I. INTRODUCTION

Not so long ago one might have said that the Spanish product liability regime essentially rested on a few articles of the civil code of 1889. Indeed, Spanish law never succeeded in developing a clear and coherent set of rules for product liability. Spanish law committed itself to a very strict subjective or fault liability system. The subjective elements played therefore a fundamental rôle in ascertaining the liability of the manufacturer of a defective product. Furthermore, the codification of Spanish private law was greatly influenced by the laissez faire doctrine which consecrated the privity of contract. After the enactment of the Spanish constitution, the legislative took some steps which never proved enough. It was not until the implementation of the Product Liability Directive that Spain adopted a general but not absolute strict liability regime.

II. THE PRODUCT LIABILITY REGIME

A. CONTRACT

Spanish law on sales contracts are contained in both the Civil Code of 1889 for individuals and the Commercial Code 1885 for businessmen. Article 1445 onwards of the Civil Code regulates the sales of goods law. For a contract to be valid it needs: offer and acceptance (agreement between the parties), a certain object and a cause (consideration).1

1. Privity of contract

As in other jurisdictions, Spanish law consecrated the principle of privity of contract in its private law and therefore only parties to the contract would have an action for damages. In effect, Article 1257 categorically states that “Contracts produce effects between the parties thereof and their heirs”. It follows from that that the purchaser had only action against the vendor but not against the importer or manufacturer. It is fair to
admit that this situation was commonplace in most European jurisdictions as well as in English law. 

2. Defective product.
Not surprisingly, the civil code does not provide for a definition of defect although it affords some hints. Of particular importance is Article 1484 onwards which tackles the duty of the vendor to compensate for hidden damages. Indeed, Article 1484 states that “The seller is liable for the latent or hidden damages (vicios ocultos) of the product in case they deem it worthless for its main use, or the damages have deteriorated to such extent that had the purchaser known them before had never bought it.” Article 1485 establishes the principle whereby “The vendor holds himself liable before the purchaser for any latent damage, even if the vendor was not aware of them”. Contrary to the current Product Liability Act, the Civil Code does not provide for any definition on what a defective product is.

3. Fault requirement
The claimant had to show strong evidence of either the negligence (lack of expected care) or dolus (malicious intention to produce the tort). The vendor is not responsible for any evident or disclosed defects or where the purchaser is an expert who should have been able to detect the defect. The manufacturer may rise the so called defence of force majore which is contained in Article 1105.

4. Breach of contract
In case of latent defects the purchaser has the right to opt between: to repudiate the contract upon payment of those expenses who he may have had or to bring the price of the product down. If the vendor knew of the hidden defects, the buyer will have not only the rights earlier described but also he is entitled to claim damages.

5. Limitation period
The limitation period is of 15 years since it is a “personal action” in opposition to “real actions” which refers to actions on property rights.

B. TORTS

1. Civil Code
1.1. Breach of duty of care.
Until relatively very recently, the whole system was essentially underpinned by Articles 1101\(^9\) and 1902\(^{10}\). Article 1101 governs damages in contractual relations while article 1092 establishes extra-contractual liability for damages. Article 1101 sets the principle of subjective or fault liability since it expressly requires a negligent act (\textit{culpa}) for a party to be held liable. Conversely, Article 1902 sets forth the principle of “universal liability” whereby everyone may be liable for the damages caused. The wording of Article 1902 is ample enough to cover any sort of tort\(^{11}\). The burden of proof was thus on the purchaser so it was for him to provide for enough evidence of the manufacturer’s negligence. In addition article 1484 regulates the obligations of a seller to repair latent defective products. Likewise, similar articles were to be found in the Commercial Code of 1885 which governs legal relationships between merchants.\(^{12}\) That was all. No wonder torts law has been not only a poorly developed legal discipline but also an arcane and mysterious field utterly ignored by scholars and law schools. The system (or the lack of system) was highly criticised by commentators who particularly pointed out the lack of a concept of fault; of damage and of casual relationship.\(^{13}\)

2. Breach of a statutory duty.
A significant change took place upon the approval of the Spanish Constitution in 1978. For the first ever time a constitutional text devoted one article on the protection of consumers by public authorities. In effect, Article 51 constitutes an express mandate to public powers to guarantee safety, health and economic health of consumers.\(^{14}\) The importance of the above principle is paramount since it is meant to guide not only public authorities but also judicial and legislative practice.\(^{15}\) As a consequence of the constitutional command a new piece of legislation landed in the by then rather desolate product liability province.

