



# **Pan-European Organisation of Personal Injury Lawyers**

## **PEOPIL**

### **RESPONSE TO GREEN PAPER**

**on the**

### **PRODUCT LIABILITY DIRECTIVE (COM/1999/396 of 28.7.99)**

#### **Introduction**

The Pan European Organisation of Personal Injury Lawyers - is as the name suggests an organisation of lawyers, practitioners as well as academics from all European jurisdictions, dealing with personal injury law. Our membership is open to lawyers regardless of whether they represent claimant and/or insurers but seeks, as one of its primary aims, to promote fair and just compensation for personal injury victims.

We are therefore an interested party in the development of European legislation in this field.

The Paper deals with a number of issues. Some are clearly targeted at other interested parties than legal representatives. We have written that no comment is possible from our position to these questions.

This response is not intended to reflect the position of members in all member countries but, based primarily on the experience in the UK reflects what we believe are common concerns across lawyers in Europe in this field.

Another point to make at the outset is that often, where it is evident that a defective product has caused injury, a case will settle without recourse to litigation. It is therefore hard to find a lot of cases dealing with the specific issue of product liability.

#### **Our Replies**



**14.** According to your experience, does the Directive properly function in practice?

**Yes. In several cases it is evident that a product is defective and has caused injury. Liability is readily admitted on behalf of the producer and compensation is dealt with in the usual way for the country. Only a small proportion of personal injury cases actually go to Court and most of those only have to deal with issues of compensation.**

1. Given the importance for consumers and economic operators to rely on a stable legal framework of product liability, do you think it would be justified to modify the Directive?

**Yes. The Directive has a specific purpose - consumer protection. With the changing economic environment, with the enlargement of the EU and greater health awareness, the importance of the Directive is not to be underestimated. The stable legal framework of the Directive need not be radically altered, but the system of reviews and amendments eg to include primary agricultural products in the wake of a public health crisis indicates the necessity to review the Directive regularly and if necessary to amend and modify the Directive.**

2. Has the disparity in legislation on producer liability - even potentially - discouraged the marketing in one Member State of products from another Member State.

**No comment possible**

3. Where ordinary law has been applied rather than the directive, what do you consider to be the reasons for this?

**This is rarely the case. Where for some reason there is some doubt as to the applicability of the Directive to the case in hand, the two will be pleaded in the alternative. Again as soon as liability is admitted on behalf of the producer it is not a concern to discover whether they are accepting liability on the basis of the Directive or the ordinary law.**

**The case of Carroll v Fearon CL [1998] 3995, does not appear to have relied on the product liability Directive at all. From the summary it is unclear why.**

4. Do you think the Directive should be revised to become the common and sole system of liability for defective products (deletion of Article 13 of the Directive)?

**The internal market and free movement of goods and workers inevitably widens the possibility of an increase of cross border litigation. This would certainly support the contention that the Directive be common.**

**The exclusion of other remedies for defective products at the present time results in a restriction of the victim's possibility to claim damages. While limitations in the present Directive such as maximum limits, development risks and a ten year limitation exist, the underlying contractual and non-contractual rules of liability for defective products grant claimants other means of access to compensation in particular where the Directive is**



restricted. The Directive would have to be significantly widened in scope and extent before national rules of liability could be excluded without upsetting the existing balance in favour of the producer. Therefore the contention that it should be the sole law in this field we would feel is not supported at this time

5. Do you think that each Member State should be able to adopt stricter liability rules (introduction of a “minimum” clause in the Directive?)

**Lawyers request clarity and simplicity of laws. Clarity on a minimum European wide standard of liability is useful.**

The effect of stricter rules is depending on the position of the lawyer (ie pro claimant/pro defendant) something that some will support others oppose. In principle the stricter the liability or the less exceptions to a rule there are, the easier it generally is to deal with the issue of liability. Stricter rules usually provides more clarity, therefore less dispute and long-winded legal argument can be avoided. This would lead to a quicker resolution of compensation claims.

2. *Do you think that the Directive weakens the position of European business vis a vis their foreign competitors because of the conditions governing liability for defective products?*
  1. What are the main reasons for this, and how can it be avoided?
  2. What is the impact on European businesses of exporting to markets with stricter legislation (or legal practice), such as the United States (in terms of costs, production methods, insurance, level of litigation, etc.)?

