

Product Liability

Contributing editors

Gregory L Fowler and Simon Castley



2018

GETTING THE
DEAL THROUGH 

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Gregory L Fowler and Simon Castley
Shook Hardy & Bacon LLP

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This article was first published in July 2018
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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2008
Eleventh edition
ISBN 978-1-78915-056-8

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Product Liability 2018

Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Product Liability*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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

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London
June 2018

Colombia

Daniel Arango and Maximiliano Londoño

Londoño & Arango

Civil litigation system

1 The court system

What is the structure of the civil court system?

The civil court system in Colombia is composed of:

- municipal civil courts, which try small claims (up to 150 times the monthly national minimum wage. The monthly minimum wage in effect for 2018 is 781,242 Colombian pesos; therefore, municipal civil courts can hear cases that claim damages of 117,186,300 pesos or less);
- civil circuit courts, which hear cases when the claims exceed 150 times the monthly national minimum wage. Civil circuit courts may also decide appeals from certain municipal civil court rulings;
- district courts: civil division, which act as appellate courts; and
- the Supreme Court: civil division, which decides extraordinary appeals from district courts – civil division's judgments. The decisions of the Supreme Court will be considered binding on all civil judges.

2 Judges and juries

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

Civil proceedings are mainly adversarial. The proceedings begin with the lawsuit filed by the plaintiff, and the court is bound by the facts and claims presented by the parties. During the trial, the judge must remain impartial at all times. However, during the evidentiary stage of the proceedings, the judge may order the taking of evidence on his or her own initiative.

In class actions, the court has additional inquisitorial powers that allow the court to bring new defendants into the proceedings if there is evidence that the additional defendant might be liable for the damages or injuries allegedly caused to the group. In any case, these newly involved defendants will have the right to due process.

On the other hand, Colombia does not have juries in its civil court system. The courts decide both questions of fact and law.

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?

Proceedings begin with a written complaint. After this document is filed and notice is served, the defendant may submit his or her response within 10 or 20 days, depending on the amount in controversy. In class actions, the defendants must file an answer within 10 days of the serving of the notice.

Under the General Code of Civil Procedure (CGP), which was enacted on 12 July 2012 and which has been in force since 1 January 2016, the parties hold an initial mandatory mediation hearing before the court; if mediation fails, the court orders the taking of evidence. The judge may order expert reports, consider the documents submitted by the parties and order any other evidence he or she deems necessary, and will set a new date for the hearing of the witnesses and experts. Once the evidentiary stage of the second hearing ends, the parties may orally present their closing arguments. Finally, the court

must orally issue its decision at the same hearing, unless considering the circumstances the court opts to issue a written decision within 10 days. In some cases, the initial and the evidentiary hearing may be merged into a single hearing.

Under the CGP, actions may take up to one year from the date on which the notice was served at the trial stage, whereas an appeal may take up to six months from the date on which the appellate court receives the case file; however, deadlines may be extended by the trial or appellate court by a maximum of an additional six months. An extraordinary appeal before the Supreme Court has no time limit, although in practice it may take up to two years.

4 Pre-filing requirements

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

There is a mandatory mediation requirement. The parties shall appear before a neutral third-party mediator. This pre-filing requirement does not apply for class actions and when the plaintiff also requests temporary injunctive relief.

5 Summary dispositions

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

The defendant may seek a resolution before a full hearing on the merits, in limited circumstances. Summary judgment is available when the defendant raises the following defences: statute of limitations, res judicata and settlement. Summary judgments are subject to appeal.

6 Trials

What is the basic trial structure?

Colombian civil procedure has been largely written; however, under the CGP, trials are mainly oral and structured by consecutive sessions.

The court decides both the facts and the law, since there are no jury trials in Colombia. The courts must remain impartial at all times and grant all rights to the parties. During the hearings, witnesses are first questioned by the judge and then by the parties; cross and re-cross examination of witnesses is allowed under the CGP. The parties may also be questioned by the court and the opposing party. Written affidavits by the parties or witnesses are not allowed. Judges usually prepare questionnaires for the parties and witnesses.

Hearings are public.

The role of the advocate, as well as presenting the client's case, is to file any pertinent written submissions, request and participate in the taking of evidence and to appear before the court. Advocates are not officers of the court.

7 Group actions

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

In 1998, Congress enacted, through Law No. 472, two types of actions. The first one is the class action, which is available when there are at least 20 alleged victims. The plaintiff may bring suit on behalf of the group if he or she alleges that there are at least 20 victims harmed under uniform circumstances. Group actions may be brought in pursuit of compensation for the injuries or damages caused by a defective product.

