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## Introduction to fault in product liability

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### 1 Introduction

What are the factors that influence the way in which law develops in modern legal systems? Are these factors the same or similar in legal systems with different legal traditions, histories and institutions? To what extent is the development of the law in any particular legal system isolated from the development of the laws of other systems?

A response to these questions is of central importance to an understanding of existing laws, the nature of their interrelationships and their continuing differences. It is the purpose of the European Legal Development project – directed by Professors John Bell and David Ibbetson of the University of Cambridge and supported by the AHRC – to explore these important questions in the context of the development of the laws of a number of European countries. In order to do so, they decided to use a particular (though still very broad) area as a way in which to identify at least some of the factors influencing legal development, this area being civil liability for ‘fault’ since 1850. At this stage, the directors of the overall project consulted with a number of scholars working within the fields of civil law, comparative law and legal history so as to find a mechanism or mechanisms by which the exploration of the history of this very broad area could be managed across a number of laws. The mechanism chosen was to set six sub-topics for consideration, these topics chosen for their legal theoretical or practical significance. This book results from the work undertaken by a group of scholars on one of these sub-topics: the development of product liability in Europe over the period in question. At a second stage of the overall project, it is intended for groups of scholars to look at particular factors forming legal development, for example the legal and philosophical ideas informing the development of European private law.

The group was brought together at Cambridge by the directors of the overall project, and convened by the writer of this introduction; as a result, the laws to be included in the project were the following (with the names of

the responsible scholars in parentheses): English law (Simon Whittaker); French law (Jean-Sébastien Borghetti); German law (Gerhard Wagner); the law of the Netherlands (Ivo Giesen); Italian law (Nadia Coggiola); and Spanish law (Miquel Martín-Casals and Josep Solé Feliu). The working method of the group was the following: firstly, we agreed to focus our work on ‘product liability’, understood as the liability of manufacturers and suppliers of products in respect of death, personal injuries and damage to property that these products cause, though we realised that this focus would not be seen as legally significant (nor even wholly sustainable) at all times since 1850 in all the laws to be studied. The purpose of this focus was to put aside questions purely concerned with liability in respect of failures in the conformity of products with contractual stipulations, with qualitative defects (as contrasted with defects of safety) and with their functional inadequacy (again, except where this related to safety). Having said this, however, we explicitly wished to explore the variety of conceptual techniques used to impose liability on manufacturers and suppliers for physical injuries, whether these were contractual, delictual or tortious, or expressed in some other special terminology.

The members of the group were then asked to explain the development of product liability in the above sense for the century and a half since 1850 in the context of their own law. In this respect, we decided not to compose and respond to an elaborate questionnaire, nor even follow a set of strict guidelines, as we agreed that this would too easily constrain both the content and the style of argumentation of the contributions – and perhaps give them a rather English law bias given the background of the convenor and the directors of the overall project. However, each contributor had clearly in mind that the main aim of the project was to use the modern history of product liability as a context for the identification of factors in legal development. We therefore thought it helpful to refer to a number of questions on which each contributor should include discussion in their work, even though the manner of doing so was left to their own choice:

- (i) Was the area significant in relation to the wider development of conceptual analyses of liability?
- (ii) What were the relative roles of the different protagonists in legal development, both internally (notably, the legislature, the courts and legal scholars) and externally (notably, in the context of product liability from the USA or European Community (EC) law)?
- (iii) What relationship (if any) has ‘product liability’ borne to other special grounds of liability, such as employer’s liability or the liability of a *gardien*?

- (iv) What was the *view* taken as to the significance of insurance and, in particular, liability insurance in the development of product liability? and
- (v) Were any factual contexts particularly significant for the changes in approach to product liability?

After the contributors had supplied their individual papers, the group met at Cambridge and discussed an outline of the factors that the convenor had identified as significant. The remainder of this introduction is based on a more considered version of this outline, together with comments and suggestions from members of the group and from the directors of the wider project. Firstly, I shall consider the identification of the topic of product liability. Secondly, I shall sketch out a broad chronology of developments of the law in this area over the last century and a half. Thirdly, I shall explain some of the difficulties encountered in relation to the standard of liability to be imposed in the laws under consideration, whether for ‘fault’, negligence, a presumption of fault or strict liability. Fourthly, I shall explore some of the factors at work in relation to the developments in the law earlier set out.

