

Product Liability

Contributing editors

Gregory L Fowler and Simon Castley



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GETTING THE
DEAL THROUGH 

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Product Liability 2017

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Portugal

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Civil litigation system

1 The court system

What is the structure of the civil court system?

In Portugal, jurisdiction is assessed according to various criteria, including the litigation subject, the hierarchy, the value of the claim and whether the case is within the territory covered by the court.

As a general rule, civil courts have a residual competence in Portugal, that is, they will enter a case if no other court has jurisdiction.

As further described below (in question 32), according to the Portuguese system there are three levels of courts: lower courts, courts of appeal and the Supreme Court of Justice.

Binding precedent rule does not exist in the Portuguese legal system. Judges refer to prior decisions as a secondary source to assist them with the interpretation and application of the law and other legal principles to a particular case.

2 Judges and juries

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

The court system may generally be described as an adversarial system that has certain features of the inquisitorial system incorporated within it.

The civil procedure rules are structured so that the litigating parties have an autonomy as regards the court (ie, the main role of the judge is not to actively intervene in the process, but rather to ensure that the parties abide by the procedure rules). For example, the case shall only begin at the plaintiff's initiative, and the case is defined within the boundaries of the petition or defence submitted by the plaintiff or defendants respectively, the judge not being entitled to decide on matters which are beyond the borders of the case as defined by those parties.

Yet the judge also has inquisitorial powers, which have been strengthened in recent reforms. Once the facts are brought before the court, the judge has the power to take the necessary actions in order to find out the material truth. The judge may also address questions to witnesses, convene witnesses not listed by the parties, or require additional information and documents to confirm the truthfulness of the alleged facts. In relation to matters of law, the judge is also free to decide on grounds different from the ones alleged by the parties.

Jury trials are not foreseen under Portuguese Civil Procedure 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?

A product liability action is governed by the same rules set forth by the Portuguese Code of Civil Procedure for ordinary proceedings.

The action starts with the filing of an initial pleading which consists of a document in which the plaintiff states his or her version of the facts, the legal rules that he or she considers applicable and the claims upon which the court is asked to decide.

The defendant is summoned and will then have 30 days to submit a defence. The plaintiff is entitled to submit a written defence of its own within 30 days, if a counterclaim is filed by the defendant. If only exceptions or other arguments are used by the defendant but it does not submit a counterclaim, then the plaintiff may only respond orally in the prior hearing.

4 Pre-filing requirements

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

There are no pre-filing requirements to begin a lawsuit for product liability, although parties may contractually agree to subject to a conciliation mechanism before the dispute is brought before the court. Should that be the case, parties are bound to follow such mechanism.

5 Summary dispositions

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

The judge may decide to resolve the case before a full hearing on the merits, insofar as it considers that all relevant facts are already duly evidenced in the procedure file, or that there is a formal exception which shall result in the acquittal of the defendant regardless of any other facts alleged, following the submission by the parties of the petition or defence, and any other procedural documentation produced by the parties.

In normal circumstances, however, the judge schedules a prior hearing of the parties to attempt to reach a settlement between the parties or, if not possible, to define the object of the proceedings based on the procedural documentation produced by the parties.

6 Trials

What is the basic trial structure?

Normally, proceedings are public and must be fully recorded.

The final hearings are normally held on consecutive days.

The judge usually begins by attempting to reach a settlement between the parties. In the event no agreement is viable, a hearing will follow, in the following order:

- parties' testimonies;
- exhibition of films or audio records;
- clarifications from experts;
- witnesses testimonies; and
- final oral statements.

Yet the court is free to decide to alter this sequence upon the parties' request, or should the judge conclude that a different sequence is more efficient.

Oral testimonies are one of the most common forms of producing evidence in Portugal. The witnesses may be examined by the appointing lawyer in relation to all the relevant facts at stake, and they may be cross-examined by the opposing lawyer. The judge is also entitled to interrogate the witnesses.

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?

Class actions are allowed under Portuguese law, there being a specific proceeding called *acção popular* to deal with a group of related claims. This procedure is based on the Portuguese Constitution and in specific regulations, which grant all citizens, individually or through organisations created for the defence of relevant interests, the right to initiate a class action, in the cases and within the terms established therein. It includes the right of an injured party or parties to request compensation to:

- promote the prevention, termination or the judicial persecution of infringements against public health, consumer rights, quality of life and the preservation of the environment and cultural heritage; and
- guarantee the defence of state property, the property of the autonomous regions or of the local authorities (eg, municipalities).

Generally, class actions are not restricted to a particular area of law or to a specific sector. Notwithstanding this, the law specifies certain areas to be specially protected by these actions such as public health, consumer rights, quality of life and the environment, cultural heritage and public dominium. It is important to note that there is collective action available to product liability.

