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Product Liability in Europe.

There is a widespread notion in the European business world about the condition of things in the United States of America. It is a notion so common among business decision makers as to be highly effective in influencing business decisions on doing business in the United States. It is the notion that whatever you sell in America you expose yourself to the worst of all legal evils: product liability under American law. Any attorney in Europe who regularly counsels businessmen about general American business issues is quite familiar with the worried expressions that haunt otherwise less worried businessmen once the topic of product liability in America is brought into the open.

Legal counselling for European business companies involves the painful process of explaining to businessmen why they should be extremely careful if they want to establish business in America and why they might not want to do it after all.

The legal counsel must explain concepts such as punitive damages, civil juries and ambulance chasers. But not only that. It must also be explained why the company's insurance costs might triple if the company decides to enter the American market and come into contact with what many European attorneys consider the most volatile of all legal risk factors: the American law suit mentality. In the European business community, there are many colourful stories circulating about famous American court cases on product liability. No doubt many of these stories are grossly exaggerated. As experience proves, however, the impact of any doctrine - ill-founded or not - can quickly supersede the factual content of the doctrine itself once its general message is transmitted to a large number of people who are inclined to believe that they might be affected in a number of unpleasant ways should the doctrine hold true.

The deterrent effect of this common European notion on American product liability law is

pervasive. Many companies simply abstain from doing business in America for that sole reason. Not because they make bad products, but because they would be ruined if they were to pay the bill that follows even good products if they become part of a product liability case. These companies reason that being present at the scene of the crime, even if you are innocent, may turn out to be just as bad as the crime itself; so they chose to stay out of the American market.

This attitude, rational or irrational, reflects at least one single difference between American and European justice. In Europe, generally speaking, you cannot get away with being overly litigious. If you sue and you lose, then obviously you were in the wrong. Since you were in the wrong, you have wrongly conferred upon your innocent counterpart the costs of being part of a law suit. Consequently, a court - say in Denmark - will equal this by ruling that the losing party should indemnify the winner his costs. This puts a certain restraint on ill-founded law suits. It tempers the cantankerous plaintiff from pursuing rights that are imaginary in the cool eye of the law. It offers vulnerable companies the minimum protection from being targeted by uncritical plaintiffs and their serendipitous lawyers. In addition to this, it must be remembered that the common American practise of "no cure no pay" - or splitting the bargain into a third for the lawyer and the rest for the client - is not common practise in Europe. The "pactum de quota litis" - agreements by virtue of which the client shall pay to the lawyer a share of the economic result of the litigation - is expressly prohibited in the Code of Conduct for Lawyers in the European Community issued by the CCBE (Commission Consultative des Barreaux Europeens).

These differences aside, it still appears difficult for European legal observers to understand American law of product liability fully. It is difficult because the American state of affairs depends on many institutional features that are unfamiliar to the European mind. It is difficult perhaps because of differences in attitudes towards using the court system as a remedy against misfortunes. In most of the European countries, going to court is a step generally associated with considerable discomfort and concern to those involved.

Until recently a country such as Denmark had no general legislation on product liability. With the exception of a few highly specialised statutes such as infant vaccination laws, the law was governed by case law. Case law taught that a manufacturer was liable for damages caused by a defect in his product if the defect was due to his negligence in designing, constructing or manufacturing the product or instructing about its proper use. The standard of liability was not based on strict liability - in Danish law titled "objective liability" - since it requires no additional element of subjective negligence from the person liable. The plaintiff had to prove that the manufacturer had been negligent in some way relevant to the damage.

But, even if the standard of judgment were not a strict one, it worked rather severely. If damage had occurred and the link of causation between the damage and the faulty product was clear and direct, the plaintiff would normally have a fairly simple case. Once the damage had been linked unmistakably to the defective product, the burden of proof would shift to the manufacturer. If he were to exculpate himself from liability, he would have to produce convincing evidence to the effect that all proper precautions and safeguards had been taken to control and preclude the endangering potential of his product. If this was the case, the implication would seem to be that the plaintiff had been negligent in handling the product and the manufacturer would be blameless. However, since this was a fairly heavy burden of proof, the manufacturer faced a high risk of being held liable. He would not be liable for any kind of damage though. Some damages were unforeseeable even in the light of all available knowledge at the time of manufacturing the product. For instance, damage caused by the long term effects of the use of hormone oral contraceptives would not impose product liability on the manufacturer if the process of causation were only recently recognised in the scientific community. In Danish case law, there never was any promise of a risk free environment. If you would enjoy the benefits of today's scientific discoveries you would have to live with the cost of those of tomorrow. This was and still is good law in the Kingdom of Denmark.

