

Chapter 24

Spain

Sönke Lund



Belén Arribas Sánchez



Monereo, Meyer & Marinel-lo Abogados

Liability Systems

- 1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role?**

In Spain, product liability is regulated by Act 22/1994, July 6th, concerning civil liability for damages caused by defective products (*Ley de responsabilidad civil por daños causados por productos defectuosos*). The liability of a manufacturer is an *objective* or strict liability, since the occurrence of fault is not necessary. The features of such a liability system are i) its relativity (there are a number of defences and the manufacturer is not always held to be liable), ii) timeliness (the initiation of proceedings are subject to a statute of limitations), and iii) compulsoriness (liability cannot be waived or limited in a contract or agreement by the parties).

Civil liability arises only when three requisites exist: a defect or fault in the product, the existence of damage and a causal link between them. It is not necessary, therefore, that there is fault on the part of the manufacturer or supplier, and the Act makes no reference to fault.

According to both the Act and the doctrine of the Spanish Supreme Court, a product that is defective means a product which fails to offer the degree of safety that was expected, taking into account all the circumstances and specifically i) its presentation, ii) the use one could reasonably expect of it and iii) the timing of its commercial launch. The legal concept of defective product is severely restricted by the issue of timing. By law, a product may not be considered defective unless it is available in the market regardless of the intrinsic faults that that product may present.

A defect may have its origin in the product's design, in its manufacturing or may result from the information provided with the product (unclear guidelines or imprecise operating instructions or risk information).

Damage is an essential requisite. Economic damage to property other than the defective product as well as personal injury or death are covered. The damaged property has to have been objectively devoted to private use or consumption and has to have been principally used for this purpose by the injured person so the Act does not apply to products sold for resale.

The third element, causation, is a bridging concept

between the defect and the result; damage must be a consequence of the product's defect. The Supreme Court has interpreted the various theories on the causal nexus in civil liability. To summarise, for the finding of the existence of causation, a precise and direct link between the defect (cause) and the damage (effect) is required. If this link cannot be established, causation will not exist despite the proven existence of a defect and a loss.

In Spain, the distinction between contractual and extra-contractual liability is not clear. Briefly it is useful to outline that on most occasions, a claim concerning material or property damage which affects the purchased product itself shall be considered contractual, whilst a claim for personal injury or property damages other than to the product as well as for economic claims of positive damages *daño emergente* and loss of profits *lucro cesante*, shall be considered extra-contractual (law of tort). The latter is hence covered by the aforementioned Act.

- 2 Does the state operate any schemes of compensation for particular products?**

In accordance with the Act, the State has put into operation schemes of compulsory civil liability insurance for motor vehicles (R.D. 7/2001, January 12th), compulsory insurance for travellers (R.D. 1575/1989, December 22nd) and for recreational or speed boats (R.D. 607/1999 April 16th).

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

The rule provides that the manufacturer and the importer will be liable. The legal concept of manufacturer includes i) the producer of a finished product, ii) the producer of any element integrated in a finished product, iii) the producer of raw material, including agriculture and livestock products, and iv) any person presenting itself to the public as producer, placing its name, company name, trademark or any distinctive mark whatsoever on the product or its packaging. Hence, the legal concept of manufacturer includes not only the real producer but also the apparent one.

An importer is defined as the person who, in the exercise of a professional activity, introduces a product in the EU for its sale, rent, leasing or any other form of distribution whatsoever. An importer is liable just like the

manufacturer. On the other hand, a person importing goods from the EU or the AELC will be considered, accordingly, a mere supplier.

A supplier is any person who supplies or makes the product available. He has in principle a reduced liability compared to the manufacturer and the importer but if the supplier acts knowing that the product it supplies is defective his liability can become equal to that of the manufacturer/importer. If he were held liable, the supplier is entitled to bring an action to recover damages from the manufacturer or importer.

