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Product Liability in Europe: Politics, Reform and Reality

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PRODUCT LIABILITY IN EUROPE: POLITICS, REFORM AND REALITY

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I. THE PRODUCT LIABILITY DIRECTIVE

Strict liability for personal injury, death or damage to personal property was introduced in Europe by Council Directive 85/374/EEC (the "Directive"). The Directive was required to be implemented into the national law of EEC member states by March 1988, although almost all countries were late, with Spain implementing only in 1995 and France as late as 1998. Before the Directive was introduced, courts in some continental states had reversed the burden of proof in negligence claims. This reversal had the effect of forcing the manufacturer to prove it was not negligent. In contrast, the burden of proof under the Directive, in relation to the three essential elements of defect, damage and causation, remains entirely with the plaintiff.[1]

The Directive provides, in summary, that a product is defective if it does not provide the level of safety which is to be objectively expected, taking into account all the circumstances including its labelling.[2] The primary person liable is the "producer" of the product.[3] Under the Directive, various different parties might qualify as "producers" of the same product, including the manufacturer, the importer into the EEC (now EEA), and the party which, by putting its name, trademark or other distinguishing feature on the product, presents itself as the product's producer.[4] If a producer cannot be identified, each supplier of the product shall be treated as its producer unless that producer informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same applies to the importer of an imported product.[5]

Contributory negligence by the plaintiff reduces or extinguishes the recoverable damages.[6] There is a limitation period of three years from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect,

1. Council Directive 85/374/EEC, art. 4, 1985 O.J. (L 210) 29.
2. *Id.* at art. 6.
3. *Id.* at art. 1.
4. *Id.* at art. 3.
5. *Id.* at art. 3.3. There are a number of differences in national laws in relation to this particular issue.
6. *Id.* at art. 8.2.

and the identity of the producer.[7] However, this three-year period is subject to repose ten years from the date on which the producer put the actual product into circulation.[8] The defendant has various defences including:[9]

(a) that the producer did not put the product into circulation;

(b) that, under the circumstances, it is probable that the defect which caused the damage did not exist at the time the product was put into circulation or that this defect came into being afterwards;

(c) that the producer neither manufactured the product for sale or any form of distribution for economic purpose, nor manufactured or distributed the product in the course of its business;

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;

(e) that the state of scientific and technical knowledge at the time when the producer put the product into circulation did not enable the existence of the defect to be discovered (this is referred to as the "development risks" defence);

(f) that, in the case of a manufacturer of a component, the defect is attributable to the design of the product in which the component has been fitted, or to the instructions given by the manufacturer of the product.

European member states may choose whether or not to include two provisions within their legislation. Those options include whether to allow the "development risks" defense and a total cap on liability of not less than seventy million ECU. Most states have opted to include the "development risk" defense, although sometimes with some differences. A third optional provision allowing the exclusion of liability for producers of unprocessed primary agricultural products, game or meat was deleted as of December 4, 2000 as a consequence of the BSE crisis.[10]

II. CASE LAW

As of the writing of this article, a total of perhaps only thirty cases have been decided in national courts under the Directive. There have only been two in the United Kingdom, one in Ireland

7. *Id.* at art. 10.
8. *Id.* at art. 11.
9. *Id.* at art. 7.
10. Council Directive 1999/34/EC, 1999 O.J. (L 141) 20.

and a handful in Germany, Austria and Spain.

A. *Decisions On The "Development Risks" Defense*

A decision by the German Supreme Court (which was surprisingly not referred to the European Court) held that the "development risks" defence is not available in the case of a manufacturing defect.[11]

An important decision on the "development risks" defense came out of the Netherlands in 1999.[12] In that case, the plaintiff underwent cardiac surgery. During the surgery he received blood from which he contracted HIV. The plaintiff claimed that the blood was a defective product under the Directive and also that the defendant was negligent in relying on a statement made by the donor that he did not belong to a group with an increased AIDS risk. The court found the defendant was not negligent in relying on this statement. Special circumstances might have shown the contrary, but there was no such evidence produced. In relation to the strict liability claim, the court found that the product was defective. The court found the defendant did not prove the defense of compliance with mandatory regulation, but that he did prove the "development risks" defense.

