

Mexico

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1 Liability Systems

1.1 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? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

In Mexican law, liability arising out of an illegal act is regulated by a variety of laws that must be interpreted and applied in a harmonious manner. Examples of the most important are: the Federal and State Civil Codes; the Federal Consumer Protection Law; the General Health Law; the Federal Labour Law; and the Ecological Balance and Environmental Protection Law.

The Mexican provisions regulating liability arising out of illegal acts provide the injured party the option to claim from the offender to: a) do what is necessary to revert to the original condition (restore things as they were before the harmful result occurred) whenever possible; or b) pay damages to the victim.

Considering that product liability is the subject matter of this legal guide, it must be noted that said concept did not exist as such in Mexican legislation until the most recent amendments to the Federal Consumer Protection Law (May 4, 2004), and therefore, the actions arising from a defective product were based on the general principles regulated by the Federal and State Civil Codes, whereby anyone who causes injuries or damages to another is obligated to indemnify the victim, unless it is proven that the harmful result was due to the inexcusable fault or negligence of said victim.

Furthermore, liability requires that the injury or damage derives as a direct and immediate consequence of the illegal act, either for breach of contract, or an obligation arising from the law.

It should be noted that liability as a result of the use of a product or service, depends on the following:

- i) Existence of an obligation (whether by agreement or imposed by law).
- ii) Breach of a legal obligation or contractual (acting in a manner contrary to law or proper customs).
- iii) Causation between the illegal act and the injury or damage suffered by the victim.
- iv) Damages are not the result of the inexcusable fault or negligence of the victim.

Breach of statutory obligations can in fact be the ground for imposing administrative penalties to the offender; however if there is no actual damage to a consumer, liability cannot exist for lack of causation.

1.2 Does the state operate any schemes of compensation for particular products?

No, the Mexican Government does not have any schemes of compensation for particular products.

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

The Federal Consumer Protection Law establishes that: "...*The enforcement of warranties is claimable, without distinction, from the manufacturer, the importer-exporter, or from the distributor unless one of them, or a third party, expressly accepts the obligations in writing...*".

The aforementioned Law allows consumers to "...*choose to file [a claim], without distinction, against seller, manufacturer, or importer-exporter...*"; however, in the event of injury and/or damage caused by a product, determination of actual liability has to be made in each case, since several individuals and/or companies may be sued, but one or more may not be liable, even though they have participated in the chain of supply.

The previous statement is based on the fact that liability should be attributed to the person who actually causes the damage, since the Mexican legal system applies the theory of causation, which means that the alleged damages must be the direct and immediate consequence of the illegal conduct of certain individual or company.

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

In Mexico, the Consumer Protection Agency and the Health Department have authority to secure goods and products which may negatively affect the life, health and safety of consumers.

Once the proceedings established in the respective Law have been completed, if the manufacturer and/or importer and/or distributor do not recall the goods and products, they can be subject to additional administrative penalties, but besides the right to denounce such omission, consumers do not have the right to file an individual claim, unless they have suffered an injury or damage to their property.

1.5 Do criminal sanctions apply to the supply of defective products?

The response is negative, since manufacturers do not intentionally produce defective products. However, if: a) a defective product is

found; b) the defect is identified; and c) those responsible to cure such defect do not correct it, they (or the directors of a corporation, as the case may be) can be held criminally liable for injuries and/or damage to property.

2 Causation

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

In judicial proceedings the plaintiff (consumer) has the burden of proof of fault/defect and of the consequent damages.

The above mentioned is corroborated by the provisions of the Federal and State Codes of Civil Procedures which provide that *"the parties have the burden of proving the facts on which their claims are based"*.

In turn, the defendant is entitled to prove that the harmful result was not caused by its product or service, or that it derived from the recklessness, negligence, or lack of ability of plaintiff.

In any event, taking into account the Mexican reality (Mexican consumers often do not have the means to file claims for damages) and as an example of the legal protection of the consumer the Consumer Protection Agency and the National Commission on Medical Arbitration provide counsel at the administrative level to them. Thus, in Mexico there are many administrative complaints, and a very small amount of lawsuits.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure?

As mentioned above, according to Mexican law, injury and/or damage must be the direct and immediate consequence of an action contrary to law or a breach of a contractual obligation, and the mere increase of risk would not be sufficient to prove causation.

2.3 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?

Considering that, under Mexican law, liability is based on the principle of causation (illegal conduct-harmful result), assuming that such a scenario occurs, none of those manufacturers would be held liable.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

Yes. If the manufacturer fails to establish and specify the applicable

and adequate warnings that apply to its product, and such product causes injury and/or damage, the manufacturer will be held liable.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The Federal and State Codes of Civil Procedures provide procedural defences that a defendant may invoke, in addition to those based on substantive issues.

