Legal Backgrounder

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CHANGES PROPOSED IN EUROPEAN PRODUCT LIABILITY LAW

by

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The European Commission plans to study the potential economic impacts of allowing product manufacturers to be held liable in Europe for development risks – a proposal similar to the now-discredited practice by some American courts of imposing "super strict" liability on manufacturers. This would allow product manufacturers to be held liable in Europe for product defects that were both unknown and undiscoverable at the time their products were marketed.

The Commission announced its plans for the study in its recent report on the application of strict products liability law under the European Council's Directive on liability for defective products. The report, available at the Commission's website (http://europa.eu.int/comm), was issued after the Commission sought and reviewed numerous comments from consumers, businesses, industry groups, and other interested parties for its periodic update on the application of the Directive.

The Commission, which plans to establish an expert panel on products liability issues, also intends to study how the Directive operates alongside the diverse fault- or contract-based legal schemes in Member States, and, in light of these varying systems, consider whether it is possible to develop a uniform preventative products liability system in the European Union. This Legal Backgrounder will provide a brief overview of European strict products liability law and discuss the problems posed by the proposed abolition of the development risks defense, as illustrated by the United States' experience.

Early History. Before 1985, few European countries provided for strict liability for defective products. Under the national law schemes of the individual Member States, manufacturers of defective products could be held liable if they were found to be at fault, or if they were found to have breached an implied contract term for fitness of use or the quality of the product. In 1985, the Council of the European Union adopted Directive 85/374 on products liability. The Directive provided that manufacturers could be held liable for defects in their products, regardless of whether they were negligent. This was essentially the first time strict products liability was available in Europe.

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Unlike in the United States, where the doctrine of strict liability was developed and refined by lawmakers over time, in Europe the doctrine was introduced in "one fell swoop." Drafters of the Directive based it on Section 402A of the Restatement (Second) of Torts, which used a singular definition of defect. They did not incorporate United States case law that was decided after (and as a result of) the confusion brought about by § 402A's use of a singular definition of defect. Drafters in the U.S. appreciated that a single definition of defect did not work and created separate rules for manufacturing defects, design defects, and defects based on failure to warn. As a result, there are significant differences between the Directive and American products liability law in the definition of product "defect."

Strict Products Liability and the Directive. The Directive is targeted toward consumer products. It provides for strict liability for death, personal injury or property damage over 500 ECU caused by defective products. It applies to manufacturers of finished goods, raw materials, and component parts, as well as to commercial importers.

Plaintiffs are required to prove damages, the existence of a product defect, and that the defect caused the damages alleged, as in the United States. The Directive uses the "consumer expectations" test as a singular definition of product defect. This test 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." Directive 85/374/EEC, art. 6, § 1. A product is not to be considered defective for the sole reason that a "better" product is subsequently put into circulation. See Directive 85/374/EEC, art. 6, § 2.

Under the Directive, manufacturers can assert such defenses as contributory negligence of the plaintiff and misuse of the product. Plaintiff's fault is considered on a comparative fault basis. A key part of the Directive is a "development risk" defense. The "development risk" defense prevents a manufacturer from being held liable if the state of scientific or technological knowledge at the time the product was marketed made the defect undiscoverable. The "development risk" defense was made optional, but most Member States adopted it. Most courts in the United States apply an American analogue of the development risk limit on liability.

The Directive also adopted joint and several liability; established a three-year statute of limitations and a ten-year statute of repose; and set an optional damages cap, which most Member States adopted. Procedural rules and punitive damages, which generally are not available in Europe, were not addressed in the Directive.

Plaintiff-Friendly Proposals for Change. The proposal to eliminate the controversial development risk defense from the Directive was just one suggestion made by the Commission. In July 1999, it issued a Green Paper on products liability seeking comment on a number of wide-ranging proposals to make it easier for consumer plaintiffs to recover against product manufacturers under European products liability law. Other proposed changes in the law included: assigning the burden of proof in products liability cases to the defendant rather than the plaintiff; allowing market-share liability; and liberalizing discovery.