The court held that the relevant test was the safety level that the general public should expect. It took into account the vital importance of blood products and the fact that there are no alternatives. Accordingly, the court held that the general public expects, and should expect, that blood products in the Netherlands have been 100% HIV free "for some time now." The court said that the fact that there is a very small chance that HIV is transmitted during a blood transfusion is not common knowledge and therefore the general public does not have, or should not have, such an expectation. Accordingly, a blood product which is infected with HIV is a defective product in the Netherlands.

The defendant argued that it had to comply with the Blood Products Regulation which require (1) that the collection, preparation, storage, packaging, labelling, transport and delivery of blood products be conducted in such a way that the recipient's health is

11. BGH, Urt v. 9, 5, 1995-V12R 158/94 Hamm.

12. Hartman v. Stichting Sanquin Bloedvoorziening, 3 Feb. 1999, NJ 1994, nr. 621. A full text copy of this case in the English language was unavailable at the time of publication.

not damaged and (2) that the defendant act in accordance with the guidelines of the Council for Blood Transfusion (the "College"). The College requires blood banks to comply with its guidelines and "can deviate from them in exceptional cases and only when there are well-founded reasons and only if the quality is not negatively affected." The court held that since blood banks are allowed to deviate from the guidelines, the Blood Products Regulation was not a mandatory government regulation for the purposes of relying on that defense. However, the court explicitly left unresolved the argument that the defendant had no reason to deviate from the guidelines.

The blood donation in this case was made on May 29, 1996, supplied to the hospital on June 5, 1996 and given to the plaintiff on June 6, 1996. The next time that the donor donated blood, on October 1, 1996, the results of the HIV-1-2 screening test showed that he had contracted HIV. Accordingly, an archived sample taken on May 29, 1996 was tested. The HIV-1-2 screening test was negative, as was the HIV p24 antigen test. An HIV-1 RNA test was then done. The first time the results were positive (just above detection level) and when this was repeated, the results were negative (just below the detection level). This led to the conclusion that the results of the tests were dubious. The defendant notified the hospital that the donor had tested positive for HIV, after which a test on the plaintiff was done. The plaintiff also tested positive for HIV.

It was undisputed that the HIV-1 RNA test was elaborate, experimental, and not approved nor validated as a screening test. There was a report from the Paul Ehrlich Institute that the test was not at a stage of development that its implementation could be recommended. Accordingly, the court concluded that it was, as a practical matter, impossible for the defendant to have discovered the defect. Thus, the court determined the defendant had acted in accordance with the scientific and technical knowledge.

B. The First European Court Reference

In the first product liability case to be referred to the European Court, a Danish patient was to receive a kidney transplant from his brother during a publicly funded operation.[13] The kidney was removed from the brother and preserved in fluid pending implant by another public hospital within the same authority. It was

13. Henning Veedfald v. Ärhus Regional Authority, Case C-203/99.

noticed before implant that the fluid contained microscopic crystals which, after the kidney had been implanted, would have made the kidney unviable and would have clogged the patient's arteries. The patient brought suit against the regional authority responsible both for the manufacture of the fluid and the explant of the kidney.

The following questions were referred to the European Court:

1. Was the fluid put into circulation? The authority argued that the fluid was produced as part of a service, was kept within its own organization and was not put into circulation, in order to rely on the defense in Article 7(a) of the Directive. The claimant argued that the fluid was used on and caused damage to the explanted kidney and that this constitutes putting the fluid into circulation.

2. Was the fluid manufactured for sale or any form of distribution for economic purpose or in the course of a business? If not, the hospital authority has a defense under Article 7(c) of the Directive.

3. Was the damage of a type recoverable under the Directive? Recoverable damage was "damage caused by death or by personal injuries" and "damage to, or destruction of, any item of property." The patient suffered no physical damage caused directly by the fluid, but only loss of a chance and, presumably, further deterioration because the intended kidney could not be implanted. The kidney suffered damage, but it was not owned by the claimant when it was damaged. In any event, would that constitute recoverable damage?

The European Court's judgment on these questions is awaited during 2000.

III. POTENTIAL AMENDMENTS TO THE EC DIRECTIVE

Many provisions of the Directive were controversial before it was passed and have remained so. Consumer representatives have objected to issues such as the "development risks" defense and the burden of proof on the plaintiff. Some members of the European Parliament put forward a number of pro-consumer amendments during consideration of the 1999 Directive which amended the optional provision relating to unprocessed agricultural products, but insufficient support from the Parliament and the Council of Ministers defeated the proposals at that stage.

