Product Liability: a response by the NCC to the review of the product liability directive

1. Introduction

1.1 The Product Liability directive was an attempt to set up a regime of strict liability for injuries caused by products. At the time it was adopted there was considerable concern over disasters such as the Thalidomide case, where claims for negligence were hard to prove.. From the industry point of view, fears were expressed that the directive would stifle innovation, involve expensive insurance against the risks, and result in a flood of claims.

1.2 The experience of the intervening years has been that most claims in the United Kingdom involving large numbers of claimants, based mostly on pharmaceuticals, have foundered on problems with legal aid. The mushrooming of smaller claims has not been apparent anywhere in the Union. The 1995 review of the operation of the directive showed that there had been no general effect on insurance premiums.

1.3 The Commission has said that it wished to hear arguments based on evidence rather than statements of principle. The problem with this approach is that there are very few cases reported cases anywhere in the Union. This paper, therefore, looks at some of the questions asked in the light of what evidence exists.

2. Evidence

2.1 NCC responded to the 1995 review of the operation of the directive and a copy of that report is attached. This gives an indication of the kinds of cases that were being brought at the time. In order to respond to this review we, together with Consumers In Europe Group, commissioned a study of what evidence exists of accidents caused by unsafe goods and cases brought.

2.2 There are a number of sources of evidence of problems with unsafe goods. These are examined below.

2.3. Office of Fair Trading

2.3.1 In the 12 months ending 30 September 1998, the OFT were notified of 896,901 consumer complaints, a decrease of 0.8% from the preceding year. More than 99% of these complaints originated from Trading Standards and Environmental Health departments (local authority bodies), the other 1% from Citizens' Advice Bureaux (though it is important to note that only a small number of CABs report these complaints to the OFT and so these figures do not reflect the overall number of consumer complaints made to CABs. See section 5, below).

2.3.2 Four percent of the overall number of complaints were “Health and Safety” complaints (as opposed to five percent the previous year), but beyond this it is impossible to tell from the published figures how many cases were cases of damage or injury through a defective product. In addition the figures include services as well as goods.

2.4 HASS/LASS statistics

2.4.1 The DTI collects annual data on accidents occurring in the home and while at leisure (work and road traffic accidents are not included). From a sample of 18 hospitals in the UK they estimate the number of accidents nationwide per year, broken down into age, sex, accident mechanism, activity of patient, location and type of injury. These figures are correlated by the Commission into Europe wide statistics (EHLASS).

2.4.2 The 1997 statistics (which are the most up to date available) show that from January 1997 until January 1998 there were 324,216 accidents in the home and at leisure (1,732 fewer than 1996).

2.4.3 However, there will obviously be a margin of error in the national estimate, by the fact that there are no specialist hospitals in the sample and, therefore, specific injuries associated with unsafe products such as burns or eye injuries may be underrepresented.

2.4.4 Aside from this, the main drawback with these figures is that even where they identify the involvement of an "article" in the injury, they do not specify whether the injuries have arisen from a defective or unsafe product. In fact they assert in the notes that where an article is involved in the injury, there is "no imputation thereby of cause or fault" relating to that article. Therefore, although these statistics can be a rich source of data, it is again impossible to glean from them much about the nature or number of product liability cases.

2.5. The Royal Society for the Prevention of Accidents

2.5.1 This organisation is a charity (part funded by the DTI) involved in promoting safety and researching and collecting information on accidents. They deal with victims' solicitors rather than victims directly, and also with Trading Standards enquiries. Part of the remit of one of their employees is product

liability. This employee is also registered in the Law Society's Directory of Experts and frequently appears in court as an expert witness on product defects.

2.5.2 Unfortunately as an organisation ROSPA does not keep a database of the product liability cases referred to them. Their system of paper files is comprehensive but difficult to track.

2.5.3 In terms of volume of cases, it was suggested by ROSPA that the numbers were small but growing. Information was made available regarding cases arising from as far back as 1996. Between the period January 1997 and October 1999, there were 23 cases of unsafe products which had either been resolved since January 1997 or had been brought to the attention of ROSPA before January 1997 but the results of which were still outstanding by October 1999. Some of the cases illustrate how lengthy the court process can be: one case was brought to ROSPA 5 years after the accident, and in another case the ROSPA report was prepared for court in 1992 and the case is not yet resolved. Examples of the kinds of cases dealt with by ROSPA are:

- an eye injury caused by a drill part which failed BSI standards
- lacerations caused by sharp unprotected edges on a washing machine
- head injuries caused by a fall from a baby's high chair with inadequate security

2.5.4 Over the last ten years ROSPA has also collected information, gleaned from the daily press, on product recalls. In their quarterly magazine "Staying Alive" they publish in detail the most recent recalls on dangerous and defective goods. This seems to be the only record of product recalls in the country, other than for cars, which are collected by the DETR.. In the period between January 1999 and October 1999 ROSPA identified 47 product recalls advertised in the press. However it is obviously not possible to conclude from this how many cases of injury actually occurred.

2.5.5 Again it is difficult to gauge from the ROSPA data either how many cases of product liability there are, or what kinds of issues may prove difficult for the consumer in such cases. A brief outline of the cases brought to ROSPA's attention is contained in Appendix A.

2.6. The National Association of Citizens Advice Bureaux

2.6.1 This is the umbrella organisation of local citizens advice bureaux nationwide. Advisers may complete an evidence form after seeing a client. These are then collected and sent to NACAB who categorise them and use them to identify and work on issues of social policy. Of approximately 6,000,000 enquiries per year only around 25,000 evidence forms are returned to NACAB. This indicates that it is unlikely that their findings are statistically representative.

