

London Conference on Product Liability

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Product Liability raises fundamental issues; issues of morality and jurisprudence, as well as of commercial and industrial policy. It has been the subject of reports by the English Law Commission, the Scottish Law Commission and a Royal Commission under the Chairmanship of Lord Pearson, which treated product liability as part of the general subject of compensation for personal injury. Product liability has generated a great deal of discussion. Many conferences have dealt with the questions it poses, yet these questions have lost none of their urgency. Your conference is therefore well-timed. It is less than a year since the European Parliament adopted a resolution on the draft EEC directive, which aims to introduce product liability as the rule throughout the European Community, and the intervening months have seen further developments with regard to this proposal. I am grateful for this opportunity to review the progress which has been made.

I would begin by observing that although the European Parliament welcomed the draft directive, it did not do so in an unqualified manner, but suggested a number of amendments. The Commission found itself in agreement with most of them, and a modified version of the directive was submitted to the Council of Ministers at the end of September 1979. The last few weeks have seen the beginning of discussions on the directive in the Council. As Commissioner with responsibility

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for consumer protection, it therefore seemed to me to be most opportune to have this chance of explaining how things stand at present, although let me say that I do so purely in a personal capacity. The draft directive dates from 1976. It proposes a standard of strict liability for defective products. The underlying idea is that the producer has a responsibility for the products which he has put into the stream of commerce. He is the best person to ensure that compensation is provided to persons who have suffered damage, loss or injury as a result of defects in those products. He can do so by taking out product liability insurance and spreading the cost over all of his products. Ultimately, the consumer will pay for this extra protection. It will be included in the price of the items he buys.

The directive proposes a strict liability standard, irrespective of negligence on the part of the producer or supplier. In other words, it proposes liability without fault. This is an aspect which has provoked a good deal of controversy, but I sometimes wonder why it should be such an emotive issue.

If I may take some relevant parallels in U.K. experience, I think I can demonstrate that strict liability is not a stranger to the law of this country. For example, Section 14 of the Factories Act imposes a duty to fence dangerous machinery. Where an injured workman brings an action for damages for breach of statutory duty under Section 14, it is no defence to say that the factory owner did not know that the machine was unfenced or that he had done everything reasonably possible to make the machine safe. Indeed, the principle of strict liability even extends into the criminal law. A breach of

Section 14 of the Factories Act is a criminal offence.

Secondly, I would point out that the law of contract adopts the principle of strict liability. A consumer who has purchased a defective product, and suffered injury while using it, has no need to prove the seller negligent in order to recover damages. Under the Sale of Goods Act it is a condition of the contract that the goods shall be of merchantable quality or, in certain circumstances, fit for the purpose for which they are required. The consumer may formerly have found himself at a disadvantage if the contract contained exemption clauses excluding his rights under the Act. However, the Unfair Contracts Terms Act 1977 was passed to curb that type of provision.

The law of tort adopts a different rule and this leads to some rather strange consequences. Suppose, for example, a person becomes ill as a result of eating bread which contains a noxious substance. If he bought the bread, he can recover compensation from the seller, even if the seller is able to show that he did not know of the presence of the noxious substance in the bread and had taken every care to ensure that it did not become contaminated. On the other hand, a guest in the house of the purchaser of the loaf, who had become ill at the same time and for the very same reason, would be unable to claim compensation unless he could prove that the manufacturer of the loaf had been negligent. The burden of proof may be impossible to sustain. The greater the complexity of the product, the greater will be the task facing the injured party.

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I believe that these fine distinctions have nothing to recommend them. If we are ready to accept liability without fault in the context of the law of contract or of factory legislation, then why not in the case of defective products generally?

As I said at the outset, the Commission's original proposal was that liability for defective products should be irrespective of fault. The aim of this proposal is to remove a barrier to a claim by the injured party. In order to succeed, the plaintiff will still have to prove the existence of the defect. It will also have to be shown that the defect caused the damage, loss or injury.