Many responses to the Green Paper suggested that there was absolutely no evidence to support the need to change the Directive. Although it has existed for 15 years, it has produced very little decisional law and was only just recently adopted in some Member States. It was also difficult to assess the impact of the Directive on litigation because claims filed under national fault-based or contractual legal schemes were considered along with claims filed under the Directive. There was little information available to identify major problems with the Directive. For example, there was no showing that a particular individual or group of individuals had just claims that failed under the Directive. The Commission concluded that any changes to the Directive should be on "objectively factual bases," and that "the information available at the present stage is not sufficient to draw firm conclusions." As a result, the Commission opted to undertake the proposed studies rather than to recommend any changes at this time.

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Problems With Abolishing the Development Risks Defense. It would be unsound public policy for the Commission to abolish the development risk defense. This conclusion is supported by direct evidence in the United States. For a brief period in the United States, a few courts held that under absolute liability a manufacturer could be held liable for a design even though it neither knew nor could have known about the risk imposed by the design, or even though there was no safer way to make the product given the existing technology. *See, e.g., O'Brien v. Muskin Corp.,* 463 A.2d 298, 306 (N.J. 1983), *abrogated,* N.J. Stat. Ann. § 2A:58-C-3 (1999). Similarly, a few courts held that a manufacturer could be strictly liable for failure to warn even though it was unaware of and could not have known of the risk giving rise to the need for a warning. *See, e.g., Halphen v. Johns-Manville Sales Corp.,* 484 So.2d 110 (La. 1986), *abrogated* La. Rev. Stat. Ann. § § 9:2800.56, 9:2800.59 (1999). American courts and legislatures quickly found that imposing this extensive liability in design and warnings cases deterred new product development, created pockets of uninsurability and did not promote product safety.

Defective Design Cases. A few courts justified their use of the absolute liability theory in defective design cases by conducting a "risk-utility" analysis. Where injuries were caused by products considered to be dangerous and (in relation to the danger) of comparatively little utility, the products were found defective and the manufacturers were held liable. This was true even in cases where no alternative design existed for the product. Thus, in *O'Brien v. Muskin Corporation,* supra, the New Jersey Supreme Court held that the manufacturer of an above-ground swimming pool could be held liable even though there was no way to make an above-ground pool safe for diving. Similarly, a Maryland court held in *Kelley v. R.G. Industries,* 497 A.2d 1143 (Md. 1985), that the manufacturer of a cheap handgun known as a "Saturday Night Special" could be held liable for injuries sustained when a grocery store employee was shot during a robbery, even though the essential purpose of a handgun is to fire bullets.

The New Jersey and Maryland state legislatures overturned O'Brien and Kelley because the cases created unsound public policy. The absolute liability theory had the practical effect of severely limiting or banning products, as the costs of liability tended to "dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible." John W. Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U L. Rev. 734 (1983). Legislators properly believed that it was their role (or that of an administrative agency) to decide what products should flow in the marketplace. This was not a decision to be made under products liability law. Absolute liability lessens the incentives for manufacturers to make safe products. An incentive to design safe products results from a system where manufacturers who allocate resources to careful and safe design will benefit from lower insurance premiums and fewer claims. As one court explained, "[t]he incentive will result from the knowledge that a distinction is made between those who are careful and those who are not." *Prentis v. Yale Mfg. Co.,* 365 N.W.2d 176, 195 (Mich. 1984).

Failure to Warn Cases. A few courts held manufacturers liable although they were unaware of and could not have known of the risk giving rise to the necessity of the warning. Courts justified their use of this theory by the concept of "risk distribution," which assumes that a manufacturer is better able to absorb the cost of a product-related injury by "distributing" the cost of the "risk" in the price of the product. For example, the *New Jersey Supreme Court in Beshada v. Johns-Manville Products Corp.,* 447 A.2d 539 (N.J. 1982) relied on the risk-distribution theory when it ruled that a manufacturer of an asbestos-containing product could be held liable for failing to warn about its dangers – even if the manufacturer neither knew nor could have known of those dangers at the time the product was made. *The Supreme Court of Louisiana in Halphen v. Johns-Manville Sales Corp.,* supra, reached the same conclusion with respect to products that were so dangerous that "a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product." Id. at 114. These cases were subsequently overruled.