The European Commission is obliged to issue a report every

five years on the working of the Directive on strict product liability. The next report is due by December 2000. In preparation for this, the Commission issued a Green Paper in July 1999 requesting comments both in general terms, and on a list of some twenty-three specific issues. The specific issues were almost all amendments which consumers had previously suggested should be made to the Directive and included:

—reversal of the burden of proof;

—removal of the "development risks" defense;

—extending the three-year limitation period;

—extending the ten-year period of repose;

—increasing the seventy million ECU cap on liability;

—providing a claim for psychological injury (the scope of which is unclear); and

—providing some form of "class action" mechanism.

Many trade associations covering the manufacturing and insurance sectors submitted responses to the Commission's Green Paper, which have made the consistent points that the general level of product injury from unsafe products in Europe, and therefore, the general level of product liability claims are very low. Accordingly, those responses argued there is no justification for amending the Directive at this stage. Furthermore, the responses said that great care should be taken in considering any aspects of "access to justice" factors or national rules of civil litigation procedure, since uncontrolled reforms in these areas may lead to a generation of poor claims which would impose unnecessarily high costs on industry. Consider, for example, the many product liability claims (principally against pharmaceuticals), which have arisen only in the UK amongst EU jurisdictions, virtually all of which have been funded by legal aid, and many of which have been lawyer-led, but 93% of which have failed at enormous public expense.[14]

The Commission is considering its position in light of these responses and at the time of writing has not made public any conclusions. However, there have been indications from members of the European Parliament that the industry side has put up a strong case against change and may have won the battle. Consumers merely repeated their long-standing agenda of items for change (set out at the start of this section), without particularly extending

14. CJS Hodges, *Factors Affecting the Incidence of Multiple Claims,* 1999 JPIL 289 (1999).

them or providing further factual or intellectual justification for their position. Whilst the pro-consumer Committee on the Environment and Public Health has supported the consumer amendments, the lead committee dealing with this issue, the Committee on Legal Affairs, rejected the consumer position and voted for maintenance of the status quo, all the while suggesting that further research should be done over the next five years.

Industry has requested that two significant changes should be made to the Directive. The first change would be to align European strict liability provisions more closely with the U.S. *Restatement (Third) of Torts,* specifically by adopting a "reasonable foreseeability" standard for design defects and failure to warn claims. This would avoid a need for a separate "development risks" defense. The second proposal is that there should be a pre-emption defense of compliance with EU regulatory law given the enormous increase in product regulation since the Directive was passed in 1985. There would otherwise be a risk of inconsistent decisions on what is expected of industry as between EU regulators and a multiplicity of civil courts.

On March 30, 2000 the European Parliament adopted a resolution on the Green Paper which called on the Commission to connect factual evidence on the situation relating to product liability (an, by implication, product safety) by applying scientific methods and by involving the academic community. It suggested that specific research products should be undertaken. However, in clear contrast with the position that the Parliament had adopted two years previously, the March 2000 resolution did not call upon the Commission to amend the Directive without further study. In essence, the Parliament accepted that there was insufficient evidence of the need to change the Directive at that stage. Similarly, the Economic and social Committee of the European Community on March 1, 2000 delivered its Opinion that further in-depth study of the situation should be carried out since there was not enough information to provide a clear overall picture, and that it was critical to maintain an overall balance on the Directive. The Economic and Social Committee also expressed the view that there should be no change in the provisions relating to the burden of proof, causation, development risks, the optional financial ceiling on liability, or limitation, and that a "market share liability" should not be introduced.

IV. FURTHER POTENTIAL AMENDMENTS IN GENERAL EUROPEAN PRODUCT REGULATORY LAW

The debate on product liability law is closely linked with, and influenced by, interaction with similar debate on reform of Council Directive 92/59/EEC on general product safety (the "GPS Directive").[15] The GPS Directive is a regulatory directive applying to consumer products generally and includes powers for regulatory authorities to take action against unsafe products, or where recalls should be made. Proposals are currently being made to amend this Directive and some of these proposals will undoubtedly be carried through. Regulatory authorities are likely to be given enhanced powers to order product recalls and enhanced obligations in relation to market surveillance; producers and distributors would become subject to an obligation to notify the authorities of any dangerous product and to an enhanced recall obligation; export of products considered to be dangerous within the EU would be banned.