The second type of action is the public interest action, which may be filed by any citizen when a public interest has been harmed or is in danger. These actions may also be brought by associations (such as consumer organisations) in order to protect consumers' rights. Even though individual damages are not recoverable under these actions, they may be relevant in the product liability context, given that the court may order specific measures to hinder damages and injuries that may be caused by the defect. These measures could include, *inter alia*, product recall, modifications, warnings and changes in the design. Public officials may also bring these actions in order to protect consumers from allegedly defective products.

8 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?

Under the CGP, from the moment the notice is served, it may take 12 to 18 months for the trial court to reach a decision. An ordinary appeal may take from six to 12 months. Depending on the monetary value at stake, the case may reach the Supreme Court where proceedings could take up to two years.

Evidentiary issues and damages

9 Pretrial discovery and disclosure

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

Colombia does not have a broad American-style pretrial discovery. Instead, a limited pretrial discovery and disclosure of the documents are permitted. A party may request, before filing a complaint, a court order for the production of documents. The requesting party shall reasonably identify the subject-matter documents and state that the documents are in the possession of the requested party and how the documents are relevant for the forthcoming case. A party may also request the subpoena of potential witnesses or of the opposing party before the complaint is filed.

10 Evidence

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

The taking of evidence is regulated in the CGP. Both plaintiffs and defendants are allowed to prove facts by admission, witness testimony, expert examination and opinion, judicial inspection, documentary evidence and circumstantial evidence. The constitutional clause regarding due process allows the opposing party to contest evidence at different stages of the process. Witnesses are questioned by the court and are also subject to cross-examination. Written statements or affidavits by witnesses are not allowed. Expert testimony is also available.

The parties may file expert reports. These must be made available to the opposing party, which may in turn question the expert, file an additional expert report, or both. Additionally, experts may be appointed by the court on its own initiative.

11 Expert evidence

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

Courts may appoint experts on their own initiative. It is also possible for parties to present experts' reports. In such a case, the expert must

appear at the court for cross-examination at the request of the opposing party or the court.

12 Compensatory damages

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

Different categories of compensatory damages are recoverable in a product liability case. Economic losses include both out-of-pocket expenses and lost profits. The victim is compensated only to the extent of the harm suffered. Economic damages recoverable in a product liability case include lost profits for bodily injury, loss of support in the case of death and damage to property. There are no reported cases where the damage to the product itself has been an issue in a product liability action.

Non-economic damages, which include moral damages (eg, compensation for pain and suffering, emotional distress, psychological injuries, loss of a loved one or grievances) and compensation for loss of enjoyment of life, physical impairment or altered social, family or everyday activities, are also recoverable in product liability cases. The Supreme Court periodically lays out guidelines for the compensation of non-economic damages. Under the current guidelines, a plaintiff may recover up to approximately 60 million pesos for moral damages and up to approximately 140 million pesos as compensation for loss of enjoyment of life, physical impairment or altered social, family or everyday activities. These guidelines are not, however, static and the Supreme Court allows the trial courts relatively wide discretion in awarding non-economic damages. Non-economic damages are not, however, punitive or exemplary.

13 Non-compensatory damages

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

The Colombian legal system prohibits punitive or exemplary damages. Victims are compensated only to the extent of the harm suffered.

Litigation funding, fees and costs

14 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?

The CGP allows legal aid for those who cannot afford the costs and expenses of the trial without affecting their own subsistence. If granted, the party will not have to pay the costs of the experts appointed by the court nor will it have to bear the attorney's fees and costs generally allocated to the losing party. Defendants can request the judge to withdraw such aid at any stage of the process by proving that the plaintiff's situation has changed or that there are no motives to maintain the legal aid. This kind of aid is directly granted by the same judge that hears the case and the judge will notify the decision to all parties, so the beneficiary is not required to notify its opponent.

Certain public officials may, if requested, file class actions on behalf of a group. Law No. 472 provides for the creation and operation of a public-run fund that provides legal aid and funding in class actions and public interest actions. The beneficiary is not required to notify its opponent of this kind of aid.

15 Third-party litigation funding

Is third-party litigation funding permissible?

The Colombian legal system neither regulates nor discourages such funding. The parties are not required to notify their opponents of the funding arrangement.

16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Contingency fees are allowed and usually make part of the attorney-client agreement in tort and contract cases. The parties are not required to notify their opponents of this kind of arrangement.

17 'Loser pays' rule**Can the successful party recover its legal fees and expenses from the unsuccessful party?**

Unsuccessful parties must pay expenses (such as expert fees when appointed by the judge, taxes and document-copying fees, among others) and legal fees (attorney's fees), which the judge determines according to the rates defined in a specific regulation.

