



产品责任理论与判例研究

Research on Product Liability
Theory and Case

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序

19 世纪中期以来,产品责任作为一个法律问题首次在英国司法判例中出现。第二次世界大战以后,随着工业社会的发展和科学技术的进步,尤其是现代消费社会的到来,各式各样的产品极大地改变了人们的生产、生活状态,使人类社会比以往任何时代都更为富足。但与此同时,因为产品所具有的缺陷,给消费者、使用者的人身及财产造成越来越多的损害,甚至构成大规模的侵权,导致严重的社会问题。产品责任由此成为现代侵权责任法的重要领域。

近年来,我国产品责任领域的问题日趋严峻。然而,我国各级政府部门在产品安全事件发生之后,注重的是行政处罚措施,而对企业应当承担的产品责任往往缺乏应有的关注。从发达国家的经验来看,完善产品责任的体系,强化损害赔偿责任的预防与救济功能,对保障消费者权益、降低企业风险以及提高产品质量等具有至关重要的作用。2009 年 12 月 26 日,十一届全国人大常委会第十二次会议表决通过了《中华人民共和国侵权责任法》,该法第五章规定了产品责任(第 41—47 条),产品责任制度成为侵权责任法中的热点议题。结合我国先前的产品责任法律法规,阐释该法规定的产品责任制度,成为侵权法理论工作者的重要任务。

本书以产品责任制度为研究对象,通过比较法的研究方法,对我国产品责任立法以及相关判例进行了全面的梳理与分析,主要具有以下特点:

第一,产品责任的核心是产品缺陷。本书通过类型化的研究方法,将产品缺陷分为制造缺陷、设计缺陷、警示缺陷以及跟踪观察缺陷,提出制造缺陷的归责原则是严格责任,而设计缺陷、警示缺陷以及跟踪观察缺陷的归责原则是过失责任的观点。从制造者与消费者的利益平衡,尤其是产品缺陷的判断上看,上述观点无疑具有积极的意义。

第二,本书的一个显著特点是比较法的运用。作者在占有较为翔实的资料的前提下,对美国、欧盟以及我国台湾地区规制产品责任的立法以及判例进行了深入的比较和分析,涉及产品责任制度的归责原则、缺陷类型、产品的范围、责任主体等,内容广泛,分析较为透彻明了。

第三,以我国现行产品责任法律为依据,对相关制度进行了详细透彻的解释。“徒法不足以自行”,本书在探讨不同国家和地区产品责任制度的基础上,最终立足于我国的立法与司法实践,分析评价实证法的规范意义,并参考引用了我国各级人民法院的大量判决文书,从中发掘具有指导意义的裁判规则。

第四,全面梳理了产品责任制度的内容,包括产品责任的归责原则、产品的概念与范围、产品责任的主体、产品缺陷的分类以及判断标准、因果关系、损害赔偿、抗辩事由以及召回等。本书内容全面、论证上逻辑严密,就产品责任的理论体系构建而言,这是一个比较好的尝试。

本书作者冉克平是我的学生,看到近些年他在学术道路上的进步,我感到由衷的高兴。在方法论上,在我看来,理论研究应当从法律文本出发,依据一定的价值判断,总结裁判经验,探寻如何准确地将法律规范运用到司法实践中,并由此形成完整、合理的理论体系。本书比较好地体现了这一点,这与克平的不懈努力是分不开的。同时,我也期望,克平能继续勤于思考、勇于探索,在理论研究上取得更大的进步。

是为序。

王利明

2014年6月19日

中文摘要

19 世纪中叶,产品责任作为法律问题首次在英国司法判例中出现。“第二次世界大战”以后,随着工业社会的发展和科学技术的进步,尤其是现代消费社会的到来,产品类型丰富,数量繁多,极大地改变了人们的生产、生活状态,使人类社会比以往任何时代都更为富足。但与此同时,因产品设计、制造以及流通过程所引起的缺陷,给消费者、使用者的人身、财产带来越来越多的危险与损害,甚至构成大规模侵权,导致严重的社会问题。如何应对因产品缺陷引起的侵害成为不同国家或地区必须面对的重大法律问题。在此背景之下,产品责任法登上了历史舞台,逐渐为各国法制广泛接受,成为现代侵权责任法的重要领域。