**No comment possible**

3. *What percentage of victims has been compensated either on the basis of ordinary liability law or on the basis of application of the principles of the Directive 85/374/EEC?*

**(Just UK) This is incredibly difficult to answer as both will usually be pleaded in the alternative. Very few cases are decided at a hearing and even then the judge’s reasoning is often that if the claimant has succeeded on one issue there is no need to determine the other(s). When liability is admitted in negotiation again it is usually without indication as to what point has been conceded.**

1. *In the case of the application of the Directive, was it easy to obtain the compensation awarded in terms of speed and efficiency.*

**(UK: there is no difference in speed and efficiency of personal injury cases simply because the matter includes the Directive. If a hearing on liability is heard then due to not having to prove**

fault this will speed the time the Court requires if the Directive is held to apply in a case is established)



4. *How has the Directive impacted on the victim's interests because of the balance established in the Directive?*

**Where the claim clearly fails within the remit of Directive, and the facts ie the defective and damage and link are self-evident, then negotiations of settlement are improved. Liability is not an issue and therefore all that remains to discuss is compensation.**

1. *Should the Directive be amended to give greater protection of victim's interests, even if this involves changing its present balance?*

**This depends on the perspective of the interest group. It is fair to say that representatives for both sides appreciate that factors such as evidential burdens can effect the way a case is run from the outset crucially. The injured party will have little or no evidence to establish and no simple and cheap way of establishing whether a product was defective and that that caused the injury complained of in cases where this is not self-evident. The representative will therefore warn claimants of the costs in pursuing the matter even to be in a position to decide whether a claim is likely to be successful or not. Where there are possibilities to obtain/force disclosure of documentation at the initial investigation stage, this can change the way the litigation is run as a whole.**

5. *In your experience, how do you assess the relationship between the possibilities to award damages to the victim by Directive 85/374/EEC and those of the social security schemes?*

1. *Can you indicate any cases in which the social security schemes took proceedings against the producer on the basis of the rights conferred upon the victim under Directive 85/374/EEC after having covered his expenses?*

**No data available**

2. *Can you indicate any cases in which the producer liability scheme set up by Directive 85/374/EEC was insufficient to fulfil its compensatory role, so that it was then necessary to fall back on the solidarity of society as a whole to compensate the victims?*

**No data available**

6. *Are you aware of any cases of defective products in which the Directive was actually applied and how this affected your activities?*

**No - searched 1990-99**

*Have you undertaken any research or studies on the Directive's potential impact on your activity?*

**No research available**



7. *Have you any data - if possible with figures and broken down by year - on the number of claims which the insurance sector has dealt with after accidents caused by defective products since 1990?*
1. If so, is it possible to know whether the guarantee given by the insurer is related specifically to the producer's liability under Directive 85/374/EEC?
  2. Is it possible to know whether the insurance market has seen an increase in demand for this type of guarantee after application of the Directive and, if so, what has been the impact on costs for the sector (in terms of compensation paid) and for the beneficiaries (level of premiums)?
  3. In the claims made, what was the percentage breakdown by type of defect (defect in design, manufacturing and/or information)?

**No comment possible**

8. *Do you agree that the six principles above constitute the basis that needs to be maintained in order not to upset the internal balance of Directive 85/374/EEC?*
1. *Objective* - no fault

**there is little point to the directive if the core - ie no fault - is removed**

2. *Relative* - no liability if producer can prove existence of certain facts

**There is a danger to say that all absolutes are bad. It could be argued that the exceptions are even worse. The question that requires an answer is what facts if any could support the contention that a producer of a defective product should avoid liability if the defect has caused injury to a customer. Such circumstances, if any, must be extremely rare or the core element of the Directive and therefore the purpose is a nice sounding phrase..**

**Article 7 lists these at present. Reasonable appears to be (a) (c) (f)**

**(b) latent defects are not covered. It also uses the word "probable". This gives a lot of scope for a producer to avoid liability.**

**It is almost impossible for a claimant to positively disprove a producer who states that at the time the product was put into circulation the quality control testing process in place did not**

**pick up any defect. Why should the risk shift back to a victim of the defect because was not apparent or came into existence afterwards. Quality checks is the sort of proof the producer would bring to assure a Court that it “probably” did not have a defect. This results in a differentiation between an producer with a process no matter how watertight or effective and those without.**

**If the claimant need show that the product is defective and that it caused the injury**



**complained of, then the producer of the defective product should not avoid liability because of doubt whether it existed at the time of putting into circulation. It is something different if the cause of the defect is a novus actus interveniens over which the producer has no control eg-in the case of (f).**