There has also been much discussion, following the infected blood and beef problems and in the light of potential issues such as GMO's and electromagnetic fields, of the basis on which regulatory action should be taken against products pursuant to the "precautionary principle."

The Commission has published a paper attempting to define what it means by the "precautionary principle."[16] In brief, the paper adopts the policy that a systematic approach should be adopted to regulating risk in the post-marketing situation. The first requirement is for objective and high quality scientific evaluation of all available data, including an evaluation of the risks and uncertainties. The second step would be for further research of the areas of uncertainty or unquantified risks. The ultimate point is that decisions on the acceptability of risks—i.e. decisions to take regulatory action where there are uncertain risks—are political judgments, so it is implied that decisions should be taken by politicians rather than scientists or administrators.

15. Council Directive 92/59/EEC, 1992 O.J. (L 228) 24.

16. Communication from the Commission on the Precautionary Principle, COM (2000)1 final at 1.

V. RELEVANT AMENDMENTS RELATING TO ENVIRONMENTAL LIABILITY

In February 2000, the Commission also issued a White Paper proposing that an EC regime should be introduced based on strict liability of a polluter when damage is caused by a hazardous activity. There is an indication that a "development risk"/state of the art defense would not be permitted. It is proposed that liability for certain types of damage caused by non-hazardous activity should be based on fault. Some (as yet unspecified) alleviation of the burden of proof concerning fault or causation in favour of the plaintiff is contemplated. In relation to personal injury damage or damage to personal property, it is suggested that where there is an overlap between the new regime and the Product Liability Directive, the latter should prevail. The liable party should be the operator in control of the activity that caused the damage. In the case of environmental damage, the compensation to be paid by the polluter should be spent on the effective restoration of the damage. Public interest groups should have the right to step into the shoes of public authorities. All of these aspects clearly have some impact in relation to the debate on reform of strict liability under the Product Liability Directive.

VI. FUNDING OF LITIGATION: LEGAL AID

It is widely understood that important factors which can influence the incidence of product liability claims include the extent to which the plaintiff has to fund his legal and expert advice, and whether he would recover such costs if he wins, or would be liable to pay his opponent's costs if he loses (a cost shifting rule). Many EU member states provide for cost shifting rules and provide for some form of legal aid. However, the rules of EU member states on what may constitute "legal aid" vary considerably, for example in relation to:

—free or low-cost legal advice or court representation by a lawyer;

—exemption from other costs, such as court fees;

—financial assistance in relation to litigation costs, such as lawyers' costs, court fees; and

—witness expenses, and the liability of a losing party to reimburse winners' costs

In recent years, the European Commission's former Directorate-General XXIV has included within its Consumer Action Plan methods of increasing consumers' access to justice. The Commission has issued recommendations on a network for settling consumer disputes out of court (EEJ-NET)[17] with a standard Consumer Complaints Form. In reorganizing the Commission in 1999, President Prodi created a Directorate-General on Justice and Home Affairs (DG JAI), which has taken over responsibility for some access to justice topics and issued a Green Paper on Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant on February 9, 2000.[18]

A. *The Commission's Cross-Border Jurisdiction*

In this project, DG JAI seeks to base its jurisdiction at Community level on the October 1999 Tampere meeting of the Council on the creation of an area of freedom, security and justice in the European Union and the Council's invitation for the Commission to make proposals to establish minimum standards ensuring an adequate level of legal aid in cross-border cases. The Green Paper therefore seeks to identify a number of instances in which there are problems of access to legal aid for the cross-border litigant, particularly instances of discrimination against Community nationals on grounds of residence or nationality, or impediments engendered by the extra costs of cross-border litigation, and by differences in the national systems as regards financial thresholds and examination of the merits of an application for legal aid.

B. *The Suggested Solutions*

The possible solutions to these problems which are mooted in the Green Paper include the following:

—the Commission asserts that the confusing patchwork of national laws in relation to entitlement to legal aid are likely to contain a number of provisions which would be struck down by the European Court as being contrary to Article 12 of the EC Treaty

17. Commission Recommendation of March 30, 1998, on the principles applicable to the bodies responsible for out of court settlement of consumer disputes, 1998 O.J. (L 115) 31; Council Resolution of April 13, 2000 on the creation of a European network of national bodies for the extra-judicial settlement of consumer disputes (EEJ-NET).