Sources of law**18 Product liability statutes****Is there a statute that governs product liability litigation?**

In 2011, the Colombian Congress enacted the Consumer Protection Statute through Law No. 1,480. This statute establishes a strict liability rule, under which the manufacturer and retailer are jointly and severally liable for injuries caused by defective products. Under this cause of action, the plaintiff bears the burden of proving the defect of the product, the injury or damages caused by the defective product and the causation between them. Defendants are excused from liability if:

- they prove that the injury was caused by force majeure or it arises out of the plaintiff's fault or negligence;
- if the injury arises exclusively out of the actions of a third party;
- if the product had not been yet introduced to the market;
- if the defect arises directly out of the compliance of a mandatory rule; or
- if the scientific or technical state of knowledge was not sufficiently advanced to enable the defect to be detected.

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

Until 2011, product liability rules were construed and applied by the courts based on general statutes governing torts and contract causes of action. The Supreme Court applied a strict liability rule for product liability. Today, in addition to the strict liability rule available under the Consumer Protection Statute, the plaintiff may seek recovery based on fault-based liability rules. The latter is not, however, a separate cause of action but an additional theory available to the plaintiff.

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

The Consumer Protection Statute imposes several duties on manufacturers, importers, distributors and retailers, which affect product liability litigants. Under this statute, consumers are afforded protection against breach of warranties, breach of the duty to be fully informed and against deceptive advertisement. The Consumer Protection Statute also imposes the duty on any company involved in the chain of distribution to promptly disclose to public agencies any known circumstance where a defective product has caused or may cause injury; additionally, these companies shall take corrective measures. Failure to observe these duties shall result in joint and several liability with the manufacturer. Supervisory and control authorities may also impose fines on those who disregard their legal duties and can even close their public establishments.

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

There are criminal sanctions for the sale or distribution of defective alimentary, medical or prophylactic products (article 372 of the Penal Code). Even though there is no general rule in the Penal Code that establishes a criminal sanction for those involved in the sale or distribution of other defective products, the Consumer Protection Statute establishes the possibility to impose fines on all those who participate in the chain of distribution of defective products. In any case, if the defective product damages someone's property or causes personal injuries or even death, the person responsible for these crimes may be prosecuted according to the Criminal Code.

Update and trends

In July 2017, the SIC launched a web portal to aid the divulgation of product warnings and action plans and to speed up the disclosure procedure detailed in Decree 679. In the web portal, consumers can check reports of defective products, as well as the details of the recall or action plan implemented by manufacturers and sellers. Although there is no legal requirement for manufacturers and sellers to directly post their reports in the web portal, the SIC will usually require them to create an account and post any relevant information.

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

The Consumer Protection Statute embodies most of the theory on this matter that had been advanced by the Supreme Court during the last few decades. This theory had been built on comparative law studies and the principles established in the Civil and Commercial Codes. Therefore, there are no novel theories on the subject in Colombia.

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

Product defect may be established if the product's design, manufacturing, construction, packaging or warnings do not provide the reasonable safety standard that any person is entitled to.

24 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?**

A product is deemed defective if it threatens someone's life, health or belongings. The plaintiff bears the burden of proving the defects; however, the Consumer Protection Statute does not provide a particular standard of proof. Under general evidentiary rules, the plaintiff shall present evidence that in the light of the sound judgment and reasoned analysis of the court shows that the product is defective. If a sanitary or technical regulation is violated, the defect of the product shall be presumed. In other cases, courts may, under special circumstances, shift the burden of proof onto the opposing party, if the opposing party is deemed to be in a better position to submit proof of a given fact. However, once the plaintiff proves that the product is defective, the manufacturer or seller may only be discharged if it proves one of the defences brought by the Consumer Protection Statute (force majeure, claimant's fault, etc).

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

Under the Consumer Protection Statute, the manufacturer and seller may be found liable for defective products. Additionally, any other persons or companies involved in the chain of distribution may be jointly and severally liable for injuries caused by defective products if they fail to disclose known circumstances to public agencies or fail to take corrective measures once the product's defect has come to their knowledge.

26 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?**

Neither the Consumer Protection Statute nor the Supreme Court rulings define a certain standard by which causation between defect and injury or damages must be established. However, judges have maintained that the plaintiff has the burden of proving not only that the product is defective but also that the damages or injuries suffered were caused by the unsafe conditions of the product. Under special

circumstances, courts may shift the burden of proof onto the opposing party, if he or she is deemed to be in a better position to submit proof of a given fact. However, there is no reported case where the Supreme Court has shifted the burden of proof in this matter.

