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A case of bad eggs

How the Danish supplier product liability rule came in conflict with the EC Product Liability Directive.

The European Court of Justice's decision of January 10, 2006.

1. The problem

Mrs. Hansen has purchased a new laundry machine from a Danish retailer who imported the machine directly from an Italian manufacturer. A few days later Mrs. Hansen puts the machine to work and leaves the house to go shopping. When she returns 3 hours later her house has burned down to the ground because of a thermal overload in the laundry machine caused by a defective circuitry. A whole production series of that particular model of laundry machines suffers from the same inherent flaw. Mrs. Hansen's losses amounts to 700.000 Euro.

Mrs. Hansen's fire insurer covers the losses and turns to the Danish laundry machine supplier. He refuses to pay and claims that he is not subject to product liability because of cases decided by the European Court of Justice. The reason, he maintains, is that a supplier such as himself cannot be held responsible in Mrs. Hansen's case because the provision on suppliers' strict liability in the Danish Product Liability Act from 1989 - transposing the EEC Product Liability Directive of 1985 into Danish law - is invalid. Also, he had not been negligent, he says. How should he know that the laundry machine was equipped with a defective electronic circuitry?

2. The Danish salmonella case

The source of inspiration to the supplier's line of reasoning comes from a pending Danish product liability court case about eggs containing salmonella bacteria. The case started in 1998 when a young married couple was having their evening meal, a freshly made omelette made from eggs

bought from a major Danish convenience store. Both spouses became ill from a severe poisoning with salmonella enteritidis, a bacteria type associated with eggs and regularly occurring in Danish eggs. The bacterium is resilient and dangerous and is estimated to kill about 25-30 people every year in Denmark. The wife recovered after hospitalization, but the man was partly disabled as a result of the infection.

The couple sued the convenience store in the city court. The store sued the producer of the eggs, a Danish egg farm. The injured couple claimed that the store had acted negligently by selling the poisonous eggs without giving any warning against the risk of salmonella infection. They also claimed that the convenience store as a supplier was liable on a strict basis under the Danish Product Liability Act paragraph 10. It reads:

"A supplier is responsible for product liability directly towards the injured party and subsequent suppliers in the chain of supply".

The supplier and the producer claimed that it was not proven that the eggs were salmonella infected; that the eggs did not constitute a product comprised by the Danish Product Liability Act as it were at that time (before the Directive 1999/34/EC which deleted the exception for primary agricultural products and game as from 4 December 2000) because the eggs had not undergone an initial processing; that the eggs even if proven to be salmonella infected, were not defective; that the case was one of "system damage" - i.e. eggs were to be considered unavoidably unsafe products because salmonella bacteria were a known and inevitable risk factor associated with eggs; finally it was claimed that the injured couple had failed to comply with proper standards of kitchen hygiene despite the fact that it was public knowledge since the mid 1990'ties that eggs could carry salmonella -meaning that there was contributory negligence on the part of the plaintiffs.

In a verdict of January 22, 2002, the city court of Aalborg found against the supplier who was convicted to pay compensation to the plaintiffs. The court stated that the eggs were infected with salmonella, and that this infection meant that the eggs were defective unless the eggs were sold with a warning about the salmonella risk, or if the risk were generally known to the ordinary consumer. The eggs did not have such a warning. The court said that the eggs ought to have been followed by a clear and unmistakable warning about the salmonella risk. Consumers in general, the court said, were not aware at the relevant time - May 1998 when the eggs in question were sold - that an omelette prepared in a usual way could transmit salmonella infection and cause serious disease. The couple had prepared the omelette in a proper and usual fashion. Thus, there was no contributory negligence. Also the court dismissed the argument that he eggs had not undergone an initial processing; the very process of sorting and packing the eggs was such that bacterial cross contamination from one egg to another was possible. The eggs, the court said, were covered by the Product Liability Act and not excluded by the exemption applicable at that time for initially unprocessed agricultural products.

The court also refused to accept the idea that eggs were unavoidably unsafe products. As conditions were in the Danish eggs industry it had to be conceded that the manufacturers were aware of the salmonella risk. However, that risk was not equally common knowledge among ordinary consumers.

The supplier was held liable to the plaintiffs, and the eggs manufacturer was found to be liable to the supplier.

The city court's decision was in line with a number of other Danish product liability cases decided in recent years covering products such as grounded meat, chopped chicken and also a couple of other cases on egg transmitted salmonella infections.

The premises of the Aalborg decision suggest that the court found both negligence and strict liability under paragraph 10 for the supplier. Specifically, the court stated that it was a fault for which the supplier could be blamed and held liable that he had not put a suitable warning on the eggs packet. This was negligent. This view conforms with general product liability law in Denmark. A manufacturer or a supplier who realises or ought to realise that an injury might occur if the consumer of his product is not properly instructed or warned against a possible risk associated with the product and its use is negligent if he fails to supply such instruction or warning along with the product. The standard is severe for a professional party who is commercially involved in the product market in question. He must take adequate steps to ensure that the ordinary consumer can use the product as intended without danger. User manuals, products guides or warnings should follow the product to protect against such inherent product risks. In a Danish Supreme Court decision from 1994 (U1994.53 H, The Weekly Law Reports 1994 p. 53) a kitchen cooking table tipped over and the house wife who got caught beneath was severely injured. The cooking table was considered defective because of an insufficient user guide.

3. The eggs case appealed - EC issues raised

The supplier and the producer both appealed the city court decision to the Danish High Court West. On appeal they claimed that the Danish Product Liability Act, based on the EEC Product Liability Directive of 1985 (85/374/EEC), was in conflict with the Directive.

4. The supplier rule in paragraph 10 of the Danish Product Liability Act

"A supplier is responsible for product liability directly towards the injured party and subsequent suppliers in the chain of supply", says paragraph 10. In paragraph 4(3) of the act the supplier is defined as a party *"who in the course of his business puts a product into circulation and who is not a producer"*. This definition excludes private sellers (garage sales) and the supplier is clearly distinguished from the producer who manufactured the product (or made himself a producer by virtue of putting his name or trade mark on the product thus presenting himself to be its producer). To put into circulation covers sale, renting, leasing, or other form of distribution for commercial purposes.

The responsibility of the supplier under paragraph 10 is direct which means that the injured party can sue the supplier independent of whether the producer is also target of litigation. The supplier's responsibility is on a strict basis; no negligence is required, but of course, as in the eggs case, a supplier may also be held liable if he is acting negligently, e.g. if a hardware dealer tells his corpulent customer that the ladder easily can carry a man of 250 pounds if it cannot, or if the paint shop declares that an outdoor paint is highly suitable for indoor use when in fact it emits poisonous gasses requiring the paint only to be used for outdoor purposes (as in the Danish Rentolin cases where a wood treatment product was marketed as suitable for indoor use though it was not).

Paragraph 10 was not a part of the original proposal to transpose the Product Liability Directive into Danish law in 1986 (law proposal no. 35 of October 8, 1986), but was introduced with the later transposition proposal of 1988 (law proposal no. 54 of October 10, 1988) as a declaration of existing case law.

The preparatory law comments from the Ministry of Justice to the then proposed paragraph explain As follows:

"The proposed rule that the supplier is responsible on a strict basis for product liability is really just a declaration of current law on suppliers...the proposed rule covers not only product liability under…the proposed law but also current product liability under general Danish law outside the area of the act..."

Clearly, the Danish legislator proposed paragraph 10 as a mere declaration of the case law rule on a supplier's responsibility towards the injured party for the product liability of the manufacturer, a rule long established in case law.

It should be emphasised that paragraph 10 is not a primary liability rule; it is a rule of substitute responsibility. It is completely contingent on and is only applicable if there is or has been a producer in the upstream supply chain who has put the product into circulation, and the product at that time was defective. The responsibility under paragraph 10 is an ancillary responsibility in line with the vicarious liability for employers under King Christian V's Danish Law of 1683 - i.e. a proxy responsibility mechanism presuming a prior action carrying liability and performed by someone else than the proxy. The supplier rule is a legal auxiliary vehicle. Because of these characteristics it is quite precise when the preparatory works from the Ministry of Justice describes the rule as comparable to a surety. The person that insures or guarantees another person's debt is not himself a primary liable debtor, but is directly and immediately responsible to pay the debt if the debtor fails to do so. As with a surety the supplier can seek redress against the primary liable persons, under Danish law the manufacturer and the preceding suppliers in the upstream supply chain, cf. paragraph 11(3) of the Danish Product Liability Act. This right of redress can not be excluded by contract.

