LITIGATION RULES AND CULTURE: THE EUROPEAN PERSPECTIVE

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I.
INTRODUCTION

A survey of the rules and practice of product liability law in Europe shows patterns of similarity between countries, but not absolute consistency. European product liability laws have continued to vary despite implementation of the 1985 European Union (EU) Directive (the Directive) on product liability law,[1] which was to have brought about "approximation"[2] of the laws of Member States.

These discrepancies in European product liability laws reflect both current social and economic differences between member states and the unique history of each country's legal system. Furthermore, the Directive itself reinforces some of these variables. For example, the provisions of the Directive are not exclusive of other remedies nor do they affect the rights

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1. Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, Council Directive 85/374, 1985 O.J. (L210/29) [hereinafter Directive]. A directive is a type of EU legislation that does not become effective until Member States implement it. Implementation may take the form of legislation, administrative regulation, executive decree, or constitutional amendment. A directive generally establishes certain objectives that must be attained, but leaves the exact method of attaining them up to the Member States. National governments are given a period of time after the promulgation of a directive to implement it. *See* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE 14 (Christopher Hodges ed., Sweet & Maxwell 1993).

2. *See* Directive, *supra* note 1, at recital 1. (stating that approximation of the laws of Member States concerning product liability is "necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property." Approximation aims at "the reconciliation in one way or another of existing national laws rather than the adoption of a new and uniform law throughout the [EU]." ANTHONY PARRY AND STEVEN HARDY, EEC LAW 359 (1973).

of persons who were injured prior to its implementation. Also, the Directive preserves the laws of Member States with respect to limitation periods.[3]

I will first list important aspects of product liability law in the Member States prior to implementation of the Directive. Next, I will discuss several important provisions of the Directive and their current state of implementation. Finally, I will use examples from my own experiences working to clarify the Directive to make a few predictions about the future of European liability litigation.

II.
PRE-DIRECTIVE PRODUCT LIABILITY LAW IN EUROPE

There is no prospect of doing detailed justice in an article of this type to the legal systems of fifteen different countries. Excellent summaries have already been written,[4] and I do not attempt to outdo them.

In general, the pre-Directive product liability law of the various Member States shared the following aspects:

(1) Specific product liability statutes were all but non-existent.[5]

(2) Liability was universally available for breach of contract,[6] but usually without mitigation by the rules of privity.

(3) Liability in tort was universally available on proof of fault. Presumption of fault and reversal of the burden of proof[7] were available in some jurisdictions, but there were no true regimes of strict liability.

(4) The rules of each jurisdiction were detailed, full of exceptions and somewhat incomprehensible from the outside.[8]

III.
THE DIRECTIVE

A. History

The Directive was not the first attempt to achieve pan-European standards for product liability legislation. It was preceded by the Convention

3. *See* Directive, *supra* note 1, at art. 13 (providing that the Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or of a special liability system existing when the Directive is notified) and art. 10(2) (preserving the laws of Member States regulating suspension or interruption of limitation periods).

4. *See* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1; Lord Griffiths et al., *Developments in English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353 (1988).

5. *See* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1, at 328.

6. *See generally,* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1.

7. *Id.* at 452 (discussing treatment of burden of proof in Italy), at 391 (discussing treatment of burden of proof in Greece), and at 589 (discussing treatment of burden of proof in Spain).

8. Directive, *supra* note 1, at recital 1.

of Product Liability in regard to Personal Injury and Death (the Strasbourg Convention), adopted in September 1976. The Strasbourg Convention was signed only by France, Belgium and Luxembourg (then Member States of the EEC) and Austria (then a non-Member). Due to the low number of signatories, the Convention was never implemented.

Most Member States may have been reluctant to sign the Strasbourg Convention because they wished to monitor the progress of an August 1974 draft of an EEC Directive on Strict Liability for Defective Products.[9] The 1974 draft of the Directive on Strict Liability for Defective Products was revised repeatedly in response to Member States' reluctance to surrender legislative power to the EU and criticism from consumer and industry groups about how to determine liability under the law.[10] After more than a decade of negotiations, the EU Council of Ministers finally adopted the current Product Liability Directive on July 25, 1985.[11]

The legal basis of the Directive is Article 100 of the Treaty of Rome.[12] The Directive is grounded in the judgment—reflected in Article 100—that the approximation of laws is necessary to prevent the distortion of competition between Member States, eliminate impediments affecting the free movement of goods, and provide uniform consumer protection across the EU; this would reinforce the original economic purpose underlying the formation of the Community.[13]