27 Post-sale duties

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

The Consumer Protection Statute obliges manufacturers and product suppliers to warn the competent authorities about any known adverse effect of their products. Additionally, they have to maintain records of warranties in case they have sold a defective product. Manufacturers and retailers may have the duty to recall a product. The Superintendency of Industry and Commerce (SIC) and the commercial and civil courts have the express power to sanction those who do not follow the provisions of the Statute.

In 2016, the government regulated the duty on any company involved in the chain of distribution to promptly disclose to public agencies any known circumstance where a defective product has caused or may cause injury, as well as to take preventive and corrective measures. Decree 679 of 2016 details the disclosure procedure, the preventive and corrective measures that shall be put in place and the penalties for breaching the aforementioned duties, which include fines of up to 2,000 times the monthly national minimum wage (which, in 2018, equals 1,562,484,000 pesos), temporary or definitive closure of the establishment, prohibition of offering, producing or distributing certain products and destruction of the product, among others.

Limitations and defences

28 Limitation periods

What are the applicable limitation periods?

The Consumer Protection Statute does not include any limitation period for product liability; there is a 10-year statute of limitation in the Civil Code. Accordingly, the limitation period for product liability is 10 years and generally runs from the date on which the damage or injury occurred. However, under special circumstances, if there is evidence that the plaintiff was not aware of the injury at the time it was caused, courts will rule that the limitation period starts from the date on which the plaintiff should have discovered the injury.

There is a two-year limitation period for group actions. If the applicable statute of limitations for class actions runs out, plaintiffs may sue individually.

29 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?

The defendant may be excused from liability if, as of the date that the product was introduced to the market, the defect was not discoverable within contemporary scientific and technological limitations. The defendant bears the burden of proving the defence under the general evidentiary rules previously explained. Liability may later arise if any person involved in the chain of distribution fails to promptly disclose any known circumstance that the defect has caused or may cause injury or fails to take corrective measures after such knowledge was acquired.

30 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?

The defendant is excused from liability if the defect is a direct result of compliance with a mandatory rule or standard for the manufacturing, warning or packaging of the product, as long as the defect cannot otherwise have been avoided without breaching this mandatory rule or standard. Compliance with voluntary standards or requirements is not a valid defence.

31 Other defences

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

Under the Consumer Protection Statute the defendant shall be excused from liability if:

- the injury is caused by force majeure;
- the injury is caused by the claimant's fault;
- the injury arises exclusively out of the actions of a third party;
- the product has not yet been introduced to the market;
- the defect arises directly out of the compliance with a mandatory rule or standard and may not have otherwise been avoided; or
- under the state-of-the-art or development risk defence.

32 Appeals

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

The unsuccessful party may appeal the trial court's decision. Depending on the monetary value at stake, the unsuccessful party may further appeal before the Supreme Court. These appeals are also available in class action litigation.

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Jurisdiction analysis**33 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?

Product liability is a developing field in Colombia. There have been several Supreme Court cases dealing with basic issues of product liability. However, product liability is still a novel area of the law and the volume of claims is as yet relatively low and there is not a fully developed body of case law. Additionally, the Consumer Protection Statute has not yet been properly developed by case law. There is growing interest in the field, and one can expect a significant increase in the caseload in the coming years.

34 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?

As mentioned above, the Consumer Protection Statute will shape the new developments on product liability. At the time of writing, since the Consumer Protection Statute was only recently enacted, there has not been an increase in the number of claims filed for product liability.

35 Climate for litigation

Describe the level of ‘consumerism’ in your country and consumers’ knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

There is a growing trend of consumerism. The Consumer Protection Statute, which has been widely publicised and discussed, is the result of a growing public concern to remedy perceived wrongs. Additionally, any person has standing to file a public interest action for the protection of public interests, which include consumers’ rights, public safety and health. Finally, the local media shows great interest in product defect allegations and, generally, in consumer protection claims. After recent developments (eg, the collapse of a residential building owing to alleged design and construction defects), there is a marked interest in real estate consumer protection and construction-related litigation.

36 Efforts to expand product liability or ease claimants’ burdens

Describe any developments regarding ‘access to justice’ that would make product liability more claimant-friendly.

Class action litigation is a major development in the field. Under Colombia’s Class Action Statute, counsel for the plaintiff is entitled to recover 10 per cent from the damages afforded to members of the class who did not personally intervene. Additionally, contingency fees are permissible and widely used in liability cases. Therefore, class action litigation poses a significant financial incentive to plaintiff’s counsel and additionally promotes litigation even in low-value injury claims covering a wide group.

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