The nature of the liability system laid down by the Act is joint and several liability. The injured party has the option to bring an action against the manufacturer, the importer, the supplier or the retailer. However, the injured party cannot join all these operators to the action unless he is able to prove that they all concurred in the production of the damage.

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

Under civil law, there is no obligation to recall products specifically contained in the Act. However, there might be an obligation to recall products by virtue of an administrative procedure if the authorities so require, or as a consequence of an injunction granted as an interim measure of a lawsuit.

Causation

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

The injured party has the burden of proving the defect, the damage and the causality. This clearly shows that the liability system laid down in the Act has a relative and objective nature. The doctrine of the higher courts also refers to it as "special closed liability". Of the three requisites, the most difficult to prove is the defect, which may derive from an action or negligent omission. Once a defect is proven to exist, the applicable law is the Act, otherwise the norms of the Civil Code (section 1902) will apply.

To avoid liability, the manufacturer has to prove that the use of the product by the injured party was incorrect. The Supreme Court in a recent decision (STS, 1^a, 10.06.02) found the parents of a three-year-old child who died after eating a sweet negligent for allowing the child to eat it and therefore lowered the penalty that lower courts had imposed upon the importer of the sweet on the grounds of not warning that such a sweet could be dangerous for small children.

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

As mentioned above, Spanish law requires causation as the mechanism to attribute and, at the same time, limit liability. However, court practice resolves the problem of causation in cases where the damage has been caused by a non-determined member of a group by means of the joint liability of all members (see decision STS 8.2.1983, STS 13.9.1985 and STS 8.7.1988). In each case, there

was just one injured party who brought an action against all possible tortfeasors. Therefore, a market-share liability does not apply.

Notwithstanding, some authors believe that a market-share liability may also be applicable under Spanish law, both in the field of product liability and environmental liability. They maintain that market-share liability would be admissible in cases where the manufacturer of the defective product is capable of identification by its membership of the group, although his exact identity is impossible to discover ("relative indetermination").

Defences and estoppel

7 What defences, if any, are available?

There are two different types of defence:

- The subjective defence, where the defendant objects (1) that he did not put the product into circulation; or (2) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business.
- The defence for cases where the defect cannot be attributed to the defendant. This kind of defence is available when (1) having regard to the circumstances, it is likely that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards, (2) the defect is due to compliance of the product with mandatory regulations issued by the public authorities, (3) that the state of the scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the detection of the defect – the "development risk defence" or (4) 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.

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

Section 6.1.e) of the Act 22/1994 sets out the rules for the development risk defence (see Question No 7). However, this defence strategy may not apply in the fields of medicine and food law as established in section 6.3. of the Act 22/1994.

The manufacturer may present a defence in the case of manufacturing defects alleging that the state of knowledge at that time prevented the fault from being discovered. In the case of design defects, the manufacturer may deny liability by contending that it was not possible at the relevant time to choose a securer solution. In the case of insufficient warnings or instructions, the defendant may use the defence of state of knowledge which made it impossible to identify the risk in question.

The defendant has to explain and prove the development risk. The evidence has to refer to the fact that the state of scientific and technical knowledge at the time of

the placing of the product in circulation did not make it possible to discover the fault.

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

This possible defence (see question 8 above) is set out in section 6.1.d) of Act 22/1994. The exclusion of liability established in this section is only in reference to the binding legal norms which oblige the manufacturer to a total and absolute commitment to the fulfilment or omission of certain actions. The defendant, however, cannot plead observance of legal norms which are subject to the disposition of the parties (*jus dispositivum* "norma dispositiva"), as these are characterised by the voluntary nature of their fulfilment.

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

A judgement which has been handed down in proceedings initiated by an individual does not have legal force in relation to a third-party plaintiff. Section 222.1 of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil – LEC*) provides that *res judicata* only applies, and even then it is only effective as regards the admissibility of an action, where a final verdict has already been handed down in proceedings with an identical subject matter. It is not classed as an identical subject matter if the persons in the two proceedings are not identical, amongst other things.

