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Introduction

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Product liability and overlapping interests

The essence of product liability is the apportionment of the risks inherent in the modern mass production of consumer goods. A choice must be made as to who should bear these risks: the victim, the state or the manufacturer?

Despite this apparent simplicity, the law of product liability is indeed a complex one, lying as it does on the overlap of a series of different matrices. In terms of substantive law, the law of contract and the law of tort make up one layer of rules, with oft-conflicting concepts and approaches. To this, a supranational stratum has been added. The European Directive on Product Liability has brought an important dimension of European Community law,[1] with the introduction of terms often alien to the national systems, such as 'putting into circulation' or 'defect', as well as the technical debates over competence and levels of harmonisation brought about by the European legislation. The law of product liability is further complexified due to the superposition of a myriad of other domestic rules stemming from the broader legal framework of consumer law, procedures governing damages claims, and, in some scenarios, the application of notions of public law.[2]

This complex legal framework must also be set within the broader policy debate. The framing of product liability regulation has been underpinned by a stark debate with conflicting viewpoints, on occasion

Any opinions expressed in this piece or mistakes made are those of the authors personally, and do not represent the views of the Commission.

[1] Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), OJL 210.

[2] See e.g. Conseil d'Etat, 3 March 2004 (State liability for failure to take preventive measures to reduce risks of work-related asbestos exposure). The text of this judgment and analysis of the decision may be found on the BIICL Product Liability Database, which may be accessed at www.biicl.org.

characterised as a struggle of consumer versus industry. Avoiding such oversimplification, account must nonetheless be taken of the important macro debate about how the varied interests of the victim, the producer, the insurer, the distributor *et al.*, should be correctly accommodated within the architecture of product liability regulation. At the core of any system for civil liability is the concern for the correct provision of compensation. There is however a recognition that in framing the law in this area, account must be taken of broader considerations, including the availability of alternative means of financial support such as insurance payments and social security awards, broader societal concerns about the function of the tort system, as well as the rights of the defendants, a consideration referred to in the contribution by Christopher Hodges as 'commercial continuity'.[3]

The European Directive and harmonisation

The factors which led to the intervention of the European legislator in this area of the law are significant.[4] Under a broad consumer-protection agenda, the Commission's attention settled on civil liability, with reform of the European-wide product liability at the forefront. Underpinning the development of the Directive were the parallel but distinct concerns of, on the one hand, the US-influenced review of commercial sale and supply of goods, and, on the other, the potent impact of the European-wide thalidomide drug tragedy in the 1960s and the inadequate response of traditional contract (warranty) and tort law to the plight of the victims.[5]

After protracted negotiations at a supranational level, partly due to the conflicting policy considerations described above, the European Product Liability Directive was eventually adopted.[6] The Directive was introduced as an internal market measure under Article 100 of the Treaty, which concerns the harmonisation of laws directly affecting the establishment of the common market. Nonetheless, there has been a good deal of debate whether the measure should correctly be perceived as an internal market or rather as a consumer protection initiative. In the contributions to this

[3] See chapter 11.
[4] Generally, see J. Stapleton, *Product Liability* (London: Butterworths, 1994) chapter 3.
[5] Ibid.
[6] Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), OJL 210.

book, we shall see that the European Court of Justice seems to have preferred the internal market argument. As a result, it has been decided that the Directive was intended to effect a 'complete' and not 'minimum' harmonisation.[7] As a consequence, Member States cannot increase consumer protection other than in areas where this was provided for expressly by the Directive.

A series of obstacles to this goal of maximum harmonisation remain. As a consequence of political compromises, Member States were presented with a menu of options and add-ons under the Directive, covering the development risks defence, the exclusion of primary agricultural produce and game[8] and a ceiling on personal injury damages. Moreover, many of the concepts in the Directive are left undefined, such as the crucial notion of 'putting into circulation'.[9] Even where a definition is given, the margin for manoeuvre in interpretation can be large.[10] Thus the core notion of 'defect' of a product is defined as when a product does not 'provide the safety which a person is entitled to expect'.[11]

Crucially, under the Directive, various key elements of a product liability action are simply left to domestic law, including areas as fundamental as causation, remoteness of damage, standard of proof, contributory acts, assessment of damages, procedure and rules of discovery. Over and above these areas specifically left outwith the Directive, Article 13 of the Directive leaves open the possibility of a co-existence of product liability systems. We shall see that these parallel systems play an important role in countries such as France (where the innovative *Cour de Cassation* case law on no-fault liability can be considered markedly pro-claimant),[12] and Germany (where the thalidomide tragedy resulted in a statutory no-fault regime for liability in pharmaceutical cases).[13]

[7] See Case C-183/00 *Gonzalez Sanchez v Medicina Asturiana SA* [2002] ECR I–3901; Case C-52/00 *Commission v France* [2002] ECR I-3827.

