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Problems with the EC Approach to Harmonization of Product Liability Law

Marianne Corr*

I. INTRODUCTION

On July 25, 1985, the Council of the European Communities adopted a Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products ("Directive").¹ The Directive adopts a "no fault" approach to imposition of liability for injuries caused by product defects.² A defect is defined by measuring the product's performance against a standard analogous to the consumer expectations test familiar to American lawyers.³

The Directive contemplated that all necessary implementing legislation or regulations would be enacted by the Member States within three years after adoption by the Council.⁴ To date, however, only seven Member States have adopted legislation implementing the Directive⁵ and only three of those countries Greece, Italy, and the United Kingdom have complied with the three year deadline included in the Directive.⁶

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² Id. at preamble, para. 6.

³ Article 6 of the Directive provides that:

A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;
(b) the use to which it could reasonably be expected that the product would be put;
(c) the time when the product was put into circulation.

Cf. RESTATEMENT (SECOND) OF TORTS § 402 A comment i (1975). The Directive focuses on a product's safety rather than its performance; thus, a consumer apparently cannot recover under legislation implementing the Directive for a product "defective" only in that it failed to achieve some expected level of performance, unless the product also failed to provide the expected level of safety.

⁴ Product Liability Directive, supra note 1, art. 19.

⁵ These Member States include Denmark, West Germany, Greece, Italy, Luxembourg, Portugal, and the United Kingdom.

⁶ In June 1989, the Commission sent warning letters to the Member States that had not yet enacted implementing legislation, threatening to bring infringement proceedings if legislation was not passed. Belgium, n.m.n. A/145/89; France, n.m.n. A/146/89; Ireland, n.m.n. A/150/89;
Because of the recent and incomplete implementation of the Directive’s concepts, there is little factual basis on which to predict the Directive’s practical impact on the jurisprudence of the European Communities. The conventional wisdom is that, despite the adoption of American-style strict liability, Europe will not experience an American-style explosion of product liability litigation. The belief that Europe will remain immune from a “litigation crisis” rests on a number of procedural and cultural differences between Europeans and Americans. These include 1) the lack of or limitations on extensive pretrial discovery, contingent fees, jury trials, and punitive damages; 2) the Directive’s failure to include pain and suffering as compensable items of injury; and 3) the perception that Europeans are simply less litigious than Americans.

This Article will review briefly the Directive’s provisions, identifying several areas of uncertainty or confusion. It will then address whether a sanguine attitude toward the Directive’s impact is really justified, or whether the adoption of a consumer expectations test, combined with procedural and cultural differences among the Member States, provides a spawning ground for litigation similar to that seen in the United States over the last twenty years.

II. THE DIRECTIVE

The stated goal of the Directive is the harmonization of the Member States’ laws of product liability. The harmonization was deemed necessary due to the perception that “existing divergences” in the systems of imposing liability might “distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the onsumer against damage caused by a defective

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Netherlands, n.m.n. A/151/89. The designation “n.m.n.” means that no measures have been notified by the Member State to the Commission. Proceedings are initiated by the Commission through a confidential (non-published) letter to the Member State.

7 For purposes of clarity, references throughout this Article are to the provisions of the Directive itself, rather than to the provisions of any implementing legislation in the various states. The Commission has threatened to bring infringement proceedings against Member States whose implementing legislation differs substantively from the Directive, but it has not yet done so. United Kingdom, n.p.i. A/89/0153. The designation “n.p.i.” means that the measure has not been properly implemented by the Member State’s national law, and that proceedings have been initiated. The Directive’s goal of harmonization of the laws of the Member States will obviously be defeated if states modify the provisions they adopt, but the Commission’s enforcement power in this area is uncertain. The Directive provides that implementation of some of its provisions is optional, and those provisions will be noted in the text where relevant. For example, Product Liability Directive, supra note 1, art 16(1) regarding a ceiling on a producer’s total liability; art. 15(1)(a) regarding the agricultural option; and art. 15(1)(b) regarding the state of scientific and technical knowledge defense.

8 Product Liability Directive, supra note 1, at preamble, para. 5.
The Directive’s concepts are boldly stated and seem straightforward: “The producer shall be liable for damage caused by a defect in his product.” A “product” includes all moveables, excluding primary agricultural products and game, even though incorporated into another moveable or immovable, and specifically includes electricity. A “producer” is defined as “the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part . . . ,” anyone who “presents himself as the producer,” anyone importing into the Community products for sale, hire, leasing or distribution, and, where a producer cannot be identified, any supplier of the product. The injured party has the burden of proof, and stands to recover damages for personal injury or death, or for damage to property, other than the defective product itself, that is “ordinarily intended for private use or consumption” or is in fact “used by the injured person mainly for his own private use or consumption.”

