

GENERAL TRENDS IN SOUTH AMERICAN PRODUCTS LIABILITY LAW: AN OVERVIEW

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The purpose of this article is to provide an introduction to the general trends of products liability law in South America. Products liability law incorporates components of the traditional fields of private and public law, such as torts, contracts, and administrative law, and imposes an increasing number of duties upon producers and distributors.

1.1. Safe Goods and Services: Free from Any and All Risk, Damage, or Danger

Article 5 of Law No. 24.240, Argentina's consumer protection law, provides: "Goods or services must be supplied or rendered in a form such that, when utilized in conditions that are foreseen or those of normal use, do not present any danger to the health or physical safety of consumers or users."¹ The "duty of care" cannot, in our opinion, be stated in a clearer way. As a caveat, there is not liability for all damages caused by the use of the product. There is only liability for damages that originate from "foreseeable or ordinary" use. This is limited to its intended use or purpose, including use arising from the nature of the good or service.²

There is also a duty of safety that goes beyond products and extends to services. Additionally, it applies to both contractual and non-contractual relations. The duty of safety that arises by implication – without the need of a statutory or contractual provision – is imposed on manufacturers or retailers. It is recognized by the legal systems of different countries. Duty of care, *obligation de sécurité*, and *Verkehrssicherungspflicht* are some of the other titles given to this duty in

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1. Law No. 24.240, Oct. 13, 1993, art. 5 (Arg.), translated in DAVID B. JAFFE & ROBERT G. VAUGHN, SOUTH AMERICAN CONSUMER PROTECTION LAWS 27 (1996).

2. Given the fact that this chapter deals with the "prevention of product liability" (literal translation: entrepreneurial damage), we have deemed it convenient to begin by pointing out a "strong duty" by those who introduce goods or services into the market. Taking into account that such introduction of goods and services may be "surprising" with respect to the use of the goods, and given the fact that it is expected that the user or consumer behave reasonably, we understand that the mentioned duty cannot be separated from the notion of "information," defined by Article 4 of Law No. 24.240 and to be explained in the following sections.

different legal systems, such as under French and German law.³ This statutory approach to strict liability reflects an evolving concept of strict liability joined with the idea of the creation of a social risk.⁴

1.2. The Duty of Safety in Relations and Agreements

With a great deal of irony, Parra Lucan recalls “the thesis that such an important issue – the one regarding damages arising from products liability – may not be abandoned to the hands of the Judicial Power; it requires legislative action.”⁵ This 1980’s theory from the United States and Europe arrived in Latin America in the 1990’s and is included in some legal reform projects and the Civil Code itself.⁶

One aspect of the current debate is known as the “preventive function problem.” Prevention may be classified in the following manner. General prevention is understood as a psychological impulse that may be experienced by a citizen, who is aware of the statutory provisions, and who tries to avoid the adverse consequences that would result from being subject to such provisions. Special prevention refers to the influence of a possible executory judgment ordering compensation in future actions by the same person. The type of prevention that concerns us at this moment is prevention as a reasonable activity

3. With regard to “strict liability and the duty of safety in contracts,” and in addition to what has been explained in this report, see Jorge Mosset Iturraspe, *El incumplimiento contractual*, in 2 RESPONSABILIDAD POR DAÑOS 86 (1998). We reproduce a list of “recommendations” from national meetings and conferences dealing with the current status in our legal system of the “duty of safety,” both as a contractual obligation and an “implied” duty (CÓDIGO CIVIL [CÓD. CIV.] art. 1198 (Arg.)) arising from objective good faith, as well as a non-contractual duty, arising from the bundle of duties included in the maxim “thou shalt not harm,” applicable since the Roman Law.

4. We have mentioned the point of view, mistaken in our opinion, of the 1998 Civil and Commercial Reform and Unification Project, which transforms this duty of “final outcome” into a duty of diligence and prudence, which does not result in liability when the debtor shows that he acted without fault. This is not the basic idea behind this duty, or its traditional version. Once harm has been caused, in relation to the use of the thing, the only admissible defense is the improper act or fault of the victim.

5. M.A. PARRA LUCAN, *DAÑOS POR PRODUCTOS Y PROTECCIÓN AL CONSUMIDOR* (1990).

6. This goes back, as in previous centuries, to a lack of confidence in the judge (“a ‘gray’ character who shall be limited to the application of the law”) and increased confidence in the legislature, through the enactment of less generic and abstract laws. This is the mistake of the 1998 Argentinean Project. The abusive use of definitions and adjectives has no other explanation. It is enough to read, for example, the proposed text of Article 1662, which defines “dangerous goods” as the ones that produce “frequent or serious” damages; Article 1665, which describes “specially dangerous activities;” and Article 1667 on “goods without inherent risks.” Cód. Civ. arts. 1662, 1665, 1667 (Arg.).

of a businessman (*homo economicus*), arising from calculation of prevention costs for accidents as compared to reparation costs. The reasonable businessman will analyze which is more economically convenient for the person causing the damage. Manufacturers and distributors should not “speculate” about the benefits in order to decide in a given case to go ahead with the risky or dangerous activity. Penalties should be “exemplary” to dissuade such conduct. The provision mentioned describes which goods or services should not represent “any danger.”⁷

I have emphasized the basic human rejection of all harm or impairment. However, the same person that rejects harm may act in a way that provokes harm or makes it possible. This “contributory” conduct takes place with regard to goods and services due to the irrational, capricious, abnormal, or unexpected action on the part of the consumer. However, such conduct may be attributable exclusively to the victim if the victim was put on notice of how to act correctly. In some cases, this may be elementary or simple. However, in some cases, *i.e.*, when dealing with complex machinery, what is ordinary conduct or foreseeable use may not be obvious to the person who was injured.

