

# Product Liability

in 29 jurisdictions worldwide

# 2014

Contributing editors: Harvey L Kaplan,  
Gregory L Fowler and Simon Castley



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**Product Liability 2014**

**Contributing editors:**  
**Harvey L Kaplan, Gregory L Fowler**  
**and Simon Castley**  
**Shook, Hardy & Bacon LLP**

*Getting the Deal Through* is delighted to publish the seventh edition of *Product Liability*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions this year include Argentina, the Dominican Republic and the Netherlands.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors, Harvey L Kaplan, Gregory L Fowler and Simon Castley of Shook, Hardy & Bacon LLP for their continued assistance with this volume.

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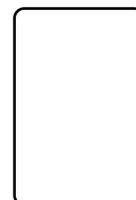


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# Argentina

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## Civil litigation system

### 1 What is the structure of the civil court system?

Argentina is a federal country and, therefore, the civil court system has federal and local courts. In the city of Buenos Aires there are federal courts, national courts (which are local but are also federal courts) and local courts. Typically, product liability cases in the city of Buenos Aires are brought before the national or the federal courts.

### 2 What is the role of the judge in civil proceedings and what is the role of the jury?

The civil court system is adversarial and is based on judges who manage and rule the case. However, it should be noted that in certain cases where consumer rights are involved, the Public Attorney can have a relevant role.

### 3 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?

Typically, a product liability action in the city of Buenos Aires requires a previous mandatory mediation process, after which the plaintiffs are entitled to file the suit within a year by submitting a written pleading. Depending on the amount claimed, the claimant shall present its written defences within five or 15 working days. If the claim involves consumer rights the defences usually shall be submitted within a period of five working days.

### 4 Are there any pre-filing requirements that must be satisfied before a formal law suit may be commenced by the product liability claimant?

See question 3.

### 5 Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Certain defences can be judged prior to entering to the evidentiary stage. The most usual defences are:

- statute of limitation;
- lack of jurisdiction of the courts;
- lack of standing to sue;
- lis pendens; and
- res iudicata.

However, courts are usually reluctant to judge a case in this way and defer the judgment of these defences to the final stage of the proceeding.

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### 6 What is the basic trial structure?

The proceedings, which in principle are public, are written and have the following structure: firstly the plaintiff submits its written pleading and the defendant its defences; then a hearing is set in order to allow the parties to reach an agreement and if they fail to do so, the evidentiary stage starts (witnesses usually testify orally in a hearing and expert witnesses submit written reports). After the evidentiary stage has finished, the lower court issues the judgment, which can be appealed to a higher court.

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

The Consumer Protection Act (CPA) provides for a rudimentary class action proceeding. A variety of judicial precedents, including court decisions are shaping this kind of proceeding. Certain provinces have local procedure rules that regulate class actions.

Class actions are usually brought by representative bodies such as consumers' non-governmental organisations (NGOs), by the Public Attorney and, only in a few cases, by affected persons (in this case there are not enough precedents as to definitely state that affected persons can file a class action on behalf of a class).

Notwithstanding the above-mentioned, product liability class actions are not as common as others (eg, against banks for abusive fees), since the need to prove individual damages clashes with the requirement that the class members be in a similar situation. However, there are a few product liability class actions already filed.

### 8 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 answer depends on the complexity of the evidence necessary to prove the defect and the extent of the damages. Complex cases can take more than five years to get to the trial stage and two to three more years to get the final judgment from the Court of Appeals. An extraordinary appeal to a State Supreme Court or to the National Supreme court can take a further one or two years.

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## Evidentiary issues and damages

### 9 What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

There are no pretrial discovery stages as in the United States. In cases where evidence might disappear, certain preservation measures can be obtained (eg, a testimony from an elderly person or information that can be destroyed after a period of time).

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

Documents shall be submitted by the parties along with the suit or the defences. If the counterparty denies the validity of the documents, the submitting party should offer other complementary evidence (eg, a writing expert).

Other evidence shall be offered at the same time for examination during the evidentiary stage.

Third-person testimony is given orally in a hearing, and both parties can interrogate the witness.

Expert witnesses are randomly appointed by the courts and submit written reports that can be challenged by the parties who can be advised in the matter by their own experts.

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

See question 10.

**12** What types of compensatory damages are available to product liability claimants and what limitations (if any) apply?

All kind of damages are available. Typically bodily injuries, property damages (loss of profits) and moral damages are awarded by the courts, provided that these consequences have been proven after the evidence stage.