Each of these provisions raises a number of questions of interpretation. The more intriguing questions, however, relate to the Directive’s “consumer expectations” standard for identifying defects, and to the application of the defenses to liability incorporated directly into the Directive.

III. CONSUMER EXPECTATIONS STANDARD

The American experience with the consumer expectations standard has not been a happy one. Reasonable men can and do differ as to what is reasonable in a given circumstance, and consistent application of the standard has proved elusive.

The jury system is often blamed for perceived excesses in American

9 Id.
10 Id. art. 1.
11 Id. art. 2.
12 Id. art. 3.
13 Id. art. 4.
14 Id. art. 9(b)(i)&(ii). Article 9 also states that its provisions “shall be without prejudice to national provisions relating to non-material damage.” Id. Thus, individual Member States can broaden the scope of possible recovery by permitting recovery of the “non-material” damages, such as damages for pain and suffering. The limitations of article 9 seem to be an attempt to preclude commercial plaintiffs from suing for damages resulting from defective products. The effectiveness of this limitation, however, is questionable, particularly in light of the allowance for damages to property “of a type ordinarily used for private consumption.” Product Liability Directive, supra note 1, art. 9(b)(i). Is a computer, for example, a product ordinarily used for private purposes? If so, surely there is no defensible distinction between an individual’s laptop computer and a corporation’s mainframe. However the question of “ordinary use” is resolved, it does not seem likely that article 9 will represent a significant limitation on the nature or the number of lawsuits.
15 Id.
cases, but results that seem to defy common sense occur regularly even without involvement of a jury. Thus, a Texas appellate court recently ruled that a liquor manufacturer might be liable for the lethal consequences of a person's decision to consume excessive amounts of alcohol. In *Brune v. Brown Forman Corp.*, the trial court had entered summary judgment for a liquor manufacturer, which had been sued by the mother of a college student who died after drinking an entire bottle of tequila within the span of a few hours. The appellate court reversed and ordered that the matter be tried, stating that there was a genuine question whether the lethal effect of consuming large quantities of alcohol was within ordinary consumer expectations. This result cannot be attributed to any peculiarity of the American system; rather, it is a consequence of the deference accorded a standard whose limits are ill-defined.

It is not unreasonable to assume that the parameters of the test will prove even more uncertain in the culturally more diverse European Community than they have in the United States. The Directive cannot tell manufacturers and consumers what consumer expectations are with respect to any given product. In addition, it fails to suggest what type of proof will satisfy the standard. At least U.S. defendants can appeal to the common sense and common experience of the jury, but what type of proof will be persuasive to a single factfinder faced with the challenge of identifying a community's expectations?

After implementation of the Directive, European litigants cannot even be sure of the group of consumers whose expectations will govern liability for a product's performance. The Directive provides no guidance as to whether the relevant consumers are those in the purchaser's home jurisdiction or those in the jurisdiction where the product was first put into circulation. For instance, how is a German judge to identify the consumer expectations that govern the purchase of a German-made product whose alleged defect has injured a French consumer? What if the German manufacturer sold the product to an Italian wholesaler, which in turn marketed the product through French retailers? And what if the alleged defect is in a British-made component? The Directive provides no guidance as to whose expectations govern, and no direct mechanism for reconciling the inconsistent results in application and outcome which seem virtually inevitable among the diverse Member States of the Community.

Even apart from the cultural differences among the Member States that make predictions of foreign expectations difficult and uncertain at best, there are a number of unresolved issues with respect to proving

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17 Id. at 828.
18 Id. at 831.
consumer expectation in even the simplest case. For instance, the identification of factors influencing the development of consumer expectations will affect the presentation as well as the result of product liability actions. Do producers, through their advertising or public relations campaigns, for example, set standards of expectations which they will then be called upon to meet in the context of product liability actions? Whatever the answer to these questions, the nature of acceptable proof remains to be explored.

IV. THE DIRECTIVE'S DEFENSES TO LIABILITY

Certain defenses to the strict liability contemplated by the Directive are implicit in the language of article 6. That article provides, for example, that a product is defective when it fails to provide the safety which a person is entitled to expect, "taking all circumstances into account, including . . . (a) the presentation of the product."\(^{19}\) It seems, then, that effective use of labels, warnings, advertising, and packaging may provide a defense.\(^{20}\) Article 6 also provides that "a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation."\(^{21}\) This provision is commonly referred to as the "state of the art" defense.

