

## THE RIGHT TO BE MISTAKEN: PRODUCTS LIABILITY IN PERU

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### I. INTRODUCTION

Since 1991, with the publication of the Legislative Decree 716, Consumer Protection Law (*Ley de Protección al Consumidor*), products liability evolved remarkably in Peru. The National Institute for the Defense of Competition and Consumer Protection (INDECOPI) (*Instituto de Defensa de la Competencia y de Protección al Consumidor*), a government entity, was created in 1992 by Law Decree 25868 to solve disputes and enforce rules regarding adequate market performance and consumer protection.<sup>1</sup> Together, this legislation and the INDECOPI established a new framework of conduct between suppliers and consumers within a free market system. This framework has made the role of the consumer more dynamic, transforming the consumer into the market's protagonist.

Regarding the liability for products or services, this legal framework has established two different and clear responsibilities. First, the Ordinary Courts are in charge of assessing civil liability for damages to the consumer resulting from the noncompliance with agreed-upon terms and defective products and services. Second, the application of administrative liability in the form of sanctions is made by the INDECOPI and includes, products confiscation, and establishment closure. Further, a recent amendment allows INDECOPI to order corrective measures favoring the consumer, such as a money refund and change or product repair, among others.

The Peruvian model, the focus of this article, opposes models that seek to rule the relations of the consumption market. Instead, the Peruvian model seeks to make private autonomy and freedom to contract more dynamic rather than more restrictive. The goal is to create conditions that facilitate the making of independent decisions by the consumer.

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1. Within its powers there are the application of the rules of consumer protection, antitrust, elimination of bureaucratic barriers built up by state organizations, elimination of non-tariffs barriers, repression of unfair competition, dumping and subsidies, advertising, bankruptcy and insolvency cases, normalization system, and registration and defense of intellectual property. All these functions altogether under the same roof allow a better coordination and unification of the policies for the competition and the market's development.

This reformulation of Peru's model has transformed the State's role into a facilitator by changing it from an economic agent to an arbitrator by guaranteeing the transparency of the process and by considering consumer preferences in the market.

## II. THE PERUVIAN SYSTEM CONCEPTUAL FRAMEWORK

The Peruvian legal system sustains a relatively simple and consistent conceptual framework based on the following essential principles:

- a. **The consumer's sovereignty:** The consumer is in the best position to decide what is good for him. Thus, his decision must not be replaced by a decision by the state.
- b. **Informative asymmetry:** The consumer, despite knowing what is better for himself, does not necessarily have enough information to make his own decisions.<sup>2</sup>
- c. **Correction by competitive incentives:** The market itself generates incentives for consumers to obtain accurate information. Therefore, market competition stimulates suppliers to provide accurate information to meet the consumers' preferences. Consequently, the State will have an exceptional and residual role.<sup>3</sup>

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2. In many occasions, it is not necessary that all the consumers, not even a great number of them, have to be accurately informed. In really competitive markets an informed attitude of a relatively small consumer group provides adequate incentives to suppliers for providing the products in an adequate way for a very simple reason: if consumers are less reasonable and act with little information, their decisions will have a random effect, by chance or luck, that will result in a number of cases adequate elections and in others inadequate ones. It will be enough that a relatively small number of consumers act reasonably and with accurate information to create incentives for the suppliers to reach those consumers preferences. In most competitive markets, it is not possible to discriminate well-informed consumers from less-informed ones, and the products and services will finish responding to the well-informed consumers preferences, creating a positive externality in favor of the less informed consumers.