In recognition of the adverse policy impacts, American courts have moved sharply away from that type of liability exposure in duty to warn cases. The Commission can and should benefit from the hard-learned lessons of American courts and retain and improve the development risk defense.

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The Development Risk Defense Should Be Improved. The development risk defense should be strengthened so it shields manufacturers from liability in those cases where there *was no reasonable alternative design* for the product at the time the product was put into circulation. Sometimes it is impossible to design a product that is always safe if it is to meet consumer demand and not deprive consumers of the usefulness or desirability of the product. Examples include animal fats, sugar, alcohol, tobacco, convertible cars, and motorcycles. Under the current Directive, it is possible to argue that manufacturers of such products should be held strictly liable.

The "reasonable alternative design" test is based on the principle of fairness. If something is wrong with a design, the plaintiff should show how it could be improved and made right. It also suggests that there has to be some way the product could have been rendered safe. With respect to widely distributed products that have dangers that cannot be removed, the judgment to remove them or sanction them should be one of administrative agencies and legislatures, not tort law. As a result, under the reasonable alternative design test, common and widely distributed products would only be found defective if a reasonable alternative design could blunt the risk without compromising their basic utility to the user of the product.

The New Restatement Third, Torts: Products Liability Supports A Full Development Risk Liability Limitation. Problems stemming from the singular definition of defect contained in *Restatement (Second) of Torts, 402A,* led the American Law Institute to again restate the law of products liability. In *Restatement Third, Torts:* Products Liability, two distinguished law professors, James Henderson of Cornell and Aaron Twerski of Brooklyn Law School, surveyed thirty years of American case law addressing design and warnings, with particular focus on whether manufacturers should be held liable either for defective design or failure to warn if the manufacturer neither knew nor could have known about a particular risk.

Aided by a 20-person advisory committee, *See* Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability -- The American Law Institute's Process of Democracy* and Deliberation, 26 Hofstra L. Rev. 743 (1998), the Reporters determined, and the *Restatement Third* reflects, that manufacturers should not be held liable in those situations. Specifically, the *Restatement Third* indicates that manufacturers should not be liable for failure to warn if they neither knew nor could have known about a risk. *Restatement Third, Torts: Products Liability, § 2(c).* Liability would only occur when the "foreseeable risks of harm posed by the product could be reduced or avoided by the provision of reasonable warnings." This reflects the inclusion of a development risk limitation with respect to warnings. Moreover, development risks in Restatement Third is not a defense. Plaintiffs must prove that the defendant had reason to know about the risks at the time the product was introduced into the commercial chain of distribution.

Restatement Third also makes clear that a manufacturer would not be liable for defective design unless the risk of harm could have been reduced or avoided by the adoption of "a reasonable alternative design at the time it made the product." *Id. § 2(b).* The judgments at the content of the *Restatement* were predicated on public policy. Rules extending liability beyond the perimeters of the *Restatement,* which would include the imposition of liability for development risks, would seriously compromise research and development of new and needed products, place undue pressure on the insurance system because of the impossibility of actuarially determining the unknown, and engage in "overkill" with respect to the appropriate goal of deterrence. *Restatement Third* did include strict liability for manufacturing defects when a product departed from its intended design, but this imposition of product liability focused on quality control, not whether a defendant knew or could have known about a particular development risk. *See id. § 2(a).*

Conclusion. While it is encouraging that the Commission decided against recommending its numerous and unnecessary pro-plaintiff proposals to the Council of the European Union and the European Parliament for adoption at this time, the Commission's interest in revising the soundness of the development risks defense is of concern. Supporters of a fair and balanced civil justice system in Europe should help assure that the Commission notes the lessons learned about "liability overkill" in the United States. This is a classic case where a clear lesson from history can help promote sound public policy.

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