VIEWPOINT
Is product liability still a global problem?

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Abstract

Purpose – Almost 20 years ago one of the present authors wrote an article entitled "Product liability: a global problem". The brief paper seeks to provide a summation of what has happened in the meantime.

Design/methodology/approach – The article is a brief discussion of the issues: the first section comments on products liability outside Europe and the final part concludes with an overview of what happened in the UK and Europe.

Findings – The article finds that the EU Directive's approach to strict liability has become the most common influence on law reform around the globe and that there is still much uncertainty in Europe and the USA as to what the law of product liability actually is.

Originality/value – The paper illustrates how, for the foreseeable future, businesses may continue to be most concerned about product liability exposure in the USA.

Keywords European directives, European Union, Product liability

Paper type Viewpoint

Almost 20 years ago one of the present authors wrote an article for this journal entitled "Product Liability: A Global Problem"[1]. That was at a time when the UK had just implemented the Products Liability Directive[2] by providing for strict liability in Part 1 of the Consumer Protection Act 1987. This brief paper seeks to provide a summation of what has happened in the meantime. The final part concludes with an overview of what has happened in the UK and Europe, but the first section comments on products liability outside Europe.

The first observation is that the Directive's approach to strict liability has become the most common influence on law reform around the globe. It is of course mandatory now in 27 European countries that comprise the enlarged European Union, but its influence has been felt beyond that in South America and the Asia-Pacific region. This European influence is perhaps surprising given that US products liability law is the most developed products regime. One suspects that the headlines generated by some product liability actions in the USA have given it a bad press and made legislators afraid of adopting similar substantive rules for fear of fuelling a litigation explosion. In truth, however, the American context is unique. Its tort system has to cover high medical costs, allows for punitive damages, uses jury trial, readily allows contingent fees and does not have a loser pays cost rule. The absence of many of these features in other jurisdictions means that product liability is not likely to have the same impact. Moreover products liability is brought into accident claims in the USA that in the UK at least would be dealt with as workers' compensation claims. In the next section, however, we consider how the USA's substantive regime itself has become less claimant friendly.

Back in 1988 strict products liability was dominated by s 402A of the American Law Institute Restatement (Second) of Torts (1965), which provided that:

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> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property

This had applied strict products liability to a wide variety of product defects, crucially including defects based on challenges to the product's design. Yet there was a growing debate as to whether strict liability was appropriate. Scholarly reviews of the case law suggested that many courts when applying the test to design defects did so in a manner that was more akin to negligence analysis (Henderson and Eisenbreg, 1990). Although this was fiercely disputed (Vargo, 1996). Other scholars looked back at the history of the drafting of the Second Restatement and suggested it had only intended to tidy up the law and impose liability for manufacturing defects (Priest, 1989). It was indeed hard to tell at times what the ultimate policy underpinning strict liability in the Second Restatement was. It seems clear that it was not following the usual practice of simply "restating" what the courts were doing, but rather sought to introduce a new development in the law, but just how far it was intended to go was not entirely clear. We shall see this ambiguity over policy motivation is also evident in the European context. There have always been attempts to use legislation to rein in products liability and the tort system, but these have been relatively unsuccessful with what successes there have been being more common at the state than Federal level (Blackmon and Zeckhauser, 1991; Lipsen, 1991).

In 1998, amidst much controversy, a Restatement (Third) of Torts: Products Liability was published. In essence, this restricted strict liability to manufacturing defects. The language of negligence was avoided, but in substance a negligence type standard was imposed for design and failure to warn defects. For example, liability for design defects requires evidence that foreseeable risks of harm be reduced by proof of a reasonable alternative design. Restatements are not law. They are simply recommendations for the courts to adopt with the hope that all courts will follow them and promote uniformity across the United States. A mixed picture exists as to whether state courts are favouring the adoption of the Third Restatement. Certainly, however, there is a more conservative climate in the United States, with the heady days when courts would impose liability for unforeseeable defects behind us (*Beshada v. Johns-Manville Products*, 1982). In that context it is arguable the Europe's substantive laws are more protective than those of the Third Restatement (Howells and Mildred, 1998).

