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Unravelling the Mystery – A Comparative Introduction to Product Liability Law in the US and Europe

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UNRAVELLING THE MYSTERY – A COMPARATIVE INTRODUCTION TO PRODUCT LIABILITY LAW IN THE US AND EUROPE

Brandon J. Riordan

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I. INTRODUCTION: THE PROBLEM

The twentieth century could very well be coined the century of the automobile. This invention, which is really the combination of thousands of inventions, has drenched the fabric of our lives by capitalizing on a simple formula embedded in our DNA: personal motion = personal freedom = desire. In order to fuel the desire, a whole industry has been built up through the last century to make sure that the roughly 20,000 parts are properly designed, fabricated, sold, shipped, and integrated into a car. In just about any country in the world, there is probably some activity relating to the automotive industry – it is the archetypal big business.⁴⁷

Americans are generally led to believe that the automobile is something fundamentally American, but this belief is misleading. Although Henry Ford, an American, was among the first to promote the idea of a mass-marketed automobile, Europeans such as Daimler, Benz, and Panhard performed much groundwork prior to Ford.⁴⁸ Henry Ford, seeking new markets and recognizing that the formula for personal freedom was universally understood, set up facilities for auto production in Europe, Japan, and South America. In more recent times, the capitalistic pressures for higher efficiency, lower cost, and better products along with the basic human pursuit of the formula have pushed the automobile and its production to the four corners of the globe.

Such globalization has been augmented by the refinement of the computer. Inventions such as the computer and the automobile have made our world yet smaller and yet faster. Indeed the twenty-first century could

⁴⁷ See, e.g., U.S. Bureau of Census, Annual Survey of Manufacturers – 2000, Issued February, 2002, available at <http://www.census.gov/prod/2002pubs/m00as-1.pdf>. In the United States alone, the value of motor vehicle manufacturing shipments (e.g. the as-produced value of the cars) in the year 2000 accounted for approximately 11% of all goods manufactured. A motor vehicle is 1 of 473 classes of such manufactured goods.

⁴⁸ See THOMAS GILLESPIE, FUNDAMENTALS OF VEHICLE DYNAMICS 2 (1992)

probably be coined the century of the computer. The computer has compressed our world into milliseconds. A business plan developed in Germany can be emailed to the United States for review and an edited version can be exchanged several times in the same day.

The efficiency gained from such reduction in time has mated well with the drive for efficiency in the automotive industry. As international borders have succumbed to the capitalist goals of big business and human desires for personal freedom, the automotive industry has gone global, accelerated by the computer. National and regional automotive manufacturers (OEM's) such as Ford, General Motors, PSA, Toyota, VW, DaimlerChrysler, and Renault/Nissan now have operations in across the globe. However the globalization of the industry has not been confined to OEM's, but has also spread to suppliers.

The ocean of capitalism bears its pressure even on the tiniest creature in the automotive supply chain. The drive for efficiency, quality, and technical excellence, as well as the desire for more cash, has pushed automotive suppliers to expand and follow their customers across boundaries. For many smaller suppliers, these forays have been quixotic and sometimes disappointing. Despite the fact that at the beginning of the computer century it may seem easy to envision setting up a business in another country, since most of the information is available over the internet at the touch of a button and communication is so rapid, the inexperienced get mired in the old-fashioned legal issues. Many a business venture gets killed because of misunderstanding and down right fear of international legal issues.

The words *liability* and *recall* strike fear in the heart of even the most seasoned business person. In the United States, we associate the words with multi-million dollar awards, injured plaintiffs, overly-enthusiastic plaintiff's lawyers, lost earnings (and lost profit-sharing checks), and rising insurance premiums. The *liability* and *recall* lexicons are at home in the auto industry.

Unfortunately, very often the entwinement of the automobile with our daily lives brings this invention to center stage in litigation, especially in the area of products liability. Indeed, where would American products liability law be with out the automobile; the classic cases concern automobiles.⁴⁹ The automobile represents a special challenge for several reasons: 1) the level of complexity; 2) the shear volume of units placed in the hands of consumers; 3) the lack of experience of users; 4) the level of risk the user is subjected to when an auto accident occurs; 5) automotive companies, due to their size, are tempting targets for litigation.