By its nature the supplier rule as described is strict. A proxy responsibility, in distinction from a primary liability, is essentially a responsibility for someone else's actions, and in virtue of this carrying over of liability from one subject to another, the rule cannot be dependent on any fault on the part of the supplier. As with a surety the obligation is a strict one for the default of the primarily obligated person. The employer is strictly liable for the liable acts done by the employee in performing his job. The maincontractor is strictly liable to his client for the construction faults made by his subcontractor. The Danish supplier rule is in fact the very same rule within the area of sales of physical goods. It makes little sense that the dentist is liable towards his patient for his assistant's poor work if the dentist is not also liable for the defective tooth implant that he supplied to the patient as part of the dental work.

Substantially, the Danish supplier rule is not about the supplier's product liability. He has none, but he can act in negligence and because of that become liable with respect to products he sold. The Danish supplier rule is a substitute responsibility rule - making the supplier responsible for the product liability of the producer. As such this responsibility by its very nature can only be strict.

The conceptual difference between a primary liability rule and a substitute responsibility rule is of importance for the arguments exchanged in the European Court of Justice case on paragraph 10, cf. para 8-10 below. If the Danish supplier has not acted negligently, he can only be made responsible for the producer's product liability if the producer is considered liable himself - which presupposes the product to have caused damage and to have been defective when put into circulation by the producer, cf. article 7(b) of the Product Liability Directive. If the defect has come into existence after the time of putting the product into circulation, and this can not be attributable to the producer there is no product liability to be conferred upon the supplier.

Another feature of paragraph 10 is notable. Product liability in Danish law is considered a non-contractual liability. It is a liability in tort, cf. the Danish court cases U1994.342 ØLD and U1986.922 H. However, paragraph 10 covers contractual as well as non-contractual product liability. Under paragraph 10 any supplier in the supply chain (that supplied the defective product in question) between producer and consumer is responsible although only the supplier who actually sold the product to the consumer is in privity of contract to the consumer. The injured consumer is free to choose if he wants to litigate against the retailer, the wholesaler, the importer or other intermediate vendors in the supply chain that sold the defective product. Each of these links in the supply chain is responsible to the injured consumer. The responsibility, though, is not confined to the consumer who purchased the product, but can be invoked also by non-purchasers harmed by the product. The dinner guests contracting disease due to salmonella contaminated food can sue the suppliers. The bypasser who is injured because a defective antenna detaches from a rooftop and falls down on the pavement can sue the suppliers of the antenna. In short: any supplier of the defective product causing injury can be litigated against by any injured party whether he is a purchaser of the product or not.

5. The supplier as a contracting party

In the Western industrialised world the seller's liability to the customer for damages caused by the purchased product is an established rule. In English law the rule was the cradle of product liability. In *Winterbottom v. Wright* (1842, 10 M. & W. 109) the plaintiff was injured and rendered lame when a mail coach that he was hired to drive broke down because of latent defects in its construction. The coach had been sold from a supplier to the postmaster-general to be used for the carriage of mail. The driver sought compensation from the coach supplier, but was rejected. The court found that the duty of the defendant to keep the coach in good condition was a contractual duty owed to the postmaster-general who had purchased the coach, and not to the unfortunate driver.

With the landmark case *Donoghue v. Stevenson* (1932 A. C. 562) English law detached itself from the privity of contract doctrine. Mrs Donoghue's friend bought for her at a cafe a bottle of ginger beer. The bottle was made of dark glass. After consuming part of the ginger beer, she discovered that the bottle contained the remains of a decomposed snail. Mrs. Donoghue suffered shock and severe gastroenteritis. Because she was not a contracting party to the cafe owner she could not sue him; instead she sued Stevenson, the manufacturer of the ginger beer. She won her case. The manufacturer was found to have a duty of care to the consumer when selling products intended to reach the consumer in the form in which they left him. This fundamental principle of product liability law was one of negligence, not strict liability; the manufacturer had to take reasonable care to secure his products if they could injure a consumer's life or his property.

Danish product liability law has evolved along different lines as the legal reasoning has not been linked to a privity of contract doctrine. Throughout the 20th century Danish law has had no restrictions to applying general tort law - in Danish law the so-called culpa rule (culpa is Latin for guilt) - to manufacturers of defective products causing damages. Traditionally, however, product liability issues have been viewed as occurring typically in relation to vendors of products, but the ambit of the culpa rule did not preclude manufacturers as targets for liability although the burden of evidence to prove negligence in many cases would bar the plaintiff from being successful.
The unique feature in Danish law is that the Danish Sales of Goods Act from 1906 (titled "Købeloven", the Purchasing Act) only concerns itself with the conformity of the goods under the sales contract; it does not cover product liability claims. The preparatory works to the act explicitly states that the act is not intended to cover product liability damages. If Mrs. Hansen's new laundry machine does not work, she can recover her money under the Danish Sales of Goods Act; the seller's liability extends to 2 years. This is a contractual liability for non-conformity of the goods purchased. If the laundry machine sets the house on fire due to inherent defects in its circuitry, the losses suffered are outside the application area of the act.

In a century Danish law has distinguished these two set of problems from one another. As the English authors Miller and Goldberg correctly observe: *"An entitlement to recover the purchase price when the goods are not as promised does not necessarily carry an implication that there is a right to claim compensation for physical injury which results from their use"* (C.J. Miller and R.S. Goldberg "Product Liability", 2nd edition 2004, p 4). Claims concerning the conformity of goods is a contractual issue to be resolved by the Sales of Goods act. Product liability damages is a tort issue to be handled by the culpa rule as applied in case law by the courts, unless covered by a specific piece of legislation.

Danish law, on the other hand, has for decades acknowledged the supplier rule: that the commercial seller is liable to his customer (and the customer's customers) for damages caused by the products sold. Without the supplier rule in Danish law Mrs. Hansen would be in a highly discomforting situation: the smaller damage - that the laundry machine does not work would carry liability for the seller for the full duration of 2 years - while the bigger damage - that her house and all her possessions vanished in the fire generated by the defective laundry machine - leaves her with no legal remedies against the seller, assuming as is most likely that he has not been negligent.

6. The EC aspects of paragraph 10

When paragraph 10 was adopted by the Danish Parliament in 1989 the parliamentary legal committee asked the minister of justice whether paragraph 10 would conflict with the EEC Product Liability Directive. The minister replied:

"The EEC directive does not regulate the legal position of the supplier, but only that of the producer. Consequently, there is no obstacle to adopting national rules concerning the supplier's liability. This has been stated explicitly by the Council in the 1025 adjournment on July 25, 1985, where the Council made the following statement:

"With regard to the interpretation of Article 3 and 12, the Council and the Commission are in agreement that there is nothing to prevent individual Member States from laying down in their national legislation rules regarding the liability of intermediaries, since intermediary liability is not

covered by the Directive. There is further agreement that under the Directive the Member States may determine rules on the final mutual apportionment of liability among several liable producers (see Article 3) and intermediaries" (the reference to article 12 is an error; it should read article 13*).*

Apart from that it should be emphasised that the proposed responsibility for the supplier as mentioned in the general explanatory notes to the law proposal...corresponds to Danish law as it is already".

From this it is reasonable to conclude that the Danish legislator acted in full confidence to, and in compliance with, the Council Statement as cited in proposing paragraph 10 in 1989 as a mere declaration of current law in Denmark on the supplier's responsibility for the producer's product liability. According to the Council Statement the supplier was not comprised by the group of legal subjects covered by the Product Liability Directive; in consequence the Danish legislator assumed to have retained its national legislative power to legislate on the issue.

It is the basis for this very assumption that has been put to doubt as part of the salmonella eggs case. It was triggered by three cases from the European Court of Justice.

7. The court cases on the Product Liability Directive

On April 25, 2002, the European Court of Justice decided three linked cases addressing the interpretation of the Product Liability Directive: Case C-52/00 *Commission v France*, Case C-154/00 *Commission v Greece* and Case C-183/00 *Gonzales Sánchez v Medicinia Asturiana SA* (Spain).

The common denominator for all three cases is that the Court decides whether the Directive, in the matters regulated by it, is a minimum harmonization directive or a maximum harmonization directive.

A minimum harmonization directive requires the Member States to enact a floor in their national legislation - a minimum level of legal protection that does not preclude the Member State from enacting a higher level if so it desires. A harmonization directive obliges the Member States to enact a ceiling of legal protection - a maximum level of protection that the Member States are not permitted to exceed and one they are obliged to meet. The floor and the ceiling coincide; there is no room between them for divergence. The Member States must transpose the maximum harmonisation directive to ensure complete uniformity of the law covered.

From a Danish point of view it is the French case that has attracted the most attention. The case was generated by France's tardiness in transposing the Directive into French law. The Directive should have been transposed into domestic law at the latest on July 30, 1988, cf. article 19 of the Directive. In January 1993 France was convicted at the European Court of Justice for failing to transpose the Directive within its time limit. With nearly a 10 year delay France finally complied and enacted the product liability law in May 1998. However, once again France attracted attention from the Commission for failure to transpose the Directive correctly. Infringement procedures were launched, and in 2002 France was convicted by the European Court of Justice for 3 transposition flaws. One of them concerns the product liability for suppliers.

