EC Directive on Product Liability

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Introduction

The European Community Product Liability Directive has special relevance to companies in Australia which deal in computers and other products. The Directive will affect not only those companies which trade with the twelve member nations of the European Community. It will also directly affect all Australian companies which deal locally in products, as the Directive will soon be enacted in a form modified for local conditions as a new Part of the *Trade Practices Act 1974* (Cth). The forthcoming Australian legislation will supplement existing heads of importers' and manufacturers' liability based in tort and contract.

The European Community Product Liability Directive

The European Community Product Liability Directive dates from 1985, and has been adopted widely as a model for law reform. In addition to its use by the twelve member nations of the European Community, some members of the European Free Trade Association, including Austria, Finland, Norway and Sweden, have proposed to adopt the European Directive model. The European Directive model has had an influence on the laws of Israel and Brazil, and may also be adopted in Japan, the Republic of Korea and Taiwan.

The Preamble to the European Community Product Liability Directive sets out the premises underpinning the Directive. One important objective of the Directive was to ensure that product liability laws among member states would be uniform. Without uniformity, divergences could distort competition and affect the movement of goods within the common market as well as entail a differing degree of protection for consumers.

The Directive is also based on the premise that 'strict liability', or liability without the requirement that a plaintiff prove fault, is the most appropriate standard in an age of increasing technological complexity.

According to the Preamble, the objective of protecting consumers dictates that all producers involved in a production process should attract liability. 'Producers' includes not only persons who produce end products, but also those who import, those who place their name, trademark or other distinguishing feature on products, and, significantly, those who produce components for incorporation into other products.

The European Product Liability Directive imposes liability onto producers where a product is 'defective' or otherwise is not 'as safe as persons can reasonable expect.' Significantly, this means that the Directive imposes liability both where a product contains a 'manufacturing' defect, as well as where there is a defect in design or formulation.

A 'manufacturing' defect is one which is inadvertent and unplanned, the result of some misadventure or accident in the course of production. An example would be a programming defect in computer software. A design or formulation defect, on the other hand, is advertent and planned, the result of a deliberate decision by the manufacturer to produce and supply a product in a particular way. An example would be the design of a software program which was unfit for the purpose for which it was designed, or the design of hardware which contributed to injuries, such as RSI, in the workplace.

An essential feature of the European Product Liability Directive is its emphasis on 'safety.' 'Safety' is a highly subjective concept, and one which is more closely tied to community expectations than costs. The Directive's emphasis upon safety explains why the remedies available under the Directive are damages for personal injury or property damage but not damages for pure economic or commercial losses.

Significantly, the Directive specifies that when courts decide whether a product is defective, that they must consider the totality of the product. The Directive requires a court to look at all circumstances including the presentation of the product, the use to which the product could reasonably be expected to be put, and the time when the product was put into circulation. These factors require that producers take special care to place appropriate warnings and instructions for use on products, and to ensure that they keep abreast of developments in technology which may be utilised to improve the safety of products.

However, the European Directive provides some defences to liability. For example, there is a defence where the damage is caused concurrently by a defect in the product and by the fault of the injured person, such

as through misuse of a product. There is also a defence where a defect is due to the compliance of a product with mandatory regulations issued by a public authority.