⁴⁹ See, e.g., *Macpherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69 (N.J. 1960)

The globalization of the auto industry has brought about the need for managers to clearly understand the product liability issues when marketing autos in various countries and also the need for lawyers to understand comparative values to be able to effectively litigate, especially with international clients. European automakers are sued in the United States and US automakers receive likewise treatment in Europe.⁵⁰ The basic doctrine of product liability used in the United States is not very different than the doctrine used in Europe; however, it is the manner and the societal environment in which the doctrine is pursued that presents and magnifies the differences in outcome between the two environments. As a result, managers need to realize that the dogma of product liability is essentially the same in the United States and in Europe. In parallel, lawyers must attempt to peel back the procedural onion to help managers understand the basic dogma and show that business decisions should be made on roughly the same grounds in both the U.S. and in Europe.

II. AMERICAN TREATMENT OF PRODUCT LIABILITY

In the last 50 years, the American legal profession has witnessed profound changes in product liability tort law.⁵¹ Evolving from a primordial brew of 19th Century contract law and tort concepts, products liability law developed into a viable litigation alternative by extending the scope of a producer's duty to foreseeable users and others, regardless of contractual relation.⁵² However, postwar America was simply not satisfied, as pent up consumer demand allowed the manufacturing sector to provide consumers with wonderful new products, thus creating a similar rise in the number of injuries caused by these products. As injuries increased, the cry for reform grew louder. The landmark decisions of the 1960's such as Henningsen v. Bloomfield Motors and Greenman v. Yuba Power Products rode the crest of reform culminating in the publishing of The Restatement (Second) of Torts in 1964.⁵³

⁵⁰ See, e.g., Dreisonstok v Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) (Generally it is the legal entity authorized to do business in the respective country that is actually liable but the mother business suffers from lost returned profits.); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (For a glimpse at the procedural nightmare caused when international parties are involved in a product liability lawsuit.)

⁵¹ While the ancestry of contract law remains a significant part of US product liability law and is embodied in various provisions of the UCC, Magnuson-Moss Warranty Act, and the Restatement (Second) of Torts §402B, it is not treated in this paper – See Denny v. Ford Motor Co., 662 N.E. 2d 730 (N.Y. 1995) (For an interesting comparison of tort and warranty theories).

⁵² See, e.g., Winterbottom v. Wright, 10 M. & W. 109, 152 Eng.Rep.402 (Ex.1842) as an example of establishing the privity requirement for products liability suits; Huset v. J.I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir.1903) as an example of establishing three exceptions to the privity requirement; Macpherson v. Buick Motor Co. 111 N.E. 1050 (N.Y. 1916).

⁵³ See Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963).; RESTATEMENT (SECOND) OF TORTS (APPROVED BY THE A.L.I., 1965).

For products liability law, the key part to the revision was §402A, which abandoned the failure-to-use-due-care standard (i.e. determine what the producer did to prevent the tort) and adopted an is-there-a-dangerous-defect standard (i.e. determine if the defect harmed the consumer) when assigning liability.⁵⁴ The strict liability theory was a breakthrough for plaintiffs because the burden of proof was reduced to the point of just having to show that the defect caused the plaintiff's injury. Jumping on the evolutionary bandwagon, many states adopted §402A. As the Great Society was pushed to the background by faded rust-belt inspired dreams⁵⁵, courts and legislators began to switch gears. As if taking natural cues, such as from the laws of thermodynamics,⁵⁶ legislators and courts began to relax some of the "strict" liability concepts.⁵⁷

Exceptions were created for design defect and warning defect cases. These cases returned to negligence concepts that employ the risk-utility analysis, such as state of the art defense and reasonable alternative designs.⁵⁸ The risk-utility analysis for design and warning defects remains the dominant analysis method for US products liability law and is recognized by legal scholars.⁵⁹ However, there are still some jurisdictions that refuse to acknowledge the analysis and strict liability exceptions. These courts continue to apply the consumer expectations for design and warning defects.⁶⁰

More commonality in the application of strict liability remains applied to manufacturing defect cases, presumably because manufacturers

⁵⁴ See RESTATEMENT (SECOND) OF TORTS (APPROVED BY THE A.L.I, 1965) §402A. "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer..."

⁵⁵ "Rust-belt" is a colloquial expression that refers to the industrial regions of Ohio, Pennsylvania, Michigan, Indiana, Illinois, and Wisconsin. These areas have predominantly been automotive and steel-related industries, which suffered severe economic crises from the 1970's through the early 1990's, which resulted in the shuttering of many manufacturing facilities. Many of the facilities sat unused for long periods and corroded, hence the name "Rust-belt".