This relates to the issue known alternatively as the “consent of the victim,” assent to suffer an injury, or assumption of the risk. Díez-Picazo, in dealing with this topic, explains “for the injury to be considered as consented two requirements must occur: (a) the interested person must consent with knowledge of the risks that he is subject to and after having received, when necessary, timely information if the other party was able to provide it; and (b) the person causing the injury was acting for the benefit of the victim and according to his implied will and to the level of required diligence.”⁸

1.3. The Expectation of an “Ordinary Contract” and of a Reliable Negotiation

It should not be implied from the mere execution or signature of a contract that there is acceptance of abusive provisions, such as those that exempt or limit liability, or those that create pseudo-contractual “acts of God” or contravene the agreed-upon duties. And this is the case to the extent that the consumer may and should trust the market, including consumer relations and transactions that take place in the market. Contractual relations should be “ordinary” or according to legitimate expectations. Everything that is not part of these ordinary relations, because it is surprising, different, or strange, should be rejected rather than considered as “consented to by the victim.”

7. There is no distinction between ordinary danger and excessive or special danger. Goods and services should be “harmless” when used properly. The classification of the danger will inevitably give rise to excuses or defenses that will benefit the person causing the damage.

8. LUIS DÍEZ-PICAZO, *DERECHO DE DAÑOS* 304 (1999). Notice the caution shown by the Spanish Professor when explaining such a delicate issue.

It is a pretty well accepted doctrine of disclaimer law throughout South America that business enterprises should not abuse their stronger bargaining power, their dominant position in the market, or their professional knowledge or experience to obtain excessive or undue advantage or unfair exemptions. The consent of the victim is no longer a good defense; the victim does not consent to be harmed.

2.1. Controls of the Manufacturer or Producer

In examining the liability of the entrepreneur for the risks of the enterprise, there is not only a legal aspect, (which focuses on compensation), but there is also a very important ethical aspect. I have recalled the significance of this dialectic: ethics and progress, ethics and development, ethics and economy. These are not utopias. Companies should maintain an ethical behavior in all stages of the manufacturing and distribution processes. This ethical conduct should apply in their relations with consumers and obviously with other companies of equal or lesser power.⁹

The ethical issue of proper compensation for imponderable harm serves as an imperative for more and better business controls regarding goods and services. Since human lives and disabilities do not have a monetary translation they cannot be “compensated.” Compensation is nothing more than a palliative to the ethical conundrum of how to bring the victim back to the status quo ante. Prevention is always much better than compensation. Tort law in the new millennium should be preventive. However, without a cultural shift that places the human being as the axis or center of society and the market, nothing can be achieved.

Having examined the main features of Argentina’s product liability law, I will now examine the “Brazilian version” of product liability, specifically Article 12 of Brazil’s Consumer Protection Code:¹⁰

9. M. LÓPEZ GIL & L. DELGADO, DE CAMINO A UNA ÉTICA EMPRESARIAL (1996). The Argentinean newspaper *La Nación* recently published two articles with regard to these topics: (1) Bernardo Kliksberg, *Ética y desarrollo*, LA NACIÓN February 12, 2001, http://www.lanacion.com.ar/EdicionesAnteriores/Nota.asp?nota_id=52064 (mentioning that “poverty and disparity in America contradict the values of the western civilization” and “the lack of health care and education seriously limits the real opportunities of great part of the population;” and (2) Andrés Thompson, *Un reclamo que crece*, LA NACIÓN February 12, 2001, http://www.lanacion.com.ar/EdicionesAnteriores/Nota.asp?nota_id=52066 (stating “the human being and not money should be in the center of all decisions.”).

10. For specific research in this area by Brazilian legal scholars, see generally M.M. Bertoldi, *Responsabilidade contratual do fornecedor pelo vicio do produto ou serviço*, 10 REVISTA DO DIREITO DO CONSUMIDOR [REV. DIR. CON.] 126 (1994); Z. Denari, *Da qualidade de produtos e serviços, da prevenção e da reparação dos danos*, in CODIGO BRASILEIRO DE DEFENSA DO CONSUMIDOR 127 (5th ed. 1998); Odete Novasis Carneiro Queiros, *Da Responsabilidade por vicio do protuto e do serviço*, 7 REV. DIR. CON. 141

Brazilian and foreign manufacturers, producers, builders, and importers are liable, regardless of culpability, for redress of damages caused to consumers by defects resulting from the design, manufacture, construction, assembly, formulas, handling, presentation or packing of their products, as well as by insufficient or inadequate information as to the use and risks thereof.

1. A product is defective when it does not offer the safety rightfully expected of it, taking relevant circumstances into consideration, including: (i) presentation of the product; (ii) use and risks reasonable expected of it; and (iii) the time when it was distributed.

2. A product is not to be considered defective simply because another better-quality product has been placed on the market.

3. The manufacturer, builder, producer or importer shall not be held liable when it evidences: (i) it did not place the product on the market; (ii) that, although it did place the product on the market, there is no defect; or (iii) the exclusive culpability of the consumer or a third party.¹¹

I will now focus on the possible defenses to alleged violations of this Brazilian law. This author disapproves of the provisions that allow business defenses because of their vagueness and partiality to business. The provision that takes into account the time when the product was put into the market to determine its defective character is problematic because it allows companies to claim the defense known as “development risk.”¹² I have already commented on the proof of not having introduced the product into the market. This is an issue that, at least

(1993); R. Senise Lisboa, *E vicio do produto e a exoneração da responsabilidade*, 5 REV. DIR. CON. 89 (1993).