The first attempt to further regulate certain aspects of product liability law was by means of the enactment of the General Act for the Defence of Consumers (Ley 26/1984 para la defensa de consumidores y usuarios, hereinafter the GADC).\(^{16}\) The GADC aims at providing consumers with a legal instrument to defend their rights and establishing a
new more efficient actions to protect these rights. The GADC establishes the protection against those risks which may affect consumer’s health and safety as a fundamental right. The wording of the law is therefore the happy implantation of the constitutional mandate into the Spanish legal system.

Chapter 8 of the GADC sets forth a far reaching set of rules governing guarantees and liabilities. The GADC adopts a twofold approach for the GADC provides for one regime for general products subject to fault liability (Articles 25-27) and another one for listed products subject to strict liability. Yet, the approach is rather confused and small wonder it was adduced that the GADC was far from having brought a clear and coherent system of liability without fault. Firstly, consumers and users are entitled to damages for defective product unless they have been fully negligent using the products. The liability is therefore based on negligence although manufacturers may escape liability by showing they acted diligently. In effect, Article 26 proclaims the liability of producers, importers, distributors and suppliers for any negligence in putting the product into circulation or in the provision of the service. Manufacturers, suppliers and importers may provide though for full evidence of their having met all the requirements and conditions required by the pertinent law.

As was said beforehand, the GADC establishes a double regime of liability. While Articles 25 and 26 implant a fault liability scheme, Article 28 applies a strict liability regime to those products included thereof which contain a specific warranty on purity, efficacy, safety. All in all, the following products listed in Article 28 are under a strict liability scheme, foodstuff, gas, electricity, cosmetics, sanitary fittings, medicines, white goods, modes of transport, lifts, motor vehicles, toys. Manufacturers and importers of the above mentioned products are liable for damages without any further proof of negligence from the seller.

3 Limitation period

The limitation period for tort actions in Spain is of one year from the moment the claimant becomes aware of the damage.
C. STRICT LIABILITY

1 General Background

On 25 July 1985 the EU Council Directive on Product Liability (hereinafter the Directive) was approved having therefore an enormous impact in all the Member States legislations. Spain along with Portugal joined the EU in 1 January 1986 although it is fair to admit that the impact of the Directive in the Spanish product liability remained nil for nearly 8 years of discussion over the best means to implement the Directive. Spanish government looked undeterred at the three years time that the Directive gave member States to implement it. In effect, Spanish authorities faced a trinity of options, viz. reforming the relevant Articles; reforming the Consumer Protection Act; the enacting a new act. It was submitted that the Ministry of Health favoured the idea of only reforming the Consumer Protection Act on grounds of Article 13 of the Directive while the Ministry of Justice supported the enactment of a new Act. The option chosen was the enacting of a new Act instead of reviewing and amending the current legislation which would have changed Articles of the nearly sacred civil code and the Consumers Protection Act. Spain hence implemented the Directive by means of the Product Liability Act (Ley 22/94 de responsabilidad civil por daños causados por productos defectuosos, hereinafter the Act). The Act came into force on 8 July 1994, a day later his publication in the Spanish Gazzette, (B.O.E).

Although Spanish law had already recognized strict liability in certain situations, as it was seen beforehand, it was not until the Act that a more coherent approach was installed into the Spanish product liability system. As a result of it, strict liability became the rule in clear contrast with the provisions of the civil code requiring negligence or fault. Furthermore, the Act intends to cover anyone damaged or injured and not only consumers in contrast with the Consumer Protection Act. The general principle is enshrined in Article 1 whereby “Manufacturers and importers will be held liable for the damages caused by the products they manufacture or import”. The existence of two different Acts has caused problems of interpretation and applicability of rules of law. Case law, yet, has already confirmed the specific character of the Act, taking priority over the CPA.
2.2 Definition of a product.

Spanish law essentially follows the directions of the Directive, a product being thus all movables, even if incorporated into a movable or an immovable. It is worth pointing out that according to Spanish law a movable fully incorporated into an immovable becomes part of the latter. In addition, the Act expressly deems electricity and gas as products, in spite that the Directive does not mention gas in Article 2. For the Directive does include gas, case law has therefore claimed that the product of gas requires a “restrictive interpretation”. Although it was permitted by virtue of Article 15 (a) of the Directive, the Act did not include primary agriculture or game as products.