3. Resolution No. 101-96-TDC/INDECOPI, *Chennyi v. Konica*, Dec. 18, 1996. This case established through this resolution, by the Defense Tribunal for the Competition of Indecopi that:

The one who conducts a productive process and/or product and service trade has the possibility to acquire and use, in a better way, relevant information, and eventually obtain an advantage that could be used in infringement to the Law. This does not mean that INDECOPI Consumer Protection Commission should amend all of the asymmetry information. In fact, if the market works adequately, it can generate enough relevant information for the economic

- d. **Restrictions of the ordinary contractual system:** So it will not be adequate to fully solve these problems. This is due to the different nature of the process of the development of the consumer decision (mainly based in adhesion contracts) and the high costs of appealing before the judiciary system to solve the type of problems raised.<sup>4</sup>
- e. **Cost of the protection system to consumers:** Judicial and administrative authorities could turn into expenses for the firms, expenses that will be transferred to the consumers through the price system. In countries with large groups of low-income consumers, the poorest are the most affected. In addition, certain rules could turn into restrictions to trade and imports, reducing competition, raising prices, and as a result, limiting the consumer's options. This non-desirable effect of the system must be avoided.

The information asymmetry potentially generates two kinds of problems. The first type involves the information itself. For example, when a supplier hides some relevant information from the consumer. Article 5(b) of Legislative Decree 716, normally governs these cases.<sup>5</sup> Some examples include: concealing a car's

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agents to make rational and well-informed decisions, without being necessary to develop any ability in handling information similar to the suppliers. In effect, the present Resolution purpose is to determine in what cases the asymmetry in the information justifies the Consumer Protection Commission intervention.

*Id.*

4. Chennyi v. Konica further established that the resolution determined a reason to use against this interpretation is that the contractual rules in force, have already contemplate solutions to the problem of the informative asymmetry between the parties, and for this reason the necessity of an especial system of administrative protection turns unnecessary. Those who could be affected by asymmetric information between the parties could use forms like error, fraud or warranty for hidden default. However, the existence of a different regime is justified, among others. In the one hand, by the special characteristics that in many cases present the lack of information in massive contracting forms and, in particular for the few margin that this type of contracting leaves to the negotiation, as a way to obtain and use the available information; and, on the other hand, for the difficulties that the ordinary civil jurisdiction have in facing those problems, that have reduced amounts and that need corrective actions for repeated practices and not only for particular cases.

*Id.*

5. Article 5(b) of Legislative Decree 716 establishes that, by the terms of the Legislative Decree, consumers have the "right to receive from providers all information necessary to make a decision or to make a suitably informed selection in the acquisition of products and services, as well as to effectuate a suitable use or consumption of products or services." Legislative Decree No. 716, Nov. 9, 1991 and its amendments, Dec. 2000, art. 5(b), translated in DAVID B. JAFFE & ROBERT G. VAUGHN, SOUTH AMERICAN CONSUMER PROTECTION LAWS 472-73 (1996).

mileage by manipulating its tacograph;<sup>6</sup> failing to inform passengers of flight delays or the reasons for the delays;<sup>7</sup> making withdrawals from a client's bank account to correct an error;<sup>8</sup> failing to accurately warn consumers about the potential for credit card robbery; and making them responsible for consumptions above their credit line.<sup>9</sup>

The second type of problem that results from the information asymmetry involves the so called "idoneity," or warranty cases which are governed by Article 8 of Legislative Decree 716.<sup>10</sup> Sanctions are imposed when a product fails to meet a consumer's expectations in suitability and quality. Idoneity involves the adjustment between what a reasonable consumer expects and what a reasonable consumer actually receives. Some examples include: the noncompliance with on-time delivery of kitchen furniture;<sup>11</sup> typing mistakes in the number of leucocytes in a laboratory test result;<sup>12</sup> refusing to grant professional degrees to a group of students because the university decided to change the degree requirements;<sup>13</sup> insecure passenger transportation that might cause accidents involving death and serious injury;<sup>14</sup> unnecessary delays in the delivery of vehicles, cards and plates;<sup>15</sup> the manufacture of shoes that wore out too quickly,<sup>16</sup> or combining the wrong ingredients in the manufacture of a medicine.<sup>17</sup>

Both infringements may apply. To use an extreme case, an airline can be liable both for failing to inform a passenger of the risk of lost luggage and for the loss itself whether relevant information was provided or not. An insurance company can receive sanctions both for failing to inform an insured about a coverage exclusion and for not providing the coverage, rendering the service inadequate. Consequently, if one presumes, as Peruvian jurisprudence does, that idoneity means that which the reasonable consumer expects to receive from

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6. Resolution No 072-97/TDC, Márquez v. Abical Motors, Mar. 19, 1997.