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

Since 2008, punitive damages have been available in consumer claims due to an express provision of the CPA. There is a limit of 5 million Argentine pesos.

The only requirement set forth by the CPA is failing to comply with a contractual or legal duty. Other parameters such as the relevance of the damage, the gross negligence by the defendant, etc, shall only be considered to calculate the amount of the award. However, courts are usually careful when it comes to awarding punitive damages and require gross misconduct by the defendant.

#### Litigation funding, fees and costs

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

Procedure rules provide for the right to litigate without bearing costs when the plaintiff has no resources to afford them or when the case involves consumers' rights. The defendants can challenge that request.

Certain consumers' NGOs receive governmental funds.

**15** Is third-party litigation funding permissible?

There is no regulation on this issue. In cases where a lawyer and his or her client agree that the lawyer is entitled to receive more than 20 per cent of the outcome of the case, the lawyer shall bear the litigation costs (except when its expressly agreed otherwise).

However, even though third-party litigation funding is not usual in Argentina, some ways to provide economic assistance to the plaintiff can be available.

**16** Are contingency or conditional fee arrangements permissible?

Yes, lawyers and their clients can agree to entitle lawyers to receive up to 40 per cent of the outcome of the case, notwithstanding the fees that the courts can award in favour of the lawyer to be paid by the losing counterparty (also see question 15).

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

Yes. The 'loser pays' rule applies, except when the losing party has been granted with the right to litigate without bearing costs. However, it should be noted that the fees and expenses paid by the winning party that can be recovered from the loser are only the ones awarded by the court.

#### Sources of law

**18** Is there a statute that governs product liability litigation?

Our National Constitution grants the right of safety for all consumers as a basic principle in this matter. The Constitution reads: '[c]onsumers and users [...] have the right to the protection of their health, safety and economic interests' (article 42).

Product liability in our country is based on two different systems that, in certain cases, can partially or totally overlap. These systems are the basic one set forth in the Civil Code and the special one established in the Consumer Protection Act (CPA).

#### The Civil Code system

The system ruled by the Civil Code provides two different sources of liability:

- contractual liability: it considers that there is an implicit duty of safety by which the provider of a product is liable for the damages caused by the product to the purchaser. It is strict liability based on the accessory duty of safety for all the products launched into the market; and
- non contractual liability or tort: it states that there is a general duty not to harm any person and, therefore, a manufacturer or seller can be considered liable for damages caused by products to persons with whom there is no contractual relationship. This liability is strict and based on the created risk.

In both cases, the liability can only be released by proving that there is no causal link between the damage and the product.

Although strict liability can be applied under both systems, they have different consequences, for example, the scope of the compensation and the statute of limitation. The grounds of strict liability are different too, ie, duty of safety under the contractual liability and the created risk under the non-contractual liability.

Besides, the Civil Code also provides for a fault-based liability that can be applied also to manufacturers or sellers of a product if it is defective, but in this case the alleged victim shall have the burden of proving the existence of fault.

At present, there is a bill to reform the Civil Code that devotes a special chapter to consumer rights. This new Code would eliminate the principal differences between contractual and non-contractual liability. The bill has passed the Senate and is now under the consideration of the House of Representatives.

#### The Consumer Protection Act system

This system only applies when the victim is a consumer.

Under the CPA, consumers are individuals or corporations that acquire products or services as final consumers for their own benefit or for the benefit of their family or social group.

People who are not party to a consumer relationship, but that as a consequence, or on the occasion, of a consumer relationship, acquire or use products or services as final consumer, as well as anyone exposed to a consumer relationship, are also considered consumers under the CPA.

According to the CPA, products and services shall be supplied in a way that does not harm consumers' health. Therefore, the liability is strict and is based on the duty of safety.

The manufacturer, the importer, the dealer, the provider, the retailer and anyone who applies his or her brand or trademark to a product or service are jointly, strictly and severally liable for any

damages caused to a consumer by the risk or defect of the product or service. The carrier shall be liable for damages arising from transportation.

Anyone mentioned above can be released from liability if he or she proves that the cause of the harm is alien to them.

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

See question 18.

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

Yes, as mentioned in the answer to question 18, the CPA provides specific regulation to protect consumers. Some of its main provisions are the following:

- punitive damages with a cap;
- administrative penalties with a cap; and
- shifting of the burden of proof.