**Again the fact that a defect is due to compliance with mandatory regulations of authorities (d) appears to fundamentally alter the rationale behind the directive. The problem of a defective product causing injury is not altered by compliance with an irrational regulation. For what other regulation can justify the circulation of defective products that cause injury? If anything liability should then be widened to include the joint and several liability of the public authority who made the regulation, which entailed that in complying with it the product was defective.**

**The knowledge and state of the art defence (e) is also open to interpretation. Looking at the problems with BSE and asbestos-related diseases, it can often take several years before causative links between products and injuries can be established. This is not equivalent to the knowledge or presumed knowledge that can be attributed to producers of these products. Denial of knowledge as appears to have happened in recent tobacco litigation as it was in the asbestos litigation can often turn on the discovery of some research the results of which have to the detriment of the health of consumers been covered up. The use of this exception can be balanced against the duration of time for liability discussed below.**

### **3. *Limited in time***

**The long-stop provision of 10 years appears to apply regardless of whether the claimant is under a legal disability. [Halsbury’s Laws Vol 28 para 1072]. The problem in general with long-stop provisions is that it works usually against those claimants who are most in need of the protection to which the legislation is seeking to offer redress.**

**From an insurance point of view it would appear that the important issue is the risk that a product is defective, not when the defect comes to light or that the causative effect of the defect was the injury can be proven. In the circumstances a justification for the long-stop provision particularly including those claimants who remain under a legal disability is hard to rationalise.**

4. *Liability cannot be waived by agreement*

**In line with Unfair Contract Terms legislation in most countries.**



5. *It is the victim's task to prove*

1. Damage occurred
2. Product defective
3. Causal relationship between the two

**Item 1 is self-evident, the Claimant must prove what damage has occurred.**

**Article 6 defines defective product. The difference between the parties' awareness as what may constitute a defective product should not be ignored. The problem is enhanced by subparagraph 2. Where a better product comes on the market does not mean that the original product was defective. In the commercial world, where a choice in production can decide between whether a product includes further safety features or not, economics suggests that the cheaper usually the less safe option will be used - as long as the producer can "get away with it". A producer gets away with it if for some reason there is not a spate of injuries which lead the producer to alter production to include the initially discounted safety features. The claimant, in such circumstances, will find obtaining proof that the production of the product slightly differently would have avoided the injuries caused, extremely difficult. There are going to be many cases where the defect is evident. This does not mean that the Directive or its interpretation or use in practice is perfect. The use of presumptions is a useful means in law to put the onus on the person with the better knowledge and documentation to then show the Court why it is that the product should not be considered to be defective. A middle way of the Claimant establishing that the product was defective in line with Art 6(1), and then for the Defendant to rebut the presumption of a defective product may be a way forward.**

**A similar argument can be made for (c) proving causation. Again having stated that in many cases proving causation will not be a problem, where cases are more complex, research and documentation on potential safety issues will usually or at least should be available to the Defendant, who is then the party in a better position to rebut a presumption of causation at a hearing if there is such proof.**

**In the interests of justice, particularly with changes in funding litigation in parts of Europe it cannot be correct to force the person injured where on the face of it, it appears that the**

defective product is the only possible cause of the injury to incur the costs of proving it. Again where rules of litigation force disclosure of documentation it will become more readily apparent at an early stage whether the injury was caused by the defect or not. The Court is the ultimate arbiter on whether there is sufficient proof or not and in some cases there may be good arguments on both sides in support of each case.

It would appear not to accept that claimants have difficulties in proving causation or defect simply because how can sufficient probability be “defined” is not a tenable argument. The Directive already has variables such as “probable”. It a Defendant can avail himself of



establishing that probably a defect did not exist at the time it was put into circulation, the claimant’s representatives can argue that it is just and fair to include the imposition of a presumption possible of rebuttal that a defect did cause the injury where this is “sufficiently probable”.

6. *Joint and several liability of producers*

With production methods and component production becoming more and more difficult to trace, this balances the interest of the consumer to obtain compensation and again allows those with the knowledge of the production to draw other interested parties into proceedings.

9. *Do you think that the experience of implementing the directive justifies its being amended in order to make easier to determine the burden of proof? How?*

See the above discussion at 8. in particular with regard reversal of burdens. Rules on disclosure of documentation and pre-action applications for disclosure would necessarily assist in allowing a full investigation by both sides into the respective strengths of both parties’ cases.

10. Would “market share liability” be feasible in Europe for this type of case?

Such a move would be backed by claimant/plaintiff solicitors as the choice of Defendant to pay full damages regardless ultimately of his share of liability is important when considering costs of litigation.