7. Resolution No 130-1998/TDC, Indecopi v. Aerocontinente, May 15, 1998.

8. Resolution No. 077-1999/TDC, Delgado v. Banco Wiese, Mar. 3, 1999.

9. Resolution No. 167-1999/TDC, Espejo v. Banco Santander, May 12, 1999.

10. Article 8 outlines Providers Responsibility:

Providers are responsible, additionally, for the fitness and quality of products and services; for the authenticity of trademarks and legends displayed on their products; for the veracity of the commercial advertising of the products; and for the contents and useful life indicated on the label.

Legislative Decree No. 716, art. 8, *translated in* JAFFE & VAUGHN, *supra* note 5, at 474.

11. Resolution No. 120-1998/TDC, Indecopi v. Gasayo, May 6, 1998.

12. Resolution No. 170-1998/TDC, Guimet v. Ricardo Palma Clinic and José Chávez, June 24, 1998.

13. Resolution No. 186-1998/TDC, Iparraguirre et al. v. Garcilaso de la Vega University, July 8, 1998.

14. Resolution No. 221-1998/TDC, Indecopi v. Civa, Aug. 19, 1998.

15. Resolution No. 222-1998/TDC, Indecopi v. Abical Motors, Aug. 21, 1998.

16. Resolution No. 085-95-TD/INDECOPI, Tori v. Kourus, Nov. 13, 1996.

17. Resolution No. 095-96-TDC/INDECOPI, Indecopi v. Hersil/Smithkline, Dec. 18, 1996.

available information obtained, it becomes clear that the difference between information and idoneity is more theoretical than the problem itself.

Because the idoneity analysis has been understood as more useful than the lack of information analysis, the INDECOPI has gradually changed its method for solving cases to the idoneity analysis, especially in the last five years. This change may also be attributed to the efficiency of the idoneity rule. Although it is based in the same informative asymmetry idea, it does not ask who is better informed, but who is in a better position to obtain the relevant information.<sup>18</sup>

### **III. BASIC GUIDELINES FOR THE CONSUMER PROTECTION IN THE PERUVIAN LEGISLATION**

The most relevant aspects of Peru's legislation, INDECOPI'S resolutions, and the Courts, are discussed below.

#### **A. How does Peru protect its consumers?**

Ex post actions override ex ante actions. In an ex ante action, the state takes preemptive action before a problem occurs. Some examples include: price control systems, quality control, obligatory technical norms, and approval of contractual conditions in standard contracts. On the other hand, ex post actions occur after the problem has occurred and serves to sanction those who violate the rules. The Peruvian system prefers to apply later administrative sanctions, and civil liability overrides the use of specific regulations.

#### **B. How does Peru define a consumer?**

Not every consumer deserves protection under Article 3(a) of 716 Legislative Decree.<sup>19</sup> Under this legislation, only the final users of a product or service is considered a consumer. The rationale behind this definition is based on the understanding that once acquired, the consumer uses the product for personal or family purposes or for his immediate social environment. Excluded from consumer protection are those cases where companies acquire goods or services for activities linked with its purpose. These criteria do not exclude corporations as

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18. This is a simple application of the principle of "the cheapest cost avoider." See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

19. Legislative Decree No. 716 defines consumers or users as "[n]atural or legal persons that acquire, utilize or enjoy products or services as final addressees." Legislative Decree No. 716, art. 3(a), *translated in* JAFFE & VAUGHN, *supra* note 5, at 470.

final consumers altogether, but place conditions on corporations for activities other than the incorporation of such goods or services to its productive process.