But a second chapter has now emerged. As a result of Denmark's membership of the European Economic Community - the EEC - an additional piece of legislation on product liability has

come into force serving as an alternative basis of suing a manufacturer for recovery of damages caused by his products. The new statute came into force in Denmark on the 10th of June 1989. It can be applied jointly or separately with the case law as described above.

The new statute is a product of a directive issued by the EEC Commission in 1985. The directive obliged the individual member states of the EEC to adopt legislation to protect consumers against defective products. Since Denmark has fulfilled its obligations under the EEC directive by legislating in due accordance with the directive, Danish law now reflects the common product liability law in most countries of Western Europe, allowing for minor national variations among the member states.

The statute is not an elaborate one, but is a succinct piece of principled legislation on a large subject that cannot possibly be expounded in complete detail within the framework of a single code. The law states that it covers the liability that rests with the manufacturer when damage is caused by a defect in his product. In contrast to case law principle, the standard of liability is based on strict liability. The negligence of the manufacturer is immaterial in the purview of the law. But the law does not only hold the manufacturer responsible. The law also imposes product liability on the middleman thereby comprising suppliers of any kind between the manufacturer and the consumer.

This general portrait contains all the basic elements of product liability. First, damage must have occurred in order to invoke the liability issue. The statute recognises three kinds of damages as recoverable. These are personal injuries, loss of family maintenance and damage to property of private use. The concepts of personal injury and loss of family maintenance are well-known in Danish tort law since these concepts are elaborated in detail in a special act concerning the economic recovery of torts. This act - the Tort Liability Act of 1984 - defines the guidelines for calculating the exact economic compensation of various losses caused by torts. The standard tort compensation rates in the law are adjusted regularly according to a general Danish price index.

As to property, the law on product liability

does not cover damages to commercial property. This important feature of the law is quite consistent with its purpose as set out in the EEC directive. The aim of the law is to protect the private consumer - defined as a natural person who buys, leases or obtains goods or services for personal, household or family purposes. In consequence, if a faulty product causes damage to property, the manufacturer will only be liable under the statute if the property in question is of a type generally intended for non-commercial use and if the property is in fact being used as such by the plaintiff. If a faulty battery causes damage to your private television set, the manufacturer of the battery will be responsible - within the limit set by the law as to damage on property - currently 500 European Currency Units (about 570 USD). If the battery causes damages to your company television set used by your employees during lunch hour, the law does not apply.

If the defect of the product causes damage to the product itself the law does not apply. This is a well-known exception in product liability law (and in general tort law as well since self-inflicted injuries are not recoverable). If the product is self-destructive, the product probably does not comply with the terms agreed between the seller and the purchaser. The dispute should be resolved in accordance with principles of contract law, not as a case of tortious product liability.

The crucial issue, of course, is what is "the product itself". The answer depends on what you buy. If you buy a car for private use and the brakes turn out to be faulty thereby causing damage to the car, the product liability law does not apply since the brakes were part of the product purchased. If you order new brakes installed by your local mechanic and they turn out to be faulty thereby causing damage to your car, the product liability law does apply since the brakes caused damage to something other than themselves, even if they had become an integrated part of the car at the time of the damage. The manufacturer of the brakes will be liable, and so will the mechanic - since he was a middleman within the meaning of the statute.

In order to delineate the borderlines of the product notion you will have to interpret the individual agreement on its own terms. If the

cause of the damage is inherent in the product purchased as a contractual unit the case is outside the law, even if the manufacturer might be responsible under Danish case law. If the damage is due to a component that has only later been inserted into the body damaged, the manufacturer of the component will be liable.

The very concept of a product is carefully expounded in the Act. The law provides that the concept includes any kind of movable goods apart from real estate. It does not make any difference whether the item has been subjected to an industrial process - as have all artefacts - or if the product can be classified as a natural product untouched by any modifying process, apart from the exceptions mentioned below. Neither does it matter if the product has or has not become incorporated into movables. The law does not apply to damages caused by real estate, but it does not exclude products because they have been inserted into real estate e.g. windows into buildings. This is important. If a building collapses because of bad planning on the part of the architect, the injured pedestrian cannot hold the building contractor liable under the product liability Act. If the building founders because of defective concrete, the case is different. The injury inflicted on the pedestrian has been caused by a faulty product, namely the concrete in the building, even if it exerted its damaging effects through the collapse of the building. The pedestrian may sue the building contractor as liable under the Act since he supplied the faulty concrete. The contractor may, in turn, sue the manufacturer of the faulty concrete, with whom the final liability rests.