We are not able to comment whether producers would prefer the Market share liability solution or merely for judge to apportion blame considering the evidence before him.

However it would increase certainty of risk between producers where there is clearly a defect but it is difficult to know which producer is to carry which liability to split liability either equally or in accordance with market share.

11. *Do you have information about the actual application of the exemption clause in case of*

*“development risks” (article 7(e) of the directive)?*

**No data available**

1. *Have you any information on specific extra costs incurred by industry in countries where producers are liable for development risks?*

**No data available**

2. *Do you think that producers should be liable for development risks?*

**Producers seek to make profit from consumers by marketing products including those**



**where the risks at the date of putting into circulation are not fully known. Often these new products are advertised and marketed as being better and more effective than before. Injuries sometimes occur and following further research it is apparent that the product is defective. If the purpose of the Directive is to protect consumers of defective products it is hard to see why producers should not be liable for development risks.**

3. *Should damages by development risks be borne by society as a whole (by means of a compensation fund using government revenue) and/or by the manufacturing sector in question (by means of a fund to which those in the sector contribute)?*

**Considering the above answer the main contributor to such a fund should be the producer. Considering the major impact where a development risk causes injury governments should then guarantee that sufficient funds are available to compensate these losses ie to top up any shortfall.**

12. *Do you have any information on the percentage of cases involving material damage of less than E500.*

**No data available**

1. *Would you modify the Directive as regards the E500 threshold and/or optional upper limit of E70 million?*

**Damage from one causative defect appears to increase with every new event. Upper ceilings limits the possibility of full and fair compensation to victims. There is growing unease with the current ceilings in the Athens and Warsaw conventions in other fields. With the potential numbers of claimants from defective products increasing with the perfection of the Single Market and indeed the potential widening of the Single Market, the ceiling of liability reduces the likelihood that full compensation will be achieved. The producer is getting the benefit of an increased market without trade barriers within Europe. As such the producer should also**

**accept the increased risk that the number of potential claimants for a defective product is increased.**

2. *If you have opted for product liability with regard to development risks (question 11), do you think that there is justification for keeping the optional upper limit for this kind of risk?*

**No**

13. *Does the time limit of ten years need to be changed, either generally or specifically for certain products or sectors?*

**Yes, refer to the answer to 8.c.**



1. *Should and could that change be borne in terms of cost by industry, especially SMEs, and the insurance market?*

**No comment possible**

14. *Are you aware of any cases whereby lack of insurance made it impossible for victims to obtain reimbursement for damages?*

**The most famous case in England is the Thalidomide case where on the assumption that the victims's life expectancy would be severely curtailed, the insurance fund was not sufficient. However, this also has a lot to do with the English method of compensation to award a lump sum. Only through public pressure is this fund being topped up occasionally but there is no certainty that the fund satisfies the victims of the defective product.**

1. *Do you think that there is a need to require producers to have insurance cover for risks linked to production or, alternatively, to encourage voluntary arrangements between producers and the insurance market?*

**Yes, uses of motor vehicles must have insurance to protect damage to anyone as a result of use of that vehicle. Employers must have insurance. Producers by the same logic should have cover for potential damage to third party of using their product.**

**The insurance companies are now largely Europe -wide, and with products marketed, sold and imported into any number of different member countries, it would not assist certainty if some Member States had voluntary arrangements and others a compulsory insurance cover.**

15. *Do you think that the directive needs to be revised in order to include means of increasing the transparency of the way in which operators apply the rules especially by identifying the cases involving defective products that are still on the market?*

**A problem in a number of personal injury fields is that sometimes companies will settle cases before proceedings are issued so that precedents cannot be set. This is an area where this is likely to happen to. Out-of-court settlements or even pre-issue settlements need to be included in the data collection process. In PI cases in the UK there is notification to the CRU and a question could be asked whether the case involves the issue of defective products. This would ensure that a record is maintained of the number of cases in which the Directive may be applicable. This could then be followed up by an obligation when liability is established or admitted that the Defendant clarify whether this was on the basis of the Directive. On completion of the matter or earlier settlement, there would be an obligation on the Defendant to inform authority of the terms of settlement.**



16. *Should the victim prove that he provided the supplier with the opportunity to inform him of the identity of the producer, at the risk of having his claim declared inadmissible, and on the other hand, should the supplier inform him of the identity of the producer within a maximum time limit (eg 3 months)?*