In the French case a consumer contracted trichinellosis after eating horsemeat from a butcher. The consumer sued the butcher who had sold the horsemeat. The consumer lifted his burden of evidence by proving that the horsemeat was defective because of the parasites in the meat, that a damage had occurred and was caused by this defect. The butcher was held liable at the Appeal Court of Toulouse.

The law applied was a supplier rule in the French transposition law article 1386-7 in Code Civil. The French rule stated:

"The vendor, hirer, except a lessor under a hire-purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety defects in their products on the same basis as the producer".

Clearly, this rule imposes a strict product liability regime on a broad class of commercial parties. In line with producers the commercial suppliers - as the butcher who sold the horsemeat in the course of his business - is made strictly liable for their products if they prove defective and cause damage. The Commission was dissatisfied with this rule and maintained that the rule equated the supplier with the producer whereas the Directive's article 3(3) only made the supplier liable on an ancillary basis where the producer was unknown.

The Commission also blamed France for a couple of other anomalies in the French transposition law. The law included damage under 500 Euro, and the law made the applicability of the development risk defence and compliance with mandatory regulations dependent on the producer being able to show that he had taken appropriate steps to prevent the consequences of a defective product.

On all three counts the Court noted that they raised the *"initial question whether in regards to the matters for which the Directive makes provision the result sought by it is complete, or merely a minimum, harmonization of the laws, regulations and administrative provisions of the Member States"* (paragraph 12).

The rationale behind considering this question to be "initial" seems to be that the 3 special features of the French law all worked to expand consumer protection compared to the Directive and therefore could only be permissible if France had retained legislative power to regulate the substance matter - as would only be the case if the Directive was to be interpreted as a minimum harmonization directive.

Similar issues arose in the Greek and the Spanish cases. Like France, Greece had chosen to exclude the lower threshold of 500 Euro from its transposition law. In the Spanish case a female patient Mariá Sánchez had received a blood transfusion in a Spanish medical establishment. The blood had been treated by a transfusion centre and was infected by hepatitis C virus. Sánchez sued the owner of the medical establishment and based her claims on a Spanish 1984 consumer protection statute - enacted prior to the Product Liability Directive -instead of the Spanish law transposing the Directive. The 1984 statute provided for a system of strict liability enabling consumers and users to obtain compensation for damage caused by the use of a thing, a product or service. The 1984 statute conferred more extensive rights to a consumer than the transposition law. The defendants argued that the 1984 statute had to yield to the transposition law meaning that the transposition overruled

the 1984 statute thereby limiting its scope and applicability in Sánchez's case. Sánchez, though, had a seemingly strong argument against this view. She pointed to article 13 of the Directive that states:

"This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified" (July 30, 1985).

As article 13 is worded it appears to be a rule to safeguard against retroactive effect of the Directive. The term "...shall not affect any rights..." reads like a standard protection formula against the impairment of vested rights under existing laws in force prior to the notification of the Directive. Whether such rights are rooted ex contractu or ex delicto is immaterial. Article 13 is general in its declared scope. As seen from the considerations expressed in the preamble it voices a consumer protection objective. The preamble in its 13 recital explains article 13 as follows:

"Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive..."

On this background it was obvious for the injured Mariá Sánchez to argue that the Product Liability Directive could not deprive her of her rights under the Spanish 1994 state as this statute preceded the Directive and therefore "...should remain unaffected by this Directive...". It would conflict with the very goals of the Directive if its adoption were to limit the rights of an injured party, she claimed.

The Spanish government and the Commission argued that the Directive was a maximum harmonization directive. Article 13 could not be interpreted as enabling the victim of damage to rely, in regard to the products coming within the Directive's scope, on a system of liability more favourable than that provided for by it.

María Sánchez maintained a different interpretation of Article 13. In her view the harmonization brought about by the Directive was incomplete. Article 13 should be interpreted as meaning that the Directive does not alter the provisions of national law relating to contractual or non-contractual liability.

The question that the Spanish referring court wanted the European Court of Justice to rule on was essentially to ascertain whether article 13 of the Directive must be interpreted as meaning that the rights conferred under the legislation of a Member State on victims of damage caused by a defective product may be limited or restricted as a result of the Directive's transposition into the domestic law of that State. Or in the simple version: can the Directive lower the rights of an injured party based on domestic law?

In the French case and the Greek case the governments launched the same view as Mariá Sánchez. Article 13 taken on face value was clear evidence, they said, that the Directive did not preclude a higher domestic level of consumer protection.

This view on the Directive has shared wide support in the legal community. In a standard handbook as "European Product Liabilities" edited by Patrick Kelly and Rebecca Attree (2nd edition 1997, p. 11) it is stated:

"The new system introduced by the Directive supplemented the then prevailing systems of consumer protection for defective products. It was designed to afford additional protection, co-existing with other consumer rights, whether based upon contract or tort law. Consumer rights which went beyond its scope were not precluded by the new law. Hence the national laws of member states may indeed in some cases continue to provide consumer rights whereby the producer of the products is strictly liable for defects without limit. The Directive therefore sought to introduce a system under which there were prescribed minimum consumer rights, upon which consumers throughout the European Community could rely and according to which producers would be responsible".

In all three cases the Court stated that the Directive is a maximum harmonization directive, in regard to the matters which it regulates. On the basis of this conclusion the Court found against Mariá Sánchez. Article 13, the Court said, cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive (paragraph 13).

How then is article 13 to be understood? After all, in its general wording it does seem to guarantee an injured party against the possibility that the Directive should deprive him of any existing rights ("This Directive shall not affect any rights which an injured person may have...").

The Court goes on to explain that the reference in article 13 to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects (paragraph 31). Likewise the reference in article 13 to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed, as is clear from the third clause of the 13th recital thereto, as referring to a specific scheme limited to a given sector of production (paragraph 32). Conversely, a system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production does not come within any of the systems of liability referred to in Article 13 of the Directive. That provision cannot therefore be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive (paragraph 33). The reply to the question raised must therefore be that article 13 of the Directive must be interpreted as meaning that the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive's transposition into the domestic law of that State (paragraph 34).

A few conclusions can be extracted from the Court's reasoning.

Article 13 allows the Member States to retain and enact liability systems for producers based on fault or a warranty in respect of latent defects - whether or not such systems are of contractual or non-contractual nature.

Clearly the Court draws a distinction between such systems and the system under the Directive. Domestic liability systems for producers - existing or future ones - founded on "the same basis" as the one of the Directive (and non-general because if they are not limited to a given sector of production) are not permissible. A domestic "one the same basis" liability system not confined to a specific product sector cannot seek refuge under article 13. For a general liability system to be allowed under article 13 it must have a different basis than the one of the Directive. Evidently, this line of reasoning, permeating in all the three cases, makes it crucial to define what is the essential characteristics of the liability system of the Directive. The Court characterises the liability system under the directive as a system which *"...enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage..."*. It appears to be the standard description of a strict product liability regime.

The Mariá Sanchez case was not concerned with a supplier as the medical establishment must be deemed to be a producer within the meaning of the Directive. The French horsemeat case is the only one addressing the supplier directly.

France defended its supplier rule with arguments similar to those in the Sánchez case, notably the claim that article 13 did permit the Member States to maintain or adopt a higher domestic level of consumer protection. As the French supplier rule antedated the Directive, it should be allowed to survive, France said. Also, France pointed out that the French supplier rule worked to achieve to same result as sought by the Directive since a supplier sued would sue the producer who would then be liable to pay compensation. The bill would end up anyway on the producer's table.

First, the Court stated, as in the Spanish and Greek cases, that the Directive, in the matters regulated by it, sought to achieve a complete harmonization (paragraph 24). The Court reused the same premises from the Spanish and Greek case in stating that article 13 did not entitle the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive (paragraph 21). But other systems of contractual or non-contractual liability based on other grounds were permissible - grounds such as fault or warranty in respect of latent defects (paragraph 22).

That a French supplier could turn to the producer and sue him did not impress the Court. This would multiply the proceedings, a result which the direct action afforded to the victim against the producer was specifically intended to avoid, the Court said (Paragraph 40).

On this background the Court stroke down the French supplier rule under which *"The vendor, hirer, except a lessor under a hire-purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety defects in their products on the same basis as the producer"*.

The Court found that this rule violated the Directive as asserted by the Commission because it provided that *"...the supplier of a defective product is to be liable in all cases and on the same basis as the producer"*. With this conclusion the Court appears to agree completely with the Commission's criticism that blamed the French supplier for equating the supplier with the producer. With the same complete harmonization premises the Court found that Greece had violated the Directive by excluding the lower threshold of 500 Euro from its transposition law.