## 2 Liability for products and product liability: the identification of a topic and the language that surrounds it

An initial problem relates to the characterisation or labelling of the topic itself, which has undergone a very notable evolution, for there are two ways in which we can now use the expression ‘product liability’ and its various linguistic counterparts in the other laws under consideration. On the one hand, we can use it in a broadly descriptive way to denote the possible civil liabilities that manufacturers (and certain other categories of person, such as suppliers or importers) may incur for physical (and possibly other) damage caused by their products; in the remainder of this introduction, I shall refer to this usage as ‘liability for products’. These liabilities may themselves be based on the involvement of a ‘product’ or of manufacturers or others in the chain of their distribution, but they may instead be based on other grounds, notably the defendant’s fault or a failure to perform a contractual undertaking. On the other hand, we can – and in the European context, after implementation of the EC Product Liability Directive,<sup>1</sup> often do – use ‘product liability’ to describe

<sup>1</sup> Council Directive 1985/374/EEC of 25 July 1985 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7 August 1985, 29 (The ‘Product Liability Directive’).

a distinct legal basis for the imposition of liability on manufacturers and suppliers for damage caused by their products (and therefore falling within the broadly descriptive usage), the liability explicitly resting on the involvement of a 'defective product' and explicitly imposed on those involved in its production and/or distribution. In the following discussion, I shall keep the expression 'product liability' for this specific legal usage.

One of the most striking features of the law in Europe in this area is that the ways in which we can properly use these terminologies reflect changes in understandings of the law itself. So, in the nineteenth century, our study of 'liability for products' in most – if not all – of the legal systems studied is rather an anachronistic undertaking: we can identify the situations (and legal bases) of manufacturers' liability, but lawyers at the time would not see these situations as having any special common feature. Later, in the early to mid twentieth century, we find lawyers (whether scholars or judges) in some legal systems identifying the liability of manufacturers for harm caused by their products as a distinctive *factual* problem requiring a degree of special legal response, even while still treating this legal response as part of a broader basis of liability. This can be seen most clearly in English law in the leading case of *Donoghue v. Stevenson*,<sup>2</sup> which marked both the independence from contract of a more generalised tort of negligence around the so-called 'neighbour principle', and the specific recognition *under this heading* that a manufacturer could be liable for its negligence for personal injury caused by its product.<sup>3</sup> Owing in part to the factually contingent nature of the force of English precedent, this decision marked out a certain particularity of liability for products underneath a much more general legal heading. A similar way of thinking can be seen in French law's treatment of the *action directe en garantie*, where the liability of a *vendeur-fabricant* to buyers and sub-buyers was seen as distinctive, even though it was still part of the traditional law of sale.<sup>4</sup> A further step can be seen in the later twentieth century (and in particular from the 1970s) when some legal scholars began to see liability for products as a *legally* distinctive problem requiring its own analysis (and articles or books), even though the positive law (in the codes and in the courts) remained based on other, more traditional concepts.<sup>5</sup> In the mid 1970s, this was clearly influenced both by a growing acquaintance with the work of US courts and the American

<sup>2</sup> [1932] AC 565.    <sup>3</sup> Chapter 2, pp. 69–75.    <sup>4</sup> Chapter 3, pp. 91–3.    <sup>5</sup> Below, pp. 20ff.

*Restatement on Torts*<sup>6</sup> and by the early work of the Council of Europe,<sup>7</sup> and then the EEC Council on the harmonisation of ‘product liability’ at a European level. Finally, this intellectual influence was transformed into a legally necessary effect, a ‘forced legal transplant’<sup>8</sup> of specific ‘product liability’ into the laws of all EC Member States by the creation and implementation of the EC Product Liability Directive of 1985.

Perhaps rather surprisingly, however, this formal recognition of product liability as a legal – indeed, a *legislative* – category has not lessened the importance in practice in the laws of a number of Member States of liability for products in its wider, descriptive sense; in fact, the contrary is rather the case, for the fairly limited nature of the new law of product liability and its interpretation by the European Court of Justice (ECJ) as requiring a ‘complete harmonisation’ of liability on the terms that the Directive sets out has led some Member States to rely even more on *other* grounds of liability for the imposition of liability on producers and suppliers in respect of harm caused by products: producer liability for products developed both in parallel to and beyond ‘product liability’.<sup>9</sup>

There is a further aspect of this labelling of liability and its changing significance, for the terminology used by lawyers in referring to liability for products (and especially in the case of product liability) is overtly related to two important changes occurring in the wider economic and social contexts of European laws from the middle of the nineteenth century. Firstly, it explicitly evokes *production*, and implies that production should itself (and at least sometimes) attract liability, typically in respect of goods and archetypically *industrial* goods (although there is a certain ambivalence here<sup>10</sup>). To an extent, this terminology may simply reflect

<sup>6</sup> American Law Institute, *Restatement on Torts*, 2nd edn (West Publishing, St. Paul, MN, first published 1965), esp. para. 402A.