Class or group proceedings can be brought by individuals, associations and foundations created for the defence of relevant interests (regardless of their direct interest in the case), and local authorities regarding the interests of their residents, within their respective area.

However, Portuguese law establishes certain compulsory features for associations and foundations that intend to bring a class action, such as:

- they must be a legal person;
- their purpose, established in their articles of association, must expressly comprise the defence of relevant interests in these types of actions; and
- they must not carry out any kind of professional activity that may compete with companies or independent professions.

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?

It normally takes from one to two years to get to trial.

The duration of a trial varies according to the duration of expert examination and the number of witnesses and therefore ranges from some days to even weeks.

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?

Under Portuguese law, there is no obligation to disclose documentary evidence either before court proceedings begin or as part of the pre-trial procedure.

According to article 419 of the Code of Civil Procedure, if there is a risk that some evidence will become very difficult or impossible to obtain the testimony of certain persons (for instance, because of illness or travel abroad) or the verification of certain facts by way of inspection it is possible to obtain such testimony or inspection in advance.

Any party petitioning these proceedings shall justify before the court why evidence must be produced in advance, and identify the person to be heard or the assets to be inspected, as well as the specific facts in relation to which evidence will have to be obtained. In this context, any evidence obtained shall be recorded on tape or registered in a written document.

10 Evidence

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

Documentary evidence should be disclosed with the pleadings, however parties are still allowed to present evidentiary documents up to 20 days before the final hearing against the payment of a fine, unless they demonstrate that it was impossible to present such evidentiary elements beforehand.

Witnesses are questioned in person at a final hearing.

11 Expert evidence

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

Under Portuguese law, expert evidence can be requested by the parties and by the judge.

The court may also be assisted by an expert with competence and capacity to help the judge with the examination and interpretation of relevant facts.

In case of product liability the expert opinion has a relevant role. The judge is not bound to the experts' written reports, but normally he or she follows them.

The experts produce a written report submitted to the court and made available to both parties before the trial. Experts may also be summoned to clarify their statements, yet they are heard by the lawyers or courts as witnesses. When questioned, their input shall be limited to the report's scope.

12 Compensatory damages

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

According to article 8 of the Product Liability Statute (defined below), the only recoverable damages are:

- damages caused by death or injury; and
- damages caused to any item of property other than the defective product itself.

This article shall be without prejudice to other systems of liability available.

13 Non-compensatory damages

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

Under Portuguese law, punitive damages are not recoverable, except if expressly agreed between the parties. However, there have been recent opinions sustaining that punitive damages should be allowed, and recently the Supreme Court of Justice has recognised this position. It is a single and non-precedent decision but could be followed in the future and applied to similar cases.

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?

Legal aid is available.

The other party may contest the facts presented by the person requesting the legal aid by presenting the contrary evidence.

15 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party litigation funding is not prohibited, there not being any known limitations or restrictions.

16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Funding through conditional and contingency fees is not allowed, as the Portuguese Bar Association Statute – in accordance with principles adopted in the majority of the European countries – imposes a prohibition of *quota litis*.

Success fees are admissible.

17 'Loser pays' rule

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

As regards court fees and other incidental expenses and legal costs for bringing the action, the successful party may recover the amounts paid, within the proceedings. In respect of legal fees, these shall be allocated by the judge at the end of the proceedings in accordance with complexity and value thereof. However, Portuguese courts tend to limit the amount of legal fees that shall be paid by the losing party to an insignificant amount.

Sources of law

18 Product liability statutes

Is there a statute that governs product liability litigation?

Product liability is specifically governed by a statute approved by Decree-Law No. 383/89, of 6 November, which implemented Directive 85/374/EEC, of 25 July, as amended by Decree-Law No. 131/2001, of 24 April, on the producer liability for defective products (the Product Liability Statute). In the silence of the Product Liability Statute, general provisions of law, in particular of the Portuguese Civil Code, also apply.

The Product Liability Statute follows closely the above mentioned Directive 85/374. In particular, under the Product Liability Statute:

- the producer is liable for damages caused due to defects in products placed in the market independently of fault (meaning on the basis of strict liability), notwithstanding the fact that the consumer bears the burden of proof in relation to the remaining prerequisites of civil liability (damage, defect and causation);
- the liability of the producer may not be limited or excluded by contractual provision and any agreement to the contrary is void; and
- the remedy provided constitutes a supplemental cause of action, in particular in relation to the general rules on liability for damages.

19 Traditional theories of liability

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

To the extent that a person causes to another person a loss in connection with a defective product, general theories of liability may apply, in particular:

- tort – under the tort theory liability may be sustained provided that the injured party is able to establish an unlawful defect in the product; fault; a loss; and relevant causation; and
- contract – provided there is a contract between the parties, the injured party may sustain liability of the counterparty for breach provided the same is able to establish the same prerequisites applying in case of tort (as set out in (i)), except regarding fault which is assumed in contractual liability, causing a reverse of the burden of proof, which is imposed on the counterparty for this particular prerequisite.