[8] Subsequently amended: Directive 99/34 OJ 1999 L 141/20.

[9] See Articles 6, 7 and 11 of the Directive. Under the French provisions, a further gloss is thus given on the notion of 'put into circulation', as follows: 'A product is put into circulation when the producer has voluntarily parted with it. A product is put into circulation only once' (Article 1386–5 of the Civil Code).

[10] Note also that linguistic variations have themselves engendered further divergences. The differing interpretation of the Article 9(b) exclusion of the first 500 euros of property damage between a lower-limit cut-off point or a non-claimable insurance-style 'excess' are examined in the contributions to this book.

[11] See Article 6 of the Directive.

[12] See chapter 5 on product liability in France.

[13] See chapter 6 on product liability in Germany.

Clearly, given these potential divergences, it is crucial to compare and contrast the national courts' stances in order to assess the success of the objective of unification. We turn thus to the role of comparative law.

Product liability: why compare?

Comparative law is increasingly recognised as an essential reference point for judicial decision-making. Whilst the English courts have long been open to considering how legal problems are solved in other jurisdictions, and in tort cases the courts have even showed an interest in looking further afield than common law jurisdictions,[14] the recent case of *Fairchild v Glenhaven Funeral Services Ltd* has further reinforced this trend. In his judgment, Lord Bingham conducted a comparative law survey on a point of causation and declared that:

> Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world . . . there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.[15]

The growing use of comparative law poses a challenge to judges and counsel. It is recognised that scholarship also has an important role to play in making comparative material available in a systematic manner. The role of comparative law in the judicial process is subject to increasing scrutiny, covering topics as diverse as the relevance and weight of comparative law arguments, to the practical aspects of how to present those arguments to a court or the accessibility of source materials.[16]

[14] See e.g. *McFarlane v Tayside Health Board* [2000] 2 AC 59, 73 and 80–1; *Henderson v Merrett Syndicates* [1995] 2 AC 145, 184; *White v Jones* [1995] 2 AC 207, 263.

[15] [2002] UKHL 22, para 32. Lord Rodgers also observed that '[t]he Commonwealth cases were supplemented, at your Lordships' suggestion, by a certain amount of material describing the position in European legal systems . . . The material provides a check, from outside the common law world, that the problem identified in these appeals is genuine and is one that requires to be remedied' (para 165).

[16] See generally Guy Canivet, Mads Andenas and Duncan Fairgrieve, *Comparative Law before the Courts* (London: BIICL, 2004).

Comparative law has a particularly important role to play in the development of European Community law. For, unless there is an exchange of judgments of national courts on the application of Community law, then any goal of harmonisation becomes illusory. Harmonisation cannot solely be achieved simply through legislative initiative. It must also be fostered by means of debate between the legal communities of the Member States, and an exchange of the decisions applying and interpreting that primary legislation.

This comes to the fore in the application of the Product Liability Directive. The potential role for comparative law, as well as the challenges that it poses, are well illustrated in the seminal product liability case of *A v National Blood Authority*,[17] in which Mr Justice Burton drew extensively upon comparative law as a core aspect of his decision-making.[18] His Lordship opined that:

> I have had the great benefit of detailed submissions in writing, and some ten days of exegesis and argument orally in opening and closing by leading counsel, just on the law, including authorities and academic writings from France, Germany, Spain, Portugal, Sweden, Denmark, Belgium, Italy, Holland, Australia and the United States, as well as the United Kingdom and the European Court.

It is thus clear that the harmonisation effort does not end with the mere implementation of the Product Liability Directive. The success of the enterprise is likely to depend upon the harmonised *interpretation* of the provisions by the national courts. It is hoped that in some way this publication, as well as the Product Liability Database developed by the British Institute,[19] will participate in this laudable endeavour of achieving 'a higher and consistent level of consumer protection throughout the Community'.