产品责任法是一门理论性与实践性均很强的学科。本文在产品责任法的理论框架下,一方面详尽透彻地阐释和分析相关的理论学说以及有关产品责任立法的具体内容;另一方面对我国司法实务中的大量判决中所包含的裁判准则加以分析和评判,以发展和完善我国产品责任立法及规范意义。本书即是以产品责任理论与判例为研究主题,对此进行了比较系统和全面的分析和论述。

第一章是对产品责任归责原则的沿革与趋势的论述。因产品的危险性致使消费者人身或财产损失的责任,总体上经历了从合同责任向侵权责任、从过失责任到严格责任的发展过程。19 世纪末 20 世纪初,为摆脱合同相对性的束缚,过失侵权责任取代了合同法。20 世纪中叶以后,为了加强对处于弱势地位的消费者的保护,确保事故发生率被减至经济、合理的水平,严格产品责任制度得以诞生。然而,随着复杂的产品责任诉讼的出现,在产品责任领域全面适用严格责任越来越受到人们的质疑。《美国侵权法第三次重述:产品责任》明确将严格责任限制在产品制造缺陷案件中,而对产品设计缺陷、警示缺陷以及跟踪观察缺陷则适用过失责任,这是产品责任归责原则的最新动向。我国《侵权责任法》规定的产品责任,无论是销售者还是生产者,均为严格责任而非过错责任。

第二章是对本书产品的概念与范围的界定。从比较法上看,产品责任法

的发展趋势表明,产品的范畴越来越宽泛。从有形的动产到无形的电、天然气,甚至不动产,从工业产品到手工产品乃至初级农产品,均可以适用严格产品责任,表明产品责任立法对消费者权益保护的力度进一步加强。我国产品责任立法将产品限于经过制作或加工,投入流通以供使用或消费的有形动产,其范围过于狭隘,不当地限制了产品责任的适用范围。产品被投入市场进入消费领域,不仅可以通过销售方式,而且还有租赁、借用等方式,在此种形式下进入流通领域的,也可以被视为产品。特殊类型的财产,如初级农产品、出版物中的信息、计算机软件、处方药品、血液及人体器官、旧货以及航空器,是否属于产品,应当依据产品责任背后的立法政策予以综合衡量。

第三章论述了比较法上产品缺陷的类型及其判断。产品缺陷的认定是一切产品责任案件的核心要求。从比较法上看,对产品缺陷的界定,均是从产品缺乏消费者或使用者所期待的安全性,因而对消费者或使用者的人身或财产具有的不合理的危险这一角度来衡量的。产品缺陷通常被类型化为制造缺陷、设计缺陷、警示缺陷以及跟踪观察缺陷。对于制造缺陷,通常可以根据偏离预期设计这一外部标准来衡量,适用严格责任原则;在设计缺陷的案件中,许多国家或地区的法律以及判例均要求原告提供合理的替代设计,并通过“风险一效用”标准予以判断,其实质上是过失责任;警示缺陷的基础是交往安全义务,产品的制造者和销售者使产品进入流通,该产品的制造者和销售者必须对产品可能带来的伤害风险提供合理的指导说明和警示,适用的亦是过失责任;就产品跟踪观察缺陷而言,其主要是为了限制发展风险的抗辩而产生的,对其判断采取的是“理性人”的标准,其实质同样是过失责任原则。

第四章分析了我国产品缺陷制度、判例及其完善。在我国司法实务中,产品质量纠纷包括产品瑕疵案件与产品缺陷案件,前者属于合同法的领域,后者属于产品侵权责任的范畴。一些判决有将产品瑕疵案件当作产品责任案件,致使合同纠纷与侵权纠纷发生混淆。我国现行法律以“不合理危险”作为产品缺陷的判断标准,司法实践则以国家标准与行业标准作为“不合理危险”的实质内容,难以适应产品缺陷类型化的要求。我国产品责任法应该借鉴产品缺陷类型的划分,分别采用不同的判断标准与归责原则,使生产者、销售者的行为模式与消费者权益保护达到合理的平衡。产品召回的性质应为法律责任而非义务。在举证责任上,受害人只要提供产品存在的表面证据,即可初步认定产品存在缺陷。在例外情况下,只要证明事故不是由于产品缺陷以外的原因所导致,可以基于高度的盖然性推定产品存在缺陷。