18. Green Paper on Legal Aid in Civil Matters: The Problems Confronting the Cross-Border Litigant, COM (2000)51 final at 1.

which prohibits discrimination on grounds of nationality. The Commission also notes that only a minority of member states have ratified the 1990 Hague Convention on International Access to Justice, and urges all member states to ratify the Convention;

—the Commission suggests clarification that consumers' associations qualify for legal aid would have a major impact on such associations' use of Directive 92/27/EC on cross-border injunctions;

—while accepting that the financial criteria for eligibility of legal aid may validly differ on the basis of varying costs of litigation and income levels between member states, the Commission decries different policies on access to justice and suggests that the criteria of the country of litigation should apply, but together with adjustment by means of a "corrective factor" or "waiting" which would take account of the differences in the cost of living between the two member states concerned or, alternatively, to apply a more flexible and objective test of taking into account both the applicant's disposable income and the likely cost of the lawsuit;

—the Commission calls for greater transparency in relation to merits tests, such as under the 1977 Agreement of the Council of Europe on the Transmission of Applications for Legal Aid, plus an obligation for authorities to give detailed reasons for a refusal to grant legal aid based on grounds that the merits test had not been satisfied (the Strasbourg Agreement—which has been ratified by all EU states except Germany);

—the Commission proposes the creation of databases of legal professionals, indicating the courts before which the lawyer is authorised to plead, his areas of expertise and of experience, the languages in which he is competent or fluent and whether he is available (voluntarily or automatically) to handle cases funded on a legal aid basis;

—in order to facilitate technical procedures for applying for legal aid abroad, the Commission suggests that either the Strasbourg Agreement mechanism should be extended or that more ambitious and integrated action should take place at EU level, such as use of standard forms and encouraging new transmission technology similar to the Convention on the Service of Judicial and Extra Judicial Documents in Civil or Commercial Matters of 26 May 1997 and now a proposed draft Regulation.

C. *Affordability Problems: Alternative Mechanisms*

The Commission notes that some member states have found

that a well-performing system of legal aid is costly and that they have been experimenting with alternative means to ensure that justice is affordable. Particular alternatives include the UK moves towards conditional fees and the wide availability in Germany and Sweden of legal expenses insurance. In relation to the conditional fee system, the Commission notes that the litigant could still be exposed to the risk of having to pay the other party's costs if he loses. The Commission neglects to mention the UK solution of insurance policies for the costs risk. The Commission does, however, comment that "there would also appear to be little incentive, other than creating goodwill, for a lawyer to accept a case on this basis unless he was reasonably confident of winning." Some will respond by asking whether anything is wrong with a system which discourages bringing cases which have poor chances of success: that problem was at the heart of the UK's decision to stop its vastly increased demand-led expenditure on legal aid and move to a conditional fee system in which lawyers have to undertake their own objective risk assessments so as not to waste funds on poor cases.

D. Forthcoming Consideration of Legal Expenses And Lawyers' Fees

The Commission is to publish a Working Paper on the recovery of legal expenses and lawyers fees later in 2000.

VII. Reform Of Access To Justice Issues In England And Wales

In contrast to the Commission's new found concentration on legal aid, the UK and Swedish governments have proceeded in the opposite direction. In Sweden, private legal expenses insurance (LEI)policies, which are widely held in that country (and also in Germany but not so much elsewhere), shall now be used before claims can be made on state legal aid. In England and Wales, there has in 1999-2000 been radical reform of litigation funding of personal injury claims. As a result, it is likely to be very much more difficult for consumers or consumer lawyers to obtain public funding for personal injury claims. There are, however, new and complex arrangements which may facilitate funding of multi-party claims.

A. Removal Of Legal Aid

The Government has proceeded to implement its plans to reform and largely deconstruct the legal aid system which has been in existence for the past 50 years. Reform has been necessary because

of the huge expansion in the cost of legal aid, which seems to have been demand-led by consumer lawyers. The legal aid arrangements have been replaced by a Legal Services Commission which is responsible for much more limited public funding of criminal and civil cases, the latter through the new Community Legal Service. The overall budget of the Community Legal Service is capped and expenditure is subject to priorities set by the Lord Chancellor. The Lord Chancellor has directed that funding should primarily be directed to certain areas dealing with welfare, housing, education, children and liberty issues, with personal injury cases falling into the lowest category.