*Cheenyi E.I.R.L. v. Konica* demonstrates this distinction.<sup>20</sup> There, a company (Cheenyi) specializing in import, distribution, trading, and wholesale of food products, acquired from Konica, a photographic laboratory machine, so that it could offer a developing service. The photography machine was defective, but the INDECOPI ruled that the company was not the final user, and consequently dismissed the claim. Other examples include: a transportation firm that buys buses; a company that buys software for its commercial activity;<sup>21</sup> an individual who buys a car for taxi purposes;<sup>22</sup> and a hotel that purchases a washing machine.<sup>23</sup>

### **C. Is the consumer always protected?**

Regardless of the existing tendency in other countries to protect the average consumer, Peru protects only the reasonable consumer. A reasonable consumer includes one who acts with ordinary diligence under the circumstances. Therefore, compensation is inappropriate for consumers acting unreasonably.

Although this distinction has been criticized, it remains very simple. It is justified on the basis of the relationship between the consumer and the supplier. Keeping this relationship in mind, there are two reasons that consumer's expectations are not met: first is lack of information, and second is lack of consumer diligence. Traffic accidents depend on the conduct of the driver and the pedestrian. We want careful drivers and careful pedestrians. We also want careful and well-informed suppliers and cautious consumers.

The *Henri Van Hasselt Dávila v. Bancosur* case<sup>24</sup> illustrates the importance of this relationship. Mr. Van Hasselt purchased an automobile with a loan from Bancosur. The loan conditions/procedures for the payment were clearly established in the contract. Mr. Van Hasselt did not read the contract and, as a consequence, did not follow the appropriate procedure. He thought that after making deposits into his bank account, the loan payments for the car would automatically be deducted from his account. When he discovered his mistake, he sought sanctions against the bank for lack of idoneity. Taking into account that Mr. Van Hasselt did not read the contract, did not ask for a copy, did not read his bank statement indicating that payments had not been made for several months and, furthermore, that he ignored the prepayment system, INDECOPI considered Mr. Hasselt an unreasonable consumer.

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20. Resolution No. 101-196-TDC/INDECOPI, Dec. 18, 1996.

21. Resolution No. 197-1999/TDC, Prosac S.A. v. Aisoft del Perú, June 2, 1999.

22. Resolution No. 196-1997/TDC, Nureña v. Cedeá Motos, Aug. 1, 1998.

23. Resolution No. 004-1997/TDC, Inversiones San Antonio v. Representaciones y Distribuciones Americanas S.A., Jan. 3, 1997.

24. Resolution No. 179-1999/TDC, May 21, 1999.

#### **D. How does Peru define a supplier?**

A supplier is an individual or corporation that regularly sells products or renders services to the public.<sup>25</sup> They are not individuals that occasionally sell products or occasionally render services, such as a person selling a second-hand car or his personal home.

Additionally, the rules demand exchange of consideration, as provided in Article 3(c) and (d) of Legislative Decree 716.<sup>26</sup> Non-profit operations (without consideration) are excluded. However, if the product or service generates profit, as is the case with offers or gifts, it meets the supplier definition.

#### **E. What does the analysis or competence model mean?**

The competence analysis determines the existence of administrative liability as well as the existence of civil liability for a faulty product or service. The competence analysis evaluates the lack of overlap between the consumer's expectations and what the consumer actually receives. The competence model hypothetically reconstructs what a reasonable consumer expects. The difference between the competence model and the product received by the consumer is that a

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25. Legislative Decree No. 716 defines suppliers as “[n]atural or legal persons that manufacture, develop, manipulate, condition, mix, package, store, prepare, expend, or furnish goods or render services to consumers.” Legislative Decree No. 716, art. 3(b), *translated in* JAFFE & VAUGHN, *supra* note 5, at 470-71. The following are considered suppliers, only for expository purposes, but with no limitation whatsoever:

- b.1. Distributors or merchants: Natural or legal persons that customarily sell or provide in another form at wholesale or retail goods with an ultimate destination to consumers, even when they are goods not developed in establishments open to public.
- b.2. Producers or manufacturers: Natural or legal persons that produce, extract, industrialize or transform intermediate or final goods for their provision to consumers.
- b.3. Importers: Natural or legal persons that regularly import goods for their sale or provisions in another form in their national territory.
- b.4. Providers: Natural or legal persons that habitually provide services to consumers.