**21** Can criminal sanctions be imposed for the sale or distribution of defective products?

Yes; the supply of defective products can lead to criminal sanctions.

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

There are no novel theories, but in certain cases the courts' rulings can modify traditional theories, usually in favour of consumers; for example, medical monitoring is considered a future damage and this shall only be compensated if its occurrence is certain or if it is an inevitable consequence of present damages.

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

The manufacturer or seller liability can stem from the design defect, manufacturing defect, lack of warning or any event that can produce harm.

A failure to warn can give rise to liability. According to the CPA, the provider of a product shall inform the consumer about all the characteristics of the product or service, and, regarding risky products or services, the provider shall follow the applicable regulations and provide the reasonable information in order to allow the consumer to use them in a safe way. For example, a user manual in Spanish shall be provided by the producer or the provider, in certain cases.

Even though it is not clear to what extent information provided to intermediaries may totally or partially release if at all, the producer from liability, it should be noted that the CPA sets forth that the information shall be given to the consumer.

There is no 'learned intermediary' principle. All the members of the supply chain may be held liable under the CPA.

**24** 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?

The general principle is that the claimant has the burden of proof of the causal link between the damage and the product. The defendant has the burden of proof that the causal link was interrupted by another event. Therefore, the defendant has to prove:

- (i) lack of causal link between the damage and the product;
- (ii) force majeure or similar situations;
- (iii) victim's negligence; or
- (iv) damage caused by third persons for whom the defendant has no liability.

It should be noted that in (iii) and (iv) the defences shall have force majeure characteristics.

It should also be noted that some courts apply a theory by which the burden of proof lies with the party who is in a better condition to prove it.

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

Under the CPA, all the members of the supply chain are considered strictly, jointly, and severally liable.

The manufacturer, the importer, the dealer, the provider, the retailer and anyone who puts its brand or trademark in a product or service are jointly, strictly and severally liable for any damages caused to a consumer by the risk or defect of the product or service. The carrier shall be liable for damages arising from transportation.

Any of the above-mentioned can be released from liability by proving that the cause of the harm is alien to them.

The one who had strict liability and ended up paying the total compensation can seek proportional reimbursement from the other strictly based liable respondents. Besides, the strictly liable respondent can seek total reimbursement from the ones held fault based liable.

Similarly, the ones who were considered liable because of his or her fault and ended up paying the total compensation can seek proportional payment from those who were also considered guilty by fault.

**26** 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?

See question 24.

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

Although there are not general rules regarding mandatory recalls, the authority can order a recall of products when the public safety is involved. Certain activities are also subject to specific regulations that may lead to mandatory recalls ordered by the respective authorities (eg, drugs, food and medical devices).

Besides, should the producer, supplier, seller, etc, of any kind of product become aware of a defect in a product, section 4 of Decree 1978/94 provides that authorities and consumers be promptly informed (in the latter case, through advertising).

### Limitations and defences

**28** What are the applicable limitation periods?

Time limits arise from the applicable statute of limitations.

The statute of limitation period starts when the claimant suffers the damages or when he or she knows about it.

There are different time limits. The statute of limitation for torts is two years and for contractual claims ten years.

The CPA also provides a three-year statute of limitations for consumer cases, but longer time limits under other regulations shall prevail.

It should be noted that some circumstances might affect the calculation of time limits (eg, pre-judicial claims, continuing damages). Additionally, the courts are allowed to disregard time limits when the suit was not filed in time due to the existence of factual obstacles, provided that the claim is filed within three months after the said obstacles disappeared. A similar solution is applicable if the plaintiff failed to file the suit due to fraud of the defendant. Criminal actions might also suspend or interrupt the calculation of time limits.

The mediation suspends the statute of limitations.

**29** 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?

The concept of 'risk activity' is advancing as a reason to attribute liability and this is proposed in the bill to reform the Civil Code. Therefore, if the producer causes damages due to the limitation of sciences and technology, he or she can be considered liable for carrying out a risk activity. As a result of this, a state of the art and development risk in this context has little chance of success.

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

When the rule of the duty of safety is applied, compliance with mandatory (or voluntary) standards or requirements is not usually a successful defence.

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

As mentioned in the answer to question 24, the general principle is that the claimant has the burden of proof of the causal link between the damage and the product. The defendant has the burden of proof that the causal link was interrupted by another event. Because of that, the defendant has to prove:

- (i) lack of causal link between the damage and the product;
- (ii) force majeure or similar situations;
- (iii) victim's negligence and claimant's fault;
- (iv) damage caused by third persons for whom the defendant has no liability.