The concept of products covered under the purview of the law has specific limitations though. Even if the law covers natural products in general, it does not apply to products of agriculture, stock farming, fisheries and game if these products have not been submitted to an initial processing. The key word is "initial processing". In the explanatory notes to the EEC directive it is said that the distinctive line is passed once the natural product has been submitted to an "initial processing". Then what is an "initial processing"? Not much seems to be required under the EEC directive. Once cucumbers have been wrapped in coating plastics they have been subjected to an initial processing. Once fresh farm milk has been cooled down it has been subjected to an initial processing. Once

the grapes have been washed in water they have been subjected to an initial processing. It seems that the EEC directive does not want to recognise any distinction between measures of a mere preservative nature and measures of a modifying nature, even if this distinction in some areas only reflects customs of handling. Under the EEC rule, few natural products will retain their innate immunity against the product liability code once they are removed from their natural state of being and into the human environment. The apple of the tree of knowledge was subject only to the laws of the Lord. Had Eve peeled it though before offering it to Adam, it would also have been subject to European product liability law.

A basic requirement of product liability - in case law as well as in the new act - is that the product must be defective. There is no absolute formula to explain when this is the case. Clearly, the textbook definition of product liability as a legal discipline dealing with dangerous products is inadequate. Many products that are not dangerous may be susceptible to product liability challenges. If a drug proves inactive it is not dangerous, but it certainly is defective in a way relevant to product liability matters. A strong poison, on the other hand, is not defective though dangerous. The product liability law does not offer any distinct definition of defectiveness, but points to a handful of circumstances of particular relevance. Defectiveness may occur as a result of misleading marketing. If the manufacturer has not furnished the consumer with proper instructions on the use of the product and the specific lack of these instructions results in damage, this may give rise to a liability issue - but not if the missing information is of a nature that should be readily apparent to the average consumer. Knives are self-explanatory and no accompanying instructions are needed to warn the users against injuries. The law therefore restrains itself to proclaiming that a product is defective if it does not offer the safety that could be reasonably expected from it. This is a legal frame into which interpretation must enter in each individual case. Defectiveness is not above time and place. The law requires the court to take into consideration the time of selling. Cars of the eighties are safer than cars of the thirties. Accordingly, cars of the eighties should not be judged by the standard of safety of the thirties. The law explicitly states

that the very fact that a new and better version of the product has been put on the market does not qualify as a decisive factor in the evaluation of defectiveness.

If the plaintiff proves as the law requires him to do that he has suffered damage as a result of a defect in the product, the manufacturer has several defences. He may prove that not he but someone else has put the product on the market. He may prove that the product is not a product of commercial activity. He may prove that the defectiveness of the product is due to the fact that the product must comply with mandatory government regulations allowing no exemption. He may prove that at the time the product was put on the market science knew of no possibility of discovering the defect (the state-of-the-art defence). He may prove that the defect was not present in the product at the time when the product was put on the market. Finally, if his product is only a component inserted into someone else's main product he may try to prove that the defect is due exclusively to the design of the main product or instructions given by the manufacturer of the main product.

All these options, if successful, are legally valid defences in the product liability law. They express recognised defences in European tort law. If you didn't sell the bad medicine, you are not to blame. If the bad medicine is not a product of business manufacturing, but private activity deprived of commercial motives, there is no manufacturer within the intended meaning of the law (though the kitchen quack will nevertheless be liable under case law). If the government leaves the manufacturer no choice as to the way of constructing the product the manufacturer is not liable for complying with the laws of the land. If only the future knows what the present doesn't, then imposing product liability on the manufacturer is the same as punishing him for not being clairvoyant. If the defect of the component of the main product is caused by the design and construction of the main product then the main product is the main reason of the defect. Consequently, the responsibility should be passed on to the main product manufacturer.

If a manufacturer is liable under the law, but the plaintiff nevertheless has been a contributor to his own injury - intentionally or inadvertently - the recovery may be adjusted accordingly. In Danish tort law, it

is a general rule that if the plaintiff's own contribution to the damage does not exceed a third the recovery will not be reduced by reason of the plaintiff's conduct. If the contribution is above this limit, he must accept a reduction of his claim pursuant to his own culpability.