Additionally, a judgement which was handed down in a class action suit does not gain legal force in relation to compensation claims which can be initiated by individual consumers. Section 222.3.1 LEC provides, with regard to a judgement handed down in a class action (see question 13.), that the material *res judicata* "affects non-litigant subjects who are titleholders of the right of the capacity to sue foreseen in section 11 LEC" (see questions 13. and 14.). As the active capacity of the individual consumer is not founded on section 11 LEC, the result of the *res judicata* of the class actions is not applicable to a consumer

Procedure

11 Is the trial by a judge or a jury?

In Spain there are no special provisions regarding the appointment of the pronouncing court concerning liability for defective products. The first instance court is as in all civil claims the *Juzgado de Primera Instancia*, which consists of a single judge. Neither a jury nor a panel of judges exists at first instance.

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

The court rules on the basis of its own and independent evaluation of evidence without the support of a technical specialist. Thus, the judge rules according to the evidence as it is presented in the taking of evidence. The judge

may, however, ask for an independent expert witness to appear, but he is not bound to his technical assessment of the case (see also question 18).

13 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Are such claims commonly brought?

Class actions were introduced to the Spanish legal system by sections 6.7.7, 7.7, 11, 13.1, 15, 78.4, 221, 222.3, 256.1.6 and 15 LEC in the year 2000. By this means, consumer protection organisations or groups are able to sue for compensation on behalf of a group of people who are affected by the same injurious event. Claims which are made within the framework of a class action can be on the basis of contractual and non-contractual relationships. Liability in tort may also be established by means of a class action, in criminal proceedings as well as civil actions.

In the case of a class action, the principle of publicity of class actions is applicable, according to section 15 LEC. Generally, in the first stage of proceedings all those potentially affected are informed of the action by an announcement to be published by the court. Here it is necessary to distinguish between two types of class actions:

- Class action according to section 11.2 LEC (specified or easily specified persons affected). The persons affected can join the action at any time, though they join the proceedings at the point reached and are prevented from taking those steps which have already been carried out in the proceedings. The appeal by the court does not suspend the course of the action.
- Class action according to section 11.3 LEC (unspecified or not easily specified persons affected). The appeal by the court suspends the action for a period of up to a maximum of two months. On expiry of the statutory period the entry to the action is no longer admissible, however the persons who have not joined are able to assert their rights with reference to the issued judgement at a later date.

In the case that a class action in the sense of section 11.2 LEC be carried out for a specified or easily specified group of people, section 15.2 LEC requires that the plaintiffs be previously notified of all persons affected by the filing of the action. This notification does not replace the later appeal of the court to the persons affected.

The judgement is handed down according to section 221 LEC following the conclusion of the suit. The judgement is on the basis of whether the damaging event is to be ascribed to the defendant and whether the claimed damages of the affected persons are to be attributed to the damaging event. The individual identification of the compensation creditor is mainly dependent on its appropriateness when establishing the persons affected. If specified consumers have filed an action, the judgement has to expressly and separately decide on the claims of the respective plaintiffs.

A judgement which sets a definite compensation for a specific consumer represents an enforceable title. If the judgement does not refer to individually specified consumers, but only demonstrates the data, characteristics and requirements to which each claim is entitled, the affected persons are considered as being individualised and the compensations set respectively in the execution proceedings according to section 519 LEC.

Due to the recent introduction of this type of action (the LEC only came into force in 2001), no reliable statements may be made as to the frequency of the bringing of class actions.

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

Spanish law distinguishes between three groups which can be actively legitimised for class actions: (1) groups of affected persons, (2) consumer protection organisations and (3) corporations legally founded for the defence and protection of consumers.

