

EUROPEAN PRODUCT LIABILITIES

SECOND EDITION

Edited by

Patrick KELLY & Rebecca ATTREE



Butterworths

European Product Liabilities

Second edition

Edited by:

Patrick Kelly

Partner, Solicitor, Laytons

Rebecca Attree

Solicitor, Attree & Co

Butterworths

London, Edinburgh, Dublin

1997

United Kingdom	Butterworths a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, LONDON WC2A 1EL and 4 Hill Street, EDINBURGH EH2 3JZ
Australia	Butterworths, SYDNEY, MELBOURNE, BRISBANE, ADELAIDE, PERTH, CANBERRA and HOBART
Canada	Butterworths Canada Ltd, TORONTO and VANCOUVER
Ireland	Butterworth (Ireland) Ltd, DUBLIN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand Ltd, WELLINGTON and AUCKLAND
Singapore	Reed Elsevier (Singapore) Pte Ltd, SINGAPORE
South Africa	Butterworths Publishers (Pty) Ltd, DURBAN
USA	Michie, Charlottesville, VIRGINIA

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright owner except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under the terms of a licence issued by the Copyright Licensing Agency Ltd, 90 Tottenham Court Road, London, England W1P 9HE. Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorised act in relation to a copyright work may result in both a civil claim for damages and criminal prosecution.

Any Crown copyright material is reproduced with the permission of the Controller of Her Majesty's Stationery Office.

© Reed Elsevier (UK) Ltd 1996

A CIP Catalogue record for this book is available from the British Library.

ISBN 0 406 03256 4

Preface

Every year defective products cause millions of accidents resulting in personal injury and property damage in Europe. The liabilities arising from such accidents are a key concern to those involved in the manufacture and sale of products in Europe. The rights granted to consumers to enforce such liabilities reflect a trend of increased consumer protection in Europe which is to be welcomed. Indeed the consumer protection laws of EU countries have developed significantly over the last decade. Since the first edition, two important Directives have been issued, namely, the Product Safety Directive and the Unfair Contract Terms Directive. There have also been important developments in European case law which add further rights to consumers.

The need to know and understand the rights and liabilities established by these laws is a pre-requisite to the ability to export, manufacture and distribute consumer goods successfully. This book offers a practical guide to those laws, and the steps to be taken as a result of them. To achieve this, we have brought together contributions from leading practitioners in the field of consumer product liabilities in their respective jurisdictions. We are pleased to include contributions from Finland, Greece, Scotland and Northern Ireland in addition to those countries covered in the first edition. Each chapter has been updated and specifically refers to the national implementation of the Product Safety Directive and the Unfair Contract Terms Directive. In addition to the country specific sections, we have included chapters dealing with an overview of EC Product Liabilities Law, international considerations, risk management and insurance. There is also a 'bird's eye view' of European product liabilities for those seeking an executive summary. The law is stated as at June 1996.

We would like to thank each of the contributors without whom this book would not, of course, have been possible. We are also grateful to Elaine Gardiner, Stephen Macartney, Lynn Richards, Lorna Roberts and Nicola Warner of Laytons for their help in producing this book. Last but not least we are grateful to Butterworths for their support in publishing the second edition of this book.

Patrick Kelly, Laytons
Rebecca Attree, Attree & Co

October 1996

Contributors

Rebecca M Attree

Attree & Co
110 Cambridge Street
London SW1V 4QF
England
Tel: ++ 44 171 630 6019
Fax: ++ 44 171 630 8681

D Granger Brash

Alex Morison & Co WS, Solicitors
Erskine House
68 Queen Street
Edinburgh EH2 4NN
Scotland
Tel: ++ 131 226 6541
Fax: ++ 131 226 3156

Sonia Cortés

Bufete Mullerat & Roca
Avda Diagonal, 640 4º
08017 Barcelona
Spain
Tel: ++ 34 3 405 9300
Fax: ++ 34 3 405 9176