B. Standard of Liability Under the Directive

The Directive adopts a qualified standard of liability without fault. It is based on the principle that liability without fault is necessary for a fair apportionment of risk between producers and consumers in an increasingly technological age.[14] Under the Directive, while the producer is liable for damages caused by a defect in its product, the plaintiff carries the burden of proving that there was a defect and that the defect caused the plaintiff's injury.[15] A product is deemed to be defective when it does not provide the safety that a person is entitled to expect.[16] These rules create a standard of liability that is significantly lower than strict liability.

The standard of liability under the Directive is complicated by the fact that important terms, namely, person, producer, and defect, are not clearly defined.

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9. Commission Proposal for a Directive on Strict Liability for Defective Products, 1974 O.J. (C 241).

10. Personal communication from Dr. H-C Taschner, a civil servant of the European Commission responsible for the passage of the draft Directive.

11. Member States were notified that Directive had been adopted on July 30, 1985.

12. Directive, *supra* note 1, pmbl. (citing Treaty Establishing the European Economic Community, March 25, 1958, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]).

13. *Id.* at recital 1.

14. *Id.* at recital 2.

15. *Id.* at art. 4.

16. *Id.* at art. 6(1).

1. Meaning of Person

It is unclear whether "person" means the average person, the average consumer, or a consumer of the product in question. Also, does the Directive allow a litigant's age, sex, education, or socio-economic status to be taken into account?

Arguably, using the average person standard would simply be reintroducing the standard of negligence, thereby undermining the intent of the Directive. There is no material difference between proof that a product fails to satisfy the expectation of an average person and proof that the producer has manufactured or marketed the product in a negligent manner. Unfortunately, the Directive offers litigants no guidance and, to date, there is no case law that addresses the definition of person.

In the Consumer Protection Act of 1987, lawmakers in the United Kingdom attempted to articulate the meaning of person for purposes of its product liability laws by including the phrase "as persons generally are entitled to expect."[17] However, this drafting maneuver has not clarified matters. The phrase "persons generally" is just as vague and ambiguous as the language it was intended to improve.

2. Meaning of Defect

The Directive's definition of "defect" authorizes a court to consider three factors: i) the presentation of the product to the consumer; ii) its reasonably expected use; and, iii) the time at which it was placed into circulation.[18] The first factor rewards the producer for providing and disseminating proper information with respect to the use of a product. The second factor may exonerate the producer where a consumer uses a product inappropriately. The third factor allows for consideration of the age of a product as a means of protecting producers from liability for older products that may not meet current safety standards, but met the standards in effect at the time the product was placed on the market.

3. The Meaning of Producer

The definition of "producer" includes three categories: i) the manufacturer of the finished product and of component parts; ii) a person holding herself out as the producer; and, iii) an importer into the EU.[19] The last category assures that a consumer will always have a EU-domiciled defendant against whom to bring proceedings and, if appropriate, enforce a judgment. When a supplier cannot identify the producer the supplier will be treated as the producer by default. This guarantees that there will always be an available defendant.

17. Consumer Protection Act, 1987, ch. 43, § 3(1).
18. Directive, *supra* note 1, at art. 6(1).
19. *Id.* at art. 3.

4. Defenses

Under the Directive, six defenses are available to a defendant.[20] The first defense, that the producer did not put the product into circulation,[21] would be available to a manufacturer whose product caused harm within the confines of its factory or whose product was stolen and subsequently caused damage. The second defense exonerates a producer who shows that the defect did not exist in the product at the time the product was put into circulation.[22] This defense covers damage caused as a result of routine wear and tear or use after the expiration date. The third defense exonerates a producer who did not manufacture the product for sale, or for any other form of distribution for an economic purpose, or who did not distribute it in the course of business.[23] One example might be a university that made scientific equipment for its own research purposes. A fourth defense may be used when a defect is caused by a product's compliance with mandatory regulations issued by public authorities.[24] This defense is premised, not on the ground that the product has been approved by the appropriate regulatory authority as a whole, but rather that the defect resulted from the incorporation of a procedure or component mandated by the authority. A fifth defense is available if a component manufacturer can show that the defect in the finished product is attributable to the design of the primary product or to the instructions given by the manufacturer of that product.[25] This defense has the effect of saving a component manufacturer from joint and several liability.