2.6.2 From the period beginning January 1997 till October 1999, NACAB categorised 32 cases as involving “dangerous goods”. Some of these cases are complaints about potential injuries rather than actual injuries. The kinds of dangerous products involved include motor vehicles, gas fires, shoes, car seats, food, windows and carpets. A list of the cases involved is contained in Appendix B.

2.7. Trading Standards Departments

Though Trading Standards Departments do keep a record of criminal prosecutions of manufacturers of dangerous products, they do not collect information on civil cases of injury from defective products. The Institute of Trading Standards Administration (the professional body for Trading Standards Officers) said that they had canvassed TS authorities for information on civil cases of product liability and had received no response.

2.8. Personal Injury lawyers

At the time of writing, the Association of Personal Injury lawyers (APIL) were in the process of sending out a questionnaire to their members asking how many of them were aware of and/or had used the product liability directive. The results of this search are as yet unavailable. No response has been obtained to a request for information about cases in APIL's newsletter. In our report for the 1995 review, by making more strenuous efforts to contact personal injury lawyers, we did get information about a number of cases. The lessons from that study still apply.

Recommendations:

From the above discussion of current available figures, it is clear that there is very little statistical knowledge of the nature and number of product liability cases arising in the UK. Although it is obvious that such cases do exist, there is no central database of these cases, the sources of information are disparate, and where information does exist, that information is not specific to product liability legislation.

We recommend that the Commission considers how the collection of statistics under the EHLASS scheme can be made more useful. The statistics as they are presented cannot be used to assess whether there are large numbers of unsafe goods on the market or whether most accidents are caused by carelessness. Equally they do not appear any use in identifying particular goods which cause a number of problems.

We do not consider it acceptable that there is no central register of recalled goods. While this is more appripriate for product safety

legislation than product liability legislation, we recommend that the Commission consider whether there should be provision for a register in each Member State.

3. The development risks defence

3.1 This defence allows manufacturers to escape liability for a defective product where "the state of scientific and technical knowledge at the time when [the manufacturer] put the product into circulation was not such as to enable the defect to be discovered." [Article 7 of the 1985 Directive]

3.2 As outlined in 1995 by the NCC in "Unsafe Products", the UK legislation on development risks (section 4 of the Consumer Protection Act 1987, Part I), giving effect to the defence in the Product Liability directive, has a slightly different, and arguably wider, wording of the defence. However in 1997 the European Court of Justice decided that the Commission's challenge to the UK law as being in conflict with the EC directive had failed, and that there is no reason to suppose that UK courts would not interpret UK law in light of the EC directive (reported at [1997] All E.R. (EC) 481).

3.3 The court said that the state of knowledge was not that which the actual producer knew or could have known, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed. The court went on to say that in order to allow it to be presumed that the producer had the knowledge, the knowledge had to be accessible. No help was given over what accessible means beyond the fact that the information or research needed to have been published.

3.4 The argument put forward by Professor Mark Mildred (in his 1998 paper "The Decline and Fall of Strict Liability) is that the defence is inconsistent with the strict liability element of the law: if the courts interpret "discoverable" to mean "what is reasonable to expect a producer to discover", this reasonableness

equates the defence with a negligence test. There have been no practical examples of use of this defence in the UK and so questions of interpretation are as yet speculative.

3.5 The Directive already appears to incorporate an element of reasonableness in the criterion for assessing defectiveness. Goods are defective if they do not provide the safety a person is entitled to expect (Article 6). The United Kingdom legislation says that the consumer must show that the product was not as safe as persons generally are entitled to expect. In neither case is it clear what test is being applied. Under the Directive it is impossible to tell whether the personal characteristics of the consumer are relevant to this test, although they appear not to be in the UK legislation. The words 'persons generally' imply a test of safety based on the expectations of the reasonable person. Given that the consumer must prove the defect, we do not consider that there is any place for the development risk defence. Since the burden of proving a defect falls on the consumer, the burden of development risks should fall on the producer (who can insure against it) on a principle of fair apportionment of risk. Given the fact that the directive has had no appreciable effect on insurance premiums or on cases brought before the courts, we would expect evidence from producers of the effect of this course of action would have on their costs.

3.6 If the defence is not removed, the directive should be amended to make clear that for the defence to succeed the defect would simply have to be undiscoverable on an objective test.

Recommendation:

We recommend that the development risk defence should be removed or at least the directive amended to make it clear that the defence can only succeed if the defect could not have been discovered on an objective test of discoverability.

4 Time limits

4.1 A producer's liability ends ten years from when the product was put into circulation, and during this period, a consumer suffering injury must claim damages within three years of the infliction of the damage/injury.

4.2 In most cases of ordinary goods the ten year limit will not be a problem. However, in cases where the harm involves pathological conditions which are slow to develop, which may be the cases for which this directive could be most useful, ten years may often be too short. Cases of CJD which are thought to have been caused by eating beef infected with BSE have developed well after a ten year period. Although in the case of CJD it is unlikely that a consumer will be able to prove causation or to identify one producer, the illness is an example of the kind of difficulties that could arise with a too short liability period.

4.3 Given the lack of cases, we would expect producers to show evidence of the cost burden they believe would fall on them if the limitation period were extended.

4.4 There is a problem for consumers if the limitation period starts with the date the goods were put into circulation. This will usually mean the date the manufacturer sold them to a wholesaler or retailer. The consumer can have no idea when that date was. It would be preferable for the limitation period to start at the date the goods were first supplied to the consumer. While this would still leave problems with goods which harmed a consumer who was not the first person to whom the goods were supplied, it would make the time element a lot more secure for those who are injured by a product supplied to them.

Recommendation:

We recommend that the limitation period be increased to a period of 20 years and the period should begin from the date the goods were first supplied to a consumer.