<sup>7</sup> Council of Europe, European Convention on products liability in regard to personal injury and death of 27 January 1977, E.T.S. No. 91 (hereafter ‘European Convention’).

<sup>8</sup> The expression is B. Rudden’s: ‘Forced Transplants’ (2006) 10(1) *Electronic Journal of Comparative Law*.

<sup>9</sup> Case C-52/00 of 25 April 2002, *Commission v. France* [2002] I-3827; Case C-154/00 of 25 April 2002, *Commission v. Greece* [2002] ECR I-3879; Case C-183/00 of 25 April 2002, *González Sanchez v. Medicina Asturiana SA* [2002] ECR I-3901 (hereafter ‘European Court decisions of 2002’), and see below, pp. 25–6.

<sup>10</sup> This ambivalence can be seen in the treatment of food as opposed to industrially manufactured goods such as cars or lawnmowers. So, while in the later nineteenth century, liability for adulterated food formed an important context for liability for products, by the time of the Product Liability Directive, the new product liability was first tied to ‘processing of an industrial nature’ so that ‘primary agricultural products’ (that

the terminology used by American lawyers from the 1930s, whose work on liability for products was later plundered by European lawyers; but it may also, in part, reflect an adoption of first English and then later (and even more) American practices of mass industrial production, though these developments (and their accompanying changes in distribution patterns) occurred more slowly on continental Europe than in the UK.<sup>11</sup> If the US vehicle manufacturer Ford was famous for its methods of mass production, and the US carbonated drinks producer Coca-Cola for its international marketing and distribution, liability for motor vehicles and carbonated drinks was prominent in the US case law of product liability.<sup>12</sup> These economic developments – and later the prominence of pharmaceutical liability after Contagen/Thalidomide – formed the cultural context of the emerging new European law of product liability; indeed, one could go so far as saying that American legal concepts were imported into Europe just as much as (though a bit later than) US manufactured goods and US manufacturing techniques.<sup>13</sup>

There is, moreover, a noticeable contrast here with the traditional language used to clothe the law governing liability for products (in the descriptive sense) before the language of product liability itself took root. In the English common law context until 1932, we see the language not of production but rather of commerce – trade rather than industry. So, until *Donoghue v. Stevenson's* landmark decision of that year, the law of sale of goods dominated liability for products, and the main concern of this area of the law was with the liability of one trader to another trader

is, unprocessed food) was excluded from its ambit. This exclusion was then jettisoned as a direct result of the political effects of 'Mad Cow Disease': (Directive 99/34/EC of the European Parliament and of the Council of 10 May 1999, and see S. Whittaker, *Liability for Products: English Law, French Law and European Harmonisation* (Oxford University Press, 2005), 446–7.

<sup>11</sup> S. Strasser, C. McGovern and M. Judt (eds.), *Getting and Spending* (Cambridge University, New York, NY, 1998), 5 ('developments during the second half of the twentieth century represent both an expansion and an intensification of changes already under way before the [Second World] war'); V. de Grazia, 'Changing Consumption Regimes in Europe 1930–1970' in *ibid.*, 59 at 69–74. Cf. Chapter 2, p. 91 (referring to a legal scholar in 1955 tying changes to manufacturers' liability to changes in production and marketing).

<sup>12</sup> Notably, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (NY 1916) (Cardozo J. allowing liability in tort for negligence in a manufacturer despite the absence of privity of contract – a case cited with approval by Lord Macmillan in *Donoghue v Stevenson* [1932] AC 562 at 617; *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944) (accepting a presumption of negligence in certain situations); *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69 (NJ 1960) (privity not applicable to claim for breach of seller's strict warranties).

<sup>13</sup> See below, pp. 43–4 and Chapter 4, p. 121.

in respect of defects of function ('reasonable fitness for purpose') or of 'merchantability',<sup>14</sup> and the ambit of liability was contained within the bounds of the parties' bargains by means of contractual privity. This way of thinking can be seen very clearly in Lord Buckmaster's speech dissenting from the majority position in *Donoghue v. Stevenson*, for Lord Buckmaster saw the majority's approach as being 'simply to misapply to tort doctrine applicable to sale and purchase'.<sup>15</sup> In his view, the tort of negligence should not be used so as to impose liability for defects to apply beyond privity of contract; but after *Donoghue v. Stevenson*, manufacturers' liability had to be seen as a recognised head of liability in an independent tort of negligence.