11. Law No. 8078, Sept. 11, 1990, art. 12 (Braz.), translated in JAFFE & VAUGHN, *supra* note 1, at 96-97.

12. James Marins de Souza supports the solution adopted by Article 12. His main argument is “the status of science and technology” when the manufacturer introduces the product into the market; in addition, it is based on the impossibility of measuring the risk when only “the development of science and technology in the future will allow it to measure it.” But he also mentions the need to inspect and verify the status of science at the moment when the product is introduced into the market. See James Marins de Souza, *Risco de desenvolvimento e tipologia das imperfeições dos produtos*, 2 REV. DIR. CON. 118 (1992). But see A.H.V Benjamin, COMENTARIOS AO CODIGO DE PROTEÇÃO AO CONSUMIDOR 67 (1991) (opposing the solution adopted by the Code).

as a rule, should not reach or affect the consumer, nor excuse the manufacturer. It is an “internal” issue to the manufacturer. The facts are clear: there is a manufacturer and “his product” is in the market. The way it reached the market is not an issue that concerns the consumer. Additionally, the manufacturer or businessman must bear the consequences if there was negligence or lack of care. The defense based on the exclusive “fault of a third party” also requires clarification. It should not apply if such “third party” is related to the manufacturer, if it is to any extent “subordinated” to the manufacturer, or if the manufacturer facilitated the conduct that caused the injury to the consumer.¹³

2.2. The Good or Service Should Not Be Placed in the Market with Defects or Risks

“Intermediaries” are positioned between the manufacturer and the user or consumer; they are distributors, wholesalers, retailers, etc. May these market players be qualified as “third parties,” whose fault excuses the manufacturer from liability? The brief answer is “no.” Many different situations may arise causing defective products to be placed in the market, such as negligent handling, undue care or custody, accidents during transportation, etc. It is unfair and irrational in these situations to put the burden on the user or consumer to investigate the defect.¹⁴ The only feasible solution is the joint liability of all intervening parties, manufacturers, and distributors vis-à-vis the victim. This does not affect eventual indemnity or contributory causes of action or recourses to clarify the facts and the degree of fault in the internal relations.

13. Regarding the analysis of the situation of collaborators, assistants and subordinates, we have mentioned the difficulties existing at the time of distinguishing “relationships” and “autonomies,” between acting in conformity and “against the will;” that is, between “third-party relations” that are wanted or sought after and others that are inevitable or unwanted.

14. We cannot accept under Argentinean law the difference proposed by Galgano under Italian law, between “liability for company risk” and “strict liability.” The latter, for the eminent legal writer, is based only on the causal relation between the fact itself and the resulting harm; and the causal relation is based, in turn, on ordinary and regular statistics that render foreseeable a certain effect given to a cause. On the other hand, the one based on risk needs to be proved. According to Galgano, only strict liability allows exculpatory proof, based on the lack of a causal relation between the fact and the harm. In our opinion, there is no strict liability if there is no factor of attribution (company risk or risk of the dangerous things or conduct); and liability may be excused by proving the rupture of the causal relationship, by an act of the victim himself or by an independent third party.

2.3. When There is a Defective Product, the Party Who Introduces the Product into the Market Should Be Presumed Liable

The presumption of liability is equivalent to shifting the burden of proof. The company must prove exculpatory facts, which are restricted in number and should be narrowly interpreted. But this evidentiary burden on the defendant appears to be facilitated by factors such as the defendant's "professional experience" and his command of the science and technology involved. Over the past thirty years, coinciding with the development of consumer protection rules, resistance to these ideas of burden shifting has been very strong.

As acknowledged by the Italian legal scholar, Rosario Ferrara, "it is not unjustified to assert that the problem of consumer protection is probably one of the 'Gordian knots' of contemporary society and liberal democracy; its solution is tied to the attempt to organize and negotiate social consensus in a framework of industrial democratization."¹⁵ Even though it may seem self-evident, it is pertinent to restate the words of the Brazilian legal writer Benjamin, "there is no tort liability for consumer accidents when goods or services are not defective."¹⁶

Although enterprises create prosperity, which is followed by progress and development, enterprises also create risks, originate danger, and benefit from such risks and danger. It is not surprising, therefore, that in a highly civilized country such as Germany, where consumers are assumed to be alert and even vigilant—courts are severe when imposing on manufacturing businesses strict duties of information, instructions and warnings.¹⁷ If such "notice" is lacking, the enterprise is liable *ipso jure* for breaching its duties towards the consumers (*vis-à-vis du public*).

3.1. The Consumer vis-à-vis the "Marketing" of a Product

What is "the economic value of consumers' trust in enterprises?"¹⁸ Since the 1970s, producers have invested huge amounts of money in developing

15. R. FERRARA, *CONTRIBUTO ALLO STUDIO DELLA TUTELA DEL CONSUMATORE* 10 (1983); *see also* S. PUGGIONI, *RESPONSABILITÀ DA PRODOTTO* (1989); C. VERARDI, *LA RESPONSABILITÀ PER DANNO DA PRODOTTI DIFETTOSI* (1990).

16. In addition to the already cited comments to the Brazilian Consumer Protection Code, Benjamin has numerous studies in this area. His work includes the direction and support given to the *Revista do Direito do Consumidor*, comparable to the best journals in this area.

17. N. Reich, *Securité des consommateurs et responsabilité du fais des produits defectueux*, in *L'INTRODUCTION DE LA DIRECTIVE EN RFA* (1987).

18. C. Weingarten, *El valor económico de la confianza para empresas y consumidores*, 33 *REV. DIR. CON* 89 (2000); *see also* ALFARO AGUILA-REAL, *LAS CONDICIONES GENERALES DE LA CONTRATACIÓN* (1997); N. CROTEAU, *LE CONTRAT*

strategies to gain their consumers' trust. When seeking this trust, nothing is more detrimental than the appearance of the following types of defective products or services:¹⁹

- Defects in manufacture and distribution;
- Latent and apparent defects;²⁰
- Tolerable and intolerable defects;²¹
- Defective design, project or formula;²²
- Commercialization defects.²³

These defects account for only part of the distrust. The reality of multiple intermediaries supersedes by far the ability of a legal system to fix individual blame or fault. To the extent that the defect and causal relation have been proven, joint liability arises between all parties intervening in the production, distribution, and commercialization processes.

D'ADHESION: DE SON EMERGENCE À SA RECONNAISSANCE (1996); D.M. KREPS, *TEORÍA DE LOS JUEGOS Y MODELACIÓN ECONÓMICA* (1994).