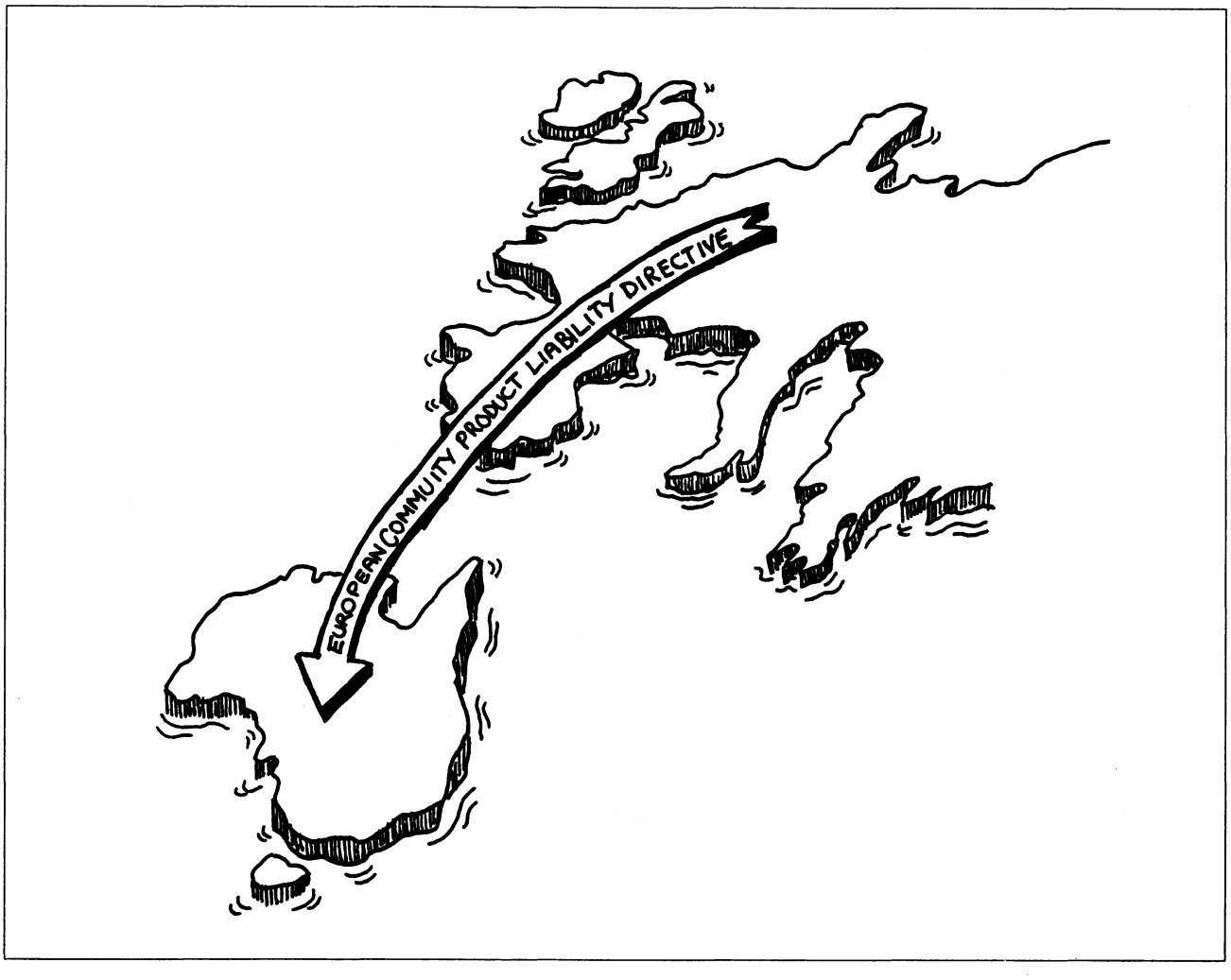
Importantly, there is a defence where the state of scientific and technical knowledge at the time the product was put into circulation was not such as to enable the existence of a defect to be discovered. This is the 'state-of-the-art defence,' the subject of considerable controversy within the Community. The United Kingdom, for example, in its *Consumer Protection Act 1987,* has preferred a version of the state-of-the-art defence which broadly requires only that a producer be aware of developments and the state-of-the-art in its own industry. The European Directive version of the defence, on the other hand, appears to require that a producer be aware of the state of scientific and technical knowledge in all industries.

Product Liability Law Reform in Australia

In March 1991 Senator Michael Tate, Minister for Justice and Consumer Affairs announced in a press release that the Australian Government proposed to enact product liability legislation based on the European Community Product Liability Directive. This announcement was the first indication that the Federal Government had decided to reject the very controversial proposals for reform of product liability law put forward by the Australian Law Reform Commission in 1989.

In May 1991 Senator Tate issued a further press release, setting out in greater detail the Government's proposals for reform. This press release contained the surprise announcement that the Government had reached a 'compromise' between industry groups and consumers on the issue of who should bear the onus of proving that a product is defective. That compromise placed the burden of proof upon the defendant. The defendant must show that a product was not defective or that it was as safe as persons could reasonably expect. Optimistically, Senator Tate announced that this 'compromise' position would be acceptable to industry. Senator Tate was wrong.