第五章分析的是产品责任的主体。责任主体即产品责任的承担者。从

比较法上看,在美国法上,产品责任法中的责任主体范围较广,几乎处于生产、加工、销售这一垂直链条上的相关的人都可能因缺陷产品致损而承担责任;欧洲及日本产品责任主体侧重于生产者。就生产者而言,其不仅包括成品的生产者,还包括如零部件、原材料的生产者,准生产者(如将商标授予他人使用的人或允许实际生产者标示其名称的名义生产者)及进口商。虽然《食品安全法》第55条规定代言人是产品责任的主体,但从立法论上看,将产品责任主体扩大至那些未直接参与生产和供应链条过程中的人并不妥当。销售者应该包括经销商、零售商以及租赁者。就生产者与销售者之间的关系而言,两者就缺陷产品给他人造成的损害承担的是不真正连带责任。

第六章讨论的是产品缺陷与损害之间的因果关系。原则上,产品责任中因果关系的判断应当采用“相当因果关系说”。对于条件关系,若是认定产品设计缺陷或者制造缺陷与损害事实之间的因果关系,应采“删除说”;若是认定产品警示说明缺陷或跟踪观察缺陷与损害事实之间的因果关系,应采“代替说”。法律上因果关系的判断,应遵循“常人基础上的适度增加”准则。在特殊情况下,还可以借鉴“市场份额”理论。原则上,应当由受害人承担因果关系的证明责任。对于科技含量较高、制造工艺特殊复杂的产品,若受害人证明使用了产品后即发生损害,且这种缺陷产品有造成这种损害的可能,即可以推定因果关系成立,转由产品的生产者或销售者对缺陷产品与损害事实之间不存在因果关系进行证明。

第七章分析的是产品责任的承担方式。我国产品责任方式不仅包括传统民法中的损害赔偿这一救济性的责任形式,还包括排除妨碍、消除危险等预防性的责任形式。产品责任损害既包括财产损害,也包括非财产损害,其赔偿的范围可以适用侵权法有关损害赔偿的一般规定。但是,缺陷产品自身损失在合同法上属于瑕疵担保责任的范围,在侵权法上则被视为纯粹经济损失。缺陷产品自身损失应由合同法救济,既不能将其纳入产品责任的赔偿范围,也不能将其纳入过失侵权责任的赔偿范围,以维系违约责任与侵权责任的二元救济体系。对《侵权责任法》第41条和42条的解释,可以通过目的性限缩,将产品责任的赔偿范围限制在“缺陷产品以外的损害”之内。惩罚性赔偿作为例外的损害赔偿形式,具有威慑和惩戒的功能,为了降低惩罚性赔偿的随意性,应该对其适用予以严格的限制。

第八章论述了产品责任的抗辩事由。在产品责任诉讼中,生产者或销售者可依据抗辩事由提出抗辩,以减轻或免除其责任。发展风险是产品投入流通时的科学技术水平尚不能发现缺陷存在的风险,其意义在于限制严格责任的适用,避免责任的绝对化。为了平衡生产者与消费者之间的利益,可以对

发展风险进行适当的限制,并与产品跟踪观察缺陷制度相衔接。我国应当借鉴受害人非正常使用或误用、变更或改造产品的抗辩,而不必采纳合法性抗辩。

关键词:产品 不合理危险 制造缺陷 设计缺陷 警示缺陷 跟踪观察缺陷 纯粹经济损失

ABSTRACT

The mid-19th century, product liability as a question of law came out for the first time in the British judicial precedents. After World War II, with the development of industrial society and the progress of science and technology, particularly the advent of the modern consumer society, products in a wide range of rich type number greatly changed people's production and living conditions, made human society more prosperous than ever before. At the same time, however, the defects in the product design, manufacture and circulation bring more and more danger and damage to the users' personal or property, and even the large-scale infringement lead to serious social problems. How to deal with the product tort caused by violations to become a significant legal issues in different countries and regions. In this context, the Product Liability Act boarded the stage of history, and widely accepted by the legal system of various countries, become an important area of Modern Tort Liability Act.

Product liability law both in theory and practice is very strong. In this paper, under the theoretical framework of the product liability law, on the one hand, it is thoroughly interpretation and analysis of relevant theories as well as the specific content of the product liability legislation; on the other hand, it also analysis and evaluate the referee criterion of sentences in ours judicial practice, to the develop and improve ours product liability legislation and norms. This paper is to product liability theory and the case as the research subject, it analyzed and discussed them in the system and comprehensive level. It is divided into eight chapters, about 32 million words.