19. The legal doctrine regarding defective products is extensive and carries a long list of classifications, which will be mentioned very briefly. It begins with ordinary and non-ordinary defects, distinguished according to their origin or degree, effects, etc. *See* E. Arruda Alvim, *Responsabilidade civil pelo fato do produto no Código de Defesa do Consumidor*, 15 REV. DIR. CON. 132 (1995); Paulo Luiz Netto Lobo, *Responsabilidade por vícios nas relações de consumo*, 14 REV. DIR. CON. 33 (1995); R. Rosado de Aguiar, *A boa-fé na relação de consumo*, 14 REV. DIR. CON. 20 (1995).

20. As a general rule, apparent defects give rise to the company's liability, contrary to what happens in the Civil Code. The reason is that a consumer, due to his ignorance, may be unaware even of what is apparent, what is shown as defective. Article 9 of Law No. 24.240 is very interesting: "*Used or rebuilt deficient goods*. When goods that contain a deficiency, are used or rebuilt are offered to the public to potentially unspecified consumers, such circumstances must be indicated in a precise and evident form." Law No. 24.240, Oct. 13, 1993, art. 9 (Arg.), *translated in* JAFFE & VAUGHN, *supra* note 1, at 28. They are still marketable, but they require "special" information. The defects do not exclude them from the market, but they should disclose such deficiencies.

21. This is clearly expressed by Article 8 of the Brazilian Consumer Code: "Products and services placed on the consumer market shall not endanger the health or safety of consumers, except for those risks considered normal and foreseeable as a result of their nature and possession, with the suppliers undertaking in any and all circumstances to provide necessary and adequate information thereon." Law No. 8078, Sept. 11, 1990, art. 8 (Braz.), *translated in* JAFFE & VAUGHN, *supra* note 1, at 95.

22. These are aspects that are distinguished from manufacturing and that involve third parties.

23. These occur when the product or service is under the control of the user or consumer, after completing the voyage or the economic circuit. They include problems such as proper custody, packaging, presentation, etc.

3.2. The Consumer vis-à-vis the Retailer and Wholesaler

The same considerations are applicable to “defective services” that do not conform to legitimate expectations, either with regard to safety or because of the lack or deficiency of information regarding their nature, use, or risks.²⁴ Nonetheless, we must always keep the perspective of the vulnerable, weak, uninformed, and inexperienced user or consumer. This is the general rule in Latin American countries.

The consumer or user of the product or service does not interact with the intermediaries in the chain that links producers to businessmen. Consequently, the acts or omissions of such intermediaries should be irrelevant as far as the consumer is concerned. This is important when considering, for example, the situation of the small wholesaler, retailer, or pharmacist. The imposition of a sanction on a small wholesaler or retailer for defects that are a result of their manufacture may seem too strict. However, without this solution, there would be a very heavy burden on the consumer to investigate the facts of risk taking in ordinary activities. It is easier from the standpoint of an equitable distribution of the risks of social life for the small retailer or wholesaler to bear the burden of the producer.

3.3. The Consumer vis-à-vis the Retailer or Pharmacist

Even in cases, which involve some of the economically weaker links within the production, distribution, and commercialization chain, consumer protection requires that joint liability be applied according to Article 40 of Law No. 24.240. Exemptions should therefore be denied.²⁵

4.1. Information is a Critical Issue in Consumer Protection

According to Uruguayan Law N° 17.250²⁶ enacted in 2000, consumer sales should be undertaken with the idea of clear, accurate and sufficient

24. R. Grinberg, *Fato do produto ou do serviço: acidentes de consumo*, 35 REV. DIR. CON. 144 (2000); see also Claudia Lima Marques, *Direitos basicos do consumidor na sociedade pos-moderna de serviços o aparecimento de un sujeito novo e a realização de seus direitos*, 35 REV. DIR. CON. 97 (2000). Ms. Marques’ study concludes with a suggestive phrase: “Justice is worth what their judges are worth.”

25. J.M. Galdos, *El principio “favor debilis” en materia contractual*, 8 DERECHO DEL CONSUMIDOR [DER. CON.] 37 (1997); see also R. Stiglitz, *Contrato de consumo y cláusulas abusivas*, 8 DER. CON. 37 (1997); R. Stiglitz, *La regulación de los contratos de consumo. Una visión en paralelo entre el Proyecto de Código Civil de 1998 y la Ley de Defensa del Consumidor*, 11 DER. CON. 33 (2000).

26. *Translator’s note*: Uruguayan Law No. 17.189 was replaced by Law No. 17.250.

information during the entire transaction.²⁷ The Uruguayan solution coincides with the Brazilian,²⁸ Paraguayan,²⁹ and Argentinean³⁰ solutions.

Information is an underlying element, almost an obsession, in Law No. 24.240. It is a duty required by Article 4 of that law and restated in a series of subsequent articles. Article 4 specifically provides that “[t]hose who produce, import, distribute or place goods on the market or provide services must furnish to the consumer or users in clear and objective form, truthful, detailed, effective and sufficient information regarding the essential characteristics of the goods or services.”³¹

In addition, the regulation issued under Decree 1798/94 states that “[p]roviders of goods or services who, subsequent to their introduction into the market, have knowledge of their dangerous character shall communicate such circumstance immediately to the competent authorities and to the consumers through sufficient public advertising.”³²

The issue pertaining to the “information” that should be provided by companies to their customers is one of those that, in this author’s opinion, should

27. G. Ordoqui Castilla, *Deber de información en la ley 17.189, de 20 de septiembre 1999*, 34 REV. DIR. CON. 45 (2000). Uruguay finally has a law regulating this issue after prolonged and heated discussions. There was firm opposition to the enactment of this, or any other law, in this matter by a strong “traditionalist” tendency. The author makes the following comment: “We shall not forget that this duty of information fulfills a ‘preventive’ function and ensures an informed consent, and, therefore, a truly free consent.” For a very valuable treatise on this topic, see M.P. CASTAÑO RESTREPO, *EL CONSENTIMIENTO INFORMADO DEL PACIENTE EN LA RESPONSABILIDAD MÉDICA* (1997).