The sixth defense available under the Directive is the development risks defense.[26] The development risks defense is available on proof by the defendant that the defect could not have been detected given the current state of scientific and technological knowledge. Because of the controversial nature of this defense, it was not included in the first draft of the Directive.[27]

Ultimately, the drafters reached a compromise regarding the development risks defense and the defense was included in subsequent drafts of the Directive. The compromise included two key elements: one, Member

20. *Id.* at art. 7.

21. *Id.* at art. 7(a).

22. *Id.* at art. 7(b).

23. *Id.* at art. 7(c).

24. *Id.* at art. 7(d).

25. *Id.* at art. 7(f).

26. Directive, *supra* note 1, at art. 7(e).

27. Speech of Dr. Hans-Claudius Taschner, the civil servant of the European Commission responsible for the passage of the draft Directive, at an October 1996 conference, in Brussels, of the Technical Assistance Information Exchange Office of the European Commission (TAIEX) for central and eastern European countries, focused on product safety and product liability.

States could choose to omit the development risks defense from their national legislation;[28] and two, the compromise included a sunset-type provision stating that the Council of Ministers would review the effect of the defense on consumer protection and the functioning of the common market.[29] Based on the findings of their review, the Council of Ministers would then decide whether to repeal or include the defense in the final draft of the Directive.[30] Not surprisingly, when it came time to give final approval to the Directive, the development risks defense was still a source of contention.[31] The drafters argued about whether the exclusion of this defense would stifle high-risk industries, such as pharmaceuticals and aerospace, or whether its inclusion would defeat the apparent simplicity and logic of a strict liability regime.

The development risks defense continues to be a source of controversy today in the EU. The wording of the defense itself raises a number of questions. What does the phrase "state of scientific and technical knowledge" mean? When does belief become knowledge? Does the Directive intend a standard of reasonable, available or absolute discoverability? Again, the vagueness of the language poses limitations on the defense's implementation.

People in industry argue that the infinite capacity to acquire knowledge, and the ever-changing state of knowledge, requires a reasonableness standard.[32] This position has been supported by academics on the ground that the mere existence of the defense qualifies the strictness of the liability and thus inevitably imports questions of reasonableness into the test.[33] The impossibility of proving a universal negative would deprive the defense of any meaning and, thereby, offend the requirement of a fair apportionment of risk, which serves as the rationale for the existence of the five other defenses.[34]

A counter-argument to the industry's position is that the language of the Directive specifically refers to the state of scientific and technical knowledge at the time a product is put into circulation, not the capacity of

28. Directive, *supra* note 1, at art. 15(1)(b).

29. *Id.* at art. 15(3).

30. *See infra* Part IV.

31. *See* Alfred E. Mottur, *The European Product Liability Directive: A Comparison with U.S. Law, an Analysis of its Impact on Trade, and a Recommendation for Reform so as to Accomplish Harmonization and Consumer Protection*, 25 LAW & POL'Y INT'L BUS. 983, 990-91 (1994); John G. Culhane, *The Limits of Product Liability Reform within a Consumer Expectation Model: A Comparison of Approaches Taken by the United States and the European Union*, 19 HASTINGS INT'L & COMP. L. REV. 1, 31 (1995).

32. *See, e.g.*, CHRISTOPHER J.S. HODGES, UNKNOWN RISKS AND THE COMMUNITY INTEREST: THE DEVELOPMENT RISKS DEFENCE IN THE PRODUCT LIABILITY DIRECTIVE (McKenna & Co., 1996).

33. *See, e.g.*, Jane Stapleton, *Product Liability*, 1994 Butterworths 236-42; Christopher Newdick, *The Development Risk Defence of the Consumer Protection Act of 1987*, 47 CAMBRIDGE L.J. 455 (1988).

34. Directive *supra* note 1, at art. 7.

a particular producer at that time. This argument is bolstered by the absence of any criterion of fault or reasonableness in any of the other defenses and the notion that the fair apportionment of risk is satisfied by placing the burden on the plaintiff to prove the existence of a defect.