Furthermore, public funding is not generally to be made available for negligence claims unless the Lord Chancellor gives a specific direction that this should be included. By an oversight, the Government has not excluded strict liability claims in this way.

B. Conditional Fee Agreements (CFAs)

As a general rule, individual personal injury claims should now be funded on a CFA between the consumer and lawyer. This means that the lawyer has to undertake a risk assessment on the case (which is consistent with the new approach under the Civil Procedure Rules) and many consumer lawyers may not find difficult cases such as tobacco litigation to be economically attractive. The claimant is exposed to the normal rule (which has been suspended where the claimant has benefited from legal aid and will probably continue to apply in general under the new public funding arrangements) that if he loses he has to pay the defendant's legal costs. This risk to the claimant is now coverable by after-the-event insurance policies which have been arranged by specialist insurers. These insurers have experienced considerable financial difficulty over setting premiums too low and failing to exercise sufficient scrutiny over the cases which they have covered. As a result, some of the insurers are in serious difficulty and are now exercising much greater control over the cases that they are prepared to cover. That ought to mean that speculative cases such as tobacco litigation would be very much less likely to be taken on by all but the most dedicated (and/or wealthy) lawyers.

C. *Specific Public Funding Budgets For Multi-Party Cases And Public Interest Cases*

However, specific budgets exist for public funding of multi-party action cases and cases involving the public interest. Such funding might only be limited, rather than supporting the entire case, such as supporting costs of the initial investigation of a case, after which it could be taken forward privately on a CFA plus a costs-insurance policy, or to "top up" CFA funding. There has been no satisfactory definition of what might constitute a "public interest" case. There must, therefore, remain some nervousness that entrepreneurial plaintiff lawyers will continue to seek ways of funding multi-party cases in innovative ways through combining public funding and CFA mechanisms in some way.

D. *Recoverability Of CFA Success Fees And Premiums*

This situation will undoubtedly get worse for defendants and their insurers from April/May 2000 as a result of the introduction of new rules which permit a successful claimant to recover from the defendant both the cost of his insurance premium and his lawyer's CFA success fee. It is known that claimant lawyers have been stockpiling claims in recent months waiting for these new and more advantageous rules to be introduced.

E. *Damages*

Over the past few years, the Law Commission (the official but independent body charged with reviewing English law) has been undertaking a comprehensive study of the law of damages. It mooted in 1993 and formally recommended in 1997 that exemplary (i.e. punitive) damages should be made available under English law on a wider basis which would include personal injury or product liability claims (for which they are not currently available). The Law Commission has also recommended that the levels of damages are too low, because they have not risen in recent years in line with inflation, and should be increased: it is suggested that damages for minor injuries should be doubled and a tapering scale should increase all damages so that highest levels should be increased by one-and-a-half times.

There is a very considerable backlog of Government implementation of Law Commission recommendations. The Government has indicated general acceptance of these proposals relating

to damages, but it is unclear whether or when there might be any legislative changes. The Court of Appeal has rejected cases requesting a major increase in levels of damages but has sanctioned only modest increases, to the relief of the insurance and manufacturing industries.[19]

VIII. PROCEDURAL DEVELOPMENTS IN ENGLAND AND WALES

A. *New Civil Procedure Rules*

In parallel with the funding issues, very significant, indeed revolutionary, change was introduced in England and Wales on April 26, 1999 with the coming into force of new Civil Procedure Rules (CPR). The CPR forms not only a new code but also an entirely new approach. It was felt that the previous rules led to litigation which was too long, too complex and therefore too expensive. Instead, the new policy objectives are for litigation to be open, collaborative, swift, cheap, with costs not being disproportionate to the sums involved, and with the encouragement of early exchange of documents and information between the parties in a pre-action phase in accordance with principles laid down in pre-action protocols, so as to encourage settlement without the need for legal proceedings, particularly through mediation or other ADR mechanisms.