Mexican law does not limit defences that may be raised by a defendant. Article 14 of the Mexican Federal Constitution grants a defendant the right of due process of law in which it may argue and try to prove all available defences in order to answer the claim.

3.2 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?

No. There is no regulation which allows a state of the art/development risk defence, since, as previously mentioned, the theory of causation governs liability.

3.3 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?

A supplier should defend itself by proving that the product and/or service did in fact comply with the official legal standards in effect at the time; however and considering that such compliance is compulsory, he will not be exonerated if the defence is based only on these grounds.

3.4 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?

The response is affirmative; different plaintiffs may file different claims based on the same issues.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

Yes, defendants can and should argue such a defence, considering the principle of causation adopted by Mexican law.

Moreover, if the defendant is a manufacturer, let us say of cars, and damage is caused by a defective component supplied to such manufacturer, the answer depends on the nature of the defect and fault, since the car maker is deemed to be an expert in this field.

Regarding the question as to the time in which the defendant can seek contribution from the third party, the answer is twofold:

- i) if the problem is known before the response to the claim is due, Mexican procedural rules authorises the defendant to name such third party as co-defendant (third interested party); and
- ii) if the defendant gains such knowledge thereafter, it has the right to file a separate claim against its supplier, and the statute of limitations allows it to sue within 10 years counted from the date in which the supply agreement became effective.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

The response is affirmative. See the answer to questions 1.1, 2.1, 2.2 and 2.3.

4 Procedure

4.1 In the case of court proceedings is the trial by a judge or a jury?

The Mexican legal system does not contemplate trial by a jury; therefore a judge is the one who rules the case.

4.2 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 Mexican legal system does not allow courts to appoint technical specialists to sit with the judge, this right is granted to the parties; however, when the experts appointed by the parties disagree in their opinions, the courts appoint a third (official) expert. The legal principle is that judges are to assess and appraise the evidence presented by the parties.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

Although the Federal Consumer Protection Law authorises the Consumer Protection Agency to file a group or class action with the courts as consumers' representative, in the Mexican legal practice, group or class actions are not common. It is also possible that several plaintiffs file the same claim and also appoint the same attorneys to represent them in a joint complaint.

Class actions are processed in accordance with the rules of civil procedures, in what is called an "Ordinary Civil Action".

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

The response is affirmative. See the answer to question 4.3.

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

A civil action is formally initiated when a plaintiff files its claim. The claim is entered immediately, unless the judge considers that plaintiff must clarify certain issues. The same applies to administrative proceedings with the Consumer Protection Agency.

A claim for damages usually takes from 12 to 18 months to be decided by the trial court, depending on the complexity of the matter. The appeal against the judgment may take from 4 to 6 months. The decision on appeal can be contested through "constitutional proceedings" (*juicio de amparo*) before Federal Courts.

Conciliatory proceedings before the Consumer Protection Agency will usually take up to 6 months; however, this proceeding is optional and not the means to obtain a judgment declaring liability and an award for damages. This conciliatory proceeding is not a prerequisite for a consumer to file a claim for damages before the trial court. Nevertheless, in practice, this conciliatory proceeding is the normal course followed by consumers.

4.6 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 Mexican legal system does not allow the courts to decide preliminary issues other than those of a procedural nature such as the authority of a party's representatives, jurisdiction, etc.

Other matters which may be dealt with prior to trial includes (but is not limited to) requesting the indebtedness recognition of witness examination due to old age, threat of imminent, death or the proximity of a prolonged absence. This may take place if such evidence is essential to the case.

4.7 What appeal options are available?

Procedural decisions and judgments can be appealed before Appeal Courts, and decisions on appeal may be contested again through constitutional proceedings before Federal Courts.

The subject matter of these proceedings is to review the constitutionality of the decision on appeal and/or the constitutionality of legal provisions applied to the case. In the latter scenario the decision of the Federal Court is reviewed by the Supreme Court of Justice.

In respect to the decisions of the Consumer Protection Agency, be it the conciliatory proceeding or an administrative proceeding for infringement, the decision may be challenged in a motion to review.

It is important to note that the motion to review is an optional remedy to challenge the decisions of the Consumer Protection Agency. Said motion is filed before the authority that issued the decision in the conciliatory or administrative proceeding and it is resolved by its immediate superior.

Penalties imposed by the Consumer Protection Agency can be challenged through an annulment action before the Federal Tax and Administrative Justice Tribunal, and its decision may be contested again before Federal Courts through constitutional proceedings.

4.8 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?

As expressed in the response to question 4.2, the parties have the right to appoint experts, and if their opinions differ, the courts can designate a third expert.

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

Evidence must be submitted at the appropriate stage of the proceedings, except for the request to examine a witness, as set forth in the answer to question 4.6.