In addition to the defenses implicit in article 6, article 7 provides specific defenses. Article 7 provides:

The producer shall not be liable as a result of this Directive if he proves:

(a) that he did not put the product into circulation; or
(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose not manufactured or distributed by him in the course of his business; or
(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the com-

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19 Product Liability Directive, supra note 1, art. 6(1)(a).
20 In light of the inclusion of producers of component parts in the definition of "producer," those manufacturers will face a difficult challenge of ensuring that any warnings they provide to the manufacturer of the finished product are appropriately conveyed to the consumer.
21 Product Liability Directive, supra note 1, art. 6(2).
ponent has been fitted or to the instructions given by the manufacturer of the product.\(^{22}\)

Most of these defenses are fairly straightforward, but the one that has already generated controversy is the optional "risk of development" defense contained in article 7(e).

V. STATE OF THE ART VS. RISK OF DEVELOPMENT

The article 6(2) "state of the art" defense is actually narrower than the "state of the art" defense familiar to U.S. litigators. The intent of the Directive seems to be to focus attention properly on consumer expectations at the time the product is distributed\(^{23}\) and to prevent identification of a defect by measuring a product's performance against more sophisticated expectations that have been developed by product improvements. The significance of this provision is that the product will not be deemed defective if it provided the level of safety which consumers were entitled to expect at the time of distribution.

By contrast, the "risk of development" defense of article 7(e) excuses a producer from liability associated with an admitted defect (no liability attaches if "the existence of the defect" could not have been discovered). The controversy surrounding adoption of this provision is reflected in the fact that its implementation is optional\(^{24}\) and in the Commission's undertaking to report to the Council by 1995 on the effect of rulings relating to this section.\(^{25}\) It seems inevitable that any producer seeking to escape liability by using this defense will face conflicting evidence regarding the actual state of scientific and technical knowledge that might have allowed discovery of the defect at the time the product was put into circulation. Pharmaceutical manufacturers are the most obvious "producers" likely to assert this defense, and indeed, the defense may be necessary in order not to discourage product innovations in this field. This type of defense does, however, raise the specter of the "liabil-

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\(^{22}\) Id. art. 7.

\(^{23}\) Article 6(1)(c) of the Directive specifically provides that "the time when the product was put into circulation" is one of the circumstances to be taken into account when determining the level of safety a person is entitled to expect.

\(^{24}\) Product Liability Directive, supra note 1, art. 15(1)(b). So far, Luxembourg has failed to include this provision in its implementing legislation. The United Kingdom has adopted a risk of development defense that differs from the Directive formulation. The U.K. Consumer Protection Act 1987, ch. 43, part I 4(1)(e) provides a defense to the producer who shows that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.

The Commission has threatened to institute infringement proceedings against the United Kingdom because of the substantive modification to this section.

\(^{25}\) Product Liability Directive, supra note 1, art. 15(3).
ity by hindsight" which the Directive apparently tried to avoid by adopting article 6(2).

Finally, analysis of the "state of the art" defense of article 6(2) raises intriguing questions about whether a claimant could use the defense offensively. It does not seem unreasonable that consumer expectations of any given product might be established by showing that no safer product could be made,\(^{26}\) as consumer expectations should be limited by the technical capabilities of manufacturers. This use of "state of the art" does not seem to be contemplated by the Directive, nor does it seem to be excluded by it.

Once "state of the art" is accorded a central role in determining the most basic question of liability, is it not reasonable for a claimant to also avail himself of this concept by showing that the "state of the art" permitted manufacture of a safer product that would have conformed to high consumer expectations of safety? It seems inconsistent with the Directive's goal of protecting the consumer\(^{27}\) to preclude aggressive and offensive use of the "state of the art" defense, but such a tactic is certainly several steps removed from the deceptively simple language of the Directive. The possibility that the Directive's recognition of a "state of the art" defense might be stretched to provide an independent basis for proving defects does not seem so far-fetched, in light of the consumer-protectionist policies prevalent in Europe.\(^{28}\)

VI. POTENTIAL FOR INTERJURISDICTIONAL CONFLICTS

Resolution of issues relating to application of the consumer expectations test and the various defenses to liability may or may not become the subject of bitter litigation in Europe. Assuming the European Community can find some way to resolve these issues amicably, and even assuming uniform implementation of the Directive, it is not at all certain that the hoped-for harmonization of laws among the Member States can be achieved. Because the Directive leaves the resolution of several important issues to the Member States, such as the role of contributory fault\(^{29}\)

\(^{26}\) As the claimant has the burden of proving defect under the terms of article 4, the defendant producer would likely take the first step in the offensive use of "state of the art" in order to rebut the claimant's proof.

\(^{27}\) The Directive mentions protection of the consumer throughout the considerations.

\(^{28}\) These policies are apparent in the draft directive concerning product safety, COM(89) 162 final, Apr. 27, 1989, 32 O.J. EUR. COMM. (No. C 193) 1 (1989) (Proposal for a Council Directive Concerning General Product Safety). This draft proposes to establish a "general safety requirement for any product placed on the market, namely that such products do not present any unacceptable risks and that potential users are warned of any remaining risks." Id. at preamble, seventh consideration. In its current form, this draft directive would not provide a private right of action but would permit states to remove from their marketplace any product that failed to meet the safety standard.