2.3. Definition of a defective product.

According to Article 3 (1) a defective product is that product which does not provide the safety one may legitimately expect taking all circumstances into account: the presentation of the product; the correct use thereof and the time when it was put into circulation. While Article 3 (1) literally borrows the wording of Article 6 of the Directive, Article 3 (2) provides for a presumption not foreseen in the Directive, that is, a general presumption whereby a product is defective if it does not provide the safety normally provided by the rest of the units of the same series. This provision provides thus for a wider concept of defect since it lows the degree of evidence to be shown. In effect, a product is to be deemed defective provided the rest of the series flawless. The presumption is not absolute and it is submitted that it is for the defendant to arise any defence that shows that although the product may be of lower safety, other circumstances contributed to produce the damage. Since the use of the product is to be taken into account when assessing the safety of a product, it is thus of particular relevance for the defendant to show that the product was not properly used by the claimant.
The Supreme Court has recently had the opportunity to further develop this Article in STS 21 February 2003 [LINK] where it concluded that where it is not possible to establish the safety required of a product, the product is to be deemed defective. In addition, lower courts have also been keen on applying the presumption of Article 3 (2), particularly in straightforward cases where only a defect could have produced the damage, Provincial Audience of Barcelona, 23 April 1999 (chair) [LINK] or Provincial Audience of Murcia, (Airbag) [LINK]. As a consequence, the burden of proof shifts into the manufacturer who may arise the defences put forward in Article 6 of the Act, 2 April 2001. [LINK].

A defence for the manufacturer is afforded by Article 3 (3) which states that “No product will be deemed to be defective solely because it has been superseded by a newer or more advanced model.” Due to the previous existent legislation, i.e. Consumer Protection Act, Final Proviso of the Act intends to avoid overlapping between both acts by establishing that Articles 25-28 of the Consumer Protection Act will not be applicable in case of damages for defective products included in Article 2 of the Act.

2.4 Concept of manufacturer and importer.

1. Article 1 sets the general principle whereby “manufacturers and importers shall be liable for damage caused by the defects of the products they manufacture or import respectively”. It follows from that the Act establishes two liable subjects, namely the manufacturer and the producer. There is hence a significant contrast with the Directive as it only holds the producer liable for damages.33 Yet, as it is well known it deems the manufacturer as a producer.34 In addition, it must be noted that while the CPA establishes the liability of the manufacturer, supplier and importer at the same level,35 the Act is mainly addressed to the manufacturer and importer, thus leaving the supplier in a secondary position, namely where the two former cannot being identified.36 The judgements of Provincial Audience of Santa Cruz, 23 September 2000, (ladder) and Provincial Audience of Burgos, 9 February 2000, (ladder) fully tackled the issue. [LINK]
The Act gives a broad definition of manufacturer whichever the stage in the manufacturing chain is:

1. The manufacturer of a finished product.
2. The manufacturer of raw material.
3. The manufacturer of a component of a product.

In addition, a manufacturer is also he who holds himself out to the public as a manufacturer by putting his name, company name, trade mark or any other distinctive name on the product, its packaging or any other element of protection or presentation.

As to the concept of importer, Article 3 (2) sets that an importer is he who within his commercial activity introduces a product into the European Union for selling, financial leasing or any other fashion of distribution”.

Where neither the manufacturer or the importer may be identified for the purposes of this Act, Article 3 (3) sets forth a subsidiary clause whereby if the manufacturer is unknown the distributor is to be deemed the manufacturer unless in less than 3 months he can provide either the identity of the manufacturer or the person who supplied him the product. This rule too apply to importers. It is to note that while the Directive requires the supplier to identify the manufacturer “within a reasonable time” the Act expressly gives a period of 3 months for doing so. The liability of the potentially responsible persons is joint and several so the claimant can choose against whom to bring an actions whomever he wishes. Case law so has confirmed.