It should be noted that in (iii) and (iv) the defences shall have force majeure characteristics.

In general, the assumption of risk is not a defence. It can only have influence when the claimant carries out or is subject to a risky activity.

**32** What appeals are available to the unsuccessful party in the trial court?

Parties can appeal rulings before the Court of Appeals. Exceptionally, the party can appeal to the State Supreme Court or to the National Supreme Court, when constitutional rights are involved.

### Jurisdiction analysis

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

Product liability is not as mature a field as it is in the United States, yet it is under constant evolution.

There are several individual cases and a few collective ones against product manufacturers (typically car manufacturers, food producers, laboratories, etc), but usually the plaintiffs have to face difficulties to prove a defect or a damage due to the lack of technical preparation of the lawyers or even of the experts available in our country.

However, this asymmetry is decreasing because of the effect of the CPA and recent judicial precedents related to class action and the awarding of punitive damages.

Recent developments indicate a growing trend of attempts to prevent incurring liability and punishing bad practices.

**34** 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?

First, it should be noted that since 2009 the National Supreme Court has been ruling in favour of collective actions filed by NGOs or affected persons in a variety of matters that include consumer rights.

Second, punitive damages have been increasingly awarded by the courts in individual cases and also are starting to be accepted in the context of a class action. However, the amounts usually awarded are low and the courts require that a serious fault of the defendant be proved.

In this regard, a relevant case is the one where a customer who had bought a bottle of a well known beverage found a gel envelope floating inside and, therefore, filed a suit claiming, inter alia, punitive damages of 2 million Argentine pesos. The lower court of the Córdoba province awarded that amount in favour of the plaintiff, but the Court of Appeals reversed the decision. Finally, in May 2014, a third instance local court affirmed the Court of Appeals judgment but ordered that a moral damage compensation be awarded (the amount is yet to be defined).

Another relevant case that might shape product liability law in the future is a class action filed in mid-2013 by 274 women on behalf of a group of approximately 15,000 women allegedly affected by defective silicone breast implants manufactured in France. The plaintiffs seek compensation of 1.13 million Argentine pesos per person, totalling 309.62 million Argentine pesos for the 274 plaintiffs.

The defendants are the French manufacturer, a German insurer and a German certifying body. The suit was filed but the defendants have not been duly served yet, due to a discussion among the courts as to which court has jurisdiction in this case (federal courts or national courts).

There are also rumours that a class action is being prepared by an NGO against a local laboratory that in January 2014 recalled several lots of a sun-screen that supposedly has caused cases of allergy.

Apart from those cases, we can mention the following:

- an e-commerce site was found liable for stolen tickets that were sold by a third person through the site (*Claps v Mercado Libre SA*, CNCom 05-10-2012, CSJN, 19 November 2013, IJ-LXX-21);
- a car manufacturer was held liable because a brand new car had to be repaired eight times in a year (*Sapas v Forest Car SA*, CNCom, 31 May 2013, La Ley, AR/JUR/26074/2013); and
- an aggregated lawsuit filed by hundreds of consumers against a supermarket in connection with allegedly tainted food (fungus in peanuts) was rejected by the Court of Appeals because the damage was not proved. The Supreme Court upheld the ruling (28 November 2013). We acted on behalf of the insurance company (*Benítez v Supermercados Norte SA*).

Further, at present, the Supreme Court is deciding on a lawsuit against two search engines accused of not having properly blocked adult sites showing fake photos of a model. This case is considered to be a leading case in this matter and several public hearings are being held before the court.

Finally, there is no statistical information as to the frequency or nature of product liability cases launched in the past 12 months.

**35** 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 product liability field the level is intermediate, but it is constantly growing, being driven by the increasing interest of lawyers and NGOs in this area.

Additionally, local governments have created a myriad of consumer protection offices throughout the country enabling consumers to easily file small claims.

**36** Describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

A more profound class action regulation, combined with a wider use of punitive damages and a shifting in the burden of proof would make the legal environment more claimant-friendly.

#### Update and trends

We perceive an interest from lawyers related to NGOs, as well as other lawyers, to apply the tools that the CPA provides for class actions, punitive damages and the shifting in the burden of proof in product liability cases. There is also an increase of forums, blogs and other web-based tools to exchange information about these matters.

Consequently, an increase of product liability litigation is to be expected.



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