From a practical perspective, cases of tort liability should be related to potential violation of legal or technical rules, whilst contractual liability may be more commonly involved where there is a sale contract for the product and potential violation of warranties.

20 Consumer legislation

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

Law 24/96, of 31 July, amended by Law No. 47/2014, of 28 July, stipulates the general framework for the consumer protection.

The consumer protection is complemented by a statute on the sale of consumer goods, approved by Decree-Law No. 67/2003, of 8 April, as amended by Decree-Law No. 84/2008, of 31 May (the Consumer Goods Statute), which implemented locally Directive 1999/44/EC, of 25 May.

The Consumer Goods Statute applies where there is an agreement executed between a professional seller and a consumer, and sets the application of several mandatory and implied warranties.

Under the Consumer Goods Statute, the seller who puts the product into circulation is also under the obligation to provide the consumers with clear, objective and appropriate information.

In case of breach of product warranties by the seller, the consumer holds several remedies against the seller, including the reduction of the purchase price, the repair or replacement of the goods or termination of the sale contract. This liability is strict and not dependent on the seller's fault.

21 Criminal law

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

Under article 282 No. 1 a) and Nos. 2 and 3 of the Portuguese Criminal Code, anyone who, in its use, production, making, manufacturing, packing, transportation or processing, or in other any activity, creates a danger to life physical integrity by corrupting, counterfeiting, altering, reducing the nutritional or therapeutic value of any substances intended to be consumed by others, may be sentenced to from between one to eight years in prison.

In case of negligence the sentence could be reduced to a maximum of three years in prison or a fine.

The same sentence applies to anyone who creates a danger to life or physical integrity by importing, concealing, selling, displaying for sale, holding, in deposit for sale or, by any away, delivering substances that are subject to the actions referred to above, or that have expired, are damaged, corrupted or altered. Also if the action is a result of negligence, the sentence could be reduced to a maximum of five years in prison. Regarding this issue it is also important to refer Decree-Law No. 28/84 of 20 January, amended by Law No. 20/2008, of 21 April, which approved the legal regime applying to anti-economic infringements and infringements against public health. Under this Decree-Law anyone who manufactures transforms, imports, exports, sells, holds or displays for sale goods that have been counterfeit or altered, making them seem authentic or unaltered, or goods that have a different nature, quality or quantity than they state or seem to have, can be subject to sentences up to six months, one year, 18 months, two and three years in prison or a fine – considering different factors, such as the nature of the products.

22 Novel theories

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

There are no significant novel theories available in this matter.

23 Product defect

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

The seller is under the obligation to deliver to the consumer goods that conform with the agreements of purchase and sale.

Consumer goods are presumed to conform with the agreement if they:

- comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
- are fit for any particular purpose for which the consumer requires them and which he or she made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- are fit for the purposes which goods of the same type are normally used; and
- show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them

by the seller, the producer or his or her representative, particularly in advertising or labelling.

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?

Under the Product Liability Statute the purchaser bears the burden of proof of the damages, the defect and the casual link between the damages and the defect in the product.

There are opinions from authors sustaining the existence of the defect of the products should be assumed, thus reverting the burden of proof. As an example, in one of the existing judicial cases that involved an explosion of the car (the product) it was impossible to prove the defect, leading some authors to defend that in this context the defect in the car should be assumed and the burden of proof reversed. Ultimately, this understanding was not followed by the Supreme Court of Justice in this case.

The judge is free to analyse the evidence brought and will then render a grounded decision.

Because of the different theories that may lead to liability in relation to defective products, the defect standard and the regime on burden of proof may vary, which is the case, for instance, in contractual liability, where the counter-party needs to demonstrate that he or she acted without fault.

25 Possible respondents

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

Respondents may vary.

Under the Consumer Goods Statute

According to the Consumer Goods Statute, the professional seller of the products is the main respondent. Notwithstanding, the consumer may claim from the seller, the repair or replacement of the defective product.

Under the Product Liability Statute

According to the Product Liability Statute respondents may be the manufacturer of a finished product, of a component part or the producer of raw material, and who, by putting the respective name, trademark or other distinguishing feature on the product, presents himself as its producer.

Further, respondents may also be any entity that imports into the European Union a product for sale, hire, leasing or any form of distribution in the course of respective business, or any supplier of the product, where the manufacturer or importer in the European Union cannot be identified, unless if, once notified on writing, such supplier informs the injured entity, within three months, also on writing, the identity of each of said manufacturer or importer or any other predecessor supplier.

Under tort liability

Establishing tortious liability depends on several prerequisites, including the fault of the injuring party. In this context the scope of possible respondents cannot be predetermined.

