Country Reports

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Product Liability in Italy

I. Introduction

The Italian lawmaker implemented Directive 85/374/EEC in 1988 through the d. p. r. n. 224 (transferred into Arts 114-127 of the Consumer Code in 2005), following the European provisions quite literally, apart from a couple of interesting specialties regarding the definition of defectiveness and regarding expertise fees which will be described further below.

The European product liability regime was implemented into a national system which did not already contain specific legislation on damages caused by defective products. Instead, the Italian courts applied the general tort law to product liability reversing the burden of proof regarding fault: It was argued that the fault of the producer was *in re ipsa*, meaning that fault was presumed by the fact that the product had a defect and that this defect caused damage to the claimant.[1] Therefore, when the directive came into force, its impact was very low, since it did not bring any substantial advantage to the victim in comparison to the rule applied in court so far and still applied afterwards. In fact, the pretended strict liability of the producer is counterbalanced by the exemption clauses enumerated in Art 7 of the Directive (in particular by the development risk defence, that in Italy applies to any kind of product). Furthermore, the victim's right to recovery encountered several limitations such as the prescription period of 3 years instead of the 5 years of the general tort law, the 10 years' foreclosure and the threshold on compensation (which in Italy is considered as non-deductible). Moreover, the fact that the fault of the producer did not have to be proven under the new regime was actually outweighed by the burden to prove the defectiveness of the product. This is not an easy task, also because the definition of defectiveness is quite ambiguous and therefore raises different interpretation problems and causes uncertainty about the outcome of legal proceedings.

In order to systematically analyze the case law interpreting the notion of defectiveness of a product, I would like to distinguish different categories: 1) case law on damages foreseeable and avoidable; 2) case law on damages unforeseeable and unavoidable; 3) case law on damages statistically foreseeable in advance, though unavoidable. These three categories are not explicitly recognized by judges. However, I believe that they are consistent with the specific reasoning justifying the decisions in each one of the three.

II. Case law on damages foreseeable and avoidable

The first decision issued by the Italian Corte di Cassazione on the notion of defectiveness under Directive 85/374/EEC stems from 2007 and regarded injuries following an allergic reaction caused by a hair dye[2].

In this case the Court held that the product was not defective, stressing that sometimes the producer escapes liability for damages which – despite being causally linked to the use of the product – should be better attributed to self-liability of the victim who could have avoided them more easily than the producer.[3] Stated differently, when the damage was foreseeable and avoidable for both parties, the Italian Court implicitly refers to the well-known theory of the cheapest cost avoider devised by *Guido Calabresi*, considering which of the two parties was in the best position to avoid that damage at the lower cost or the lower sacrifice.[4] This way of reasoning seems to be consistent with the definition of defectiveness given by the lawmaker, which distinguishes two different kinds of circumstances to be taken into account when determining whether the expectation of safety is legitimate or illegitimate. Following Art 117 of the Consumer Code, this is on one side "a) the way in which the product has been put into circulation, its presentation, its apparent characteristics, the instructions and warnings provided" (i. e. all the information available for the user enabling him to avoid the damage) and on the other side "b) the use to which the product can be reasonably intended and the behaviors that, in relation to it, can reasonably be expected" (i. e. the information that the producer had about the category of users he addressed when he decided to put that product into circulation).

III. Case law on damages unforeseeable and unavoidable

When, contrary to the above, the damage was unforeseeable and unavoidable for both parties, the producer is not liable following the development risk defence that in Italy applies to any kind of products. This exemption clause has been applied interestingly by the Tribunale di Sassari in a case regarding pharmaceutical products. With explicit reference to the decision given by the ECJ on 29 May1997 (Case C-300/95), the Tribunal affirmed that the producer was not exempt from liability in cases where he would have been able to discover the existence of the defect through the results of the scientific research objectively knowledgeable at the time when he put the product on the market, provided that the results were accessible. In the specific case at issue the Tribunal considered that – despite of the publication of a couple of scientific researches acknowledging the risk of damage of this medicament – the state of the art defence was applicable because the information was not yet generally accepted by the scientific community. Therefore, the producer was not held liable; it was considered "normal" that he did not warn about a risk of damage still uncertain at the relevant time.

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1 The leading case is: Cass. civ. 25-5-1964 n. 1270, in *Foro it.*, 1965, I, 2098.

2 C. Cass. n.6007/2007, in *Resp. civ. e prev.* 2007, 7-8 , 1587.

3 The instructions for use of the dye warned of the possibility that it might cause an allergic reaction and specifically recommended users to conduct a sensitivity test whenever suffering of allergies.

4 Guido Calabresi, *The Cost of Accidents, A Legal and Economic Analysis*, (Yale University Press, 1970).