The first chapter is about product liability imputation principles of evolution and trend. Because the risk of causing consumer product responsible person or properly losses, on the whole it has experienced from contract liability to tort liability, from fault liability to strict liability. In the late 19th century and early 20th century, in order to get rid of the bondage of contract relativity, the negli-

gence tort liability replaced the contract law. After the mid-20th century, in order to strengthen the protection of vulnerable consumers and ensure that accidents are reduced to the economy, a reasonable level, the strict product liability system was developed. However, with the emergence of complex product liability lawsuits, comprehensive applying strict liability in the field of product questioned by more and more people. In "American tort law Third Restatement: product liability", it explicitly limit strict liability in the case of product manufacturing defects, but product design defects, warning defects, and tracking observation defects are to applies to negligence liability, this is the latest trend of sellers or producers, all are for strict liability instead of fault liability.

The second chapter is to define the concept and the scope of the product, from the point of comparative law, the development trend of the product liability law indicates that the product category is more and more broad. From tangible movable property to the invisible electric, natural gas and even real estate, from industrial products the manual product and primary agricultural products to the strict product liability can be applied, so it shows that the product liability legislation further enhance the protection of consumers' rights and the interests. The legislation of product liability in China limits the products in the process of manufacturing, circulating, using and consuming tangible personal property, manufacturing or processing, its scope is too narrow, and improper limits the scope of product liability. It can not only through selling but also leasing and borrowing and so on to make products to be marketed to consumers, flowing into the circulation, sphere in such a situation also can be regarded as products. For special types of property, such as primary agricultural products, the information of publication, computer software, prescription drugs, blood and human organs, thrift and aircraft, whether or not they belong to the product based on the product liability legislation behind policy.

The third chapter deals with the classification and judgment of product defects in the field of comparative law. Assertion of product defects is the core requirements for all product liability cases. From the perspective of comparative law, the definition of product defects, both of them are the lack of the safety which the consumers and user expected, thus to consumer or user's personal or property with the unreasonable danger to measure. Product defects are usually divided into: manufacturing defect, design defect, warning defect and tracking

observed defect. For manufacturing defects, For manufacturing defect, when usually according to deviate from the expected design standard to measure the external, apply the principle of strict liability; For the case of defects in design, it requires the plaintiff to provide a reasonable alternative design and through the “risk-utility” standard to judge in the laws and legal precedent of many countries or regions, which means to apply negligence liability essentially; Contacts safety obligation is the basis of warning defects, the manufacturers and sellers of products make the product into circulation, the makers and sellers of the product must be the product may bring harm risks to provide reasonable instructions and warning applicable for negligence, it applies fault liability as well. In terms of product defect tracking, its development mainly to limit the risk of defense, the judge is the standard of “rational man”, its essence is the same principle of fault liability.

The fourth analyzes the product defect system, jurisprudence and its perfect. Judicial practice in China, product quality disputes include product defect and product flaw cases, the former belongs to the field of contract law, the latter is part of the product scope of tort liability. Some judgments take product defect cases for product liability cases, resulting in confusion between contract disputes and tort disputes. It treats “unreasonably dangerous” as the judgment standards of product defects in current laws, while the substance of “unreasonably dangerous” is national standards and industry standards in judicial practice, which is difficult to adapt to the requirements of the product’s defect typed. Product liability law in China should use for reference the division of the product defects tape, respectively, using different standards and imputation principles to achieve a reasonable balance between the producers, sellers’ behavior patterns and Consumer Protection. The properties of product recall should be legal liability but not the obligation. On the burden of proof the victim as long as the product exists prima facie evidence, which can be initially identified a defective product. In exceptional circumstances, it can be presumed defect in a product based on a high degree of cover probability, as long as it was proved that other reasons but not the product defect give rise to the accident.

The fifth chapter mainly analyzes the subject of product liability. It is the bearer of product liability. From the perspective of comparative law, it involves a wider range according to Product Liability Law in the USA, which the vertical

chain related person in manufacture, procession and sales may be responsible for the loss of defective products; however, in Europe and Japan, the subject of product liability mainly focus on the producers. As for the producers, it includes not only the producer of the finished product, but also including such as spare parts, raw materials producers, prospective producers (such as the trademark granted to others to use or allow the actual producers marked its name on behalf of producers) and importers. According to the "Food Safety Law" Article 55, the spokesperson is the subject of product liability as well, but standing on the theory of legislation, it is not appropriate to expand the range of product liability subject to those directly involved in the production and supply chain in the process of people. The seller should include distributors, retailers and renters. In terms of the relationship between the producers and sellers, both of them should assumed the unreal joint liability when the loss of others caused by the defective product.