Until the 1950s, the language used by continental civil lawyers to clothe 'liability for products' was even more pre-industrial in outlook as it remained redolent of the classical law of Rome, even though the rules themselves had been subject to a great deal of generalisation from their ancient sources.<sup>16</sup> So, in these laws during the nineteenth and first half of the twentieth century, liability for products could rest either on special rules governing a seller's liability for latent defects (a liability first imposed by Roman magistrates in respect of slaves and cattle), on special contractual undertakings or on a general principle of liability for fault, sometimes still referred to as 'Aquilian liability' after the Lex Aquilia of the third century BC.<sup>17</sup> However, the civil laws of sale of the nineteenth and earlier twentieth century were by no means as commercial in their assumptions as the English. Liability was placed by the civil codes themselves on *sellers* rather than on *traders*, and, in principle, 'liability' was limited to partial or full repayment of the price, liability in damages being imposed only where the seller had knowledge of the property's defects.<sup>18</sup> Moreover, the law of sale was not restricted to goods, but was extended to immovable property, the paradigm of the contract laws of the civil codes long remaining agricultural rather than commercial or

<sup>14</sup> This is not to say that the law of sale of goods did not apply for the benefit of non-trading buyers (see the examples in Chapter 2), but rather that it was not drawn up nor generally interpreted with them in mind. Later, this commercial focus was thought inappropriate for the consumer context, with the result that 'merchantable quality' was changed to 'satisfactory quality': Chapter 2, p. 84.

<sup>15</sup> [1932] AC 562 at 577. <sup>16</sup> Below, pp. 10–12.

<sup>17</sup> So, some older French authors refer to liability under arts. 1382 and 1383 as being '*une responsabilité Aquillienne*'.

<sup>18</sup> Below, pp. 10–11.

industrial:<sup>19</sup> indeed, commercial sales were kept rather out of the normal analysis (*le droit commun*) by their possessing their own distinct doctrines.<sup>20</sup> Only in the second half of the twentieth century do these paradigms really change, with, for example, French lawyers overtly recognising in the 1960s that the trader (*vendeur professionnel*) should be liable in damages for defects in the property sold based on an irrebuttable and entirely fictitious presumption of knowledge.<sup>21</sup>

There is a further interesting aspect of the terminology surrounding liability for products: its relationship to consumerism and consumer protection. So, a few years after the quite wide development in the 1950s of pressure groups,<sup>22</sup> and a wider consciousness of the need to protect consumers (both in terms of their safety and their financial well-being), we can see the extension or reinforcement of *contractual* rights for consumers in a number of European laws, sometimes expressly tied to buyers being consumers or 'dealing as' consumers.<sup>23</sup> Here, then, liability for products was extended as a consequence of the concern for the development of consumer rights.

However, the Product Liability Directive itself is more ambivalent here. It is true that the preamble to the Directive cited consumer protection frequently as a justification for its enactment and for some of its provisions,<sup>24</sup> but it coupled this with the economic concerns of the internal market (that is, the establishment of a level playing field for competition and the removal of disincentives to cross-border trade).<sup>25</sup> These economic concerns were primary in the sense that they were the ones that justified

<sup>19</sup> An example here may be found in the mid nineteenth-century explanation of the significance of the *bref délai*, within which a claim had to be brought by a buyer on the grounds of the property's latent defects, the leading commentators referring to the different periods customary within different parts of France and as regards different types of livestock: M. Troplong, *Le droit civil expliqué, De la vente*, 3rd edn (Paris, 1837), Tome 2, Table between 14 and 15 noting various local customs. One of the few examples of the recognition of *lésion* (gross inequality of bargain) was in the law governing sale of immovable property at an undervalue: art. 1674 *Code civil* (which was also Roman in origin).

<sup>20</sup> For example *laissé pour compte* (a form of unilateral termination by the buyer): A. Bénabent, *Droit civil, Les contrats spéciaux civils et commerciaux*, 5th edn., (Montchretien, Paris, 2001), 127.

<sup>21</sup> Chapter 3, pp. 95–6.

<sup>22</sup> The Consumers' Association was founded in England in 1956; Union fédérale de la consommation in France in 1951; Nederlandse Consumentenbond in 1953 and a European group of consumers' associations in 1962: Matthew Hilton, *Consumerism in Twentieth-Century Britain* (Cambridge University Press, 2003), 301.

<sup>23</sup> For example in the English context, Consumer Credit Act 1974 and Unfair Contract Terms Act 1977, esp. ss. 6 and 12.