The directive proposed that primary responsibility should lie with the producer of the defective item or of a defective component. The producer of the raw material could also be liable, if his product were defective. Potential liability is not confined to manufacturers. Distributors will not normally incur liability under the directive, but they may do so in certain circumstances. For example, a dealer may be liable if he imports defective products into the Common Market. He is treated as a producer. So too is the person who represents a product as his own, perhaps by putting his own trade mark on it. Where a producer cannot be identified, then the supplier of a defective product is to be treated as its producer, unless within a reasonable time he identifies the producer or the supplier from whom the product was obtained.

The directive proposes that a product should be regarded as defective if it was not as safe as one is entitled to expect. The issue here is not whether the producer detected or could have detected a defect in the product. The test is completely objective. The producer could be liable even if science or technology at the time when the product was put into circulation had not advanced sufficiently to enable the defect to be detected. Thus, development risks are included within the scope of the producer's liability under this directive.

That scope, however, is quite heavily circumscribed. A feature of the proposal is the provision which sets an upper limit to liability for death or personal injury of 25 million units of account, or about £17 million. This figure represents the total liability for all personal injuries caused by identical articles having the same defect. Then the type of loss covered includes also damage to property, provided the property was intended and used for private purposes. But there are per capita limits for damage to personal or real property of 15,000 and 50,000 units of account respectively. The reason for this upper limit is that the Commission has tried to balance the interests of industry, on the one hand, and consumers and users of products, on the other. It must be said, however, that there is a very strong consumer view against the idea of a ceiling to liability under the directive.

Two other cut off points which should be mentioned are the periods of limitation included in the directive. One is a limitation period of 3 years, which runs from the day when the injured person becomes aware of the essential facts of the case; the defect, the injury and the identity of the producer. There is also an overall cut off period of 10 years which runs from the end of the year in which the defective product was put into circulation, subject of course to the commencement of proceedings by the injured party within that time. The reasoning for this type of limit was very well stated in the report of the Pearson Commission:

"Without such a term to his liabilities, the producer would be faced with increasing difficulties. The relevant records would be more and more difficult to trace, especially where a company had changed hands; it would be more and more difficult to distinguish defect from wear and tear; and the producer would have to insure in perpetuity."

The proposed EEC directive on product liability was approved by the European Parliament in Plenary Session on 26 April 1979. Despite the number of amendments proposed by the Parliament, it was a vote for strict liability - with one exception. Parliament proposed that, if he could so prove, the manufacturer should not be liable for damage caused by defects existing at the time when the product was

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put into circulation, but which could not have been discovered by anybody, given the state of advancement of science and technology at that time. The Commission felt unable to accept the Parliament's amendment on this point.

Despite the reversal of the burden of proof, this approach would have jeopardised the principle of strict liability and it could have created a loophole through which many a lawyer would have tried to lead his clients. At first sight, the reversal of the onus of proof might seem to give the plaintiff a tremendous advantage. In practice, however, it would probably not work out that way. It is one thing for the onus of proof to be reversed when a case reaches court. It is another thing entirely when the issue of liability is being discussed outside court, and most civil litigation in the field of personal injuries never reaches court. Except in the plainest of cases, it is likely that the defendant will be able to find one or more expert witnesses to give technical or scientific evidence in his favour. Consider the individual consumer facing litigation with a large and powerful industrial concern. The firm can produce experts willing to say that nothing was known in the scientific or technical literature which would have enabled anyone to discover the defect at the time in question, and to assert that the company has taken all possible care. In such circumstances the consumer has no alternative but to prove that the defect could have been discovered. The burden of proof can thus very easily be thrown back on the plaintiff.



Another difficulty in the way of allowing a special defence in the case of development risks is to be found in the unfortunate effect such a provision might have on the current law of those EEC countries where product liability is already the rule. This is the position in France and Luxembourg. In these countries, the system appears to have worked well, without imposing unreasonable burdens on the producer. Under existing French law, the manufacturer of defective goods is likened to a seller in bad faith if he denies that he knew the defect existed. Nothing in the proposed directive would oblige the French Government to change that rule. The directive does not exclude the possibility of claims based on grounds other than those for which the directive provides. However, the adoption of a directive containing a special defence for development risks would be very likely to undermine the current product liability rule in France, to the disadvantage of consumers. How long would it be before French lawyers were arguing that the producer of a defective product should not be likened to a seller in bad faith if he tries to deny that he knew of the defect, because under the directive he is entitled to deny that he had any knowledge? The argument would go that standards had changed, and the adoption of a directive incorporating a development risks defence would be held up as showing that the current French rule was out of line with Community law.