28. J.G. Brito Filomena, *Dos derechos básicos do consumidor*, in CODIGO BRASILEIRO DE DEFENSA DO CONSUMIDOR, *supra* note 10, at 106. Article 6, section III of the Brazilian Consumer Protection Code provides that basic consumer rights include “adequate and clear information on different products and services, with correct specification as to quantity, characteristics, composition, quality and price, as well as any risks” Law No. 8078, Sept. 11, 1990, art. 6, § 3 (Braz.), *translated in* JAFFE & VAUGHN, *supra* note 1, at 93.

29. Law No. 1334, October 27, 1998 (Uru.).

30. “*Information*. Those who produce, import, distribute, or place goods on the market or provide services must furnish to the consumers or users in clear and objective form, truthful, detailed, effective, and sufficient information regarding the essential characteristics of the goods or services.” Law No. 24.240, Oct. 13, 1993, art. 4 (Arg.), *translated in* JAFFE & VAUGHN, *supra* note 1, at 93. National legal doctrine has analyzed this issue repeatedly. See O.J. Ameal & M. F. Compiana, *La obligación de informar*, 10 DER. CON. 45 (1999); A.M. Morello et al., *Información al consumidor y contenido del contrato*, 1 DER. CON. 33 (1992).

31. Law No. 24.240, Oct. 13, 1993, art. 4 (Arg.), *translated in* JAFFE & VAUGHN, *supra* note 1, at 27.

32. Article 10, when dealing with the document that should be provided in the sale of personal property, describes in detail additional information that should be given to consumers; Article 14 mentions the information that should be included in the “warranty certificate;” Article 21 deals with the information that should be given by the service provider in an “estimate” required by the consumer; etc. *Id.* arts. 10, 14, 21.

be “transferred” to the realm of the Civil Code, as has happened already in other legal systems.³³

The objectives achieved by providing consumers with information are manifold.³⁴ Informing consumers could prevent or avoid harm, which would promote both health and safety.³⁵ It would reduce inequalities or imbalances between the parties, resulting either from subjective factors, such as the lack of education or knowledge, or objective factors like the complexity of the product or service. Another goal would be to facilitate the execution of the contract under the basis of a free, rational, and real consent. It could also facilitate the liberty known as “liberty not to want,” (Carbonnier), thus avoiding abuses or undue advantages. Additionally, it would allow for a reasonable performance, particularly in the use of the good according to its purpose, as well as the enjoinder of the service, etc. Finally, increased consumer information would give priority to the duties of loyalty and truthfulness, as part of the good faith that should be present in consumer relations.

4.2. Differences Between Information, Advertising, and Marketing

Information should not be confused with advertising,³⁶ which has been defined by Article 2.1 of Directive 450/84 of the European Council as “any form of communication undertaken in the setting of a commercial, industrial, mechanical or professional activity with the end of promoting the supply of goods

33. Jorge Mosset Iturraspe, *Contratos en general en el Proyecto de Reformas al Código Civil Argentino de 1998 (Estudio comparativo con la ley 24.240 de protección al consumidor)*, 6190 JURISPRUDENCIA ARGENTINA [J.A.] 2000.

34. LLOBET AGUDO, EL DEBER DE INFORMACIÓN EN LA FORMACIÓN DE CONTRATOS (1996); C. Vallejo, *Derecho a la información*, in COMENTARIOS A LA LEY GENERAL PARA LA DEFENSA DEL CONSUMIDOR (Bercovitz ed., 1992.)

35. See Ordoqui Castilla, *supra* note 27, at 58. When analyzing the issue of information, this author includes interesting references to the comparative law of France, Spain, Portugal, etc.

36. For an excellent article, see A.R. Kemelmajer de Carlucci, *Publicidad y consumidores*, 5 REVISTA DE DERECHO PRIVADO Y COMUNITARIO [REV. DER. PRIV. COM.] 63 (1994). See also, E. Highton & G.S. Alvarez, *La resolución alternativa de disputas y el consumidor ante el conflicto: Qué modo tiene de resolverlos?*, 5 REV. DER. PRIV. COM. 221 (1994); R. López Cabana, *La contratación en la Ley de Defensa del Consumidor*, 5 REV. DER. PRIV. COM. 53 (1994); R.L. Lorenzetti, *Tratamiento de las cláusulas abusivas en la Ley de Defensa del Consumidor*, 5 REV. DER. PRIV. COM. 171 (1994); E.H. Richard, *Alteración de los derechos del consumidor en forma habitual*, 5 REV. DER. PRIV. COM. 309 (1994); H. Roitman, *Acciones del consumidor perjudicado*, 5 REV. DER. PRIV. COM. 299 (1994); Eduardo A. Zannoni, *Responsabilidad por daños y protección al consumidor*, 5 REV. DER. PRIV. COM. 251 (1994).

or the performance of services, including real property, rights and duties.”³⁷ Article 9 of Law N° 22.802 uses advertising and propaganda interchangeably, and the difference has been disregarded. Advertising has a commercial objective, whereas propaganda has an ideological, philosophical, religious, economic, or social objective.³⁸

Advertising and information occupy the same field, the pre-contractual stage related to offered goods and services. However, while information illustrates the qualities, attributes, and capabilities of the product or services, advertising tends to capture, attract, persuade, and stimulate consumers by widely showing a product and highlighting its qualities. Objectivity is a requisite of information, while advertising is defined by the subjectivity of the interests that are publicized. Information should not conceal, mislead, misrepresent, or confuse the consumer.

4.3. Information in the Different Stages of Commercialization: Pre-Contractual and Post-Contractual

This author agrees with the legal doctrine that information is “a true duty” for a company in its relations with potential consumers and users. It is a legal duty that will result in liability if harm has been caused. Under Argentina’s consumer protection law, the breach of this duty to inform, followed by an injury that arises from the use of the product or service, is attributable to the company in a strict and objective liability manner. Lack of information is a business risk that could lead to consumer negligence or mishandling. Those who do not inform should be responsible if the harm and causal relation with the use of the product or service are proven.³⁹

This duty of information appears in every stage of the transaction. First, the formation of the agreement is particularly important, since this is when the objective and subjective terms that lead to the agreement or consent are specified.