⁵⁶ The third law of thermodynamics may be summarized that all things will move from a state of maximum order to a state of minimum order. The situation where all US states apply strict liability as defined in §402A is one of maximum order whereas the situation where all US states apply some mixture of strict liability and negligence is one of minimum. See RICHARD E. SONNTAG & GORDON J. VAN WYLEN, INTRODUCTION TO THERMODYNAMICS 190 (3rd Ed. 1991) (For an explanation of the third law of thermodynamics).

⁵⁷ See, e.g., N.J.STAT. ANN. §2A:58C-3 (statute provides for a state of the art defense for producers in product liability actions).

⁵⁸ See, e.g., *General Motors Corp. v. Harper*, 61 S.W.3d 118, 124 (Tex. Ct. App. 2001); *Rudd v. General Motors Corp.*, 127 F.Supp.2d 1330 (M.D. A.L 2001); *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994) (Comparing consumer expectations with risk-utility analysis).

⁵⁹ See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U.Chi.L.Rev. 1, 16-47 (1982) (For a good discussion on the balancing done by engineers in the context of the *Grimshaw Ford Pinto* litigation).

⁶⁰ See, e.g., *McCathen v. Toyota Motor Corp.*, 23 P.3d 320 (Or. 2001) (adopting a consumer expectations standard for a roll-over case).

could at least factor such losses in their meager business plans; and, because manufacturing is a statistical process, such losses could be more readily calculated than design and warning defects. The strict liability test for manufacturing defects that is widely accepted is the deviation from the manufacturing specifications (design, part drawings, standards, etc.)⁶¹ In the experience of the author, such a test is also the same used by the auto industry itself when determining whether a product or part has sufficient quality. Such a test apparently has support among legal scholars as well.⁶²

Notwithstanding the wholesale adoption of “strict” liability, there are some states that have held out.⁶³ For example, in Delaware, strict liability has been “preempted” by the UCC for sales cases.⁶⁴ In Michigan, birthplace of the American auto industry, negligence, which looks to the conduct of a manufacturer to prevent injury, and implied warranty, which looks to the condition of the product, are used instead of strict liability.⁶⁵ Under such theories, the burden of proof imposed on the plaintiff is significantly higher than that imposed in cases of strict liability. In Fleck v. Titan Tire Corporation, the court recites a six-prong test that Michigan courts use to determine if plaintiffs have satisfied the burden of proof imposed for design defect cases.⁶⁶ However, a close reading of the six-prong test reveals that Michigan courts are probably using a risk-utility analysis under another name.

The issue of burden of proof warrants an additional discussion at this point. While the Michigan courts appear to use a tough, six-prong test for the plaintiff’s burden of proof, other jurisdictions reach the same high standard for plaintiffs by imposing a very high standard to determine whether their expert witnesses, essential to any case turning on technical issues of any magnitude, are qualified to testify. This standard is embodied in present litigation as a preliminary evidentiary procedure known as a Daubert hearing, wherein the expert witness is judged qualified to testify according to five factors:

⁶¹ See *Magnuson v. Kelsey-Hayes Co.*, 844 S.W. 2d 448 (Mo. Ct. App. 1992); *Rix v. General Motors Corp.*, 723 P.2d. 195 (Mont. 1986); *McKenzie v. S K Hand Tool Corp.*, 650 N.E.2d 612 (Ill.App.Ct.1995).

⁶² See Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 467-74 (1993)(Discussing rationales for strict liability as applied to manufacturing defects).

⁶³ *Madden & Owen Torts*

⁶⁴ See *Smith v. DaimlerChrysler*, No. CA No. 94C-12-002-JEB, 2002 Del. Super. LEXIS 434, at 4 (Del. Supr. Ct. Nov. 20, 2002, Decided).

⁶⁵ See *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 613-614 (E.D. MI. 2001) (Citing *Prentice v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984).

⁶⁶ *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 613-614 (E.D. MI. 2001) (Citing *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 738 (6th Cir 2000) (The six factors considered by the court were, “(1) that the severity of the injury was foreseeable by the manufacturer; (2) that the likelihood of occurrence of her injury was foreseeable by the manufacturer at the time of distribution of the product; (3) that there was a reasonable alternative design available; (4) that the available alternative design was practicable; (5) that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the defendant’s product; and (6) that omission of the available and practicable reasonable alternative design rendered defendant’s product not reasonably safe.”)