The law of the Federal Republic of Germany of pharmaceutical products would have to be changed as a direct consequence of introducing the development risks defence. The German law on pharmaceuticals of 24 August 1976 provides that manufacturers

are strictly liable for damages where death or serious injury results from the use of medicines, even if a development risk is involved. Again, it would be to the disadvantage of consumers, if the law had to be changed with respect to development risks.

In the explanatory note to the proposed directive, the Commission pointed out that if development risks were excluded the consumer would have to bear the risk of unknown defects. Social justice demands that the risk should be spread and the producer is the best person to do this through the mechanism of insurance. For this reason, the Commission considered that development risks had to be included within the scope of the directive. To quote a recent statement made by the UK Consumers in the European Community Group:

"It is unacceptable that consumers should be treated as guinea pigs and bear the risk, without remedy, of defects being discovered during use."

As you know, the Council of Europe, the Law Commission, the Scottish Law Commission, and the Pearson Commission all considered the question of development risks. They all considered that such risks should be included within the scope of the producer's responsibility for defective products. To quote the Pearson report:

"to exclude development risks from a regime of strict liability would be to leave a gap in the compensation cover, through which, for example, the victims of another thalidomide disaster might easily slip."

What sort of burden will this place on industry? It is absolutely clear that certain industries will hardly be affected or not affected at all. Certain other industries will feel it: pharmaceuticals and aircraft are prime examples. Nevertheless, even in these cases, one must keep a sense of proportion. Many products of these industries have been in existence for a number of years. Their characteristics are well-known. It is likely that problems which may have existed have been ironed out. Newly-developed products are very often based on existing products. Their production does not constitute a step into the unknown. It seems to me the real risk is centered on totally new developments. But is it not right that a producer who puts a totally new product on the market should take extreme care in the development process and the quality control for that product? In that respect, the product liability directive, if it includes development risks, will provide a powerful incentive to the manufacturer.

The concern of industry over the directive is to some extent due to scare stories from the United States, where strict liability already exists. Many of these stories have been apocryphal. What is more, the legal system in the United States is very different from that of the Community and its member states. In the U.S.A., lawyers operate upon a contingency fee basis, often in class actions, so that the plaintiff can sue without too much care for the costs of litigation. In most, if not all, of the EEC, contingency fees are unknown and would be regarded as unethical. Moreover, in the USA, damages

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are awarded by juries. But Ireland is the only Community country in which that is the case. And in the USA punitive damages are sometimes awarded. I would, therefore, conclude that the American experience is a poor guide on the question of the consequences for industry of the proposed EEC directive.

Are there any alternative solutions to the financial problems the directive will pose for manufacturers? Well, one possible solution was mentioned in the second paragraph of the European Parliament's Resolution. This requested the Commission to report on the advisability of covering liability for defective products out of a guarantee fund, the report to be made five years after the implementing legislation for the EEC directive has come into force. Such a fund could be wholly subscribed by governments or jointly by governments and industry, particularly with a view to protecting consumers against development risks. This type of solution was proposed in the Federal Republic of Germany before the adoption there of a compulsory insurance scheme for pharmaceuticals.

There are a number of disadvantages to the fund solution. Government contributions to it can only come from taxation. Increased taxation is unpopular. The administration of a guarantee fund would involve the establishment of an administrative office. This would be a bureaucratic solution, whereas the Commission's proposal is of a non-bureaucratic nature; it is envisaged that producers will cover the risk of damage, loss or injury, if, necessary, by taking out product liability

insurance. In other words, they will cover the risk through the market mechanism. Nevertheless, the fund solution has certain attractions. It avoids the problems implicit in a financial limit to liability as envisaged in the directive, although in proposing an upper limit to liability, the directive is realistic. There will always be some upper limit, if only because most producers operate as limited liability companies.