37. Council Directive relating to the approximation of the laws, regulations, and administrative provisions of the Member States concerning misleading advertising (Deceptive Publicity) 450/84/EEC, Brussels, 10.09.84.

38. M.L. DE SABOIA CAMPOS, PUBLICIDADE: RESPONSABILIDADE CIVIL PERANTE O CONSUMIDOR (1996).

39. Ameal & Compiani, *supra* note 30, at 59. Ordoqui Castilla distinguishes between civil and criminal consequences. Among the former he mentions: the similarity between lack of information and intentional misrepresentation or intentional concealment; the need to include within the concept of misinformation those cases known as “commercial tricks” (*picardia comercial*) or “good faith misrepresentation;” the configuration of a vice during the consent process that gives rise to an action for nullification; the possibility for the consumer to choose between the rescission of the contract, specific performance or compensation for the damages caused. Ordoqui Castilla, *supra* note 27.

This is a consequence of the good faith element that should be present in all negotiations. The duty to inform, together with the duties of loyalty, protection, collaboration, and safety encompass the group of “secondary duties.”⁴⁰ Second, information also plays a central role in the contractual stage from the moment consent is given until termination. Once the product or service has been acquired, information translates into recommendations, advice, warnings, or corrections, which may be included in complementary booklets or attached to the product. This duty to inform is particularly relevant when the other party is legitimately unaware, because there is no way for her to find out the actual facts and, thus, has to rely on what others tell her.

Finally, the last paragraph of Article 37 of Law No. 24.240 contemplates penalties for the breach of the referenced duty:

In a case where the offeror violates a duty of good faith in a stage prior to the conclusion of the contract or its implementation, or transgresses the duty of information or the legislation of the defense of completion, or of commercial fairness, the consumer will have the right to demand nullification of the contract or of one or more of its clauses. When a judge declares a partial nullification, he simultaneously will integrate the contract, if necessary.⁴¹

5.1. The Introduction Into the Market Of Lower-Quality Products

A company’s advertising is part of the contract⁴² that affirms that a product is of prime quality when it is not is considered to be false and misleading.

40. J. Martins-Costa, *A boa-fé no Direito Privado*, REVISTA DOS TRIBUNAIS 472 (1999).

41. Law No. 24.240, Oct. 13, 1993, art. 37 (Arg.), translated in JAFFE & VAUGHN, *supra* note 1, at 42-43. We have dealt with this issue repeatedly. Partial invalidity follows the principle of conservation of the contract, by preserving the valid provisions. Nonetheless, it generates the difficult issue of having an incomplete contract, which might in turn create a different contract. In addition, in case of judicial construction, it is necessary to determine what criteria should be followed. A judge is not an expert in negotiations; therefore, he may not create his own contract or amend what the parties (or actually, one of the parties) have said. To reestablish what has been nullified does not make sense; for this reason he must act reasonably and according to good business practices and good faith.

42. Article 8 of Law No. 24.240 provides: “*Effects of advertising*. Text asserted in advertising or in announcements, prospectuses, circulars, or other means of dissemination obligates the offeror and is considered included in the contract with the consumer.” *Id.* art. 8, translated in JAFFE & VAUGHN, *supra* note 1, at 28. Included in the contract means that they are part of the transactional purposes, as are other written or expressed provisions. This is a true conquest of “consumer law,” which should be transferred to the Civil Code, in a reform or unification process.

However, this does not mean that only prime quality goods or services may be introduced into the market. As in every aspect of life, quality of goods and services may vary. The consumer must make her choice on an informed basis. It is not always a matter of price; more expensive goods are not necessarily of better quality and vice versa. Other factors, such as marketing and advertising, also play an important role.⁴³

The expression “a company proposes and the market decides” is not clearly and easily applicable.⁴⁴ Risenberg explains, with citations that range from Galbraith to Lipovetsky, that:

[I]f we carefully examine the complicated and elaborate structure used by a company to propose, the capability of the market to decide should at least be revised. A lot has been said about being in a new century, in front of more rational and analytical consumers who carefully examine prices and qualities, with a falling degree of brand loyalty. However, also true are theoretical considerations regarding the ties to which a person is subjected: these are the subconscious and society.⁴⁵

Risenberg concludes, “[t]hus, marketing does not create needs, but identifies the latent, desiring energy of consumers and channels it into certain brands. The desire is not created but enhanced, incited or exacerbated. In summary, marketing and advertising do not turn on the fire, they increase it.”⁴⁶

Article 9 of Law No. 24.240, speaks of the importance of informing consumers of the lesser quality of goods. “When goods that contain a deficiency, are used or rebuilt are offered to the public to potentially unspecified consumers, such circumstance must be indicated in a precise and form.”⁴⁷ This author insists, nonetheless, that products or services of lower than best or optimal quality are not necessarily “deficient.” Lower quality and deficient are not synonyms.

43. G. Risenberg, *Marketing y publicidad: Una reflexión ética*, 11 DER. CON. 49 (2000).

44. *Id.* at 57.

45. *Id.* at 57-58.

46. *Id.* at 58; see also JEAN CALAIS-AULOY & F. STEINMETZ, *DROIT DE LA CONSOMATION* (4th ed. 1996.); F. Gherardini Santos, *Direito do marketing*, REVISTA DOS TRIBUNAIS (1999).

47. Law No. 24.240, Oct. 13, 1993, art. 9 (Arg.), translated in JAFFE & VAUGHN, *supra* note 1, at 28.

5.2 “Experimental” or Insufficiently Tested Products

Experimental or insufficiently tested products, or products where research is ongoing shall be distributed “observing established mechanisms, instructions and norms or those considered reasonable in order to guarantee safety of the same.”⁴⁸ It is inconsistent for a company to profit from the commercialization of a product that is “risky” for any reason, including the status of science and technology, on the one hand, and, on the other hand, to use this “undeveloped” status to excuse itself from liability.