- 1) Testability - whether the theory is testable and has been tested according to scientific methods.
- 2) Peer review - has the theory been subject to peer review.
- 3) Error rate - whether the theory has an acceptable or known rate of error.
- 4) Control standards – whether the theory has been subjected to appropriate standards of control.
- 5) General acceptance – whether the theory is widely accepted in the relevant scientific community.⁶⁷

This test has been refined and applied to the automotive industry through subsequent cases so that plaintiffs' experts, and therefore the viability of their cases, are always subjected to the standard as espoused in Daubert.⁶⁸ The impact of such a test has served to create a high hurdle for plaintiffs to pass on the road to a successful products liability suit, especially where design and warning defects are alleged. This is especially significant in the automotive industry simply because of the complexity of many of the designs, the cost of testing and prototypes, and the availability of suitable experts.

The lack of consistency in U.S. products liability law, especially concerning design and warning defects cases, has lead many legal thinkers to react with the drafting and release of the Restatement (Third) of Torts: Products Liability. However in true legal form, jurisdictions have been glacially slow in adopting the Restatement (Third). Despite the fact that the Restatement (Third) may represent a desirable legal standard for products liability, many seem to reject it on the basis that it is a wolf in sheep's clothing, i.e. a proposal for reform dressed up as a restatement of existing law. The result has created further uncertainty, so much so that Torts professors just throw up their hands in response to students' questions on what exactly the law is. While a bit of Shakespearian-inspired irony to the tune of Hamlet may be brushed off in the classroom, it does not sit well with many managers in the business world, in particular, in the automotive industry.

The apparent absence of a uniform definition in US product liability law, for design and warning defects, between states may leave conservative European managers averse to starting any business in the United States.⁶⁹ Perhaps it is more an issue of understanding, or lack thereof, of the state of

⁶⁷ Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)

⁶⁸ See General Electric Co. v. Joiner. 118 S.Ct. 512 (1997) (applying abuse of discretion as the standard for review for trial court's decision of whether to qualify a person as an expert witness according to the Daubert factors); Kumho Tire Co., Ltd. v. Carmichael 119 S.Ct. 1167 (1999) (holding that the Daubert factors apply to engineering expert witnesses).

⁶⁹ See 2000 COM 0893 (2000) (Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products) 9

the US law. This may occur because, in general, European business tends to be studied and planned ad nauseum. Lack of certainty in business is therefore undesirable and the idea of being slapped with a series of billion dollar verdicts is highly repugnant to any business-person, especially one who does not understand the US system of jury verdicts and punitive damages. But are the fundamentals any more different in Europe? Is the US system more favorable to consumers? Perhaps it is the intermediate outcome rather than the final result that clouds the answer.

III. EUROPEAN TREATMENT OF PRODUCT LIABILITY

The Civil Law dominates the European legal landscape. While numerous treatises have been written on Civil Law systems and how they compare to Common Law systems, the purpose here will be just to refresh the reader with its origins. The Civil Law has its roots in Roman and Germanic law traditions. Roman law did protect contractual relationships between sellers ("producers") and buyers ("consumers").⁷⁰ Since the doctrine of product liability is rooted in tort-contract hybrid warranties of quality, express and implied, it evolves naturally from the Roman Law heritage and is suited for European states.⁷¹ The evolution has been slow since, until recent years, contractual privity between parties was an essential element in maintaining a product liability claim in a European Union member state.⁷² Indeed, the Civil Law tends to emphasize laws mainly in terms of contractual obligations.⁷³

Several European Legislative actions as well as recent political events have created optimum conditions under which product liability law has been able to germinate on the continent to equal and exceed that of the United States in terms of regulation and rigidity. While a comprehensive discussion on the organization of the European Union is beyond the scope of this paper, key documents are listed below, along with a brief explanation of their relevance towards the European Union organization in the context of product liability law.

Treaty of Rome (1957)

This document sets up a federal-type framework with a legislative body that is composed of (1) a European Parliament that is made up of popularly elected members, (2) a Council of European Union (Council of Ministers) made up of representatives appointed by member states; a judicial body that is the European Court of Justice (ECJ), which has jurisdiction over

⁷⁰ DAVID G. OWEN, JOHN E. MONTGOMERY & W. PAGE KEETON, PRODUCTS LIABILITY AND SAFETY 17 (3rd ed. 1996) (Quoting Justinian's Digest, Book 19, Tit. 1, Lex 13).

⁷¹ DAVID G. OWEN, JOHN E. MONTGOMERY & W. PAGE KEETON, PRODUCTS LIABILITY AND SAFETY 16 (3rd ed. 1996).