2.5. Defences.

Spanish case law has often made it clear that the liability is not absolute in that Article 6 lists a number of defences that may be risen by manufacturers and producers to avoid liability. In essence, Article 6 reproduces the defences of Article 7 of the Directive
whereby manufacturers and importers must therefore prove that: 1) the product was not put into circulation by the time of the damage; 2) in the view of the circumstances it is easily likely that the defect never existed before being put into circulation; 3) the product was not meant to be sold or imported; 4) the defect is the result of meeting the conditions and rules required by public authorities, 5) the state-of-the-art did not enable the manufacturer or importer to detect the defect. 6) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Finally, it must be borne in mind that in virtue of Article 6 (c) medicines and foodstuff meant to human consumption shall not benefit from the development risk. This proviso springs from Article 15 (b) of the Directive which allows Member States to decide on maintaining or not the risks developments defense of Article 7 (e) of the Directive. One may wonder why Spain did covered medicines and foodstuff under the risk development defence. One of the reasons may be the tremendous mass poisoning by means of industrialized oil that killed 300 persons and injured 1000 in 1981. Consumers of the so called colza oil did nor cover damages until 1997, when the Supreme Court held the Spanish Administration vicariously liable. The case did not only give evidence of the too far imperfect consumer protection law but also it provoked a bitter social and political turmoil. It is fair to admit that the idea behind this decision was simply a political one. It was stated that it will prove very difficult for the victim to prove the damage, the defect and the causal relationship between the two so producers will not often have to meet claims on this ground of liability. For liability is not absolute, the Act provides for reduction of the manufacturer or importer liability where the defendant has used the product or acted negligently.

Evidence is tackled by Article 5 which states that for the claimant to claim for damages he must prove the existence of the defect, the damage and the casual relationship between defect and damage. The question of evidence has further developed by case law which has been fairly strict as to the existence of a causal link. While the claimant has to show the defect, the damage and the causal link, case law has expressly admitted that evidence may not be direct and that presumptions and judgements of inference are acceptable since otherwise consumers would be unprotected.
2.6. Damages.

Quite surprisingly the Act does not provide for a definition of damage which is included in Article 9 of the Directive. Making use of the discretion afforded by the Directive, Spain, like Greece, Portugal or Germany, chose to establish a financial ceiling for damages which is not to be more than 90,000 Euros. Damages cover death and injury while moral harm remains governed by the civil code. The Act does not cover damages for nuclear accidents.

2.7. Statute of limitation.

Statute of limitation is for 3 years running from the date of the damage. The limitation period thus follows the directions of Article 10 of the Directive. In virtue of the discretion given by Article 10 (2) of the Directive, interruption of the statute of limitation rules is governed by the civil code. It was submitted in the decision Provincial Audience of Zamora, 7 May 2001 (airbag) [LINK], that the limitation period established in the Act takes priority over that established in the Civil code.

2.8. Conclusions.

To conclude one may assert that two are the most significant changes in the Spanish product liability system:

1. The end of privaty of contract since the Act sanctifies a vendor’s action against manufacturers, importers, distributors or seller.
2. The establishment of strict liability whereby the purchaser must show evidence of the damage, the defect and the casual link but not any subjective aspect of the vendor at all.
III. PRACTICE AND PROCEDURE

A. PRE-TRIAL OR PRE-ACTION DISCOVERY

The Court may commence preliminary actions such as the rights of the parties to begin actions, *res iudicata*,

B. EXPERT OPINION

Indeed, expert opinion is permissible in trial as a means of evidence and parties may bring experts to support their cases.

C. TRIAL ON PRELIMINARY ISSUES

D. FEES ARRANGEMENTS

The arrangement of contingency fees or *quota litis* is forbidden in Spain.

E. CLASS OR REPRESENTATIVE ACTIONS.

Litigation is mainly regulated in Spain by the Civil Litigation Act, hereinafter, CLA (Ley de Enjuiciamiento civil 1/2000) which governs most of the litigation rules. One of the most significant novelties of the new act (it came into force on 1 January 2001) is the express recognition of consumer association as legitimate parties to a dispute. Yet, it is worth mentioning that previous to the CLA the only legal recognition to class action was contained in Article 20 (1) of the Consumer Protection Act.

Indeed, Article 6 (7) includes “consumers or users groups” as legitimately entitled to be a party to a dispute. Consumers groups must meet two conditions to acquire capacity as a party to a dispute:
1. The number of consumers or users damaged must be determined or easily determined. The burden to so determine rests on the consumer organization.