Under contractual liability

This type of liability implies the existence of a contract between the parties, therefore the seller of a defective product may respond towards the respective purchaser for the damages arising from the breach of contract.

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?

Under Portuguese law the test used to establish liability is the 'adequate causation', according to which causation is established if the occurrence of the damage was the result of the fact and was objectively and reasonably foreseeable at the time of the fact and taking into account the circumstances known by the person committing it.

The liability will only cover those damages lawfully verified and that would not have occurred in the absence of the fact. A mere indirect causation will not suffice.

27 Post-sale duties

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

Decree-Law 69/2005, of 17 March, as amended, implemented Directive 2001/91 CE on safety of products (the Safety Products Statute), applicable to products and services offered in the market.

Under the Safety Products Statute, the following post-sale duties should be noted:

- producers shall provide consumers with relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings and to take precautions against those risks;
- producers shall adopt measures commensurate with the characteristics of the products which they supply, enabling them to:
 - be informed of the risks which these products might pose; and
 - choose to take appropriate actions, including, if necessary to avoid these risks, withdrawal from the market, adequately and effectively warning consumers or recall from consumers;
- producers shall immediately inform the Portuguese Commission for the Safety of Services and Goods if he or she knows, or on the basis of information in his or her possession and as a professional, ought to know, that the product which he or she has placed on the market may pose a risk to the consumer; and
- producers shall inform the competent authorities about the measures they decided to take when putting onto the market products that presented serious risks for consumers.

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 are not sufficient.

Limitations and defences

28 Limitation periods

What are the applicable limitation periods?

Applicable limitation periods are as follows:

- tortious liability – three years from the date the claimant became aware of tort acts, even if he or she does not know the tort action or the extent of the injuries;
- contractual liability – 20 years after the occurrence of the harmful event; and
- liability under the Product Liability Statute – three years after the date on which the claimant became aware or should have become aware of the damage, the defect and the identity of the producer. However, the maximum time limit for producer strict liability is 10 years after the defective product was put into circulation.

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?

According to the Product Liability Statute, if the producer did not possess the scientific and technical knowledge to be aware of the defect at the time the product was placed into circulation, the producer will not be held liable for injuries and damages resulting from this defect.

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?

According to the Product Liability Statute, the producer may avoid liability if the producer is able to show that:

- the producer did not put the product in circulation;
- taking into consideration all circumstances it is reasonable to admit defect did not exist at the time that it was put into circulation; and
- the defect in the product was not discoverable given the state of scientific and technical knowledge available at the time the product was put into circulation.

In this context, the mere fact that product complied with standard or other requirements does not constitute a defence under the Product Liability Statute but may indicate that the manufacturer was not negligent.

31 Other defences

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

As referred to above, under the Product Liability Statute the defendant, in order to exclude her or his responsibility, must prove that:

- he or she did not introduce the product into the market;
- the damage was caused by the conduct adopted by the injured party;
- in accordance with the latest scientific knowledge it would be impossible to detect the defect in the product; and
- according to all the circumstances, it would be reasonable to admit the existence of the defect.

In addition to the above defences, when the injured person's fault has contributed to the occurrence or aggravation of the injury or loss, it shall be for the court to determine, on the basis of the seriousness of the fault of both parties and the consequences resulting from them, whether compensation is to be awarded in full, or in part.

32 Appeals

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

There are three levels of jurisdiction in Portugal: lower courts, appeal courts and the supreme court of justice.

As a last resort measure, a party may appeal to the Constitutional Court (Tribunal Constitucional), insofar as it has sustained beforehand that a provision applied under the proceeding breaches the Portuguese Constitution.

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?

Portugal has accurately transposed the EU Directive on product liability, and thus in general terms the statutory law provides a protection identical to the one defined in such directive, with a proper balance between consumer protection and producer's interest.

There is no robust case law in this area, however, the judiciary system is familiar with this area of law. In a decision with relevant public impact, the Supreme Court of Justice has decided that the sale of animals infected with brucellosis corresponds to a sale of defective products.

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?

Following the trend in Europe, Portuguese product liability law continues to become stricter for the producer or seller of the products. We can say with absolute certainty that the protection of consumers is currently one of the priorities. In our opinion, it is possible to say that Portuguese law in general has achieved a reasonable or even a high level of maturity regarding product liability matters.

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.

With the impact of the financial crisis the level of consumerism decreased in Portugal, however, it should gradually recover within the next few years.

As a result of considerable efforts made by the government to increase consumer awareness, nowadays Portuguese consumers could be considered well-informed about their rights. However, consumers in Portugal are more likely to seek redress via consumer organisations and insurance than via 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.

As mentioned above, a product liability claim involves high costs and it is the claimant who bears the burden of proof of the defect and the causal relation between the defect and the damage. In this context, the reduction of legal costs or the shift of the burden of proof would be suitable measures to make product liability more claimant-friendly.

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