- The right of action for groups of affected persons is set out in section 6.1.7 LEC. It is necessary that the individuals who make up the group of persons affected by an event are specified or easily specified. Furthermore, the group has to be made up of the majority of the affected persons. The group of affected persons is only legitimised to sue if the members of the group are exactly specified or easily specified and are able to exercise section 11.2 LEC, i.e. the so-called "intereses colectivos", collective interest.
- Consumer protection organisations always have the right of action according to section 6.1.3 LEC, no matter whether they exercise the interests of an easily specified group of people (section 11.2 LEC) or of a group of persons which may be specified only with difficulty (section 11.3 LEC). In the latter case the law talks of the so-called "intereses difusos", diffuse interests.
- In the case of a group of affected persons being specified or easily specified, section 11.2 LEC gives capacity to sue to those corporations which were founded for the defence and protection of consumers.

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

The time it takes to get to trial depends on various factors. In case of an individual plaintiff, the action can be filed immediately after the injurious event as long as the facts of the case have been gone through entirely.

If it is necessary to form consumer groups as in the case of a class action in the sense of section 11 LEC, it can take several months before actual proceedings take place.

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

The Court can try certain preliminary matters of proceedings (right of action and power of representation, *res judicata* or pendency, necessary joinder of parties, formal defect of the action) which refer to legal matters. The only preliminary matter which does not refer exclusively to legal matters concerns the jurisdiction over the subject of the Court, which has to be legally determined on the basis of the declinatory plea, e.g. because of the agreement to arbitrate.

17 What appeal options are available?

In proceedings of liability for defective products, the same means of legal redress are available to the parties as in

other contentious proceedings. In principle, these are the right of appeal (*apelación*) and of appeal to the supreme court (*casación*) (their admissibility is bound to certain requirements, e.g. the amount of the sum of appeal of at least €150,253.00, the legal significance of the matter or the possible breach of a principle of proceedings relevant to the constitution).

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

On the one hand, the parties may present their own expert's report in order to meet the burden of proof as to their responsibility. The judge can, on the other hand, on the petition of the parties ask for an independent expert to appear. The report is limited by the examination of evidence. The expert is not allowed to introduce new facts to the proceedings, although he can reconstruct facts or their causes on the basis of his expert knowledge. It is also possible that the expert provide a statement on a future course of facts or damages.

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

No.

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

Before the legal proceedings are commenced non-documentary evidence has to be disclosed. The defendant may however be obliged to present certain documents before the proceedings begin in order to protect evidence.

Time Limits

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

The rights to claim for product liability are subjected to two time limits. On the one hand section 12 of the Act 22/1994 specifies the real limitation of claims, on the other hand section 13 of the Act regulates the prescription of claims.

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

The right to claim for product liability comes under the statute of limitations after three years. According to section 12.1. sentence 1 of the Act 22/1994 the moment in which the action becomes statute-barred depends on a) the point in time when the injured party suffered the damage or the damage occurs, and b) the point in time when the injured party comes to know the identity of the person responsible. Under Spanish law, it does not depend on the point in time of noticing the fault in the product.

Another particularity is set out in Section 12.1 clause 2 of Act 22/1994 regarding recovery. This regulation states that action of recovery against the remaining persons responsible for the damage by the person who has paid

compensation to the injured party becomes statute-barred after one year.

Apart from the three-year statutory period for the claim, Act 22/1994 also states that claims become inadmissible once the product which caused the damage has been in circulation for more than 10 years, unless the injured party has initiated court proceedings against the manufacturer in the interim.

These statutory limitation regulations are applicable to the strict liability for defective products. The general rules for statutory limitations apply to fault based liability.

The statutory limitation as well as the expiration of a claim are independent of the age or other circumstances of the claimant.

The statutory limitation has to be pleaded, explained and proven by the defendant. However, the expiration of a claim has to be taken into consideration ex officio. The judge has no discretionary powers regarding the evaluation of the statutory limitation or the expiration of a claim.

Damages

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

The liability system laid down in the Act covers damages caused to property or products other than the defective product itself as well as personal injury and death (see point 1). In relation to damage to property, a franchise of €390 will be deducted.