On the other side of the Atlantic, the European Product Liability Directive has now been in existence for over twenty years, and whilst the European Commission has been busy initiating research work and undertaking regular reviews, it is striking, and somewhat disappointing, that what should be the key factor of the success of the instrument, its use by the national courts, is indeed lacking with a relatively low uptake of the Directive, and few reported cases under the implemented provisions[3].

In the Commission's recent review of the operation of the Directive, little appetite for reform was either reported or advocated by the Commission, which now seems content to play a monitoring role, leaving the fine-tuning to the European Court of Justice, if and when the relevant cases are brought before it. That under-ambitious stance contrast however with both the high expectations laid down in the Directive itself[4], as well as the demanding interpretation of the Directive made by the ECJ as a "complete" and not "minimum" harmonisation[5].

Clearly, a number of obstacles to the goal of maximum harmonisation still however remain. As a consequence of political compromises, national systems were provided with a menu of options and add-ons under the Directive, covering the development

risks defence, the exclusion of primary agricultural produce and game[6] and a ceiling on personal injury damages. Many crucial concepts under the Directive are left undefined, such as the crucial notion of "putting into circulation"[7], and even where a definition is given the margin for manoeuvre in interpretation can be large. This is most strikingly shown by the core notion of "defect" of a product which is defined as when a product does not "provide the safety which a person is entitled to expect."[8] On this basis, it is clearly a open-textured notion, as has been noted in a recent European Commission review of the Product Liability Directive: "[t]he subjective nature of the 'expectations' test means that this principle is incapable of precise definition ... Uncertainty also surrounds the question of what is required to prove 'defect'."[9]

Some confusion still prevails in English law, despite the best efforts of Mr Justice Burton who devoted a good deal of court time to the notion, including discussion of an impressive comparative survey, and in-depth analysis in the resultant decision of *A* v. *National Blood Authority*[10] which is probably the most extensive judicial analysis of product liability provisions in any of the Member States. Many aspects of this judgment were pro-claimant as the judge sought to put clear blue water between strict liability and negligence. However, the decision of *A* v. *National Blood Authority* seems not to have been influential in three recent decisions, two in the Court of Appeal, where it does not even merit a mention[11].

Thus there is still much uncertainty on both sides of the Atlantic as to both what the law of product liability actually is and indeed continued uncertainty as to what it should be given that there is often a reluctance to address policy issues directly. Whilst there is a conservative mood in the USA in the wake of the Third Restatement, the limited jurisprudence in the UK and the rest of Europe is sending mixed messages. However, structural issues centred on damage levels and civil procedure mean that for the foreseeable future businesses are still going to be most concerned about product liability exposure in the USA.

Notes

1. (1988) Managerial Law 1.
2. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products: OJ 1985 L 210/29.
3. With the exception perhaps of Austria where the pre-existing provisions were substantially less attractive for claimants.
4. "a fair apportionment of the risks inherent in modern technological production."
5. Case C-183/00 *Gonzalez Sanchez v Medicina Asturiana SA*, judgment of 25 April 2002; Case C-52/00 *Commission v France*, (2002) ECR I-3827.
6. Subsequently amended: Directive 99/34 OJ 1999 L 141/20.
7. 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).
8. See Article 6 of the Directive.
9. European Commission, *Third 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* (September, 2006: COM(2006) 496 final) page 10.
10. [2001] 3 All ER 289.

11. Court of Appeal cases are *Pollard v Tesco Stores Ltd* [2006] EWCA 393, [2006] All ER (D) 186 (Apr). and *Piper v JRI (Manufacturing) Ltd* [2006] EWCA Civ 1344, (2006) 92 BMLR 141; the other case is *Palmer v Palmer* [2006] EWHC 1284.

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