This was the basis for the provision of Article 1625 of the Argentine 1987 Product Liability Law Project, which then became the vetoed law: “The use of technology in a product whose safety or effectiveness is still being researched must be expressly consented by the person to whom the service is rendered.”

5.3. Bad-Quality Goods or Services and Warranties

The provider is liable for the vices, defects, or deficiencies of products or services. In addition, according to Article 11 of Law No. 24.240, the provider must warrant the buyer “the identity between that which is offered and that which is delivered, or its proper functioning.”⁴⁹ The provision makes clear that this warranty protects against “defects or vices of any type,” regardless of whether they are latent or apparent.⁵⁰ Article 13 provides, along the lines of Article 40 of the same law, that “[p]roducers, importers, distributors and vendors of goods are jointly liable for the granting and fulfillment of the legal guarantee.”⁵¹

48. *Id.* art. 6, translated in JAFFE & VAUGHN, *supra* note 1, at 27. Products where research is ongoing are only allowed into the market to the extent that they do not cause any danger. If they are found to cause harm, they cannot stay in the market and must be discontinued immediately.

49. *Id.* art. 11, translated in JAFFE & VAUGHN, *supra* note 1, at 30. Article 11 of Law No. 24.240 refers to the warranties in the commercialization of “non-fungible moveable goods.” *Id.*

50. *Id.* The warranty, legal in nature, applies regardless of the contractual warranties provided by the parties—but only if it is more beneficial to the consumer—and has a three-month statute of limitations. Regarding the comparison between the consumer protection act and the reform projects, see the following articles: 4 R.L Lorenzetti, RESPONSABILIDAD PROFESIONAL (1995); R.S. Stiglitz & G.A. Stiglitz, *Contratos. Parte general*, in REFORMAS AL CÓDIGO CIVIL 5 (1993).

51. Law No. 24.240, Oct. 13, 1993, art. 13 (Arg.), translated in JAFFE & VAUGHN, *supra* note 1, at 31. This is equivalent to saying that they are responsible for the breach of contract, according to general principles, when vices or defects are present. In addition, they grant a warranty that includes more general and comprehensive aspects, and that has both present and future application, but without affecting indemnity and contributory actions.

With regard to the performance of services, Argentina's consumer protection law provides for a statute of limitations of thirty days. The statute starts to run at the time the service was completed for the "defects or deficiencies in the work done." The harmed consumer is authorized to request repairs or replacement of the materials used, without affecting the appropriate cause of action to nullify the contract or claim for non-performance.⁵²

6.1. The Duty of Companies to Avoid Harm: Company Risks

When dealing with the damages that a company may cause to its customers, users, or consumers,

[T]he laws that tend to ensure good products in the market, loyalty in advertising and full compensation for damages caused to a consumer also tend to protect the companies that behave legally in the market. It is understood that a different attitude would in fact imply a subsidy to adventurers, or even to unscrupulous parties. Such subsidy would generate a comparative disadvantage for those companies that strictly comply with quality control regulations, and would consequently raise their costs. Competition would be unduly affected through the encouragement of commercial dishonesty
.....⁵³

However, Richard further explains that:

Consumer law comes together with the departure from the market of the 'constituencies' that in the past were part of 'economic groups' that dominated the factories, to secure their income through tactics in exercising their intellectual rights and indirect control of those involved in the market. The issue generates new forms of power and infiltration, through the

52. *Id.* arts. 23, 24 (Arg.). This provision is not clear regarding the 30-day limitation. We should remember that under the Civil Code, latent and serious redhibitory defects have a three-month statute of limitations; in a rescission action based on error, the term is two years, and 10 years when the cause of action is a breach of contract or termination. Mosset Iturraspe, *supra* note 33, at 484.

53. E.H. RICHARD, LAS RELACIONES DE ORGANIZACIÓN Y EL SISTEMA JURÍDICO DEL DERECHO PRIVADO 260 (2000) [hereinafter RICHARD, LAS RELACIONES] (referring to European Union legislation); *see also* E.H. Richard, *Fraccionamiento de la responsabilidad frente a consumidores y terceros a través de contratos de colaboración*, in LOS DERECHOS DEL HOMBRE. DAÑOS Y PROTECCIÓN A LA PERSONA 265 (1997).

commercialization of intellectual rights, the use of trusted brands, strategies in commercialization, licensing and franchising, and through strategies that change every day. In this manner, they secure their income leaving the risk in the hands of third-party businessmen who interact with the market and who, at the same time, try to transfer that risk to consumers.⁵⁴

6.2. Duty to Take Reasonable Measures to Avoid Damages and the Introduction into the Market of Dangerous Products or Services: Punitive Damages

In many instances, companies concerned about the cost-benefit equation disregard their harmful activities and continue to carry out those activities. There is a repeated disregard for the safety and health of consumers.⁵⁵ This behavior has given rise, first in the United States, and then in some civil law systems, to the notion of “punitive damages.” In reality, this is a sanction for repeated and egregious harmful conduct. The tendency to be “benevolent” with the business world led to the proposed reduction or disappearance of “punitive damages.” However, such a penalty is convenient because punitive damages are the best remedy against an intentional act of dereliction of a duty of diligence.

There has been a long debate in Argentina about the application of punitive damages without the support of legislative or other legal reform, because they are not intended to compensate the victim, but rather to punish the companies or persons responsible for causing the harm. In this sense, they have a “punitive” rather than a “compensatory” nature.⁵⁶ Another issue that has divided legal doctrine: who should be the “beneficiary” of the punitive sanction whom the “reiterative wrongdoer” must pay. If the victim who has already been compensated receives the amount, this would constitute an unjust enrichment. This is why some legal scholars have suggested other beneficiaries, such as victims’ trusts and non-profit foundations.⁵⁷

54. RICHARD, *LAS RELACIONES*, *supra* note 53, at 261 (citing C. Ghersi who advocates a totally different, yet comprehensive and well documented explanation).

