



ECJ Rules on Manufacturer Liability for Defective Products in Europe

INTRODUCTION

The Product Liability Directive (Council Directive 85/374/EEC) concerning liability for defective products has now been in force for over twenty years. The Directive required member states to set up a harmonised system of no-fault liability for defective products. Such a system would operate in parallel to any existing tort- or contract-based systems. Surprisingly, this significant legal development has given rise to relatively few cases in either national courts or the ECJ in which the Directive's essential interpretation and application have been considered. The dawn of 2006 has, however, already seen two such important decisions of the ECJ: Case C-402/03 Skov and Bilka and Case C-127/04 O'Byrne-v-Sanofi Pasteur MSD Limited and Sanofi Pasteur SA. Arnold & Porter acted for both Defendants in the second of these cases.

WHO IS THE "PRODUCER"?

Skov and Bilka, a reference from the Danish courts, considered the meaning of Article 3 of the Directive. Article 3 defines "producer" for the purposes of the Act and, therefore, on whom the no-fault liability imposed by the Directive falls. Skov and Bilka also considered the relationship between existing systems of national fault-based systems of law and the no-fault liability system established by the Directive. The ECJ ruled that Article 3 is an exhaustive list of those persons who could be regarded as a producer for the purposes of the Directive and that no-fault based liability under the Directive could not be extended by any national law to include other categories of persons, such as suppliers. In contrast, however, the Directive must also be interpreted as leaving intact any fault-based national systems of liability for defective products.

WHEN IS A PRODUCT "PUT INTO CIRCULATION"?

O'Byrne was a reference from the English courts and asked the ECJ to consider the meaning of Article 11 of the Directive. Article 11 provides for an absolute extinguishment of the consumer's rights conferred by the Directive 10 years after the product which caused the damage was "put into circulation" by the producer.

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The phrase “put into circulation” is not further defined in the Directive. In *O’Byrne* the producer argued that the consumer’s claim against it had been extinguished by the time it had been brought, because it was brought more than 10 years after the product in question, a vaccine, left its factory in France to be delivered to a distributor in England. The consumer argued that the distributor, as a wholly-owned subsidiary of the producer, should be considered the producer for the purposes of defining liability under the Directive.

The facts in *O’Byrne* have yet to be determined by the national court, but the consumer wished to establish that the product was not “put into circulation” until it left the distributor and, therefore, the claim would not be extinguished until 10 years after it left the distributor. The ECJ acknowledged that the aim of Article 11 was to satisfy the requirements of legal certainty in the interests of both the producer and the consumer. It ruled that *“a product must be considered as having been put into circulation, within the meaning of Article 11 of the Directive, when it leaves the production process operated by the producer and enters a marketing process in the form of which it is offered to the public in order to be used or consumed.”* It would be for the national court to determine whether any entity linked to the producer *“is in reality involved*

in the manufacturing process of the product concerned.”

This is an important ruling for manufacturers, insurers and those who represent consumers. Without ceremony, it demolishes the interpretation of the Directive, often argued for by those who represent the interests of consumers, that a product is not “put into circulation” until it reaches the consumer who claims to be injured by it. A manufacturer and his insurer must be able to define their liability by reference to objective criteria within their own knowledge. This ruling reinforces the need for manufacturers and distributors to review their document retention policies to ensure that the date on which a particular product is put into circulation is preserved against the need to show that a potential claim may have been extinguished before it is brought. The lesson for those who advise consumers is that they should not delay in commencing a claim and thereby gamble on the start of the 10-year period.

PROCEEDINGS BEGUN BY MISTAKE

The ECJ also considered two further questions in *O’Byrne*. The first was whether it was open to the national court to treat proceedings commenced against a company (in this case, the distributor)—in the mistaken belief that it was the producer—as proceedings against the producer within the meaning

of Article 11 of the Directive. In the circumstances of this case, this would have the effect of “stopping the clock” running on the 10-year period, at the expiry of which the claim would be extinguished, when proceedings were commenced against the distributor.

The ECJ was also asked to rule whether a national court could permit substitution of the mistakenly named producer for the actual producer as defendant in the relevant proceedings in circumstances where the 10-year period had expired before proceedings were instituted against the actual producer. The defendant had argued that to do so would amount to extending the 10-year period almost indefinitely, if not actually indefinitely, when that period was intended to operate as a final extinguishment of consumers’ rights and was inserted into the Directive to balance the extension of rights which the Directive embodies. In the circumstances of this case, this would have the effect of “stopping the clock” running on the 10-year period (at the expiry of which the claim would be extinguished) at the point when proceedings were commenced against the distributor.

The ruling of the ECJ on the second and third questions is unsatisfactorily vague. On the one hand, the court has said that as a rule national law determines the conditions in accordance with which one party may be substituted for another in

the context of such an action. On the other hand, the ruling impresses upon the national court, in the light of the ruling in Skov and Bilka, the need not to extend the definition of producer beyond the clear words of Article 3. These words do not include a person mistakenly believed to be a producer.

It remains to be seen how the ECJ's ruling will be interpreted by the English court. We hope that this will give rise to yet further clarification of the extent of a manufacturer's liability imposed by the Directive.

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