There are various Protocols, one of which deals with personal injury actions and requires that before beginning proceedings, claimants must write to defendants setting out the nature of their claim and identifying relevant factual allegations and issues (and possibly evidence such as medical reports). A defendant then has three months in which to write a detailed response, attaching all relevant documents. It is only after that stage that proceedings should be commenced. Failure by either party to observe a protocol, for example by not responding, or concealing documents, or by early issue of a writ, may lead to subsequent court sanctions on costs and punitive interest on damages and costs (up to 10% above base rates). In effect, therefore, the system has shifted the stages of pleading and exchange of documentary and expert evidence to the initial pre-action phase. To the extent to which these activities have been completed in the pre-action phase, it will not be necessary to repeat them during the action phase; similarly, during the action

19. Heil v. Rankin and MIB, 23 March 2000, CA.

phase it will only be necessary to deal with any outstanding issues that have not been dealt with in the pre-action phase.

Clearly, the new system constitutes a major culture shift and the courts are zealously using their new powers to encourage openness and early settlement. Since April 1999, the number of actions issued has fallen and the number of ADRs (mediations in particular) that have commenced has risen. Defendants obviously need to be well prepared so as to be in a position to produce documents and respond to claimants' allegations within the 3 month initial period.

B. New Rule On Multi-Party Actions

Some other CPR provisions are still being finalised and introduced. In particular, a specific rule dealing with multi-party arrangements (Group Litigation Orders (GLOs)) was introduced in May 2000.[20] A GLO is similar to the concept of a class action but differs from a U.S. class action in that the English rule is a mechanism aimed at the efficient management of all similar claims (rather than, as in USA, claims in which the issues are the same and common issues predominate) without necessarily assuming that the claims will be dealt with in a single trial binding on all of them. The Rule and its associated Practice Direction are relatively brief and uncontroversial: they codify the state of practice as it has developed in a sequence of major multi-party actions in England and Wales, mainly involving pharmaceuticals, over the past 15 years, most of which have met with singular lack of success. It is not yet known how the GLO procedure may inter-relate with the normal Pre-Action Protocol procedure: it is possible that both claimants and defendants who are subject to a GLO will not have to produce so much information so quickly before or at the start of a GLO.

C. Related Rules On Representative Actions

Also in May 2000, the CPR will introduce a new rule on representative actions.[21] This rule merely repeats the long-standing previous rule on this area, which only applies where each person who is sought to be represented has "the same interest." The English courts have traditionally taken a strict approach to interpreting this

20. CPR, rule 19.III.
21. CPR, rule 19.II.

phrase and it has generally been thought that personal injury plaintiffs clearly do not have "the same interest." For this reason this procedural mechanism has never been used in multi-party personal injury or product liability litigation, but the focus has instead been on the rules which have now crystallised into the GLO procedure.

D. Government Proposals On Representative Actions By Consumer Organizations

The UK Government made a commitment in its 1999 White Paper on Consumer Strategy to consult on the introduction of a mechanism to permit consumer organizations to represent consumers in actions before the courts. The Consultation Paper is expected shortly to be issued by the Lord Chancellor's Department. The Government accepts that this change would require primary legislation and it is, therefore, unlikely that that would occur for some time, perhaps some years. The proposal is as yet poorly thought out. The focus of the Government is currently not particularly on personal injury or product liability claims, but on much wider areas of unfair or illegal consumer trading, such as in the areas of misleading advertising, consumer credit or trading standards generally, (i.e. quality issues as well as safety issues). If this change were to be brought about - and similar legislation exists in some other European member states such as France and recently Portugal, although that legislation is currently very little used—then there is the potential for consumer organizations to seek to expand their ambit into the product liability area if they have sufficient funding.

IX. CONCLUSION

Very few product liability cases have been brought to the courts in any EU member state, whether under negligence principles or now under the Directive. The major exception relates to the sequence of large multi-party actions in the UK, recently spreading to Ireland, which have been funded by legal aid and have very largely failed. There are very few court decisions throughout Europe on the Directive. However, the current situation is characterisable as a time of consideration of potential reform on many aspects which affect the incidence and practice of product liability, stretching from reform of the substantive law to associated issues of access to justice, civil procedure rules and product regulation.

Whilst some of the aspects currently being considered may not result in significant, if any, reform, at least in the short term, the current situation is one of some uncertainty as to the future.

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