55. Therefore, an intentional behavior or misconduct. In the past, we would have considered imposing criminal liability, punishable by imprisonment, but always with the difficulty of punishing legal entities without having implemented legal reform to such effect. See L.O. Andorno, *Responsabilidad por daño a la salud o la seguridad del consumidor*, in *LA RESPONSABILIDAD* 479 (1995); G.A. Borda, *Comportamiento contractual de mala fe*, in *LA RESPONSABILIDAD* 243 (1995).

56. D. Baigún, *La responsabilidad penal de las personas jurídicas: polémica conocida pero no resuelta*, in *LA RESPONSABILIDAD*, *supra* note 55, at 869.

57. F.A. Trigo Represas, *Daños punitivos*, in *LA RESPONSABILIDAD*, *supra* note 55, at 283.

Another discussion is whether it is up to the legislature or the judge to determine the beneficiary of those punitive sanctions. This discussion could have been avoided by the enactment of a statutory provision creating victims' trusts. Such trusts would cover certain damages when the person causing the harm is unknown or insolvent. When the damage is particularly significant, those trusts would also be designated as beneficiaries.⁵⁸

6.3. Circumstances of the Particular Case and Magnitude of the Risks and Dangers

This author does not see any advantages to the idea of establishing degrees or scales of risks and damages, such as trivial, serious or highly serious, usual or unusual, etc., as has become a contemporary South American doctrinal fashion. This article has addressed the risk created by manufacturing and distribution enterprises or the so called "company risk" and the numerous sources or causes that may contribute to this risk, such as: the introduction of goods and services into the market; the company's organization type; materials and processes in the hands of low-paid employees; improper technology; the complexities of the process; etc.⁵⁹

58. Regarding this issue, the 1998 Reform and Unification Project provides: "*Civil Fine*: A court has the authority to apply a civil fine against those who act with great indifference towards the rights of others or the interests of society as a whole. Its amount should be set by taking into account the circumstances of the particular case, particularly the benefits obtained or which might have been obtained by such conduct, and should be used according to what the court decides in a legally based resolution." We believe this last part is very inconvenient. A court may not and should not be the one authorized to determine the use of such funds, for obvious reasons. Public opinion will consider every sanction imposed as a "compromise" or a transactional way out. The determinations should be established within the law that creates this sanction and which should also create guarantee trusts.

59. F. Osterling Parodi, *Responsabilidad Civil: Costo comercial y costo social*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 55 (Abeledo-Perrot ed., 1997); see also R.A. Etcheveity, *Publicidad engañosa, competencia y responsabilidad civil*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 773, *supra*; I.H. Goldenberg, *Los riesgos del desarrollo en materia de responsabilidad por productos y el daño ambiental*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 341, *supra*; I. Lambert-Faivre, *La responsabilidad de los fabricantes por el hecho de sus productos en el derecho de la Unión Europea*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 358, *supra* (making special references to "insurance" and the "convenience of the guarantee trusts"); C. Larroumet, *La protección de los consumidores y la responsabilidad de los productores en el Derecho de la Unión Europea*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 365, *supra*; C.A. Lombardi, *El deber de la seguridad en la ley del consumidor*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 396, *supra*; R.D. Pizarro, *Responsabilidad civil del que pone la marca en un producto defectuoso y en un servicio defectuosamente prestado*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 378,

The risk analysis should not focus on what may be referred to as a “special company risk” or a “special company danger,” or expressions dealing with “particularities” or “singularities” of certain industrial or distributional risks. The incorporation of such adjectives in future reform⁶⁰ may give rise to a new debate about whether the risk or danger is usual or unusual, general or particular, trivial or serious. This would make the situation of the victim more complicated and would create more unfair defenses available for the wrongdoer.⁶¹

A reference to a risk or danger is enough, according to the nature of the activity, the product, or the circumstances. Further subdivision of the concept of risk by sub-sector or individual producer would be to engage in a subjective and capricious analysis, contrary to the fundamental policy of consumer protection that underlies most of South America’s recent legislation.

The observable trend in this cursory description of South American legislation is away from the traditional notion of fault and in the direction of strict or objective liability. In the South American version of strict liability, liability is still subject to a small number of defenses, such as narrow forms of the victim’s contributory negligence and assumption of the risk. The narrowness of these defenses is tied to the defendants’ (producers and distributors) increasing duty to supply the necessary information on the use of the product, as distinguished from a mere advertisement of its virtues. This is a duty imposed upon manufacturers and, in many cases, distributors big and small. Joint liability among all the participants in the distribution chain of harmful products is another common and noteworthy feature of this recent South American legislation.

supra; M. Zavala de González & R.M. González Zavala, *Indemnización punitiva*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* 188, *supra*.

60. We have mentioned the text of Article 1665 of the 1998 project: “Those who perform particularly dangerous activities, or obtain benefits therefrom, directly or through third parties, are responsible for the damages caused by such activities. A particularly dangerous activity is deemed to be that which, by virtue of its nature or due to the substances, instruments or energy used, or to the circumstances under which it is undertaken, is capable of causing frequent or serious harm” We radically disagree, both with regard to the word “particularly” and with the requirement of frequency or seriousness of the harm. Both expressions are not needed; if there is harm, they are redundant and excessive.

61. Massimo Franzoni, *La actividad peligrosa*, in *RESPONSABILIDAD POR DAÑOS EN EL TERCER MILENIO* *supra* note 59, at 121 (expressing that danger is a relative concept; what is now dangerous may not be in the future, or vice-versa); *see also* R.D. Pizarro, *Actividades riesgosas*, in 1 *ENCICLOPEDIA DE LA RESPONSABILIDAD CIVIL* 222 (providing an interesting reference to comparative law and national legal doctrine).