⁷² See PATRICK KELLY & REBECCA ATTREE, EUROPEAN PRODUCT LIABILITIES (2nd ed. 1997)

⁷³ See B.S. MARKESINIS, THE GERMAN LAW OF TORTS 20 (2nd ed. 1990).

disputes involving member states, European Union institutions, businesses, and individuals; and an executive body that is the European Commission. The Treaty of Rome and its subsequent amendments form the "Constitution" of the European Union.⁷⁴ By agreeing to the provisions of the Treaty, member states have given up certain legal duties to a larger, regional governmental entity in much the same way as the US states have done by agreeing to be admitted to the Union of the United States.

Consumer Protection and Information Programme (1975)

This document was adopted by the Council of Ministers on April 14, 1975. The promulgation of this program eventually led to the creation of an action plan that ultimately led to Council Directive 85/374/EC.⁷⁵

Council Directive 85/374/EC (1985)

This document (the Directive) is the kernel of European Union product liability law. According to Kelly & Attree, the Directive "was issued to implement ... a strict liability system to compensate consumers..."⁷⁶ The Directive is analogous to the Model or Uniform codes issued by the American Law Institute in the United States in that the Directive contains a model law that was to be adopted by individual states. The main difference is that the Directive also includes a requirement that all member states were to have implemented the Directive by 1988. By implementing the Directive, member states were to have passed national product liability laws patterned after the model law in the Directive. All member states have implemented the Directive into their national laws with France being the last.

The importance of the Directive for litigators cannot be underestimated. The relationship between the Directive and the national law of the member states is recited in Veedfald v. Amtskommune, where the ECJ stated the following:

Although it is left to national legislatures to determine the precise content of those two heads of damage, nevertheless, save for non-material damage whose reparation is governed solely by national law, full and proper compensation for persons injured by a defective product must be available in the case of those two heads of damage. Application of national rules may not impair the effectiveness of the Directive (see, to this effect, the judgment in Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 20) and the national court must interpret its national law in the light of the wording and the purpose of the Directive (see, in particular, the

⁷⁴ EUROPA – Institutions of the European Union at <http://europa.eu.int/inst-en.htm>.

⁷⁵ EUROPEAN PRODUCT LIABILITIES 10 (Patrick Kelly & Rebecca Attree, eds., 2nd ed. 1997).

⁷⁶ *Id.* at 11.

judgment in Case 14/83 *Von Colson and Kamann* [1984] ECR 891, paragraph 26).⁷⁷

Such language clarifies that the Directive is the Bible for European product liability law for the member states to follow.

Amendments to the Treaty of Rome:

Several key amendments to the Treaty of Rome were (1) the Single European Act (1986) and (2) the Maastricht Treaty (1993). The Single European Act further enabled passage of European Union legislation geared towards consumer protection by eliminating the requirement that the Council of Ministers agree unanimously to new legislation, therefore making it easier to pass more controversial consumer protection legislation. The Maastricht Treaty further enabled passage of consumer protection measures by amending various articles of the Treaty of Rome to give power to the European Union to adopt consumer protection laws.⁷⁸

IV. COMPARATIVE ANALYSIS

The European Court of Justice has recently decided in two cases, *Sanchez v. Medicina Asturiana SA* and *Commission v. France*, that the Directive must be implemented into national law of member states practically verbatim, even if the national law provides consumers with more favorable protection.⁷⁹ In particular, both decisions chastised the respective national governments, Spain and France, for not following the Directive. As a result, the Directive sets forth the central product liability roadmap for all member states to follow. An analysis of the Directive is therefore useful to the litigator or businessperson.

The Directive is divided into 22 Articles:

Article 1 is short and sweet. It states, "The producer shall be liable for damage caused by a defect in his product." This statement is very similar to that of §402A of the Restatement (Second) of Torts. The Directive assigns a "strict" liability for damage caused by defective products.

Article 2 defines a product as "all moveables" (with some agricultural exceptions irrelevant to the auto industry), and Article 3 defines a producer as a manufacturer of a finished product (e.g a car), raw material, or component part, or anyone, who by way of a trademark or other feature "presents himself as a producer". Importers are also designated "producer"

⁷⁷ Case C-203/99, *Veefald v. Amtskommune*, 27 E.C.R. I-3569 (2001).

⁷⁸ EUROPEAN PRODUCT LIABILITIES 11 (Patrick Kelly & Rebecca Attree, eds., 2nd ed. 1997).