\(^{29}\) Product Liability Directive, supra note 1, art. 8(2).
and the availability of nonmaterial damages, and makes the adoption of key provisions, such as the availability of the "risk of development" defense optional, significant differences in outcome are to be expected.

Apart from the differences built into the Directive, significantly different outcomes by courts presented with similar facts seem inevitable in light of the number of diverse jurisdictions that will attempt to apply the law. A cursory review of recent U.S. product liability decisions reveals the potential for result-determinative interjurisdictional conflicts, even in the application of supposedly uniform law. The following examples, while perhaps not directly transferable to the European experience, are nevertheless instructive because the directly contradictory results cannot be attributed solely to the peculiarities of the U.S. system. These examples illustrate the vast potential for conflicting results, even when a single legal concept is applied to a similar set of facts.

The first example involves the applicability of the "learned intermediary" defense to manufacturers of intra-uterine devices ("IUDs"). Recently, a federal appellate court applying Arkansas law reversed summary judgment that had been entered in favor of Searle Laboratories, manufacturer of a particular type of copper IUD, the CU-7. The three judge appellate panel held that the "learned intermediary" defense was not applicable to manufacturers of IUDs. Thus, Searle could be held liable for failing to "personally warn" IUD purchasers of the product's risks, despite the admittedly adequate warnings provided to physicians. Just two days later, in a case involving the same defendant and the same product, the Delaware Supreme Court reached exactly the opposite conclusion, affirming summary judgment in favor of Searle. The Delaware court found that Searle had satisfied its duty to warn consumers by providing adequate warnings to learned intermediaries, the physicians who were to insert the devices. Juries were not involved at any stage of either case, nor were there any substantive differences in the applicable law. Rather, the Arkansas court made a factual determination that a patient's independent choice to purchase an IUD made the device more like a consumer product than like a drug, the product category to which the "learned intermediary" defense had previously been applied.

Another example of interjurisdictional legal conflicts involves the Clark Equipment Company, manufacturer of a style of front-end loader that allegedly had a propensity to catch fire, destroying the machine. The question presented in a series of strict liability actions against the

30 Id. art. 9.
31 Id. arts. 7(e), 15(1)(b).
32 Hill v. Searle Laboratories, 884 F.2d 1064, 1070 (8th Cir. 1989).
33 Id. at 1071.
35 Id. at 398.
The U.S. Supreme Court had addressed this issue and determined that economic damages were not properly recoverable in product liability actions.37

The Supreme Court’s opinions on such a question of product liability law are not binding on the states, but they are certainly persuasive. The East River decision was analyzed by each of three decisions last year relating to the Clark Equipment Company’s front-end loaders. In the first of those decisions, the Alabama Supreme Court adopted the U.S. Supreme Court’s analysis and affirmed summary judgment for Clark Equipment Company, holding that it was not strictly liable for the economic damages to the product due to the alleged defect.38

Just a month later, however, the West Virginia Supreme Court refused to reverse an award against Clark Equipment Company, holding that economic damages could be recovered in strict liability actions where the damage was the result of a “sudden, calamitous event” which posed a danger of personal injury, even if unrealized.39 A few months later, an appellate court in Pennsylvania also followed the U.S. Supreme Court’s reasoning and ordered the trial court to enter judgment for Clark Equipment Company.40 In doing so, however, the Pennsylvania court expressly reserved judgment on the question of whether the result would be different if the parties were not both commercial enterprises.41

Thus, in the span of a few months, a manufacturer of an allegedly defective product was found not liable for certain damages in one jurisdiction, liable for those same damages in another jurisdiction, and not liable in a third jurisdiction, at least as long as the plaintiff was a commercial entity. Juries were not involved in these result-determinative decisions, which referenced a single source of supposedly uniform law.

The perception of a similar potential for interjurisdictional differences in application of the Directive does not seem unwarranted. In fact, this potential seems to be tacitly encouraged by the Directive, which leaves issues such as contributory and comparative fault and the interplay of contractual remedies for resolution by the Member States according to their own law.42

38 Lloyd Wood Coal Co., 543 So.2d at 672.
41 Id. at 413, 563 A.2d at 134.
VII. CONCLUSION

The Directive does not resolve several potentially result-determinative issues. Whether the resolution of those issues will result in judicial harmony among the Member States is debatable. The predictions that the anticipated unity among the European states will preclude the type of interjurisdictional conflicts described above, and that the civil law will not tolerate the extreme applications of the consumer expectations standard experienced in the U.S. common law jurisdictions may well be true, but the opposite outcome seems equally as likely.