8. The Danish salmonella case at the European Court of Justice

Inspired by the Spanish, Greek and French decisions the defendants in the Danish salmonella case - the supplier and the eggs producer - believed their chances to be improved. They now asserted that the supplier rule in paragraph 10 of the Danish Product Liability Act conferred more favourable rights on an injured party in a product liability case than permitted by the Directive. Now settled that the Directive was a maximum harmonization directive the Danish strict liability regime for suppliers could not be in accordance with the Directive, they said. Whether the supplier rule was a declaration of long-time case law or not made no difference - as shown by the Spanish case more favourable strict liability rules to an injured plaintiff, even if they existed before the Directive, had to retreat for the principle of maximum harmonization. Furthermore, the supplier could not be held responsible for the product liability resting with a producer under Danish case law - a responsibility also covered by paragraph 10.

The dispute was submitted to a preliminary ruling at the European Court of Justice. In the meantime, the Commission had discovered the Danish supplier rule - although a part of the Danish transposition law since 1989 - and had made inquiries about the rule to the Danish Government. The government responded and stated as its opinion that paragraph 10 was not in any way in disagreement with the Directive, and that the French horsemeat case had no similarity with paragraph 10 and therefore was not relevant for Denmark. This reply did not please the Commission. It claimed paragraph 10 to be in conflict with the Directive and opened infringement proceedings.

The Danish couple served formal litigation notice to the government and the government sided up with the plaintiff in the preliminary case at the European Court of Justice.

The plaintiffs readily conceded that the Directive was a maximum harmonization directive. The Danish legislator, they explained, had never had any doubts about this since it was clearly expressed in the preparatory comments to the transposition law when proposed in 1988 (Law Proposal no. 54 of October 12, 1988, column 1956). The comments state that the Directive mainly contains *"maximum rules that are binding for the Danish transposition law".* Commenting on article 13, the preparatory comments state that the transposition law *"...does not intend to decrease the compensation remedies of an injured person, but seeks to improve them"* (column 1613). Also, it is stated that *"general Danish law on product liability remains in force alongside the new rules in the proposed law"* (column 1641).

It is undeniable that the Danish supplier rule confers to an injured party a more favourable legal position in a product liability case than a product liability system without such a rule. However, the Danish legislator did not perceive this to conflict with the maximum harmonization principle. The reason is quite simple: the legislator relied on the Council Statement cited above, para 6, and on the general contents of the Directive in assuming that the Directive did only regulate the product liability of the producer and not the product liability of the supplier. The government and the plaintiff maintained that it was a misunderstanding to think that the principle of maximum harmonization itself did preclude a domestic rule like the Danish paragraph 10 holding suppliers responsible for the product liability of producers.

In the French horsemeat case paragraph 18 makes it clear *that "...the Directive contains no provision expressly authorising the Member States to adopt or to maintain more stringent*

provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection". Parallel with this paragraph 24 *states "...the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States..."*.

The key term, the Danish plaintiffs and the government said, is the *phrases "in matters in respect of which it makes provision"* and *"in the matters regulated by it"* (in the Danish version of the decision the wording is *"within its application area"*).

The matters regulated by the Directive is the producer's product liability, cf. article 1 and article 3. The Directive proclaims in the preamble's recital 1 and 2:

"Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property",

and

"whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production".

These recitals were undeniable, but the Commission attempted a defence. The reason why only the producer's product liability was mentioned in the Directive reflected nothing but the desire for brevity. The express dealing with the producer did not support the view that other participants in the supply chain were outside the regulation area of the Directive. As for the recitals in the preamble such recitals were not binding as they were often just political manifestations with a vague and universal character different from the concise language of directives themselves.

The plaintiffs and the government replied that the Directive should be read true to its letter and exactly as written. The Directive regulates a specific group of legal subjects - the producers. Article 3 defines exhaustively who is a producer. Apart from the genuine producers - they who as a matter of fact do manufacture products - the definition also includes a group of business participants that really are only suppliers, but who in some cases must accept to be classified as producers. This group consists of:

1. Suppliers who, by putting their name, trade mark or other distinguishing feature on the product present themselves as its producer ("own-branders").

2. Suppliers who import the product into the Community.

3. Suppliers of products manufactured in the Community who cannot (within reasonable time) inform the injured person of the identify of the preceding supplier or the producer.

4. Suppliers of products manufactured outside the Community and imported into the community who cannot (within reasonable time) inform the injured person of the identity of the preceding supplier or the importer.

These are the defendants covered by the producer definition in article 3 of the Directive. Commercial parties of one kind or another who do not fit into this definition are not subject to the provisions of the Directive.

This particular delineation of the defendants that can be made liable as producers has its historical roots in the so-called Strasbourg Convention, *“The European Convention on Product Liability in regard to Personal Injury and Death”*, created by the Europe Council in 1976.

The Strasbourg Convention has been a central source of inspiration to the work of the Commission leading to the Product Liability Directive. The Strasbourg Convention also did limit itself to imposing strict liability on a selected group of producers and parties that were equated with producers. The idea of including suppliers in general were discarded for a number of reasons. The family ties between the conceptual framework of the Directive and the Strasbourg Convention are so close that even article 13 has a similar version in the Strasbourg Convention.

On this background the plaintiffs and the government in the Danish case pointed out that the Commission completely failed to realise that the very notion of maximum harmonization does not reach beyond the area of application of the Directive. Regulating product liability law requires that the legislator must define which damages are covered by the regulation - in the Directive death and personal injury, and damage to consumer property (article 9). The legislator must define what liability standard he wants to apply - in the Directive strict liability as opposed to negligence (article 1). And the legislator must define which defendants are to be held liable under the regulation - in the Directive the persons described in article 3.

If maximum harmonization implied, the Danish government said, that domestic legislation was precluded from regulating the supplier’s liability, then this would be mean *“negative harmonization”*. It would be paradoxical, the government said, if EC law could impose rules on areas not ruled by EC law; since the Directive did not contain any general rules on suppliers, but only on producers the area was outside the Directive. In support of these arguments one piece of evidence seemed difficult to refute: The Council statement of 1985 to the Directive said directly and unanimously *“...that there is nothing to prevent individual Member States from laying down in their national legislation rules regarding the liability of intermediaries, since intermediary liability is not covered by the Directive”.*

This statement did not in any way differ from the Directive itself but rather confirmed it since the Directive did not purport to regulate other defendants than those classified as producers. The statement, the Danish government said, was a clear expression of the legal intentions of the Community legislator at the time of the adoption of the Directive.

The Commission replied that the Council Statement only intended to state that the law of contractual or non-contractual liability for suppliers should be covered by article 13; strict liability for suppliers however, was a topic covered by the Directive. The Council statement should be read with the reservations announced in the French and Spanish cases, meaning that the statement only

addressed such liability regimes as were not harmonised by the Directive, i.e. liability regimes not based on strict liability for damages caused by defective products.

The Commission did not venture to explain how this interpretation of the Council Statement was to be reconciled with the wording of the statement that does not display any distinction as to the basis of liability but without any reservation just plainly declares that...“intermediary liability is not covered by the Directive“. It seems strained to read this otherwise than meaning that suppliers, being among the intermediaries, are a group simply exempted from the regulation area of the Directive.

9. Why was the French supplier rule overruled?

If the reasons that the Danish plaintiffs and the government presented to the European Court of Justice were valid, why then did the French supplier rule suffer its ill fate? If maximum harmonization does only reach so far as to the producer why should France be disallowed to maintain a supplier rule making the vendor or any other supplier in the course of business liable for safety defects in their products on the same basis as the producer?

Two ways of answering this question are possible (Professor Geraint Howells has suggested a third approach that the Court might have adopted, but did not, namely to say that since France extended liability in an Act implementing the Directive, the Court’s decision could have been justified on the basis that the law increases the protection beyond the permitted maximum levels by rules introduced after the notification of the Directive, cf. Howells p. 204 in “Product Liability in Comparative Perspective”, edited by Dungan Fairgrieve, Cambridge 2005. However, since the French supplier rule, as the Danish one, merely declared what was already pre-existing law in France there is no real extension of liability but just a writing into the transposition act a declaration of priorly established law already preserved by the wording of Article 13. Following Bodil Lindqvist in C-101/01 “…nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive…to areas not included within the scope thereof, provided that no other provision of Community law precludes it.” (paragraph 98).

One might take the bold view and say that the overruling of the French supplier rule was one of these hapless, but inevitable blunders that sometimes occur even in the world of court justice - nurtured by the remarkable omission on the part of France to invoke and make the Court aware of the existence of the Council Statement. Instead France choose a frontal charge on the maximum harmonization principle but did not assert that the principle, if applicable for the Directive, should not be extended to the supplier, should the charge fail. The oral argument in the French case does not reveal the slightest indication that France has even thought the thought that suppliers possibly were not covered by the Directive and therefore should not share the same fate as the maximum harmonised producers.

