regulation
Cartel Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Dispute Resolution	Product Liability
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Environment	Restructuring & Insolvency
Franchise	Securities Finance
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
Licensing	Vertical Agreements

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association