Muriel de Courreges

Salès Vincent & Associés
56 rue Notre Dame de Lorette
75009 Paris
France
Tel: ++ 33 1 42 80 63 73
Fax: ++ 33 1 42 66 58 95

Gabriele Dara

Studio Legale Morgante-Dara
Via Villa Sperlinga 5
90144 Palermo
Italy
Tel: ++ 39 91 30 34 79
Fax: ++ 39 91 62 53 172

Rene Diederich

Loesch & Wolter Avocats
11 Rue Goethe
BP 1107
L-1011 Luxembourg
Tel: ++ 352 48 11 48-1
Fax: ++ 352 49 49 44

Kaisa Fahllund

Heikki Haapenniemi Oy
POBox 232
Mannerheimintie 14B
00101 Helsinki
Finland
Tel: ++ 358 9 177 613
Fax: ++ 358 9 653 873

Hugh Garvey

LK Shields & Partners
39/40 Upper Mount Street
Dublin 2
Ireland
Tel: ++ 3531 661 0866
Fax: ++ 3531 661 0883

Patrick Kelly

Laytons
Carmelite
50 Victoria Embankment
Blackfriars
London EC4Y 0LS
England
Tel: ++ 44 171 842 8000
Fax: ++ 44 171 842 8080

Manuela von Kuelgelgen

Stibbe Simont Monahan Duhot
Rue Henri Wafelaerts 47-51 (box 1)
1060 Brussels
Belgium
Tel: ++ 32 2 533 5211
Fax: ++ 32 2 533 5212

Georg Lett

Lett & Co
Borgergade 111
DK – 1019 Copenhagen K
Denmark
Tel: ++ 45 33 12 00 66
Fax: ++ 45 33 12 12 66

Klaus-Ulrich Link

Lichtenstein, Körner & Partners
Heidehofstrasse 9
70184 Stuttgart 1
Federal Republic of Germany
Tel: ++ 49 7 4 11 89 79-0
Fax: ++ 49 7 11 4 81 57 7

Dr Peter Madl

Schönherr Barfuss Torggler &
Partners
Tuchlauben 13
(Eingang Kleeblattstrasse 4)
Postfach (POB) 41
A-1014 Vienna
Austria
Tel: ++ 43 1 534 370
Fax: ++ 43 1 533 2521

Wilhelm Matheson

Wiersholm, Mellbye & Bach
PO Box 400 Sentrum
0103 Oslo
Norway
Tel: ++ 47 22 400 600
Fax: ++ 47 22 410 600

David McFarland

Culber & Martin
Scottish Provident Buildings
7 Donegall Square West
Belfast BT1 6JB
Ireland
Tel: ++ 1232 325508
Fax: ++ 1232 438669

Ramon Mullerat

Bufete Mullerat & Roca
Avda Diagonal, 640 4º
08017 Barcelona
Spain
Tel: ++ 34 3 405 9300
Fax: ++ 34 3 405 9176

Jorge Santiago Neves

Santiago Neves & Associados
Av Engº Duarte Pacheco,
Empreendimento das Amoreiras
Torre 2, 10º Piso
1070 Lisbon
Portugal
Tel: ++ 351 1 381 43 93
Fax: ++ 351 1 387 18 82

Gus J Papamichalopoulos

Kyriakides & Partners
6 Queen Sophia Avenue
106 74 Athens
Greece
Tel: ++ 30 1 7243 072
Fax: ++30 1 7250 670

Dr Thomas Sambuc

Lichtenstein, Körner & Partners
Heidehofstrasse 9
70184 Stuttgart 1
Federal Republic of Germany
Tel: ++ 49 7 4 11 89 79-0
Fax: ++ 49 7 11 4 81 57 7

Harri Salmi

Heikki Haapenniemi Oy
POBox 232
Mannerheimintie 14B
00101 Helsinki
Finland
Tel: ++ 358 9 177 613
Fax: ++ 358 9 653 873