*Id.*

26. Legislative Decree No. 716 defines product as “[a]ny moveable or immovable good, material or immaterial, produced in the country or otherwise, that is the subject of a commercial transaction with a consumer.” *Id.* art. 3(c), *translated in* JAFFE & VAUGHN, *supra* note 5, at 471. Services are defined as “[a]ny activity of provision of services that is offered in the market in exchange for consideration, including those of a banking, financial, credit and security nature, with exception for professional services and those that are offered under a relation of dependency.” *Id.* art. 3(d), *translated in* JAFFE & VAUGHN, *supra* note 5, at 471-72

faulty product or service generates responsibility if the defect is chargeable to the supplier.

The competence model is constructed on the basis of implicit and explicit guarantees. These same guarantees outline the characteristics that a product or service should have.

Implicit guarantees result from the presumption that the product or service complies with its normal and foreseeable purpose – that it is competent. Circumstances, such as the conditions under which the product was acquired and the product's life span, factor into this analysis. For example, a consumer expects shoes to last at least two months,<sup>27</sup> that a taxi corporation will not have robbery insurance,<sup>28</sup> and that a chair will not break the first time it is used.

Explicit warranties include the express terms and conditions provided in documents, packages, and receipts, or those conditions that a consumer using ordinary knowledge should already know. When an explicit warranty excludes or restricts the scope of an implicit warranty, the exclusions or restrictions are binding. Therefore, a supplier may include an explicit warranty if the consumer is accurately informed.

#### **F. Burdens of Proof**

The supplier has the burden of proving idoneity. This burden does not require proving the cause of a defect, but rather requires proving that the defect did not occur because of the manufacturing, trading, or handling of the product.<sup>29</sup> On the other hand, if a term or condition exceeds a reasonable consumer's expectation, the burden rests with the consumer. For example, if a consumer claims that he was offered a ten-year warranty for a television (more than the normal market offers), he must prove the company made the offer. But, if the term or condition falls below a reasonable consumer's expectation, then the burden rests with the supplier.

*Carbonel v. Finantur* case established this principle.<sup>30</sup> In that case, a consumer claimed that he had purchased a non-stop ticket from Lima to Los Angeles, but the ticket agency argued that they told him it was a three-stop flight (Panama, Costa Rica, and Mexico). There was no evidence of an explicit warranty offering non-stop service nor was there evidence of three-stop service; thus, the service was considered defective. As a consequence of this case, a supplier must not only prove that it has duly informed its consumers of manufacture defects but also that the consumer has agreed.

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27. Resolution No. 085-96-TD/INDECOPI, *Tori v. Kourus*, Nov. 13, 1996.

28. Resolution No. 69-1998/TDC, *Dañino v. Taxi Drivers*, Mar. 11, 1998.

29. Resolution No. 085-96-TD/INDECOPI, *Tori v. Kourus*, Nov. 13, 1996.

30. Resolution No. 102-97-TDC/INDECOPI, Apr. 25, 1997.

### **G. Risk Warnings**

Pursuant to Article 9 of Legislative Decree 716, products and services cannot contain unjustified or undisclosed risks.<sup>31</sup> Therefore, warnings are subject to the principles listed below.

- A warning should correspond to the level of risk. It should grab the consumer's attention without frightening the public and should communicate the importance of the warning.
- A warning's appearance and frequency (in case this warning is through the media) should reasonably reach the majority of affected consumers.
- A warning should specify the nature and danger of the risk. For example, a warning should communicate whether a product is harmful drink or to apply to the eyes.
- The warning should be easy to understand. Excessively technical or scientific language is inappropriate.
- A warning should communicate the level of risk and its foreseeability. It should communicate whether the risk involves a mere probability or an absolute certainty. If merely probable, conditional expressions are allowed.
- A warning should explain how to avoid risks and how to remedy them if they do occur.