Other damage such as moral damages and other property damages and losses are excluded from the scope of the Act, therefore only being recoverable according to the principles of general civil law.

Furthermore damages arising from nuclear accidents are excluded if such accidents are covered by international conventions ratified by the Member States of the EU.

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

Damages in respect of the cost of medical monitoring when the product is yet to malfunction are not recoverable according to the current state of Spanish law and jurisprudence.

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

Punitive damages are not recoverable. The law of tort in Spain plays no sanctioning role at all. The majority of

respected authors agree that tort law cannot tie in with punitive, criminal or administrative law.

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

The Act lays down a maximum of €9,020,000 for recoverable damages as a manufacturer's global liability for death or personal injury caused by identical products causing the same defect.

Costs/ Funding

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

The LEC principally foresees the recovery of costs where either party wins each and every count its claim. This rule is relevant for the court costs that were introduced in April 2003, as well as the costs of legal counsel and the inevitable costs caused by prosecution of the claim. In the case of the mere partial granting of a claim, each party has to settle its own expenses.

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

Rules for Legal Aid were established in the Act 1/1996. Persons, who do not have an income beyond a certain limit fixed by law, may apply for free legal advice without the need to pay lawyer's fees. These expenses are covered by the State. Even non-profit-associations may claim this right. In the case of consumer associations this is particularly important

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

The family income of the person making the request must not be higher than twice the statutory minimum wage (€451.20 per month. in 2003) in order to claim legal aid. Moreover, it is not awarded in order to pursue personal rights or claims.

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

The exclusive arrangement of contingency fees is inadmissible. However, it is admissible to arrange a contingent fee if a minimum fee is arranged alongside it. There are no further rules, i.e. no definite regulations on the amount of the contingent or minimum fee. But it has to be assumed, taking into account the problematic nature of the legal regulations regarding unfair competition, that the minimum fee may not be lower than the dumping limit.

Monereo, Meyer & Marinel-lo Abogados

Spain



Sönke Lund

Line1
Line2
Line3

Tel: xxx
Fax: xxx
Email: xxx
WWW: xxx

Sönke Lund is both a German- and Spanish-qualified lawyer who joined Monereo, Meyer & Marinel-lo Abogados in 2001. Mr. Lund has over 10 years experience of company and commercial work specialising in intellectual property law, consumer law, competition and unfair practices, private international law and procedure. Additional areas of practice are environmental and technology law. Recently, he has had a strong involvement in all cases concerning the food, cosmetic and nutritional industries and distribution. The development of consumer protection and of regulation concerning food and non-food products in the EC has led to Sönke Lund working and advising on issues relating to product liability, regulatory matters, unfair competition and related areas. Clients include companies from the food, cosmetics and medicinal industries, both large and medium sized manufacturers as well as retailers. In addition, he works for companies in the fields of software, e-commerce and marketing/advertising. His conference languages are German, Spanish and English.



Belén Arribas Sánchez

Line1
Line2
Line3

Tel: xxx
Fax: xxx
Email: xxx
WWW: xxx

Belén Arribas Sánchez joined Monereo, Meyer & Marinel-lo Abogados in 2002 having completed several postgraduate specialisations (EC and International Law, Katholieke Universiteit Nijmegen, Holland 1992-93; International Commerce, ESADE, Spain 1994-95; Information Technologies Law, ESADE, Spain 2001-02). Ms Arribas compliments her academic capabilities with a wide experience in company and commercial work specialising in corporate and contract law (sale, agency and distribution), international commerce (internationalisation of business) as well as private international law and e-commerce and information technologies law. Her conference languages are Spanish, English, French, Italian, German and Catalan.

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A B O G A D O S

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The familiarity with a range of foreign legal systems and knowledge of the subtleties of business and corporate law governing cross-border trade, means that among the firm's clients are many leading multinational and European corporations in the banking, industrial, services and distribution. Hands-on experience of this nature tends to be an effective tool when it comes to advising Spanish enterprises of international dimensions.