Lucien Simont

Stibbe Simont Monahan Duhot
Rue Henri Wafelaerts 47-51 (box 1)
1060 Brussels
Belgium
Tel: ++ 32 2 533 5211
Fax: ++ 32 2 533 5212

Pernille Solling

Lett & Co
Borgergade 111
DK – 1019 Copenhagen K
Denmark
Tel: ++ 45 33 12 00 66
Fax: ++ 45 33 12 12 66

DA Thomas

Willis Corroon Limited
Willis Corroon House
Wood Street
Kingston-upon-Thames
Surrey KT1 1UG
England
Tel: ++ 44 181 787 6290
Fax: ++ 44 181 943 4297

Michael Thornton

Laytons
22 St John Street
Manchester M3 4EB
England
Tel: ++ 44 161 834 2100
Fax: ++ 44 161 834 6862

Lila Vassilaki

Kyriakides & Partners
6 Queen Sophia Avenue

10674 Athens

Greece

Tel: ++ 30 1 7243 072

Fax: ++ 30 1 7250 670

Christer Wagenius

Advokatfirman Wagenius & Partners
HB
Box 1393
251 13 Helsingborg
Sweden
Tel: ++ 46 42 19 96 60
Fax: ++ 46 42 13 00 62

Stan SH Wibbens

Rasker Duvekot & Wibbens
Herengracht 503
1017 BV Amsterdam
Netherlands
Tel: ++ 31 20 62 70 370
Fax: ++ 31 20 62 69 287

Contents

Preface	<i>v</i>
Contributors	<i>vii</i>

Chapter I Overview of EC Product Liabilities Law by Patrick Kelly

1	EC law background	6
2	Summary of principal relevant EC Directives	11
3	Enforceability of EC law	30
4	Conclusion	34

Chapter II Austria by Dr Peter Madl

1	Introduction	39
2	Pre-contractual liability	41
3	Liability in contract	42
4	Liability in tort	45
5	Liability for defective products arising from both general law and implementation of directive 85/374 on Product Liability in Austria	47

Chapter III Belgium by Lucien Simont and Manuela von Kuegelgen

1	Introduction	61
2	Pre-contractual liability	63
3	Contractual liability	64
4	Liability in tort	77
5	Liability for defective products arising from implementation of EC Directive 85/374 on Product Liability	80
6	Liability arising from general safety law and the implementation of EC Directive 92/59	83
7	Civil liability for defective products arising from breach of statutory regulations designed to protect consumers and/or to promote safety	87

Chapter IV Denmark by Georg Lett and Pernille Solling

1	Introduction	95
2	Pre-contractual liability	96
3	Liability in contract	97
4	Liability in tort	97
5	Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in Denmark	105
6	Criminal liability for defective products arising from both general law and implementation of EC Directive 92/59 on Product Safety in Denmark	108
7	Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety	109

Chapter V Finland by Harri Salmi and Kaisa Fahlund

- 1 Introduction 113
- 2 Pre-contractual liability 114
- 3 Liability in contract 116
- 4 Liability in tort 122
- 5 Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in Finland 127
- 6 Criminal liability for defective products arising from both general law and the implementation of EC Directive 92/59 on Product Safety in Finland 131
- 7 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 133
- 8 Bibliography 134

Chapter VI France by Muriel de Courreges

- 1 Introduction 137
- 2 Pre-contractual liability 138
- 3 Liability in contract 140
- 4 Liability in tort 148
- 5 Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in France 150
- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in France 154

Chapter VII Federal Republic of Germany by Klaus-Ulrich Link and Dr Thomas Sambuc

- 1 Introduction 161
- 2 Pre-contractual liability 163
- 3 Liability in contract 164
- 4 Liability in tort 175
- 5 Liability for defective products arising from the Product Liability Act (implementation of the Directive on Product Liability) 186
- 6 Criminal liability for defective products arising from general safety law; implementation of EC Directive 92/59 on Product Safety 193
- 7 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 195