⁷⁹ See Case C-183/00, *Sanchez v. Medicina Asturiana SA*, E.C.R. I-3901 (2002); Case C-52/00, *Commission v. France*, E.C.R. I-3827 (2002).

by the Directive. And when the “producer” is not identifiable, product suppliers (dealers, retailers) shall be jointly liable to the injured party until the suppliers reveal the identity of the actual producer.

Article 4 assigns the burden of proof for presence of damage, defect, and causation of damages by the defect to the injured party. In practical terms, this probably does more to prevent widespread product liability litigation in Europe than any other provision of the Directive. Simply put, in a system where parties must pay for legal services as they go, this provision stops plaintiffs from investing heavily in uncertain litigation.

Several other articles are noteworthy in their similarity to American product liability law. In particular, article 6 gives a consumer-expectation test to determine whether a product is deemed defective. Article 7 provides for a number of defenses including state of the art, and defects, which arose after the product was put into circulation. Article 8 creates a provision for producers to reduce (or eliminate) a damage award through a showing of contributory negligence (e.g. misuse) by the injured party. Article 9 limits recoverable damages to physical injuries and damage to private property. Economic loss is not included. Article 10 provides for a statute of limitations of 3 years after the plaintiff becomes “aware, or should reasonably have become aware, of the damage, the defect, and the identity of the producer.”⁸⁰ Article 11 provides for a 10 year statute of repose.

A comparison of the national code of a member state, such as Germany, to the Directive, shows that the national laws adopted from the model set forth in the Directive are essentially the same in both format and legal content, with some economizing of statutory language. For example, the Deutsche Gesetz über die Haftung für fehlerhafte Produkte (the German Act Concerning Liability for Defective Products) contains 19 paragraphs or articles instead of the 22 listed in the Directive.⁸¹ Paragraph 1 is basically a combination of Directive articles 1, 4, 7, and part of 9. However, a close reading of the German statute reveals, especially in light of the recent decisions of Sanchez v. Medicina Asturia SA and Commission v. France, the core meaning is the same.⁸²

On a gut level, the Directive, and therefore the national product liability law of the European Member States, emulates the American product liability law as presented in the Restatement (Third) of Torts, with several differences. The Directive adopts strict liability for products that are

⁸⁰ Underline added.

⁸¹ BGBl. I.S. 2198, PRODHFTG 27, translated in SIMON L. GOREN, THE GERMAN CIVIL CODE 483, Annex II (Rev. Ed. 1994).

⁸² See Case C-183/00, Sanchez v. Medicina Asturiana SA, E.C.R. I-3901 (2002); Case C-52/00, Commission v. France, E.C.R. I-3827 (2002).

defective in that they fail the consumer expectations test, but presents some risk utility concepts by allowing the use of the state of the art and misuse defenses.⁸³ In this way, the Directive is like the Restatement (Third).⁸⁴ However, the Directive diverges by allowing a statute of repose (thus favoring producers) and also by placing the burden of proof on the injured party (also favoring producers in a pay-as-you-go legal system).⁸⁵

Considering the European burden of proof requirement literally, it could be said that it places a burden on European plaintiffs that is as high as does the Daubert hearing or state imposed burdens such as that imposed in Michigan. Given this comparison, it could be said that the levels of screening achieved by both US and European product liability litigation “systems” are roughly equivalent. Considering, however, the reality of the European judicial practice suggests that the real burden of proof standard imposed by judges is lower.⁸⁶ With this in mind, it should be that most businesses would be more afraid of marketing products in Europe than in the United States. There are several factors to the US system that are missing in Europe – (1) a lack of a comprehensive social insurance system available to absorb product injuries, (2) a legal system where plaintiffs’ attorneys bear costs of litigation (court fees, experts, etc), and (3) a jury composed of non-judicial members that probably sympathize more with the plight of plaintiffs

⁸³ Council Directive 85/374/EEC, Articles 1, 6, and 7, 1985 O.J. (L210) 29.

⁸⁴ Compare RESTATEMENT (THIRD) OF TORTS: Prod. Liab. (APPROVED BY THE A.L.I, 1997) §1, §2 cmt. d (1997) with Council Directive 85/374/EEC, Art. 1,6, and 7(e) 1985 O.J. (L210) 29 (However the Restatement does not frame the state of the art defense as an affirmative defense but rather as a question of whether a reasonable alternative design existed at time of sale, thus folding in a discussion of state of the art).

⁸⁵ Compare RESTATEMENT (THIRD) OF TORTS: Prod. Liab. (APPROVED BY THE A.L.I, 1997) §3 cmt. c (1997) with Council Directive 85/374/EEC, Art. 10, 4, 1985 O.J. (L210) 29 (respectively).