Because inadequate warnings are considered product defects, they may also lead to product liability. Liability for inadequate warnings was established in the Dyazyde (Smithkline Beecham I.a.c. and Laboratorios Industriales Hersil S.A.) case,<sup>32</sup> where an antipsychotic ingredient was added by mistake to diuretic medicine (Dyazide). This created a severe health risk.<sup>33</sup>

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31. Legislative Decree No. 716 provides that:

Products and services placed at the disposal of the consumer must not carry with them unjustifiable or unwarned risk to the health or security of consumers or their goods.

In cases where, through the nature of the product or of the service, the risk is foreseeable, the consumer must be warned of said risk, as well as the correct mode of utilization of the product or service.

Legislative Decree No. 716, art. 9, *translated in* JAFFE & VAUGHN, *supra* note 5, at 474.

32. Resolution No. 095-96-TDC/INDECOPI, Dec. 18, 1996.

33. The existent risk degree is graphically explained in the Resolution issued by INDECOPI's Tribunal:

## IV. LIABILITY

### A. Liability Before the State

A defective product is characterized as a lack of idoneity case making it subject to an administrative sanction by INDECOPI. However, a sanction by INDECOPI does not affect the merits of the civil case.

The INDECOPI, which may act on its own initiative or at the request of the affected consumers, is strict, and evidence of fault is not required. As such, if the product or service is defective, sanctions apply regardless of fault. INDECOPI sanctions may be appealed to the Ordinary Courts.

The different types of INDECOPI sanctions include those listed below.

- Admonition.

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It has been clearly established in the file that the Lote No. 911075 of Dyazide did not contain the Hydroclororiazida ingredient that gave to it the characteristic of a diuretic but it contained the Trifluoperazina, an antipsychotic. In addition, it has been revealed that this substance was found in very high doses for the health. Instead of containing from 2 to 14 milligrams, the normal dose used, it contained 25 milligrams (Summary Inform in 911 pages), that does allow a prediction of effects this will have in the consumers. This fact becomes more serious taking into account that the consumers of a diuretic medicine are normally persons in mature age and that an antipsychotic like Stelazine (commercial name of the antipsychotic Trifluoperazina) would not be prescribed in such a high dose.

Moreover, in normal doses the Trifluoperazina (antipsychotic) has secondary effects as follows: sleepiness, drowsiness, skin eruptions, mouth dryness, amenorrhea, insomnia, fatigue, trouble vision, milky segregations, muscles weakness, neuromuscular or extrapiramidal reactions, such as late disquinesia, distónicas reactions, Parkinson, acatisia, neuroleptico malign syndrome, and disquinesia perioral; and for this reason other medicines are recommended to balance some of these secondary symptoms, such as antiparkinson barbiturics, Benadryl, amphetamines, dextroanphetamines, caffeine with sodium benzoato, Levofed, Neo Synefrin. See PHYSICIAN'S DESK REFERENCE (Medical Economics Staff ed., 57th ed. 2003). This proves the degree of risk for the consumers. All this information demonstrated that the defective Dyazide did not comply with the minimum requirements demanded in Article 8 of Legislative Decree 716, because, not only the diuretic effect was not complied (that is infringement violation itself) but it contained a substance other than the required one as well, and that it could be a serious danger for the health of the consumers, not fulfilling neither the idoneity nor the quality minimum requirements. The defective Dyazide betrays the most minimum expectations of the consumer.

Resolution No. 095-96-TDC/INDECOPI, Dec. 18, 1996.