The less bold view - not precluded by the bold one - were the one launched by the Danish plaintiffs. The French supplier rule, when examined closely, has characteristics that seem to make it distinguishable from the Danish supplier rule. Abbreviated to the essentials the French rule could be restated:

"The vendor...or any other supplier...shall be liable for safety defects in their products on the same basis as the producer".

And the Danish counterpart:

"A supplier is responsible for product liability directly towards the injured party and subsequent suppliers in the chain of supply".

There is, of course, no substantial difference between the terms "liable" and "responsible" - in the context they are fully interchangeable; the term "responsible" is only chosen for the translation of Danish rule to indicate the underlying fact that the Danish supplier is not primarily liable but is a stand-in, a proxy, for someone else's product liability. Terms like "answerable" or "accountable" might have served just as well.

However, the French rule states that the supplier is liable for safety defects in his products on the same basis as the producer (dans les même conditions que le producteur). This appears to imply that the French supplier is subject to the very same strict liability in relation to the person injured as a producer would have been in the same situation. Or in other words: the supplier is transformed into a producer. If his legal liability situation is defined to be "on the same basis as the producer" then it is difficult to see otherwise that he is made into one for product liability purposes.

This interpretation of the French rule is in conformity with the Commission's criticism of the rule. In paragraph one of the French case the Commission blames France for wrongful transposition *"...by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer...".* In line with this it is stated in paragraph 36 that *"the Commission maintains that, unlike Article 3(3) of the Directive, which renders the supplier liable only on an ancillary basis, where the producer is unknown, Article 1386-7 of the Civil Code equates the supplier with the producer".*

As described above, article 3(3) converts some suppliers into producers if products supplied by them cannot be shown to have been manufactured by an identified producer in the Community or imported by an identified importer within the Community. The basic purpose is to ensure that there is a defendant to hold liable within the Community. The plaintiff cannot be referred to a manufacturer in Argentina, South Korea or Iran. The French supplier rule goes beyond these boundaries as it equates any supplier with the producer - and of course also goes further than article 3(1) on own branders.

If this analysis - in tune with the Commission's arguments against the French rule - can be granted to be correct then it is obvious that what France really has done is to regulate the supplier liability by expanding the directive-bound definition of a producer. The French rule makes any supplier a producer by disregarding the conditions for such an equalisation in article 3. The directive knows of only four cases where a supplier must subject himself to be a producer. The French supplier rule seems to force the supplier to accept such a status in all cases.

The concept of a producer is governed exclusively by the Directive. Even conceding that the Directive, in accordance with its historical background and in the light of the Council Statement, leaves the supplier regulation to the Member States such a concession of course presumes that the Member States do apply an acceptable and adequate definition of the supplier concept and does not

circumvent the Directive by artificially mutating vendors, hirers and suppliers into producers. Such crafty bypassing devices would be like defining certain services to be movables in order to make the Directive applicable and subject the provider to a strict liability standard; or if the consumer property notion in article 9 was expanded so as to include general financial losses under the concept of physical property damage in order to trigger strict liability for such losses.

10. The French and the Danish supplier rule

The Danish supplier rule cannot be blamed for such manoeuvres. The Danish supplier is expressly defined in paragraph 4(3) of the act as a party "who in the course of his business puts a product into circulation and who is not a producer".

As explained above, para 4, the Danish supplier is only responsible if there is liable producer in the upstream supply chain who put the defective product into circulation. Litigating against the supplier requires the plaintiff to prove that such a producer exists and would be liable if he was targeted - as he typically will be by the supplier if the supplier is being sued. Such requirements do not apply to the French supplier rule because there the supplier is liable on the same basis as the producer. The French rule is a primary liability rule whereas the Danish rule is a contingent liability rule - the supplier is answerable for the producer's product liability only if it exists. Both suppliers, though, can seek redress from the producer, the French one under a more limited rule obliging him to litigate in the year following the year after he himself was sued.

The Danish plaintiffs and the government explained these differences at length during the preliminary hearing at the European Court of Justice. Their opponent - the supplier, the producer and the Commission - expressed doubts as to the correctness of the alleged differences between the French and the Danish rule, and maintained that whether true or not it was an irrelevant distinction - rather a sophisticated scholastic issue since the Danish supplier and the French supplier both enjoyed the privilege of being entitled to seek recompensation from the producer.

The plaintiff and the government persisted. The difference, they said, had real and tangible importance to the supplier. By universally incorporating the supplier into the group of producers the French rule had fused the whole distribution industry - importers, wholesalers, dealers and retailers - with the manufacturing industry. This turns the balance against the distribution industry in an important way: a producer is only liable if the product causing the damage was defective when put into circulation by the producer, cf. article 7(b); since the French supplier is made liable on the same basis as the producer the implication is that the supplier is made liable for subsequent defects arising after the product was put into circulation by the producer, but existing in the product when the supplier himself puts it into circulation. Since defects might arise for a number of reasons in the distribution chain without being attributable to the producer, the article 7(b) evaluation has in reality been imputed to the supplier - a logical consequence of his acquired status as a producer under the French supplier rule.

If the coffee maker is flawless when put into circulation by the producer, the producer faces no product liability if later it catches fire and ignites the family residence - due to an internal breakage of insulation caused someplace in the distribution chain, but impossible to identify. The French supplier will be liable because the coffee maker is assumed defective when he sold it. The Danish supplier will not be liable because the coffee maker was not defective when the producer sold it.

One might object that the distinction between the French and the Danish supplier rule - apart from the example given - does not really make any big difference in real life. Even if the Danish supplier only has a contingent liability presuming the producer to be liable in the first place, then the supplier is likely to be sued anyway as he is a closer target to the plaintiff. Is the difference then not really of the same nature as the black zebra with white stripes and the white zebra with black stripes? What is the difference between the taker of a loan and the person who makes himself liable to pay his debt as a surety? Is the latter in less risk of losing money that the first? Maybe not, but still they are two different persons in two different legal categories. The loantaker precedes the surety. The surety presupposes the loantaker. Similarities, even essential ones, between two legal substance matters - primary liability for the French supplier and contingent liability for the Danish supplier - cannot support the inference that harmonising one of them is the same as having harmonised the other - and thereby excluding Member State legislative power in the area of the other.

The opinion of the Commission, the Danish supplier and the Danish eggs producer may therefore be summarised just as the Danish government did it in its oral argument to the European Court of Justice: they claim that the Directive represents a *total harmonization of all product liability*, and that the Directive, accordingly, does not permit strict product liability to be imposed on anyone else than the article 3 defendants. Outside the area of article 3 there is no room for domestic rules on strict product liability. The Member States' hands are tied.

However, if the theory of total harmonization of all product liability is adopted, then this theory breeds more implications than just a bar to imposing strict product liability on suppliers.
If strict product liability is reserved exclusively for the article 3 defendants because all and any product liability is totally harmonised by the Directive, would it not then be in conflict with the Directive also to impose strict liability for products outside those defined in article 2 of the Directive - e.g. strict liability for damage to neighbour property caused by excavating work as stated in Danish case law in two Supreme Court cases (U1968.84 H and U1983.714H)? If article 3 truly is an exhaustive definition of those defendants listed in article 3 why should article 2 not likewise be an exhaustive definition of those products allowing for strict liability to be applied? Clearly, both articles are definitional provisions. The objection that service is not a product under article 2 and therefore not regulated by the Directive, and therefore open to strict liability for the provider if a Member State deems it expedient to impose such a liability standard - that is the very objection that the Commission is rejecting in relation to article 3.

Conceivably, the Commission might reply that it is a false analogy because the general substance matter of the Directive is not the liability of service providers but product liability as described in article 1 of the Directive ("he producer shall be liable for damage caused by a defect in his product"). To infer from the maximum harmonization of the Directive that strict liability might be impeded for other substance matters is untenable. But is it really? The Danish supplier rule is not a genuine product liability rule, but a substitute liability vehicle making the supplier an up-front stand-in for the producer. If combining article 3 with the maximum harmonization principle disallows such a rule for suppliers, it would seem just as reasonable to combine article 2 with the maximum harmonization principle and maintain that there is no room for strict liability for products not listed in article 2 - e.g. services rendered by service providers. It is likely that the Commission would be reluctant to support such an inference. But that only shows that the maximum harmonization principle is not a logically sound basis for settling the issue of suppliers.