While no guidance has come from the national courts of the member states, a recent ruling by the European Court of Justice indicates that industry may have the stronger argument.[35] In that case, the Court found that Article 7(e) of the Directive—which contains the development risks defense—neither contemplates the state of knowledge of which the producer in question was or could have been apprised,[36] nor specifically refers to the practices and safety standards in use in the industrial sector at the relevant time. Rather, Article 7(e) aims "unreservedly, at the state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation."[37] In addition, the Court found that "it is implicit in the wording of Article 7(e) that the relevant scientific and technical knowledge must have been accessible . . . when the product in question was put into circulation."[38] Therefore, it appears that the Directive provides for a defense, not of absolute undiscoverability, but of reasonable availability. The opinion of the European Court of Justice leaves "these difficulties of interpretation" to the national courts to resolve in the event of litigation.[39]

5.) Other Provisions of the Product Liability Directive

The Directive also lays out several other important matters pertaining to product liability. It provides that two or more persons liable for the same harm will be held jointly and severally liable.[40] It states that the liability of the producer may be reduced or canceled if the plaintiff has contributed to the causation of the harm,[41] although not if an act or omission of a third party contributes to the damage.[42]

The Directive provides for a statute of limitations of three years from the date of actual or constructive knowledge of the harm, the defect, and the identity of the producer.[43] The right of action under the Directive is

35. Commission of the European Communities -v- United Kingdom of Great Britain and Northern Ireland, Case C-300/95 (May 29, 1997) (dismissing application by the Commission of the European Communities for a declaration that the United Kingdom, by failing to transpose Article 7(e) of the Directive into English Law accurately, had failed to fulfill its obligations under the Directive and under the EU Treaty).

36. *Id.* at para. 27.

37. *Id.* at para. 26.

38. *Id.* at para. 28

39. *Id.* at para. 29.

40. Directive, *supra* note 1, at art. 5.

41. *Id.* at art. 8(2).

42. *Id.* at art. 8(1).

43. *Id.* at art. 10(1) and art. 3(3).

extinguished 10 years from the date on which the producer put the injury-causing product into circulation.[44]

Actionable harm is defined under the Directive as death, personal injury, or harm to property (other than the defective property itself). Member States may provide a limit on the total liability of a producer for death or personal injury caused "by identical items with the same defect" of not less than 70 million ECU.[45] Awards for damage to property are subject to a deduction of 500 ECU.[46]

IV.
IMPLEMENTATION OF THE DIRECTIVE

Though 10 years have elapsed since the passage of the Directive, its meaning and application remain undeveloped and ambiguous. As a result, it is fair to conclude that the outcome that the Directive was intended to achieve remains elusive.

Every five years, the Commission must present a report on the application of the Directive, with any appropriate proposals, to the Council of Ministers.[47] The first five-year report of the Commission was published in 1995.[48] Its brevity and tentativeness reflected a lack of experience with the Directive. The Commission thought it premature to recommend any changes and failed to take action on two key issues.[49] First, the Commission declined to repeal the development risks defense or to prevent States from implementing it. Second, the Commission chose to retain the provision that prevents Member States from limiting liability to an amount less than 70 million ECU.

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44. *Id.* at art. 11.

45. Directive, *supra* note 1, at art. 16, calculated in national currency as of the date of adoption, July 25, 1985. The ECU limits in this article and Article 16 may be revised every five years by the Council of Ministers on a proposal of the Commission if necessary in light of "economic and monetary trends in the Community." The equivalent in U.S. dollars is $65,195,119.68 based on the exchange rate reported in the Wall Street Jounal, April 2, 1998, at C20.

46. Directive, *supra* note 1, at art. 18(1). The equivalent in U.S. dollars is $465.68 based on the exchange rate reported in the Wall Street Journal, April 2, 1998, at C20.

47. *Id.* at art. 21.

48. Commission First Report on the Application of Council Directive on the Approximation of Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products, COM (95)617 final [hereinafter 1995 Commission Report].

49. *See* Directive, *supra* note 1, at art. 15(3) (providing for the possibility of repeal of art 7(e); art. 16(2) (providing for possible repeal of the total liability limit for a particular product); art. 18 (providing for revision of the monetary figures set forth in the Directive).