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

Except as mentioned in the answer to question 4.6, our legal system does not contemplate pre-trial proceedings. Each party is obligated to submit all relevant documents as exhibits of the claim or the response, as the case may be, and allow court officials and experts to examine other documents in their possession, at the request of the other party. In this regard, it is important to point out the fact that our procedural rules do not accept "discovery"; the interested party must identify the accounting, corporate records, correspondence and other documents belonging to its counterpart and/or third parties which are relevant to the case.

4.11 Are alternative methods of dispute resolution available e.g. mediation, arbitration?

Yes. Mexican Law allows the parties to settle their disputes under arbitration or mediation proceedings.

5 Time Limits

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

Mexican legislation does establish specific time limits to file a claim for damages, as well as for other causes of action.

5.2 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 limitation periods are as follows:

- a) Administrative proceedings heard by the Consumer Protection Agency, brought by consumers against suppliers have special rules on limitation periods, but the general period is of 1 year.
- b) Claims for damages lapse in 2 years, counted from the date in which the damage was caused, and those for breach of a contract in 10 years, counted from the date on which the obligation was to be fulfilled.

The age and specific condition of the plaintiff cannot be taken into consideration to waive or extend the limitation periods, except, for instance, in the case of minors and mentally handicapped individuals.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Issues of concealment or fraud do not affect the running of the statute of limitations.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

Damages and lost profits indemnity are available as remedies.

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

Damage to the product itself and to property of the victim are recoverable, as well as the indemnity for personal injuries.

The concept of "mental" damage may be assimilated to that of "moral" damage in Mexican Law.

Moral damage can be defined as the negative consequences which a person may suffer in its feelings, beliefs, honour, reputation, private life, or appearance. In this case, the amount of damages will be determined by the judge, which must consider the nature of the damages, the degree of liability, the financial standing of the liable party and that of the victim, and any other particular circumstances of the case.

6.3 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?

The response is negative. As stated above, damages must be the direct and immediate consequence of an illegal act. The possibility for a product to cause damage or injury in the future cannot be the basis of an action for payment of costs of medical monitoring.

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

The response is negative.

6.5 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 amount of damages for personal injuries is set out in the Federal Labour Law. The amount of damages for medical expenses and pecuniary damages are determined by the court, based upon "actual damages".

The amount of indemnity for moral damages is determined by the court, as set forth in the answer to question 6.2.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

Settlements are not subject to special rules. Nevertheless, the settlements agreements must be approved by the court, in which case they will have the same effect as a court ruling (*Res Judicata*).

- 6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the Claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the Claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

The response is negative.

7 Costs / Funding

- 7.1 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?

In ordinary civil actions, the successful party may recover legal expenses. The Federal and State Codes of Civil Procedures establish the bases to liquidate such expenses and the conditions to award them to a party.

- 7.2 Is public funding e.g. legal aid, available?

The Consumer Protection Agency is a government agency created to protect the interests of consumers, without charge. In addition, the government provides free legal assistance to those who have no means to hire the services of an attorney. Also, there is a wide network of law firms that provide free legal counsel to those unable to afford a lawyer. These law firms are mostly sponsored by universities, associations, or non-governmental organisations.

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

See the response to question 7.2 above.

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

See the response to question 7.2 above.

- 7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Yes. Mexican Law allows a third party to found the claim.

8 Updates

- 8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in Mexico.

Please be advised that there have not been any new cases or amendments to the Federal Consumer Protection Law and/or the Federal and State Civil Codes in relation to product liability.

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Portilla, Ruy-Díaz & Aguilar, S.C. is a law firm with enormous experience gained by its members in serving clients, based on superior ethics, quality and professionalism. Some of our clients are the largest and best-known companies in the world, including international and domestic law firms, as well as financial institutions, and of course, smaller firms and individuals.

The Firm offers services in various areas of the law including: administrative; bindings and privatisations; arbitration; civil and commercial litigation; consumer protection; corporate and contracts; criminal litigation; franchising; health; immigration; labour; mergers and acquisitions; real estate; social security; tax; and trusts.

Our Firm currently has four partners and 15 associates, and a supporting staff including paralegals, translators, technical specialists and administrative staff, with offices in Mexico City and Queretaro, Mexico.

The specialisation and development of each of the Firm's practice areas, the support provided among different areas, and our deep knowledge of Mexico, its legal system, markets and industry, enables the Firm to offer clients innovative, timely, and comprehensive solutions to their needs, at very good and competitive prices. In order to prevent problems before they develop, we take a preventive, coordinated, and strategic approach to advise our clients.

The Firm and its lawyers actively participate in various public and private organisations at an international level, keeps us attuned to what is happening in the community and in the world at large. It enables us to not only better understand and be closer to client needs, but also to participate in and have an influence upon the changes affecting them.

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