This is why the Danish government complained that the Commission's perception of the problem would mean negative harmonization. Also, it could be added that if any political decision-maker in Denmark in 1985 had studied the Directive in the light now proposed by the Commission it would have been turned down. If the Danish Parliament at that time was told that the Directive - although born as an internal market measure, but also claiming to intend to improving consumer protection - would have freed the supplier from the liability rule shaped in decades of Danish case law, the attitude towards the Directive would have been decidedly unfriendly. Why abandon the well-established supplier rule in exchange for strict liability for the producer when product liability standards for producers had already evolved to be close to strict liability in many cases? It would appear to be a dubious deal and a major step backwards for consumer protection. In the European common market millions of goods move back and forth over long distances. The lofty credo of the Commission that the Community is like a village in harmony making it easy for injured persons to sue producers in other Member States is not realistic. The reality is that litigating in another country is afflicted with so many practical obstacles and so heavy costs - e.g. the translation expenses for the legal documents involved - that most ordinary consumers are entirely unable to carry through. The Danish supplier rule enables the consumer to sue those participants in the supply chain that are close to himself. Typically the suppliers have insured their risks, and in a product liability suit under the Danish supplier rule they will immediately pass on the claim to their own supply source or to the producer. This was what the Danish government conceived to be in perfect harmony with the Directive by trusting the Council statement to which the Commission itself had declared to be in agreement - an agreement it then denounced and retracted by its challenge of Danish law after some 13 years of passiveness. The matter is far from academic. Many national court cases in Denmark have been started in complete reliance on the supplier rule litigating only against the supplier to avoid double costs and risks in also suing the remote manufacturer. If the supplier rule fails and other vehicles, fault or contract, to hold the supplier responsible do not succeed, then good personal injury claims might be lost due to the 3 year limitation rule in Article 10 of the Directive. It simply might be too late for the injured party to turn around and sue the producer. Under Danish Supreme Court case law as it is today, the limitation rule is not suspended by the fact that the plaintiff or his lawyers were not clairvoyants that could predict that the European Court of Justice some day suddenly might strike down traditional national principles of supplier liability based on decades of proven law and promulgate that the Directive, contrary to everybody's expectations founded on the Council Statement and on an unbiased reading of Article 13, might in fact and very severely "…affect…rights that an injured person may have according to the rules of the law of contractual or non-contractual liability…existing at the moment when this Directive is notified".

11. The opinion of the Advocate-general

In January 2005 the Advocate-general announced his opinion. The questions referred by the Danish High Court for preliminary ruling by the European Court of Justice are as follows:

Question 1

Does Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (1) preclude a statutory system under which

an intermediary bears unlimited responsibility for the producer's liability under the Directive?

Q u e s t i o n 2

Does the abovementioned Council Directive preclude a system under which the intermediary bears, in accordance with caselaw, unlimited responsibility for the producer's fault-based liability established in case-law in respect of liability for defective products resulting in personal injury or damage to consumers' property?

Q u e s t i o n 3

With reference to:

1. The Council of Ministers minutes in BEUC-News, Legal Supplement 12 November/December 1985, pages 20 and 21, paragraph 2 of which states:

13.12.2003 EN C 304/11 Official Journal of the European Union Statements on Articles 3 and 12: With regard to the interpretation of Articles 2 and 10, the Council and the Commission are in agreement that there is nothing to prevent individual Member States from laying down in their national legislation rules regarding liability for intermediaries, since intermediary liability is not covered by the Directive. There is further agreement that under the Directive the Member States may determine rules on the final mutual apportionment of liability among several liable producers (see Article 3) and intermediaries; and

2. Article 13 of the Directive, which provides that: 'This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified',

does the Directive preclude a Member State from laying down legal rules on intermediary liability for defective products where the intermediary is, as occurred in [Paragraph 3(1)] of the Danish law on liability for defective products, defined as any person who, in the course of his business, puts a product into circulation without being deemed to be the producer under the definition thereof in Article 3 of the Directive on liability for defective products?

Question 4

Does the Directive (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products) preclude a Member State from laying down a legal rule relating to liability for defective products, under which the intermediary - without himself being the producer or treated as a producer under Article 3 of the Directive - is responsible for:

- the producer's liability for defective products under the Directive,

- the producer's fault based-liability established in case-law in respect of liability for defective products resulting in personal injury or damage to consumers' property,

where the legal rule in question requires that:

(a) the intermediary be defined as any person who, in the course of his business, puts a product into circulation without being deemed to be the producer ([Paragraph 3(3)] of the Danish law on liability for defective products);

(b) the producer can be held liable and the intermediary therefore does not bear responsibility where the producer is not held liable (Paragraph 10 of the Danish law on liability for defective products);

(c) the intermediary has a right of contribution or recourse against the producer (Paragraph 11(3) of the Danish law on liability for defective products)?

Question 5

Does the Directive (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products) preclude a Member State from maintaining a non-statutory, but case-law-based, rule, which existed before the Directive on liability for defective products, relating to liability for defective products under which the intermediary - without himself being the producer or treated as a producer under Article 3 of the Directive - is responsible for:

- the producer's liability for defective products under the Directive on liability for defective products,

- the producer's fault-based liability established in case-law in respect of liability for defective products resulting in personal injury or damage to consumers' property, where the case-law-based rule concerned requires that:

(a) the intermediary be defined as any person who, in the course of his business, puts a product into circulation without being deemed to be the producer ([Paragraph 3(3)] of the Danish law on liability for defective products);

(b) the producer can be held liable and the intermediary therefore does not bear responsibility where the producer is not held liable (Paragraph 10 of the Danish law on liability for defective products);

(c) the intermediary has a right of contribution or recourse against the producer (Paragraph 11(3) of the Danish law on liability for defective products)?

It is clear that the three main questions are question 1-3. The plaintiffs had posed question 4 and 5 as more detailed versions of the main questions and to pinpoint the questions specifically to the definition of a supplier in the Danish Product Liability Act and to emphasize the fact that the Danish supplier is only facing a substitute liability requiring the producer to be liable in the first place.

Like the Commission the Advocate-general finds that the Directive is a maximum harmonization directive completely harmonising strict product liability. On this background he concludes that the definition of the defendants to be held liable under the Directive is exhaustive; the Member States can not expand the definition to include other persons than those specifically listed in article 3(3) in the Directive (paragraph 35-36).

Hence the Advocate-general proposes the first of the two questions to be answered with a yes: the Product Liability Directive does prevent that a supplier is held liable under national law for the product liability of a producer under the Directive - and it makes no difference, he states, whether the supplier's liability is based on legislation or on case law.

As for the second question the answer is this: *"Article 13 of the Directive does not permit a national provision that extends the strict liability system of the Directive to include suppliers. Article 13, on the other hand, does not preclude the supplier from being subjected to other liability systems, whether contractual or non-contractual, that have a different basis such as fault or a warranty in respect of latent defects"* (paragraph 66).

As to the answer of question 3 the Advocate-general reads the Council Statement so as to confirm his interpretation of the Directive's article 13 - meaning that the Council Statement only clarifies his interpretation of article 13 of the Directive which is that the Directive does not prevent the Member States in maintaining or adopting rules on supplier liability provided that such rules are based on fault or contractual liability (paragraph 73).

These answers mean that the Advocate-general agrees with the Commission in its general view on the matter. However, there seems to be an ambiguity in the General Advocate's opinion.

As described, in the opinion of the Advocate-general it is not in agreement with the Directive that a supplier on a strict basis is held liable for the producer's product liability under the Directive. Again. whether such a supplier liability itself rests on legislation or case law is immaterial.
But what about the possibility that the supplier is held liable for the producer's fault-based (negligence) product liability as imposed on the producer by case law?

In examining his opinion this seems not to pose any problems in relation to the Directive. It seems not to be decisive that the supplier's liability by its very nature is strict. What is decisive is that the producer's liability that is assigned to the supplier in itself should not be on a strict basis, but can be other systems of contractual or non-contractual liability based on other grounds than the Directive, such as fault or a warranty in respect of latent defects (paragraph 65). It is permitted, says the Advocate-general, to apply liability systems on suppliers concerning contractual or non-contractual liability based on other grounds than the Directive, such as fault or a warranty in respect of latent defects (paragraph 66).

Because the supplier's liability as explained above, para 4, is a substitute liability (when the supplier has not himself been negligent) it is the character of the primary producer liability transferred to the supplier that determines if there is a conflict or not with the Directive. If the primary producer liability is not strict, then there is no conflict. If it is strict, there is. This appears to be the conclusion of the Advocate-general.

This interpretation of the Advocate-general's opinion is in harmony with the opinion of the Commission, only that the opinion of the Commission was clearer on this point. The Commission comments on question 2 by saying: *"within the area that Member States are allowed to adopt or maintain a fault-based liability system for producers, the Member States are at liberty to make suppliers responsible for the producers' fault-based liability. In this context it is of no importance whether the responsibility is derived from legislation or case law"*. In line with this comment, the Commission proposes question 2 to be answered: the Product Liability Directive *"...does not prevent that a legislative or case law-based liability system under which a supplier is held liable for the producers fault-based product liability"* (section 41-42 in the Commissions opinion to the European Court of Justice).