- Fines up to 100 Tax Units –*unidades impositivas tributarias* (UITs) -- (US\$ 85,000 approximately). Although it is very rare for the INDECOPI to impose a fine for the maximum legal limit, serious cases involving life or health risks have resulted in maximum fines.<sup>34</sup> The average sanction is about 1.5 UIT (US \$1,300 approximately). In assessing a fine, the INDECOPI considers the following criteria: (1) the degree of the fault; (2) the damage to the consumer; (3) the benefit obtained by the defaulting supplier; (4) the supplier's behavior before the INDECOPI; (5) the effects of that behavior in the market; and, (6) other criteria that INDECOPI deems adequate and relevant to the case.<sup>35</sup>
- Confiscation and or recall of the products and withdrawal or destruction of the products, packages, containers or labels.
- Temporary closure of the company for up to sixty days. This is applied only in exceptional circumstances and never for the legal maximum.
- Publication of corrective advertisements amending, informing and correcting violations.<sup>36</sup>

## **B. Civil Liability**

Peruvian legislation, without prejudice to the administrative liability process, also provides liability under contract and tort theories. These theories enable the consumer to claim a right to compensation from the supplier for economic or non-economic damages resulting from the product or service rendered. Some claims may be sought before the INDECOPI or before the Ordinary Courts. But, a consumer may only seek tort claims before the Ordinary Courts.

Cases in this area do not produce meaningful precedents. In fact, these cases usually fail to rely on the fundamentals of the Consumer Protection Law. In addition, it is very difficult to access resolutions by the Peruvian Courts

### **1. Rights that can be requested alternatively before INDECOPI or before the Ordinary Courts**

Claims may be sought before the INDECOPI or before the Ordinary Courts. If the party selects the INDECOPI, this entity's resolution can

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34. See, e.g., Resolution No. 095-96-TDC/INDECOPI, Dec. 18, 1996.

35. Legislative Decree No. 716, art. 42, amended by Law 27311.

36. *Id.*

simultaneously be appealed to the Ordinary Courts. Most consumers choose the INDECOPI for two reasons. First, INDECOPI encourages conciliation in seventy percent of its cases, which contributes to a quick and satisfactory solution. Second, the INDECOPI decides more quickly than the Ordinary Courts and is rarely overruled. However, compensation for damages is unavailable.

When the consumer files a claim with the INDECOPI, he usually requests a sanction for the supplier and that the INDECOPI recognize his rights. The following rights can be claimed before either entity.<sup>37</sup>

- Replacement or repair of the product. Replacement is preferred unless circumstances prevent it, in which case, a refund must be paid. Some examples include:
  - The product does not comply with quality certification or corresponding specifications;
  - When the materials, elements, substances or ingredients forming part of the product do not meet the specifications;
  - When a warranty has been breached;
  - When the product is not suitable for the indicated use;
  - When the net contents of the product are<sup>4</sup> lower than what is printed on the package or label;
  - When the measuring instrument has not operated in accordance with the permissible tolerance limits; and
  - When the product does not meet the offered terms.
- Refund of the amount already paid. This refers to any quantity paid in excess where the refund will be whether in whole or in part depending on the fact that neither the reparation nor the change of the product is possible to be done.

## 2. Compensation for damages

Unlike the claims discussed earlier, claims for damages may only be made before the Ordinary Courts. The Peruvian system applies strict liability for defective products. Therefore, once a defect is established, the supplier is liable

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37. Legislative Decree No. 716, art. 42, amended by Law 27311, arts. 29-31.

regardless of fault, unless the supplier can prove that the defect resulted from victim negligence, some third party act, an act of God, or *force majeure*.<sup>38</sup>

Establishing liability requires proving three essential elements: (1) damage; (2) a causal link between supplier conduct and the damage; and (3) an attributive factor. If all three elements are met, liability is imposed on the supplier and damages are awarded to the consumer.

Pursuant to the Protection Consumer Law, consumers may seek compensation for personal and property injury resulting from the faulty product. The amount awarded depends on the extent of the consumer's loss of profit and moral damages. Damages for death or personal injury sometimes exceed US \$30,000, but on average, the damage awards are substantially smaller. In addition, punitive damages are not recognized in Peru, but as previously mentioned, administrative sanctions for lack of idoneity are available. Unfortunately, very few cases are available on this topic.