The EEC directive behind the Danish product liability law has the general purpose of strengthening the consumer protection against damage caused by defective products. From this background the law provides that not only the factual manufacturer is liable, but also the supplier. The law defines the middleman to be anyone who puts the product on the market in a commercial capacity. From the point of view of the injured plaintiff, the middleman is liable together with the manufacturer. Between the manufacturer and the middleman themselves the manufacturer is the one who will bear the final loss and he shall indemnify the middleman for the compensation he has been obliged to pay to the plaintiff owing to the manufacturer's defective product.

Clearly, the law appoints the middleman as a guarantor for the product liability resting with the manufacturer. If the plaintiff cannot get recovery from the manufacturer he may turn to the middleman. If the plaintiff cannot identify the manufacturer of a product produced within the EEC countries the law holds the middleman responsible as if he himself were the manufacturer of the product - unless the middleman identifies the manufacturer or the prior middleman for the plaintiff within a reasonable time. If the plaintiff can not identify the manufacturer of a product produced outside the EEC, the middleman who has imported the product will be responsible as a manufacturer - and in this case the middleman cannot abrogate responsibility by identifying a manufacturer outside the EEC.

In general conditions of sale and purchase used between manufacturers and suppliers it is customary to incorporate contract clauses with the effect of regulating liability issues between the parties. The product liability Act contains a provision that restrains the freedom of contract in certain ways. Prior agreements narrowing the rights of the party injured are invalid under the law. A middleman who has paid compensation to an injured plaintiff subrogates in the plaintiff's claim against the manufacturer. Neither can this

right of the middleman be confined through prior agreements with the manufacturer.

Product liability is a severe kind of responsibility. Rules of limitation are necessary to set reasonable limits to product liability. The law has two provisions on time limitations. The short limitation rule provides that claims under the law as well as under Danish case law shall lapse if they are not raised within three years from the day when the injured party became aware, or should have become aware, of the injury, the defect of the product involved, and the name and domicile of the manufacturer. This relatively short period of limitation may be suspended pursuant to Danish law on suspension of time limitations (requiring the plaintiff to show excusable ignorance of his claims or of the whereabouts of the debtor). The longer limitation rule provides that claims under the product liability law - but not under Danish case law - cease to exist at the latest ten years after the day when the defective product was put on the market. In contrast to the three year rule the ten year rule cannot be suspended. The plaintiff must claim recovery - in Denmark by legal action - if he wants his claim to survive past the ten year limit set in the law. Once the ten year limit has been passed, he must confine himself to the legal tools of Danish case law.

As it appears from this survey picture of Danish product liability law, the legal rules in the EEC region share many common features with the American law on product liability. The development in EEC legislation seems to have created a legal framework on product liability that must be expected to increase the average number of cases in Europe on product liability. It is premature to guess whether decades of American court cases will come to serve as a legal source to inspire European plaintiffs and their attorneys in their pursuance of recovery under new product liability concepts. Product liability issues are as basic as moral philosophy. Many of those influenced by its reasoning and sharing its results know little of its background and history. No doubt there is a growing tort awareness in Europe. In Denmark new legal trends of medical liability and work place safety liability have been visible to the keen eye for years. As society becomes ever more complex and sophisticated, the capability of the average man of handling the immense variety of goods and services of daily life

becomes feeble. The claim for stronger control on the supply side in order to establish the safety that seems difficult to locate on the demand side is making its case still more powerful. Products are complicated. Complicated things are dangerous if applied by people who want to enjoy the benefits of their complexity without understanding the side effects of incomplete understanding.

The common claim for safety in products use is understandable and even workable as a legal claim as long as established principles of tort law control the product liability reasoning. But it may also become misleading if strict product liability is mistaken for a general human right of a risk free environment in an industrialised society with cars, medicines, and electricity. Strict product liability requires strict legal reasoning and clear principle. Many European observers feel that the American court system - with its civil juries in tort cases - has become unduly disposed to confusing firm reasoning under the law books with loose equity considerations beyond the control of rational justification.

Now Denmark and its allies in the European Economic Community have shaped new legislation to solve matters of product liability within the united market of the European states as of 1992. Time will show if the American way of product liability will prove itself applicable in Europe along with other inventions of the new world.