12. Product liability ex contractu

During the oral argument at the European Court of Justice the plaintiffs argued that if paragraph 10 was entirely overruled as being a violation of the Directive then this would cause friction in relation to English law.

In England the Sales of Goods Act from 1979 contains a rule in its section 14 that enables a plaintiff to sue for compensation for personal injury and property damage caused by the product purchased. The English rule is a contractual rule that confers rights to the purchaser for non-conformity of the products purchased; but the rule has a wider range and also covers product liability claims arising from damages caused by the product purchased.

On questions from the Judges' Bench the Commission's lawyers stated that they did not consider the English rule to be in conflict with the Directive because it was founded on a contractual liability basis. This is in harmony with the premises in the French, Spanish and Greek cases. However, it means that the part of liability instances of the Danish paragraph 10 that covers defendants who are suppliers that actually did sell the defective product to the plaintiff is immune to the Commission's attack on the Danish transposition law since in these cases there is a contractual relation - privity of contract - between the supplier and the injured person who bought the product. This is the case in the Danish salmonella case in which the married couple bought the bad eggs in the defendant's shop.

If paragraph 10 were revised to read:

"A supplier is responsible for product liability directly towards the injured party to whom he sold the defective product"

it would be just as untouchable as section 14 in English Sales of Goods Act.

However, English law has to a certain degree expanded the applicability of contractual remedies to non-contractual parties thereby affording them rights to product liability claims even if they are not in privity of contract with the defendant. The expansion is fairly limited, though, and derives from the Contracts Rights (Rights of Third Parties Act) 1999. Nevertheless, in the extent it dispenses with the contractual requirement, it opens up for the possibility that a non-purchaser may sue a supplier for damages caused by a defective product not sold by the supplier to the plaintiff.
As described above the evolution in English law was a movement away from the rigid adherence to the privity of contract doctrine. The movement directed itself towards the producer who was to be held liable for his products put on the market and sold unaltered through the channels of suppliers to the consumers. It was not a movement aiming at holding suppliers responsible to third parties to whom they never sold the product.

In a geographically confined undeveloped economy system with no or little international trade and exchange of goods this may seem acceptable because the producer himself seldom is further away than the local suppliers selling the producer's products. In a global international economy system with extensive international trade the producer will often be the least desirable target of litigation because he may be far away. It eases the burden of litigation considerably for the plaintiff if he can sue the local supplier who put the defective product on the market and who can turn to his own commercial supply sources and pass on the claim to them or to the producer. Typically, the suppliers will have product liability insurance to cover their losses and pay their litigation expenses, thus spreading the product liability risk into the general market price.

It is not difficult to show that if product liability claims against a supplier are restrained by the privity of contract doctrine there will be many cases where an injured person is deprived of realistic means of compensation, all due to the fact that he did not himself buy the defective products.

With a few examples:

In a big convenience store a house wife buys with her own credit card goods to prepare the meal for the whole family's evening meal. She and her spouse, their two children and her parents in law are having dinner prepared from the goods she purchased. Among the goods is a can of olives from a financially insecure manufacturer in Portugal. Unfortunately, the olives are infected with bacillus botulinus - an unpleasant bacteria strain causing botulism, a lethal poisoning. The two children and the parents in law die. Miraculously the husband survives, but severely disabled. The house wife herself did not eat from the olives. No claim can be directed at the supplier from the deceased persons' estates. Neither can the disabled husband. None of the victims did purchase the olives. Only the house wife is a contractual party, but she did not get poisoned.

A man buys a brand new caravan at a big dealer shop and drives on autumn vacation with three friends. They spend the night in the caravan which is heated by a gas heating system manufactured by a small Finnish corporation that recently had to file for bankruptcy. Due to an inherent defect in the heating system it emits carbon monoxide into the caravan during the night. All survives, but one of the friends suffers a brain damage because of oxygen deprivation and is disabled 80 percent. He cannot sue the dealer shop because he did not by the caravan.

A house owner buys a new flagstaff in the local Do-it-yourself-centre and sets it up in his front garden. The flagstaff is imported from a small Spanish company that is on the brink of a financial collapse and is without assets. Because of flawed expansion bolts the flagstaff breaks and hits a bypasser in the back. The victim is crippled and must use a wheelchair for the rest of his life. He has no claim against the local supplier since he did not buy the flagstaff.

Evidently, in all three cases the victims or their estates have a good case against the producer of the defective products. However, if the producers are financially worthless and do not have proper insurance, it a hopeless legal adventure to start litigation in another country even assuming that the plaintiff have financial resources to embark on such a demanding project.

The examples demonstrate the effect of a product liability regime confined to contractual concepts. Not even the closest family members to the house wife whose olives killed them have any legal remedies against the supplier. The friend of the caravan owner likewise has none. And the unfortunate pedestrian who thinks himself safe on the pavement has no valid compensation claim against the flagstaff supplier. If the suppliers have not been negligent, there is no hope for the victims. Retail shops do not test their thousand of cans for deadly bacteria, the caravan dealer does not conduct technical examinations into the brand new heating systems of the caravans, and the DIY centre does not X-ray the expansion bolts to their imported flagstaffs. Only if the negligence standard is pushed towards a stricter liability standard, or if the burden of proof is reversed and the supplier presumed liable unless disproved by active measures on his part to test his products thoroughly - adding costs to the price - only then is it possible to claim that the supplier has been negligent an impose product liability on him. In that case of course the reality is that a strict liability standard has been applied but disguised in negligence terminology - which in principle would conflict with the Commission's and the Advocate-general's interpretation of the 3 court decisions on France, Spain and Greece (specifically on the situation in France cf. Dr. Simon Taylor p. 239 in

“Product Liability in Comparative Perspective”, edited by Dungan Fairgrieve, Cambridge 2005).

Another way around the problem would be to soften the contracting party notion and widen it so as to include some third parties who are in a special relationship with the contracting party. One way to do this is to expand the purchaser notion to cover the purchaser’s household members. This would cure some problems, but create others. What about the children who have moved out, but join the parents for the evening meal with bacillus botulinus? What about the parents in law? Separate extension vehicles are necessary to cater for such anomalies. The extension to cover also guests, friends, acquaintances and in the end also random bypassers who by sheer accident come in touch with the defective product and are injured by it only demonstrate the real issue: trying to get out of the conceptual straitjacket of the privity of contract requirement in a product liability context in order to avoid what is felt to be injustice to the victims. But again: under the reasoning of the 3 Court cases and the Advocate-general’s opinion it is unmistakable that if a commercial party who is not a producer within the meaning of the Directive is being targeted on a strict product liability basis by someone that did not buy the product from that same party, that party need not worry too much.

With the Contracts Rights (Rights of Third Parties Act) 1999 English law has taken a few steps away from the privity of contract doctrine. The act makes enables a third party who is expressly identified in the contract (or specified in a couple of other ways) to enforce the contract and claim damages for personal injury caused by the product purchased. Since such contracts clearly are not everyday practise in the consumer market the act has a limited effect on the typical product liability cases. Its conceptual framework resembles that of Danish law on third party promises - e.g. when a costumer makes an agreement with a florist commissioning him to send flowers to a third party - a so-called third party promise. In Danish law there is a distinction between genuine third party promises where the third party himself is entitled to claim performance, and non-genuine third party promises where access to claim performance stays with the contracting party, the flower customer. If a property insurance is deemed to have been taken out also in favour of a mortgagee, it is a genuine third party promise. In certain cases English law seems to have worked itself around the objectionable effects of the privity requirement simply by deeming the injured party to be a purchaser - for examples if food is purchased in a restaurant. Also agency principles have been employed to permit recovery by third parties, cf. Miller and Goldberg “Product Liability”, 2nd edition 2004, p 37.

American law has found it own ways around the privity of contract requirement. The Uniform Commercial Code, in various forms part of legislation enacted by the states, has different alternate options to solve the problem. The code makes it possible for the purchaser’s household or guests to enforce the express or implied warranty of the seller. Another optional version stretches even further by allowing a donee and other persons injured by the goods to benefit from the seller’s warranty. Similar legislative tools have been adopted in New Zealand. All of them show the inherent limitations in contract law to handle personal injury matters in an appropriate fashion. In Denmark such developments have not been imperative because Danish tort law, governed by flexible case law, has not been chained to contract law. The Danish supplier rule, absorbed into paragraph 10 of the Danish Product Liability Act, reflects this long-time case law.

13. The decision of the European Court of Justice in the Salmonella case

On January 10, 2006, the European Court of Justice handed down its decision in the Danish Salmonella case.

The Court correctly identifies the essence of the questions posed to be two main issues:

1. whether the Directive precludes a Member State from regulating the liability of the supplier by laying down that he is to be answerable for the strict liability of the producer.