⁸⁶ See Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM(00)893 final at 14-15.

It indicates, however, that national Courts have already developed ways to facilitate the burden of proof.

- In Sweden it is for the judge to assess the causal relation, particularly in technically complex cases. The burden of proof had been reduced by the courts in certain situations ('probability').
- In Finland, under the principle of the free assessment of evidence, the judge can take into account the difficulty of establishing the defect in a product or a causal relation.
- In Germany, according to the law on civil procedure, the Court is free to assess and judge evidence in the individual case. Causality was established in several cases on the basis of prima facie proof, when damage arose in the normal course of events.
- When the product disappeared (e.g. an exploding bottle) and when it was difficult to find the origin of the defect, in Spain judges based their decisions on assumptions.
- Judges in the Netherlands used the power to overthrow the burden of proof in exceptional cases, e.g. in the case of the defect in the product.
- In Denmark, the requirements of proof depend on each case and are decided by the judge. There are several judgements where consumers had been unable to furnish proof and where the court had asked the producer to provide rebuttal evidence.
- According to legal practice in France and Belgium, the defect of a product can be proven in any way, by evidence and by probability. The judge can infer the causal link ('the equivalence of conditions').
- In the United Kingdom the simple balance of probabilities test (this means at least 51%) is applied to issues of damage, defect and causation.

than the European court-appointed experts. The impact of these ingredients is hard to quantify, but perhaps these uncertain factors make the US still seem more attractive for plaintiffs. Maybe it is that lack of certainty that may make foreign managers afraid of selling products in the United States. Without such factors, most injured plaintiffs, unless vindication is an extreme motive, would probably walk away.

Despite the absence of such uncertain factors, the Europeans appear to have safe products and businesses appear to have just a hard a time in Europe as in the US when it comes to marketing unsafe or defective products. The basic idea of the Directive, when laid out next to the Restatement (Third), suggests that common values exist between the US and Europe regarding product liability law. Subsequent legislative action taken by the European Union shows that Europeans are definitely concerned about defective products and the scrutiny to which producers are held. However, the manner of execution and resolution of these concerns appears to focus on legislative and regulatory areas.

Several European Union actions must be therefore be examined, including the European Commission's Green Paper, subsequent resolution, the Report from the Commission on the Application of the Directive (the Report), subsequent resolution, and the General Product Safety Directives. The Green Paper, a report initiated by the European Commission and subsequently resulting resolution by the European Parliament, shows that the European Union was concerned about product safety, albeit slow to bring such concerns to real or concrete decision.⁸⁷ The resolution adopted by European Parliament shows that a comprehensive reform was desired.⁸⁸ However, the Report, and the subsequent resolution, drastically toned down the position of the resolution from the Green Paper.⁸⁹

There is a nugget of clear policy buried, however, in the results of the Green Paper. Before the European Parliament adopted the Green Paper resolution, the Economic and Social Committee delivered an opinion that recommended the Commission to "formulate a far-reaching prevention policy, also extending and strengthening European standards."⁹⁰ This recommendation was apparently heeded with the adoption of the General Product Safety Directive (GPSD) (2001/95/EEC), which is a comprehensive

⁸⁷ See Green Paper Liability for Defective Products, COM(99)396 final [hereinafter *Green Paper*]; Bulletin EU 3-2000 (for a good summary of the resolution adopted by the European Parliament as a result of the Green Paper), at <http://europa.eu.int/abc/doc/off/bull/en/200003/p103026.htm>.

⁸⁸ Bulletin EU 3-2000 at <http://europa.eu.int/abc/doc/off/bull/en/200003/p103026.htm>.

⁸⁹ Compare Bulletin EU 3-2000 (the resolution from the Green Paper, calling for a "broad dialogue") at <http://europa.eu.int/abc/doc/off/bull/en/200003/p103026.htm> with Bulletin EU 1 / 2 – 2001 (the resolution from the Report from the Commission, stating, "the Commission...considers that the directive need not be amended...") at <http://europa.eu.int/abc/doc/off/bull/en/200003/p103026.htm>.

⁹⁰ Bulletin EU 3-2000 at <http://europa.eu.int/abc/doc/off/bull/en/200003/p103026.htm>.

regulatory scheme.⁹¹ The 15 member states will have until 2004 to implement the GPSD.⁹²

Ultimately, the GPSD is a revision of an earlier Product Safety Directive (92/59 EEC)(1992).⁹³ While a complete discussion of both of these directives is beyond the scope of this article, the key piece of information is that both directives are regulatory in nature with enforcement of provisions to be carried out by national governments against producers and others.⁹⁴ Such developments represent a divergence of the way in which European product liability law is enforced with the way in which US product liability law is enforced.