**In the UK the changes in civil procedure mean that on notification to the potential Defendant (eg supplier) by the claimant, the supplier would have three months in which to investigate liability before taking a stance on the same. The supplier should within this time notify the claimant of the producer with sufficient detail eg address/insurer so that a letter of claim can be sent to the producer.**

**The victim will usually look initially to the supplier ie where he bought the product, who will usually not be the producer. Product labelling is in itself an issue of European consideration. The supply chain of a defective product may involve not only a large number of persons but also a number of different countries. The victim may be able to show injury, defective product and causation. To put more onus on the injured claimant than notification of the defect to the supplier where it is not evident who the producer does not appear to be balanced. The supplier should as a matter of business be able to show to authorities and therefore also to a claimant where the products it sold came from.**

1. *Should the Directive be applicable to any professional in the product supply chain when his activities have affected the safety properties in question of a product placed on the market?*

**Yes, again the principle is to compensate the victim of the defective product. It is not an issue for the claimant to show in such complex production chains, whose activities along the line have caused the defect. Otherwise it is almost imposing a fault based system by the back-door. All producers and professionals in the supply chain that have or may have affected the safety properties should be a potential Defendant.**

17. *Do you think that the directive needs to be extended to cover real estate property?*

**Yes. Where construction of an immovable object is defective and causes injury then we see no reason why the same principle as applies to moveable objects should not apply.**

18. *Should the directive cover other damage caused by defective products such as non-material damage, moral damage, mental suffering and/or damage to property intended for professional use, which would allow firms especially SMEs to invoke the directive against producers of defective goods?*

**This questions targets firstly differences between personal injury litigation in the member states and then the question of SMEs.**



**On the first issue there does need to be some clarity between the member states as to what “heads of damages” can be recovered. A distinction between Member States as to what heads are claimable under the Directive is basically discrimination on the basis of nationality a notion which is abhorrent to the EU. It will promote certainty in the insurance sector to know what the heads of damage are regardless of Member State. Consideration needs to be given between the levels of awards, which can vary greatly between Member States due to differing social standards and attitudes and would constitute a variable for the insurance companies. However seeing that some solution is already done in relation to motor accident claims there is no reason why this cannot be done in this sector.**

**With respect to damage to SMEs they are “end consumers” of products. It is becoming increasingly difficult to distinguish use of products for either business or pleasure. Eg computers The underlying principle is a defective product which causes injury and therefore an extension to cover commercial use would be logical and prevent a complex legal argument about whether items are used primarily for private or for commercial use.**

19. *Should Community legislation provide for court proceedings or out-of court dispute resolution means, specially set for the implementation of Directive 85/374/EEC*

**We do not agree that the promotion of out-of-court procedures is always the best way forward. Particularly when it is apparent that there are potentially a large number of claims arising out of similar facts and same defect there is grounds for believing that a representative action**

under the court management powers could provide a quicker and effective way to ensure firstly a full investigation where liability is not readily admitted and then for a determination on compensation. Such a representative action eg where a medicinal product is found to have been defective may involve a large number of persons not all of whom have agreed to be represented in that action. However a determination if liability is established to create a fund to compensate victims followed by a quasi-judicial or judicial determination of eligibility to compensation from the fund would assist in certainty.

However a crucial and often destructive issue in such cases are legal costs or even the potential legal costs. In the UK with the withdrawal of legal aid from personal injury cases continuing to proceed, cases cannot be brought even on an individual basis as the risks may be prohibitive so that no law firm can agree to take the risk of pursuing the action under Conditional Fee Agreements.

With producers and/or insurers standing to “lose” millions in compensation claims, it is often proportionate for them to defend cases as legal fees of several thousand could often make a large financial difference to the end result. The victim rarely have the money themselves to fund lawyers on a private basis, nor will firms accept the huge risk of the CFA where it is clear that an enormous amount of work must be incurred with a large risk that the case may collapse. Litigation is never a certainty until the judgment is made. From



what other source can funding be obtained other than the public purse? However inevitably there will be cases where funding from the outset ensures that victims will have a right but no means to compensation.

1. *Would injunctions provide a solution*

A danger with this solution may be “over-reaction” on items of under researched news. However A right of a recognised consumer protection organisation to apply for an injunction where there are grounds for fear of public safety may be a way of avoiding “nuisance” injunction applications.

2. *Would it be feasible to introduce better arrangements for the common representation of similar interest like the group actions in France and the people’s actions in Portugal?*

See above discussion particularly re costs of actions and withdrawal of state funding.