Every Member State of the EU, except France, has implemented the Directive into its domestic law.[50] France's failure to implement the Directive apparently is due to indecision about whether to include the development risks defense.[51] The development risks defense is excluded in Finland and Luxembourg, and in Germany and Spain with regard to pharmaceuticals.[52] Portugal, Spain and Germany[53] have imposed a financial limit on total claims.[54]

While all but one Member State has adopted the Directive, the desired approximation of product liability law has not taken place. The tracing of these differences is beyond the scope of this article, but has been documented in other works.[55]

V.
POST-DIRECTIVE LITIGATION PATTERNS

The adoption of the Directive's no-fault liability standard has not dramatically affected the number of product liability suits brought in Europe and certainly has not resulted in the creation of a U.S.-style "culture of litigation." The report on which the 1995 Commission review[56] was based noted the paucity of cases brought under the Act and further claimed that the absence of any noticeable increase in customer complaints, legal claims, or insurance premiums is attributable to the Directive.[57] According to the report, the Directive has neither caused the rate of insurance premiums to rise nor contracted coverage capacity.[58] Finally, the report suggested a generally acceptable level of product safety and a cultural reluctance to litigate.[59]

While these facts support imposing genuine strict liability, funded through insurance as originally proposed for the Directive, the report was not without its critics. The National Consumer Council (NCC) disputed

50. *See generally* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1.

51. *See* note 27, *supra*, and accompanying text.

52. *See* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1, at 296-97 (noting that Finland, while not a member of EU in 1995, was obligated by treaty to implement the provisions of the Directive, but excluded the optional development risks defense); at 476 (noting Luxembourg's failure to include the development risks defense); at 359 (mentioning special exclusion for pharmaceuticals under German law); and at 591 (noting Spain provides a development risks defense for all but pharmaceuticals, food and food products).

53. *Id.* at 553, (Portugal); 578 (Spain); and 359 (Germany).

54. As allowed under Directive, *supra* note 1, at art. 16.

55. *See, e.g.*, PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1.

56. 1995 Commission Report, *supra* note 48.

57. Christopher J.S. Hodges, Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products. Study Contract No. ETD/93/B5-3000/MI/06. (reflecting somewhat of an industry point of view, but most likely because of lack of litigation data and input from consumer groups).

58. *Id.* at 14-20.

59. *Id.* at 35-39.

the conclusions of the report.[60] The NCC attributed the low volume of claims brought under the Consumer Protection Act of 1987 to the difficulty of proving causation, the uncertainty regarding the definition of a defect, the delays inherent in the civil litigation system, and the presence of the development risk defense.[61]

The experience of British plaintiffs reflects the litigation patterns in other Member States. Product liability litigation in the United Kingdom is still relatively rare, despite increases over the past decade. In the United Kingdom, plaintiffs have used the Act primarily to sue pharmaceutical producers, including the manufacturers of Norplant, Gammagard, and Lariam.[62] In this regard, it must be remembered that pre-existing aspects of the law affect whether litigation is brought under the Directive. The most notable issues being discovery rules,[63] statutes of limitations,[64] fee arrangements and costs,[65] availability of punitive damages,[66] and rules relating to expert testimony.[67]

It is questionable whether the first 10 years of life under the Directive's product liability scheme are an accurate predictor of the future. Does the insubstantial change in product liability litigation patterns indicate that there is little chance that Europe will follow the example set by the United States? Despite a shift in European product liability law toward a United States model, there remain many significant differences between the two systems, such as: different procedural and substantive laws; different degrees of access to the courts; and different socio-cultural attitudes toward litigation. These differences continue to influence the direction of tort liability laws in Europe. It remains to be seen how well Europeans have balanced the need for judicial constraints on procedures and awards against the need for individuals to obtain justice and compensation.

60. National Consumer Council, Unsafe Products PD 45/D4/95 (1995).

61. *Id.* at 22-23, 37.

62. Information on file with author.

63. As a general matter, discovery is more widely available, and parties must turn over more documents in common law than in civil law systems.

64. *See, generally* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1. Limitation periods vary greatly throughout Europe. While several countries have set them at three years or less, others have them as long as 30 years.

65. *Id.* Solicitors and barristers in England enter into arrangements similar to lawyers in the United States. In general, the loser pays the winner's legal fees and disbursements, however, the ability to recover costs is limited in different ways in Spain, Portugal, Denmark, Luxembourg, and Belgium.

66. *See* PRODUCT LIABILITY: EUROPEAN LAWS AND PRACTICE, *supra* note 1, at 163 (noting that punitive damages have not been awarded in European product liability cases, only compensatory damages). Because the awards are not uniform across jurisdictions, intra-Europe forum-shopping has become an issue.

67. *See generally*, DAVID MCINTOSH & MARJORIE HOLMES, CIVIL PROCEDURES IN EC COUNTRIES (1991).