<sup>24</sup> Recitals 2, 3, 5, 6, 8, 9, 12, 13, 15 and 17. <sup>25</sup> Recital 1.



the EC Council's competence to enact the Directive,<sup>26</sup> a competence that later had a direct influence on the European Court's decisions in 2002 that the Directive establishes within its ambit a 'complete harmonisation', rather than merely a minimum standard.<sup>27</sup> The upshot of this decision was that consumer protection came second to the perceived requirements of the internal market, as it required Member States to cut down their legislative implementation of the Directive so as not to protect consumers beyond the terms required by it.<sup>28</sup>

There is also a more technical way in which the Product Liability Directive is ambivalent in its attitude to the protection of consumers, for, in principle, *all* 'injured persons', and not merely 'consumers', may benefit from the liabilities that it imposes on 'producers'.<sup>29</sup> On the other hand, in defining the 'damage' for which a producer is liable, the Directive distinguishes between damage caused by death or personal injuries, recovery in respect of which is required; 'non-material damage', recovery in respect of which is expressly remitted to rules of the laws of Member States; and damage to property, recovery in respect of which is restricted *inter alia* to 'property [which] (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption'.<sup>30</sup> Put broadly, damage to property is recoverable only where damages are claimed by a consumer in respect of property ordinarily used by consumers. So, while the Directive protects everyone's personal integrity, it protects the economic interests only of consumers.

### 3 A broad chronological survey

The development of liability for products differs significantly between the national laws under consideration in this study, but we can identify broadly three periods in all six systems.

#### (i) 1850–1960: differing responses to tradition

Five of the six private laws concerned in this study shared an inheritance of Roman law as developed through the *ius commune*: three (French, Italian and Spanish law) as filtered through French legal thought and crystallised

<sup>26</sup> Art. 100 (EEC) (now Art. 94 (EC)). <sup>27</sup> Above, note 9.

<sup>28</sup> See esp. Case C-52/00 of 25 April 2002, *Commission v. France* [2002] I-3827; Case C-154/00 of 25 April 2002, *Commission v. Greece* [2002] ECR I-3879.

<sup>29</sup> Art. 4 ('the injured person').

<sup>30</sup> Art. 9, and see Case C-203/99 of 10 May 2001, *Veedfeld v. Århus Amtskommune* [2001] ECR I-3569.

by the French Civil Code of 1804; one (German law) as reworked by nineteenth-century scholarship; one (the law of the Netherlands) through a more eclectic combination of influences. Here, English law forms an exception, for while, at times, it drew on the categories or concepts of Roman law,<sup>31</sup> the common law in the areas with which we are concerned did not rest directly on the Romanist frameworks of the *ius commune*. What we see, however, in the contributions from their approaches to liability for products for the century after 1850 is an interesting variety of responses by the different laws from the common background in Roman law well beyond the mere variations on a common theme that one might expect. While the English common law's approaches are indeed different, focusing on a mercantile model of commercial sale of a type for which it is famous, some of the debates that took place have echoes in the debates that we see in *some* of the civil law systems. Indeed, as will be seen, during this period, English law does not appear as radically out of line with most of the other civil law systems; this distinction goes rather to French law.

Before going into more detail, the background in the Roman *ius commune* itself is worth noting if but in outline form. In this respect, the factual category that we have termed 'liability for products' could be seen as attracting either the law of the contract of sale or for liability for delictual fault (*culpa*).

As regards liability in sale, the standard position taken by lawyers of the *ius commune* is the one reflected fairly exactly by the actual provisions enacted by the French *Code civil* of 1804. There were two basic grounds of liability in the seller in respect of the property sold. Firstly, there was liability arising from a failure to keep to an express contractual undertaking on the part of the seller in respect of one or more quantities of the property sold;<sup>32</sup> this found its way into the French (and French-influenced) laws as forming an element in the general law of liability for contractual non-performance.<sup>33</sup> Secondly, and much more prominently, there was a special liability in sellers in respect of latent defects in the property that they sold, a liability that owed its distinctive characteristics from its origins

<sup>31</sup> For example, in relation to the understanding of negligence, which was drawn from the Roman law of contract: D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), 164–7.

<sup>32</sup> R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition* (Juta & Co. Ltd., Cape Town, 1990), 30.

<sup>33</sup> J. Ghestin, *Conformité et garanties dans la vente (Produits mobiliers)* (LGDJ, Paris, 1983), 166–7, 183ff (comparing liability under the *garantie légale* and under the 'general law'); Whittaker, *Liability for Products*, 69–72.