2. The group must amount to the majority of the affected consumers.

In addition, Article 7 regulates the capacity to attend a trial and indeed it includes in Section (7) consumers and users groups. Article 11 devotes its wording to deal with class actions, once again emphasizing that consumers and users have capacity to represent the rest of the consumers affected. Those legally constituted consumers organizations will be legitimately entitled to proceed with legal actions. As was said earlier, the number of affected consumers must be determined so in case this number is undetermined it is for the Civil Litigation Act to name the most representative consumers association.\textsuperscript{53} It must be noted that using the class action does not preclude a consumer to later use an individual action.\textsuperscript{54}

\textsuperscript{53} Article 1261 Civil code.
\textsuperscript{54} In effect, in \textit{Donogue v Stevenson} [1932] Ac 562 HL the same problem was tackled and wisely overcome by Lord Atkin.
\textsuperscript{55} Note that the civil code uses the rather cryptic word vicios (vices) instead of daños (damages) which illustrates an significant lack of not only definitions but also of precise words.
\textsuperscript{56} As indicated above the civil code often lacks more accurate words, for instance, it uses not the word product but simply thing.
\textsuperscript{57} Article 1104 of the civil code defines negligence as “The omission of that diligence which is required by the nature of the obligations, and by the circumstances of people involved, time and place.”
\textsuperscript{58} “Nobody is liable for such events which cannot be foreseen or which, if foreseen, were unavoidable”.
\textsuperscript{59} Article 1486.
\textsuperscript{60} Article 1964.
\textsuperscript{61} The article reads as follows: “A party shall be liable for damages whenever he has acted negligently performing his contractual obligations”.
\textsuperscript{62} The article reads as follows: “Whomsoever causes damage to another person by an act or omission and with negligence or fault is liable for the damage caused”.
\textsuperscript{63} It must be noted that quite contrary to English law Spanish law lacks a catalogue of different torts.
\textsuperscript{64} As other Roman Law jurisdictions Spanish law holds two different sets of Private Law Codes: one for individuals and the other one for businessmen.
\textsuperscript{65} \textit{“The Likely Impact Of The Act Of 6 July 1994 Implementing The EC Directive On Product Liability In Spain.”} Martin Casals (1995) 6 EBLR 37, 41
\textsuperscript{66} Article 51 in full reads as follows: 1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests. 2. The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law. 3. Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products.
\textsuperscript{67} Article 53.3 in full reads as follows: Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.
force 1 September 2004), Ley 23/2003 de Garantías de los Bienes de Consumo.

17 Article 2 (1) (a).
18 Product Liability In Spain, Mullerat.R. 1993 (21) IBL 329
19 Article 25.
20 Article 26, in fine.
21 Article 1968 (2) Civil code.
22 Article 19 (1) reads as follows: “Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.”
25 Final Proviso 4.
26 Article 1 of the Consumer Protection Act clearly states that “(…) the Act aims at defending consumers and users (…)”.
27 Provincial Audience Albacete, 9 March 2000, (gas) [LINK]
28 Article 2.
29 Article 334 (3) of the Civil code.
30 Provincial Audience Albacete, 9 March 2000, (gas) [LINK]
31 Article 15 (a) of the Directive reads as follows “Each Member State may: (a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive ‘product’ also means primary agricultural products and game.
32 Article 3 (1)
33 Article 1.
34 Article 3 (2)
35 Article 26.
36 Article 4 (3)
37 Article 3 (3)
38 Article 7. [LINK]
39 Provincial Audience Cantabria, 7 November 2000 (defective bottles). [LINK]
40 Article 15 (b) of the Directive reads as follows: Each Member State may by way of derogation from Article 7 (e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.
42 Article 9.
43 Provincial Audience of Huesca, 18 April 2000 (pharmaceutical products) [LINK]
44 Provincial Audience of Cantabria, 7 November 2000 (defective bottles) [LINK]
45 Article 16.
46 Article 11.
47 Article 10 (2)
48 Article 10 (3)
49 Article 1961 ff. Civil code.
50 B.O.E. 7 January 2000.
51 The Article puts forward a catalogue of the functions of consumers organisations, inter alia “…to represent it members and to exercise legal actions in their defence…”
52 Article 6 (7) in full reads as follows: “Consumers and users groups affected by a damage may be a party to the dispute provided they are determined or easily determinable. For the group to suit it is necessary to be constituted by the majority of the damaged consumers”.
53 Article 11 (3).
54 Article 11 (1) consecrates the right of consumer associations to bring actions “without prejudice to the individual right of their members…”