Chapter VIII Greece by Gus J Papamichalopoulos and Lila Vassilaki

- 1 Introduction to the legal system in Greece 201
- 2 Pre-contractual liability 202
- 3 Liability in contract 203
- 4 Liability in tort 211
- 5 Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in Greece 215
- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in Greece 216

- 7 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 220

Chapter IX Ireland by Hugh Garvey

- 1 An introduction to the Irish legal system 223
- 2 Overview of the law relating to defective products in Ireland 224
- 3 Pre-contractual liability 225
- 4 Liability in contract 229
- 5 Liability in tort 239
- 6 Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in Ireland 249
- 7 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety 253
- 8 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 254
- 9 Definition and classification of terms 255

Chapter X Italy by Gabriele Dara

- 1 Introduction 259
- 2 Pre-contractual liability 262
- 3 Liability in contract 262
- 4 Liability in tort 266
- 5 Liability for defective products arising from national law in Italy: implementation of EC Directive 85/374 on Product Liability 269
- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety 273
- 7 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 274

Chapter XI Luxembourg by Rene Diederich

- 1 Introduction to the legal system in Luxembourg 277
- 2 Overview of the law relating to defective products in Luxembourg 278
- 3 Pre-contractual liability 279
- 4 Liability in contract 280
- 5 Liability in tort 287
- 6 Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in Luxembourg 291
- 7 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in Luxembourg 294
- 8 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 295

Chapter XII Netherlands by S S H Wibbens

- 1 Introduction 303
- 2 Pre-contractual liability 305
- 3 Liability in contract 305
- 4 Liability in tort 313
- 5 Special liabilities arising in respect of particular products 317

- 6 Liability for defective products arising from national law in the Netherlands 317
- 7 Liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 323

Chapter XIII Norway by Wilhelm Matheson

- 1 Introduction 329
- 2 Pre-contractual liability 330
- 3 Liability in contract 331
- 4 Liability in tort 333
- 5 Liability for defective products arising from national law in Norway: harmonisation of the Directive with Norwegian law 336
- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in Norway 340
- 7 Civil liability for defective products arising from breach of statutory regulation designed to protect consumers and/or to promote safety 341

Chapter XIV Portugal by Jorge Santiago Neves

- 1 Introduction 345
- 2 Pre-contractual liability 347
- 3 Liability in contract 349
- 4 Liability in tort 356
- 5 Liability for defective products arising from implementation of EC Directive 85/374 on Product Liability in Portugal 363
- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in Portugal 366
- 7 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and/or to promote safety 371
- 8 Further reading 371

Chapter XV Spain by Ramon Mullerat and Sonia Cortés

- 1 Introduction 375
- 2 Pre-contractual liability 376
- 3 Liability in contract 378
- 4 Liability in tort 382
- 5 Liability for defective products arising from both general law and implementation of EC Directive 85/374 on Product Liability in Spain 387
- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in Spain 393
- 7 Civil liability for defective products brought about by breach of statutory regulation designed to protect consumers and to promote safety 396

Chapter XVI Sweden by Christer Wagenius

- 1 Introduction 401
- 2 Pre-contractual liability 402
- 3 Liability in contract 403
- 4 Liability in tort 408
- 5 Implementation of EC Directive 85/374 on Product Liability in Sweden 410

- 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety in Sweden 411
- 7 Civil liability for defective products arising from breach of statutory regulation designed to protect consumers and/or to promote safety 414