While European actions such as the Green Paper, the Report, and recent European case law support a single product liability directive that results in litigative enforcement of product liability law, the emergence of the Product Safety Directive and the GPSD, along with an increasing number of European agencies, show that Europe is moving towards regulative enforcement of product liability law.⁹⁵

V. CONCLUSION: IMPACT ON BUSINESSES

One of the fundamental questions in products liability deals with incentives. In a purely capitalistic society, producers need external incentives to produce products that are free of defects. In the United States, the external incentive is the reduced litigation caused by attempts to eliminate defects by manufacturing and designing products according to best practices that in turn leads to reduction of injuries. In Europe, the external incentive is the satisfaction of regulators achieved through attempts to eliminate defects by manufacturing and designing products according to a multitude of regulations that in turn leads to reduction of injuries.

Of course, this comparison is over-simplified because, the United States promulgates reams of regulations, especially concerning motor vehicles (e.g. FMVSS Crash, C.A.F.E.), and product liability litigation occurs in Europe (Veedfald v. Amtskommune). However, the main point is to show where the emphasis is placed in terms of motivating producers to make safe products such as vehicles.

⁹¹ See Council Directive 2001/95/EC 2002 O.J. (L.11) (The General Product Safety Directive).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See EUROPEAN PRODUCT LIABILITIES 18-25 (Patrick Kelly & Rebecca Attree eds. 2nd ed. 1996) (contains a comprehensive explanation of the 1992 Product Safety Directive); Council Directive 2001/95/EC 2002 O.J. (L.11) (The General Product Safety Directive).

⁹⁵ A look on the European Union website available at <http://www.europa.eu.int/agencies/> shows the current number of agencies at sixteen with one newly created.

The end results of both the US and European product liability enforcement mechanisms are very similar. Vehicle recalls occur in both the US and Europe. Component manufacturers use the same safety test standards when designing automotive components.⁹⁶ Manufacturers still demand zero defects from their suppliers and will stop production if safety becomes an issue in either design or manufacturing.⁹⁷ Injuries due to defects are still settled out of court.⁹⁸ Because such events all pose significant costs to a business plan, businesspeople tend to factor their plans accordingly, but in slightly different manners:

A US venture needs to account for legal services (litigation) and a European venture needs to account for legal services (regulation). Understanding that both of these costs must be built into the respective business plans will help even smaller companies realize that overseas markets are realizable. Such a business approach to products liability will help eliminate much of the fear that acts as a general deterrent for a business to enter a new market place. Understanding the fact that the basic doctrines of product liability in Europe and the US are quite similar, despite different procedural wrangling, will also help managers understand that the overall focus on zero defects, safety, and satisfied customer expectations is identical in both Europe and the US. As a result, the central business mission that is successful on one continent should not turn all of a sudden negative on another continent simply because of an “unforeseen” legal issue. It is also likely that a product that is problematic on one continent from a safety point of view will also be equally problematic on another continent.

⁹⁶ The author's design engineering experience at a major European supplier of automotive seats found that European vehicle manufacturers wanted their seating systems subjected to FMVSS crash tests even for models intended for sale only in Europe.

⁹⁷ At one point in the author's engineering experience, the author demanded that component production was stopped because of the risk posed by insufficient structural performance of a component seat frame design and that production not continue until the design was changed and old stock was scrapped!

⁹⁸ See COM(01)0893 (Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products at http://www.europa.eu.int/comm/internal_market/ew/goods/liability/report-EN.pdf)

The number of product liability cases seems to be relatively low. In the vast majority (90%, according to the German and Dutch insurers) these claims are settled out of court, in particular when the facts (i.e. the defect, the damage and the causal link) are clear. Business recognises the benefits of settling genuine, validated claims by avoiding the length and costs of litigation. In these cases, liability is not an issue and all that remains to discuss is compensation. While some consider the out-of-court settlement a mechanism which functions well, consumer organisations criticise it since the details of the settlement often remain confidential and because producer and insurers have an inequitably advantageous position.

Given the high number of out-of-court settlements, it is said that victims are compensated in general quickly and efficiently. With regard to cases brought before the national courts, the question of a swift solution is more a question of the speed and efficiency of the national systems of civil procedure than of the adequacy of the substantive law.