Discussed in Chapter sixth is the causal relationship between product defects and damage. In principle, the judgment of the causality in product liability shall adopt the version of causality. For the conditions of the relationship, if it finds that the casual relationship between product design flaws or manufacturing defects and the fact of damage, the "delete version" should be adopted. If identified the causal relationship between defects of products' warning instructions or defects of tracking and observing and the fact of damage, then the "substitution version" should be adopted; the judgment of causal relationship on the legal, should follow the guidelines of the ordinary people on the basis of a moderate increase". In exceptional cases, you can also draw on the theory of "market share". In principle, it should be borne by the victim, the burden of proof of causality. For high scientific and technological content, special and complex product manufacturing process, if the victim justify the damage occurred after use of the product, and the possibility of the presence of such damage in such a defective product, that can be presumed causal relationship was established, in turn the product producer or seller of the defective product shall prove that there is no causal relationship between the damage and the product.

Chapter seventh analyzes the commitment of product liability. Our product liability method includes not only traditional civil law damage liability form of relief, but also includes the removal of obstacles, to eliminate the danger of pre-

ventive form of liability. Product liability damage includes both property damage and non-property damage, and its scope of compensation can be applied to the general provisions of tort damages. Defective product loss, however, belong to the scope of the warranty liability in contract law, is considered pure economic loss in tort. Defective product loss should be relieved by the contract law, neither can it be added to the scope of the product liability compensation, nor can it be included in the scope of the negligent tort liability compensation, to maintain binary relief of liability for breach of contract and tort liability system. Explanation Tort Liability Act 41 and 42, by narrowing on purpose, limit the scope of the product liability compensation in "other than the defective product damages". Punitive damages as an exceptional form of damages, with deterrence and punishment function should be strictly limited, in order to reduce the arbitrariness of punitive damages.

The eighth chapter deals with product liability defenses. Producers or distributors in product liability litigation, can make defense based on fact in order to reduce or waive its responsibility. The development risk is the risk not yet found when the product was put into circulation due to the level of science and technology and its significance is to limit the application of the strict liability, to avoid responsibility in terms of absolutes. In order to balance the interests of producers and consumers, appropriate restrictions should be taken to the development risk and then dovetail it with the product tracking and observing defects system. China should learn from the defense made by the victims of non-normal use, or misuse, alteration, or transformation, instead of adopting the legitimacy defense.

Keywords: product; unreasonable risk; manufacturing defects; design defects; warning defects; tracking observation defects; pure economic loss

目 录 | Contents

中文摘要 / 1

ABSTRACT / 1

第一章 产品责任归责原则的沿革及趋势 / 1

- 1 第一节 产品责任概述
- 2 第二节 合同责任与过失侵权责任
- 19 第三节 严格责任的确立及其趋势
- 31 第四节 我国的产品责任归责原则的解释与评析

第二章 产品的概念与范围 / 40

- 40 第一节 产品的概念
- 54 第二节 特殊的财产类型是否为产品的争议

第三章 比较法上产品缺陷的类型及其判断 / 77

- 77 第一节 产品缺陷概述
- 80 第二节 产品制造缺陷
- 86 第三节 产品设计缺陷
- 112 第四节 产品警示缺陷
- 124 第五节 产品跟踪观察缺陷

第四章 我国产品缺陷制度、判例及其完善 / 130

- 130 第一节 产品缺陷概述
- 142 第二节 产品制造缺陷
- 147 第三节 产品设计缺陷
- 152 第四节 产品警示缺陷
- 158 第五节 产品跟踪观察缺陷
- 162 第六节 缺陷产品召回制度
- 166 第七节 产品缺陷的证明与推定

第五章 产品责任的主体 / 174

- 174 第一节 产品责任主体的比较法视角
- 178 第二节 产品责任主体的类型
- 189 第三节 我国产品责任的主体及其借鉴
- 206 第四节 生产者与销售者之间的责任分担

第六章 产品缺陷与损害之间的因果关系 / 212

- 212 第一节 侵权法上的因果关系概述
- 216 第二节 产品责任因果关系的比较法分析
- 225 第三节 我国产品责任因果关系的认定及其完善
- 235 第四节 产品责任因果关系的证明

第七章 产品责任的承担方式 / 242

- 242 第一节 产品责任承担方式概述
- 245 第二节 产品责任损害赔偿的范围
- 254 第三节 缺陷产品自身损失的救济
- 275 第四节 产品责任中的惩罚性赔偿