Chapter XVII United Kingdom

England and Wales by Michael Thornton

- 1 Introduction 423
 - 2 Pre-contractual liability 425
 - 3 Liability in contract 427
 - 4 Liability in tort 443
 - 5 Liability for defective products arising from national law in the UK: implementation of EC Directive 85/374 on Product Liability 448
 - 6 Criminal liability for defective products arising from both general safety law and the implementation of EC Directive 92/59 on Product Safety 452
 - 7 Civil liability for defective products arising from breach of statutory regulation designed to protect consumers and/or to promote safety 456
- Annex 1 Northern Ireland by David MacFarland 459
- Annex 2 Scotland by D Granger Brash 461

Chapter XVIII Jurisdiction, enforcement of judgments and conflicts of laws by Rebecca M Attree

- 1 The international conventions 481
- 2 The considerations when bringing an international claim 487
- 3 Conflict of laws 506
- 4 Should forum shopping be allowed? 514
- 5 Conclusion 515

Chapter XIX Practical steps to be taken by producers and suppliers to manage product liability and safety risks by Patrick Kelly and Rebecca Attree

- 1 Legal issues for suppliers and manufacturers 520
- 2 Administrative issues 527
- 3 Warnings, instructions and manuals 529
- 4 Product recall 539
- 5 Conclusion 540

Chapter XX Product liability insurance by D A Thomas

- 1 Introduction 545
- 2 The product liability policy 546
- 3 Definitions 547
- 4 Indemnity limits 549
- 5 Exclusions 549
- 6 Policy conditions 552
- 7 The 'claims made' product liability policy 553
- 8 Placing and underwriting the product liability risk 554
- 9 Multi-national policies 555
- 10 The EC Product Liability directive and product liability insurance 556

Appendix 1 Specimen product liability policy 561

Appendix 2	Table comparing and contrasting the law on product liabilities in the European Union	565
Appendix 3	Product Liabilities upon dissolution of a European company	621
Appendix 4	Table relating to Product Safety Directives	631
Appendix 5	Table of implementation of international conventions	641
Appendix 6	Council Directive EC/85/374 on liability for defective products	643
Appendix 7	Council Directive EC/95/59 on general product safety	651
Appendix 8	Council Directive EC/93/13 on unfair contract terms	665
Appendix 9	Proposal for a Directive on consumer goods and associated guarantees	673
Appendix 10	Swedish Product Liability Act	679
Appendix 11	Swedish Sale of Goods Act	683
	Index	703

European Product Liabilities

Second edition

Edited by:

Patrick Kelly

Partner, Solicitor, Laytons

Rebecca Attree

Solicitor, Attree & Co

Butterworths

London, Edinburgh, Dublin

1997

United Kingdom	Butterworths a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, LONDON WC2A 1EL and 4 Hill Street, EDINBURGH EH2 3JZ
Australia	Butterworths, SYDNEY, MELBOURNE, BRISBANE, ADELAIDE, PERTH, CANBERRA and HOBART
Canada	Butterworths Canada Ltd, TORONTO and VANCOUVER
Ireland	Butterworth (Ireland) Ltd, DUBLIN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	Butterworths of New Zealand Ltd, WELLINGTON and AUCKLAND
Singapore	Reed Elsevier (Singapore) Pte Ltd, SINGAPORE
South Africa	Butterworths Publishers (Pty) Ltd, DURBAN
USA	Michie, Charlottesville, VIRGINIA

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright owner except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under the terms of a licence issued by the Copyright Licensing Agency Ltd, 90 Tottenham Court Road, London, England W1P 9HE. Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorised act in relation to a copyright work may result in both a civil claim for damages and criminal prosecution.

Any Crown copyright material is reproduced with the permission of the Controller of Her Majesty's Stationery Office.

© Reed Elsevier (UK) Ltd 1996

A CIP Catalogue record for this book is available from the British Library.

ISBN 0 406 03256 4

CHAPTER I

Overview of EC Product Liabilities Law

Patrick Kelly, Esq

Laytons
Carmelite
50 Victoria Embankment
Blackfriars, London
EC4Y 0LS

Tel: ++ 44 171 842 8000

Fax: ++ 44 171 842 8080