Following persistent criticism from industry groups over the next six months, Senator Tate announced in November 1991 that the Government would reverse its previous position on the burden of proof. He said that he would instruct parlia-



mentary draftsmen to place the burden of proof on the plaintiff.

This was a very significant victory for business in Australia, as placing the burden of proof onto the defendant in such claims would very seriously have affected dispute resolution strategies. In claims where the plaintiff alleged that a product contained a manufacturing defect, placing the burden of proof onto the defendant would have had the effect of removing totally the defendant's bargaining power at the point of negotiating a settlement. This would have meant, for all intents and purposes, that a plaintiff could have dictated the quantum of a settlement.

The Directive and Computers

Under the European Directive, 'product' is defined in very general terms to mean all movables except primary agricultural products and game. This definition includes products which are incorporated into other movables and those incorporated into fixtures. This definition is significant, as it clearly includes component parts and even end products which are incorporated into other products, such as computer products incorporated into motor vehicles, machinery, medical equipment and aircraft. There is no doubt that computer hardware is a 'product' within the meaning of the Directive. The European Commission has recently indicated that software should also be considered a 'product' for the purposes of the Directive.

It remains to be seen whether the forthcoming Australian product liability legislation will contain a more specific definition of 'product' than appears in the European Directive. A number of industries, including the computer industry, are naturally concerned that their own products be excluded from the scheme. The computer industry is concerned by the risks of personal injury or property damage which arise when defective computer hardware and software is incorporated into products such as motor vehicles, machinery, medical equipment, aircraft or traffic control equipment. For example, persons may be injured or killed and property damaged if a computer-controlled anti-lock braking system in a motor vehicle fails. [2]

Substantial arguments exist both for and against the argument that computer software should be considered a product. For example, the fact that software is stored in a tangible form, the fact that it can be bought and sold, the fact that it is often mass-produced, and the fact that defects in software can be corrected, support the argument that software is a 'product.' On the other hand, the fact that software is essentially coded information and the fact that a computer system is designed essentially to generate that information, support the argument that software is a 'service' rather than a 'product.[3]

Specific reference to computer software in the forthcoming Australian product liability legislation, either by way of inclusion or exclusion, would be highly appropriate. This would tend to avoid threshold definitional issues in litigation such as was seen in *Toby Construction Products Pty Limited* v *Computa Bar (Sales) Pty Limited*.[4] In *Toby*, Rogers J of the Supreme Court of New South Wales held that the sale of a complete computer system, comprising both hardware and software, was a "sale of goods", but the issue whether software sold alone was a sale of goods was not decided. Rogers J indicated that this was an issue which parliamentary draftsmen should consider in future.

In the event that computer software is considered to be a 'product' for the purposes of forthcoming Australian legislation, there is no doubt that there will be a substantial increase in the exposure of companies which import, manufacture, or distribute software and hardware in Australia. Forthcoming legislation will give far wider rights of standing than does the existing scheme of strict product liability contained in Division 2A Part V *Trade Practices Act 1974* (Cth), and will contain a more onerous basis of liability than exists in negligence at common law.

The new Australian product liability legislation will probably commence in mid-1992. From that moment on, companies dealing in computer products will face suit by any person who suffers personal injury or property damage as a consequence of a computer malfunction. Unless there is evidence that the claimant misused the product, and thus contributed to his own injury, it is highly probable that the company will be held liable. Courts are likely to be persuaded that the fact of loss or damage is evidence that the product was defective or not as safe as persons could reasonably expect. In certain types of claims, particularly where a company was aware that a product was likely to cause injury but did not issue warnings or withdraw the product from the market, the availability of the new class action procedure in Australia will compound companies' increasing exposures.

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Footnotes

[1] This article is an extract from a paper delivered at the December Gala Seminar of the New South Wales Society for Computers and the Law, 4 December 1991

[2] See *Scott* v *White Trucks*, 699 F 2d 714 (5th Cir 1983)

[3] See generally Junke, A, "Computer Software and Product Liability" (1991) 2 PLR 55.

[4] [1983] 2 NSWLR 48