Contents of the book

There have been a number of learned publications examining European product liability in comparative perspective.[20] Any comparative study of

[17] [2001] 3 All ER 289; [2001] Lloyd's Rep Med 187.
[18] For detailed discussion, see chapter 2.
[19] For more details of the BIICL Product Liability Database, see www.biicl.org.
[20] See e.g. P. Kelly and R. Altree (eds.), *European Product Liability* (London: Butterworths, 1992); G. Howells, *Comparative Product Liability* (Dartmouth: Ashgate, 1993); A. Geddes, *Product and Service Liability in the EEC* (London: Sweet and Maxwell, 1992); D. Campbell and C. Campbell (eds.), *International Product Liability* (London: LLP, 1993); C. Hodges (ed.), *Product Liability: European Laws and Practice* (London: Sweet and Maxwell, 1993).

product liability can at best give a snapshot of the law at a given time, as the legal provisions and decisions constantly develop. However, the time is clearly ripe for a re-evaluation of the present state of the law through an examination of the reception of the European Directive in a number of European countries, both long-standing Member States as well as New Member countries.

The contributions to the book are divided between a series of discrete reports on the state of product liability in individual countries, and contributions which examine the issues from a horizontal approach, analysing developments from a European perspective or presenting and comparing approaches in different legal systems or across a region.

In the first part of the book, 'Country reports', accounts are given of the legislation and case law on product liability in individual countries. Much of this analysis is concerned with the way in which the European norm has been integrated into the national legal systems, raising issues governing the reception of an external legal notion into a pre-existing national system. The reception of the Directive is illustrated in a representative series of Member States, encompassing both common law and civil law countries, including England, France, Italy, and Spain. Commencing with a rich comparative law analysis by the protagonists (counsel and judge) in the English case of *A v National Blood Authority*,[21] undoubtedly the leading judicial analysis of product liability provisions in any of the Member States,[22] contributions then follow covering developments in Continental systems.

A number of common themes can be identified in the contributions in this section. First, and unsurprisingly, the theme of harmonisation underpins many of the contributions. The authors thus undertake an assessment of the way in which the national systems have received the new European norm, the way in which the substantive law has been transformed, and how far the process of harmonisation has been achieved.

Second, and linked to the first, the contributions highlight the growing importance in the Member States of the taking into account of solutions adopted in other systems. A cross-fertilisation of judicial solutions is recognised as increasingly important. This is most strikingly evident in the aforementioned English case of *A v National Blood Authority*.[23] Over and above this, Professor Cees van Dam explains how the Dutch Supreme Court DES case has attracted international interest.[24] Nonetheless, it is

[21] [2001] 3 All ER 289; [2001] Lloyd's Rep Med 187.
[22] For detailed analysis of this case, see chapter 2.
[23] [2001] 3 All ER 289; [2001] Lloyd's Rep Med 187.
[24] See chapter 7.

clear that much remains to be done to enhance this comparative law exchange. The methodology for facilitating and encouraging this process is a point that is developed in other contributions.[25]

Third, and in contrast with these initial themes, it is important to note that in the various Member States, there is evidence of a continuing vitality of the parallel regimes of liability. This is partly due to substantive reasons, where the pre-existing systems in some respects offer more favourable solutions (see for instance Italy and France),[26] and partly due to inertia created by lack of familiarity with the new regime.

Fourth, it is clear from the contributions that difficulties of interpretation continue to prevail. This is well-illustrated in the detailed analysis of Professor Martín-Casals,[27] who analyses the Spanish cases with a fine-tooth comb, and observes that whilst the court decisions show that the judges are grappling with the issues, there has nonetheless been a number of judgments which are ambiguous or equivocal on crucial issues under the Directive. The European judiciary are thus undergoing a compulsory education in the thinking underpinning the Directive, in respect of which the learning curve is steep![28]

Fifth, on a similar theme, many of the contributions highlight the recurring theme of the problem of access to justice, which is left outside the scope of the Directive. The small number of cases under the Directive across Europe is attributed in part by Dr Rajneri in her paper on Italy to the difficulty,[29] as contrasted with the US, in funding the development of products claims. This concern underlines the importance of the procedural environment on the successful assertion of substantive rights, a factor which has been highlighted by studies undertaken into the operation of the Directive.[30]

In the final contribution in this section, Professor Howells traces the English case law on the notion of defect.[31] Beyond the substantive law, his contribution examines the way in which the English product liability decisions make a case study for the development of European private law. This piece thus provides a bridge between the country report section and the further contributions, which take a more lateral perspective.