2. whether the Directive precludes a national rule transferring to the supplier the producer's fault-based liability.

To answer those questions, the Court states that it is necessary to determine the extent of the harmonisation brought about by the Directive. The Court cites itself in the 3 prior 2002 decisions and reaffirms that the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States.

The Court turns to the submission by the injured persons and the Danish Government that the Directive does not operate a complete harmonisation of liability for defective products but only of the producer's liability for defective products, and thus does not regulate the supplier's liability and thereby leaves the Member States a margin of discretion as regards the definition of the class of persons liable.

On the basis of the background sources to the Directive The Court summarises the rationale behind holding the producer liable as follows:

"While acknowledging that the possibility of holding the supplier of a defective product liable in accordance with the provisions of the Directive would make it simpler for an injured person to bring proceedings, there would – it was observed – be a high price to pay for that simplicity, inasmuch as, by obliging all suppliers to insure against such liability, it would result in products becoming significantly more expensive. Moreover, it would lead to a multiplicity of actions, with the supplier seeking recourse in turn against his own supplier, back up the chain as far as the producer. Since, in the great majority of cases, the supplier does no more than sell the product in the state in which he bought it and only the producer is able to influence its quality, it was thought appropriate to concentrate liability for defective products on the producer." (paragraph 28)

It follows, says the Court, that it was after weighing up the parts played by the various economic operators involved in the production and distribution chain that the choice was made to allocate liability for damage caused by defective products in principle to producers, and only in certain defined cases to importers and suppliers, in the legal system established by the Directive.

Contrary to the view put forward by the injured persons and the Danish Government, Articles 1 and 3 of the Directive are not thus confined to regulating the liability of the producer of a defective product, but determine which of the operators who have taken part in the manufacture and marketing processes will have to assume the liability established by the Directive (paragraph 30).

In this reasoning the Court has detached itself from the key tenet of the injured persons and the Danish government that the Directive only concerns producers and those suppliers that qualify to be classified as producers under the conditions of Article 3.

The class of persons liable against whom an injured person is entitled to bring an action under the system of liability laid down by the Directive is defined in Articles 1 and 3. Since the Directive seeks to achieve complete harmonisation in the matters regulated by it, its determination in Articles 1 and 3 of the class of persons liable must be regarded as exhaustive. Article 3(3) of the Directive provides for the supplier to be liable only in the case where the producer cannot be identified.

The Danish supplier rule making a supplier answerable directly to injured persons for defects in a product, represents an extension of the class of persons liable that goes beyond the limits fixed by the Directive, says the Court (paragraph 34).

The substitute liability viewpoint – that the Danish supplier rule does not impose an autonomous liability on the supplier, because he is liable to the injured persons only to the extent that the producer, against whom he has a right of recourse, may be liable - is not a decisive factor in the Court’s opinion. Beside the fact that the Danish rule imposes on the supplier a burden considered by the Community legislature to be unjustified (see paragraph 28 above), it entails a multiplicity of actions, which is precisely what the direct action against the producer available to the injured person under the conditions laid down in Article 3 of the Directive is intended to avoid (see Commission v France, paragraph 40).

The Court concludes that it follows that the Directive must be interpreted as precluding a national rule under which the supplier is answerable without restriction for the liability of the producer under the Directive. Holding the supplier liable for the producer’s strict product liability is not permissible under the Directive. Article 13 can not provide any authorization for this either. As already stated in the 2002 decisions Article 13 does not allow the Member States to maintain a general system of product liability different from that provided for in the Directive.

As to the significance of the Council Statement,. promoted as a key source document by the injured persons as well as the Danish Government in support of their view that suppliers in general are exempt from the Directive’s application area, the Court is unimpressed.

The Court dismisses this document by saying that it must be recalled that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision (see, in particular, Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18, and Case C-375/98 Epson Europe [2000] ECR I-4243, paragraph 26).

In those circumstances, the answer to the national court’s first group of questions must be that the Directive must be interpreted as precluding a national rule under which the supplier is answerable, beyond the cases listed exhaustively in Article 3(3) of the Directive, for the no-fault liability which the Directive establishes and imposes on the producer.

The Court now turns to the question of transferring to the supplier the producer’s fault-based liability. As discussed above in section 11 the Advocate-general was not absolutely clear in his

evaluation of this problem although his opinion on further analysis seemed to accord with the Commission's to the effect that such transfer was legitimate.

The question, the Court says, is whether the Directive precludes a national rule under which the supplier is answerable without restriction for the fault-based liability of the producer where damage is caused by a defective product (paragraph 46).

Again the Court states that Article 13 of the Directive must be interpreted as meaning that the system of rules put in place by the Directive does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects. In those circumstances, the answer to the question is that the Directive must be interpreted as not precluding a national rule under which the supplier is answerable without restriction for the producer's fault-based liability.

The Court finally declined to limit the temporal effects of its judgment as it did not agree that the judgement would have serious consequences for legal certainty and the financial implications for injured persons in a large number of actions relating to product liability which have been decided since the entry into force of the Directive.

The Court sums up its results as follows:

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products must be interpreted as:

1. precluding a national rule under which the supplier is answerable, beyond the cases listed exhaustively in Article 3(3) of the directive, for the no-fault liability which the directive establishes and imposes on the producer;

2. not precluding a national rule under which the supplier is answerable without restriction for the producer's fault-based liability.

13. The consequences of the Salmonella case.

Clearly, the decision forces Denmark, as the 2002 decision did France, to revise its supplier rule in paragraph 10 of the Danish Product liability law. Several avenues are open to make Danish law comply with the Court's decision.

The direct approach is to rewrite paragraph 10 so as to make the supplier directly liable towards an injured person if it can be established that there is a fault-based liability on the part of the producer who supplied the defective product. In addition the rule can be expanded to cover the contractual product liability that is part of Danish case law. The English Sales of Goods Act may serve as a source of inspiration to put the contractual product liability into a statutory framework. This means strict product liability for the supplier if there is privity of contract or other contractual remedies that confer contractual rights in relation to the product to the injured person.

The transfer of fault-based producer liability to the supplier, and the imposing on him of a statutory contractual product liability – both liability vehicles are in keeping with the Court's interpretation of Article 13 as it permits other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.

As discussed above in section 12 suing the home supplier is often much more attractive than suing a producer in another Member State, particularly states with more pronounced different legal cultures than the traditional West European states. Distance and language alone will greatly add to the expenses and may kill many a worthy case because the plaintiff simply cannot fund the expertise to handle the litigation.

Given the inherent flexibility in the fault and negligence notions it seems evident that a national court that is sympathetic to the injured person might relatively easy decide that there in fact was a fault on the part of the producer, thus triggering liability for the local shop that supplied the product. Fault and negligence are complex notions, and evaluating if they are present, is not a scientifically documented step-by-step process, linked to a set of predefined logical elements, but an individual discretion and judgement moulded by a reasoning process of legal theory and judicial experience, typically conducted by a court that, intuitively on learning the facts of the case, quickly shapes an initial idea as to which result would seem proper to conform with broad notions of justice and fairness.

Even in cases where there seem to be little to blame the producer, the court might find that he could and should have done more; he could and should have set up better quality control or error-finding systems, or taken steps to prevent the defective product from slipping into the market; or he should have warned more adequately or extensively in his product information or user manuals to the product against potential hazards, or easily foreseeable risky side-uses, in handling the product in a usual consumer manner. As Dr. Simon Taylor has pointed out in relation to similar repercussions in France following the striking down in 2002 of the French supplier rule, any attempt to reintroduce strict liability as in the French "obligation de sécurite" would clearly be artificial in many cases and may consequently be contested by the ECJ as simply being disguises for an action on the same ground as the Directive (p 239 in "Product Liability in Comparative Perspective", edited by Dungan Fairgrieve, Cambridge 2005).

However, the Danish equivalent of fault and negligence, the culpa rule, is adaptable and flexible, and in the hands of experienced judges it is able to span a great variety of different fact scenarios and focus on a multitude of aspects of producer policy, manufacturing systems and quality control that may give support to the conclusion that the producer was negligent and thus is liable by virtue of fault, thus opening up for the supplier's liability.

Very often the analysis of whether a product was defective is intertwined with the analysis of whether the producer was negligent. If a hand-mixer for kitchen use must be considered defective because its turbo bottom can activate the equipment despite the main switch is on off, then it is hard to evade the conclusion that the producer was negligent on adopting this manufacturing design of the product.

On this background it is difficult to imagine that the Court's overturning of the Danish supplier rule in its present form will cause major chances in the risk environment for suppliers in Denmark. They are still subject to contractually based product liability and they are still attractive liability targets if

the plaintiff can prove beyond reasonable doubt that the producer in another Member State was negligent. It would be wise, therefore, of Danish suppliers not to cancel their product liability insurances in the wake of the Court's decision.