

Outline of Product Safety and Product Liability law, and recent developments

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FOUR
NEW
SQUARE

LINCOLN'S INN

Product Safety Directive

Article 2(a)

“‘product’ shall mean any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned.”

Product Safety Directive

Article 2(b)

“... any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product’s use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons ...”

“Producer”

- (i) the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product;

“Producer”

- (ii) the manufacturer’s representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, the importer of the product;

“Producer”

(iii) other professionals in the supply chain, insofar as their activities may affect the safety properties of a product;

‘distributor’ shall mean any professional in the supply chain whose activity does not affect the safety properties of a product;

Secondary duties - producers

- Information to consumers
- Post-market surveillance
- Measures to deal with risks identified
- Notification to authorities
- Co-operation with authorities

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Notification – intrinsic hazard

Slight	Serious	Very Serious
<p><2% incapacity</p> <p>Usually reversible and not requiring hospital treatment</p>	<p>2-15% incapacity</p> <p>Usually irreversible requiring hospital treatment</p>	<p>>15% incapacity</p> <p>Usually irreversible</p>
<p>Examples:</p> <p>Minor cuts</p>	<p>Examples:</p> <p>Serious cuts</p> <p>Fractures</p> <p>Loss of finger or toe</p> <p>Damage to sight</p> <p>Damage to hearing</p>	<p>Examples:</p> <p>Serious injuries to internal organs</p> <p>Loss of limbs</p> <p>Loss of sight</p> <p>Loss of hearing</p>

Notification – probability of injury

Overall probability of health / safety damage		Probability of hazard being present in product		
		1%	10%	100% (All)
Probability of health / safety damage from regular exposure to hazardous product	Hazard is always present and health / safety damage is likely to occur in foreseeable use	Medium	High	Very high
	Hazard may occur under one improbable or two possible conditions	Low	Medium	High
	Hazard only occurs if several improbable conditions are met	Very low	Low	Medium

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4 New Square / IMC Liability
Insurance Conference



Notification – vulnerability

Very vulnerable	Vulnerable
Examples: Blind Severely disabled Very old Very young (< 3 years)	Examples: Partially sighted Partially disabled Elderly Young (3-11 years)

Table A - Risk Estimation

		Severity of Health/Safety Damage			Overall Gravity of Outcome
		Slight	Serious	Very Serious	
Probability of Health/Safety Damage	Very High		Very High	High	Very High
	High	Very High <td>High</td> <td>Medium</td> <td>High</td>	High	Medium	High
	Medium	High <td>Medium</td> <td>Low</td> <td>Moderate</td>	Medium	Low	Moderate
	Low	Medium	Low	Very Low	Low
	Very Low	Low	Very Low		Very low

Table B – Grading of Risk

Vulnerable people		Non-vulnerable adults				Adequate warnings and safeguards? Obvious hazard?
Very vulnerable	Vulnerable	No No	Yes No	No Yes	Yes Yes	
SERIOUS RISK – Notification required		SERIOUS RISK – Notification required		SERIOUS RISK – Notification required		SERIOUS RISK – Notification required
		Moderate risk – Notification required		Moderate risk – Notification required		
Moderate risk – Notification required		Moderate risk – Notification required		Low risk Notification unlikely		Low risk Notification unlikely

EU Directive 85/374/EEC Consumer Protection Act 1987

- Imposes quasi strict liability
- Rarely used until recently but becoming popular

NB

- A completely artificial liability
- A complete break from law of obligations

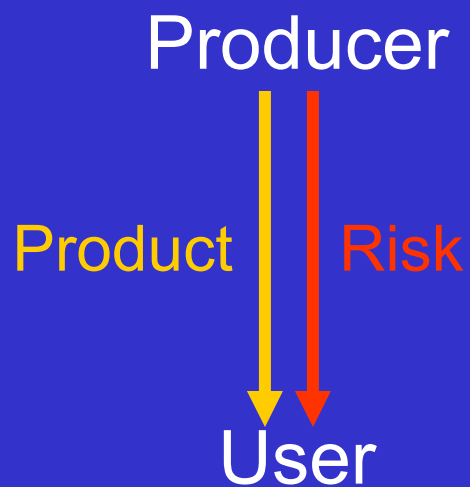
Scheme of Directive/CPA

Liability imposed on

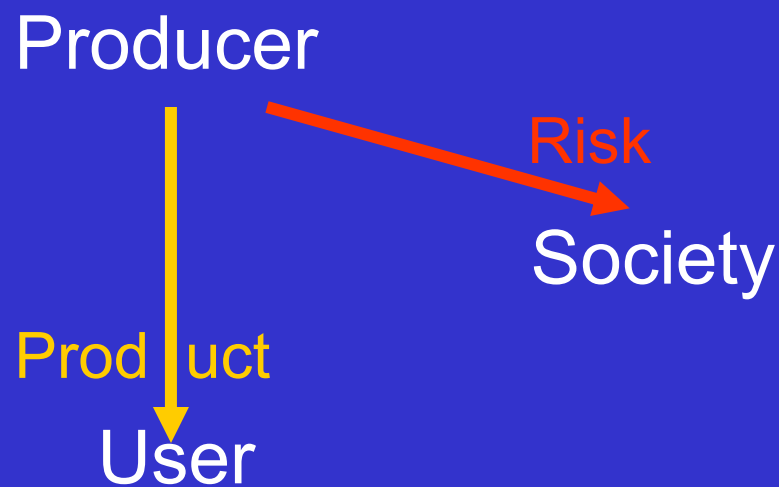
- Producers (not limited to manufacturers)
- Quasi producers (importers and own branders)
- (Intermediate suppliers)

Policy underlying the Directive

Negligence



Directive/CPA



Policy underlying the Directive

Burton J in *A & Others*:

“The purpose of the Directive is to achieve a higher and consistent level of consumer protection throughout the Community and render recovery of compensation easier, and uncomplicated by the need for proof of negligence.”

Directive/CPA: Construction

- EU Law – purposive construction
- CPA Section 1(1) – Construe Act so as to comply with Directive
- *Marleasing SA v. La Comercial Internacional de Alimentacion SA*

Directive: Preambles

“[2] ... [L]iability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.”

Directive: Preambles

“[6] ... [T]o protect the physical well-being of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect ...”

Directive: Preambles

“[7] ... [A] fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances.”

Directive: Art 1 - Liability

“The producer shall be liable for damage caused by a defect in his product.”

Directive: Art 2 - Product

“... all movables even if incorporated into another movable or into an immovable.”

- Vaccines
- Prostheses
- Drugs
- Blood / organs

Directive/CPA: Producer

- Manufacturer of product, raw material or component part
- Person who puts name, trademark etc on product
- Importer into EU
- (Intermediate supplier)

Directive: Art 3.3 - Supplier liability

“Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.
...”

CPA: S.2(3) - Supplier liability

- “(a) the person who suffered the damage requests the supplier to identify one or more of the [producers] (whether still in existence or not) ...;
- (b) that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and
- (c) the supplier fails, within a reasonable period after receiving the request, either to comply with the request or to identify the person who supplied the product to him.”

Directive: Art 6 - Defect

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

- i. the presentation of the product;
- ii. the use to which it could reasonably be expected that the product would be put;
- iii. the time when the product was put into circulation”

Limitation

- Three years (PI or property damage)
- Accrual of cause of action
- Date of knowledge
- Disability etc
- **Longstop**

Longstop – s11A(3)

- Right extinguished
- Starting date
 - Shelf-life of product
- Disability etc
- Contribution claims

Contract and tort claims

- Contract
- Tort
- Contribution