Several other amendments have been proposed by Parliament and included in the modified version of the draft directive. One such amendment excludes from the scope of the directive prime agricultural products and craft and artistic products, unless they have been subject to industrial processes. Another involves writing into the directive the defence of contributory negligence. Parliament has also asked that pain and suffering, as well as non-material damage - for example, loss of amenity - should be specifically included. These last two amendments - contributory negligence and damages for pain and suffering - are really more a matter of clarification than a change of substance. The directive in its original form did not exclude either of them.

It was also suggested that the producer should have a defence if, as soon as he discovers his product is defective, he warns the public and does whatever he can to avoid harmful consequences. The Commission did not consider it advisable to introduce a provision of this nature. It is too problematic. The producer's warning may not reach all the users of his product, or he may wish to recall the defective items, but be unable

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to trace them. It would seem highly undesirable in such circumstances that he should be able to plead in his own defence that he did all he could to avoid the harmful consequences of a danger which he created. Of course, if a consumer knows of a warning, but takes no heed and suffers injury as a result, there may well be an element of contributory negligence which the producer could rely upon by way of defence.

Although no amendments have been introduced to the provisions of the directive dealing with who shall be liable, there has been a change to the wording of Article 3 which deals with the concept of joint and several liability. This has been amended to make it clear that, where two or more persons are liable in respect of the same damage, they may claim compensation inter se. The basis on which they do so will depend upon their relationship, as determined, for example, by the terms of any contract governing their dealings, and may be defined by national law.

The definition of when a product is defective, in Article 4, has been amended. It now includes a qualification to the effect that a product is not to be regarded as defective unless it is being used for the purpose for which it is apparently intended. Another amendment indicates that in considering whether a product is defective account shall be taken of all the circumstances, including the presentation of the product and the time at which it was put into circulation. For example, in deciding whether a product is as safe as one is entitled to expect, account must be taken of operating instructions,

warning labels or warnings marked on the product itself. In addition, the amendment introduces a time factor. For example, a motorcar manufactured in 1970 is not to be regarded as defective simply because it does not contain the safety factors which would be incorporated in a motorcar manufactured today.

Article 5 of the directive has also been amended. This is the Article which provides certain defences for the producer. In the interests of clarity words have been added to indicate that there shall be no liability for a defective product, if it is neither made for commercial purposes nor distributed within the course of business activities. Consequently, the victim of Aunt Ethel's teacake will not be able to claim that it is a case of product liability. Incidentally, it was never the Commission's intention that he should be able to make such a claim.

Finally, as regards the amendments introduced by the Commission last September, I should mention the changes made to Article 7, which provides for an upper limit on liability. In its revised form the directive makes it possible for the Council of Ministers, acting on the proposal of the Commission, to decide on the amount of the upper limit or even to suppress it. Subject to any such determination, the limit remains as originally stated in the directive, that is to say, at a figure of 25 million units of account. There is also a provision to allow for inflation, requiring the Council to reconsider every 3 years the upper limits stated in the directive.

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Although the amendments I have described have to some degree narrowed the scope of the Commission's original proposal, the EEC draft directive on product liability as it stands today is still very broad and general. No doubt, many industries see themselves as being in rather a special position and feel that exceptions should be made in their case. For example, the food industry, the aviation and pharmaceutical industries, all have to meet standards either contained in legislation or required to meet certification procedures. Spokesmen for these industries may say that in meeting such standards they have fulfilled their duty to the public. Why therefore should they have to face potential liability for defective products?

In my opinion, these arguments do not carry much weight. The point is that the public safety standards do not deal in any shape or form with the question of compensating the victims of unsafe products. That is what the directive aims to do, in my view rightly.

We must never forget that product liability, the subject of so many words, is concerned with human suffering and loss. If we have a product liability directive in the EEC, it will help to make our Community a place where those who have suffered will more readily find justice.

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