[25] See in particular chapter 8, 'Defect in English law – lessons for the harmonisation of European product liability' by Professor Geraint Howells.
[26] Respectively chapters 4 and 5. [27] See chapter 3.
[28] See the words of Mr Justice Burton in the Foreword to this book.
[29] See chapter 4.
[30] See Lovells, *Product Liability in the European Union: a report for the European Commission, February 2003*, Markt/2001/11/D.
[31] See chapter 8.

Moving beyond the country-based analyses, Part II, 'European influences', adopts a horizontal approach to the topic, analysing the way in which the concepts in the European norm have been applied and developed across the Member States.

Professor Dr Hans Claudius Taschner provides an authoritative opening to this part.[32] As the person most closely associated with the genesis and drafting of the Directive, he expands his views on the current state of the harmonisation process in uncompromising fashion. He highlights three recurrent themes: the debate over the standard of liability arising from the Directive, the ceiling on the amount of damages and the vexed question of the development risks defence.

The issue of the development risks defence is then taken up in some detail by Mark Mildred, combining the viewpoint of a practitioner and academic.[33] This is a timely contribution at a point where the very existence of the defence is currently under review by the European Commission, and an important report into the economic effects of the defence has been undertaken.[34]

In his paper, Christopher Hodges points out that the picture across Europe in relation to the substantive law on liability contains a number of variations and that certain decisions fragment the appearance of harmonisation.[35] This complex situation is accentuated by divergences in the areas of access to justice, litigation procedure and levels of compensation.

As a conclusion to this part, Professor Howells analyses the harmonisation debate from a supranational and Member State perspective.[36] Using the central concepts of defect and the development risks defence to show that constructive steps need to be taken to clarify key elements of the Directive in order to facilitate the harmonisation process, Professor Howells makes the important point that harmonisation can only be advanced if cross-border dialogues are encouraged and enhanced. He thus makes

[32] See chapter 9. [33] See chapter 10.

[34] The Report of the Fondazione Roselli was submitted in June 2004. The overriding conclusion of the Report was that the economic impact of removing the development risks defence would be significant and therefore the defence should not be removed. In the report, it is argued that the removal of the development risks defence from the Directive would lead to a decrease in product variety, radical innovation by producers and basic research into new products. Insurance costs would also rise and in some cases risks would become uninsurable. The report recommends however that the Commission create a compensation fund at an EU level as a means for guaranteeing protection from product development risks.

[35] See chapter 11. [36] See chapter 12.

a powerful plea for the creation of common communication structures, such as the development of case law databases.[37]

Part III, 'Comparing systems', brings together a series of papers comparing products legislation and cases across a number of different jurisdictions.

Simon Taylor analyses two very different legal systems, England and France.[38] Taking these countries as representatives of the civil law and common law legal families, Dr Taylor's analysis is a case study in the effect of the harmonising goal of the Directive. Dr Taylor notes that despite the objective of maximal harmonisation, there still appears to be considerable divergence in both systems, due in large part to the continuing co-existence of, and, in France, the preference for, pre-existing parallel liability systems.

The European theme is continued in the contribution of Magdalena Sengayen which touches upon a topic largely unexplored in Western academic writing, that of the product liability laws in Central Europe, namely Poland, the Czech Republic and Hungary.[39] This is a crucial subject both in practical terms, due to the developing economic importance of the New Member economies, and in conceptual terms, due to the impact of enlargement on the broader harmonisation process. Dr Sengayen develops the argument that while the substantive provisions of the Directive are not likely to cause an upheaval in Central Europe as product liability provisions have never been considerably different from those in Western Europe, the surrounding context of institutional and procedural basis of the Central European product liability regimes is indeed undergoing a profound transformation.

In the two final chapters of this book, the focus of analysis shifts beyond Europe to analyse developments further afield. Professor Jane Stapleton, the leading authority on product liability, examines and compares developments within the US and Europe, taking as a focus the increasingly controversial topic of pathogenically infected products, such as bacterial and viral infection of products, and diseases such as Creutzfeldt-Jakob Disease (CJD).[40] Dr Luke Nottage examines the impact of the principles underpinning the European Directive in Japan.[41]

For ease of use, the text of the European Directive on Product Liability is included in an Appendix to this book.

[37] See footnote 19 above. [38] See chapter 13. [39] See chapter 14.
[40] See chapter 15. [41] See chapter 16.

PART I

Country reports