Peruvian legislation defines the "causal link" element as the kind of damage that would normally result, provided the damage is foreseeable. Pursuant to Peruvian rules and case law, any supplier that intervenes in the production or trading of a defective product may be held jointly liable for the defect and may file a claim against the manufacturer.

Peruvian legislation draws a line between fault and negligence in order to hold suppliers strictly liable for defects. Therefore, once a defect is established, the supplier is liable regardless of fault. In order to determine the existence of a defect, idoneity is relevant. In addition, the Consumer Protection Law provides instruction on how to establish the existence of a defect by any of the following means:

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38. Legislative Decree No. 716 provides:

The provider is responsible for damages caused to the physical integrity of consumers or for their goods through defects in their products.

A product will be considered defective when it does not offer safety to which individuals have a right, taking into consideration all of the circumstances, such as:

- a) The design of the product;
- b) The manner in which the product has been placed in the market, including its appearance, the use of any trademark, advertising referring to the same or the use of instructions or warnings;
- c) The foreseeable use of the product; and
- d) The materials, content and condition of the product.

Indemnification means all of the consequences caused by the defect, including the loss of profits, damage to the individual and moral damage.

Responsibility of the various providers of a product in conformance with the article is joint. Notwithstanding this, each provider has the right to claim restitution against the one who supplied the defective product or originated the defect.

Legislative Decree No. 716, art. 32, translated in JAFFE & VAUGHN, *supra* note 5, at 483-84.

- Design defect—when the product has a wrong conception, pursuant to the idoneity standard, from the outset, all products manufactured with this defective design will be considered to be incompatible with the idoneity model;
- Defective manufacturing – when, despite a competent design, one product or a group of products is defective due to the manufacturing process, such as problems involving the contents, conditions or materials used; and
- Defective information arising from inadequate warning labels.

Products must also be analyzed in light of their foreseeable uses. For example, although a chair is used to sit on, it is foreseeable that the chair may also be used to stand on. If the chair breaks when somebody stands on it, the supplier remains responsible for the damage because standing is a foreseeable use, unless the consumer was warned not to stand on the chair.

### 3. Class Actions

Peruvian legislation permits class action suits by a group of consumers for personal injury and other losses.<sup>39</sup> Class actions may either be filed by INDECOPI itself on behalf of the consumers, or by any public or private entity empowered by INDECOPI. Therefore, the titleholder of the class action may file the claim before the Ordinary Courts on behalf of injured consumers.

The claim is often published so that consumers who do not wish to pursue the class action can refrain from doing so. Class action awards may include the refund of amounts already paid, the repair or replacement of products, or whatever else is necessary to protect consumers' interests. If compensation is ordered, it will be collected and divided among the consumers attending the proceeding. If any unclaimed balance remains after a year, it will be set aside and used to finance and promote future class actions.

To date, the INDECOPI has not exercised, directly or indirectly, its authority to file class actions on behalf of consumers; therefore no precedent exists.

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39. Legislative Decree No. 716, art. 38, modified by Law 27311.

## V. CONCLUSION

While it is becoming increasingly important that judicial and administrative precedents establish criteria that reduce the problems resulting from asymmetry, it is important to remember that Peru's system focuses on respecting consumer autonomy. As a consequence, consumers may sometimes choose unwisely. It is not, however, the government's responsibility to correct consumers' errors, but rather to correct the factors influencing their choices. It is essential to respect the consumer's right to be wrong in order to respect the right of freedom and private autonomy. It is impossible to grant the right to choose without protecting the consumer's right to be mistaken. Therefore, consumer protection must merely guard that right and not substitute for the consumer's will.

In substance, consumer rights parallel voting rights. Just as the electoral system must define a framework allowing the electorate to cast votes reflecting their wishes, a consumer protection system must define a framework in which consumers' wishes are reflected. It is not about making decisions for the consumer, but about reinforcing the consumer's right to decide. The electoral system is not democratic because voters elect the best president, but because the president reflects the voters' preference, even when the risk of voter error often exists. In this sense, the system of consumer protection will be accurate not because consumers are never wrong, but because they are able to decide free from practices that detour their will.