

THE LAW OF --- PRODUCT LIABILITY

Second Edition



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The Law of Product Liability

Second Edition

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Series Preface

The common law is justifiably seen as a jewel in the crown of English law. The common law has travelled far afield to many other countries where it has been adopted and developed by the local courts. No longer the sole preserve of the judges in London (or Edinburgh and Cardiff), its durability and richness has been due in no small way to the diversity of approach that exists between the common law countries throughout the world. Many of the great judges in England, such as Coke, Mansfield, Blackburn, Atkin, Devlin, Reid and Denning, and those from overseas such as Oliver Wendell Holmes, Benjamin Cardozo and Owen Dixon, have been masters of the common law. As we enter the new Millennium, the common law continues to influence the development of law elsewhere. It will remain a major export, but now also an import, of this country.

Butterworths Common Law Series conceives of the common law in broad terms, providing analyses of the principles informing the frameworks of the law derived from judicial decisions and legislation. The *Series* seeks to provide authoritative accounts of the common law for legal practitioners, judges and academics. While providing a clear and authoritative exposition of the existing law, the *Series* also aims to identify and examine potential developments in the common law drawing on important and significant jurisprudence from other common law jurisdictions. Judges have increasingly looked to academic works for guidance on the accepted view of the law but also when contemplating a reformulation or change of direction in the law. The *Series* may, it is hoped, provide some assistance such that the law is less likely to be left undeveloped ‘marching ... in the rear limping a little’, to quote a famous judicial aphorism (*Mount Isa Mines v Pusey* (1970) *per Windeyer J*).

Andrew Grubb

Foreword

When perplexed by some nettlesome issue of product liability law or practice, I have often turned to *The Law of Product Liability* (Howells, Gen ed, 2000, Butterworths) for direction. This is an area of law and practice that is moving apace, and so it was with delight that I learned that Geraint Howells has again assembled his all-star cast of academic and practicing experts on various aspects of product liability law and litigation to update and consider afresh the central issues in this rapidly-moving field of law. Their labours have again borne fruit, and we who frolic in these vineyards can only sense delight.

In his comprehensive introduction, Professor Howells again widely canvasses the nature of product liability law in the modern world, providing an insightful overview of key issues of liability and defence in the UK, Europe, and the US; an exploration of theoretical foundations and policy debates that ground this area of the law; and various implications for an informed litigation practice. Next are chapters devoted to the three primary heads of product liability: contract, negligence, and strict liability. Here, respectively, Chris Willett, Norma Hird, and Professor Howells address recurring problems in these central doctrines with sensitivity, breadth, and depth. And Richard Goldberg in an important chapter examines many of the causal conundrums in product liability law, including such problems as the many perplexities of scientific proof, market share and alternative liability, and how the scope of liability places ‘causal’ limits on certain types of damages that are ‘remote’.

Chapters on jurisdiction, by James Fawcett, and choice of law, by Stuart Dutson, address salient litigation issues confronting manufacturers who market their products in a global economy, as when their products manufactured in one nation are purchased and sold in another and end up injuring persons on other parts of the planet. Because of the vagaries of substantive law, damages law, and practice rules, jurisdictional and conflict of laws matters frequently spawn the most important issues in major product liability litigation. When hundreds or thousands of persons suffer similar injuries from a particular type of defective product, litigation efficiencies can sometimes be enormously enhanced by aggregating the claims under a single class-action umbrella, a litigation approach diminishing in the US as other nations are drawn by its siren spell. The potentially catastrophic financial risk to a manufacturer from losing one gigantic judgment, and the troublesome questions of how best to handle future plaintiffs not included in the class, are a couple of the more serious conundrums of class actions that legislatures and courts should ponder carefully in structuring and constraining the enormous

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power of aggregated litigation. Mark Mildred, in a sensitive and wide-ranging treatment of these issues, provides a helpful chart for navigating the treacherous waters of group actions.

Though it is hard to measure, product liability law and litigation probably has at least some deterrent effects, enhancing product safety *ex post*. But product safety is too important to leave exclusively to the civil law, such that developed nations depend substantially on the regulation of product safety *ex ante*, backed up by the force of the criminal law. In a chapter on the regulation of product safety, Peter Cartwright explains the fit of the important regulatory component, both in the UK and Europe, in the broader puzzle that embraces both product safety and liability. In its inception, modern product liability law was driven by an assumption that manufacturers are better insurers of product accidents than are consumers. While the legitimacy of this assumption is now quite battered, particularly in America, the practical effect of product liability litigation is that manufacturers do indeed end up insuring, one way or another, against this major risk of loss. In a final chapter, on product liability insurance, John Birds surveys the many issues surrounding the nature, formation, interpretation, scope, and operation of contracts for product liability insurance.

One of the great strengths of the first edition of this book, a strength that this edition helpfully expands, was its comparative law approach, weaving perspectives of European and American law into the analysis of UK law. As the EC Product Liability Directive spreads across an expanding EU, and as European courts increasingly explore the center and corners of product liability law, it is ever more important for practicing and academic lawyers around the world to examine these developments in this now global field of law. But a caveat is in order here. As Professor Mathias Riemann has well explained elsewhere, although the substantive legal rules in the EU and many other nations appear quite similar, their power is limited by applicable rules of damages, procedure, and law practice (including methods for funding litigation), all of which reflect the cultural tradition of a particular nation and its legal system. While more and more nations in and outside the EU declare the availability of remedies for harm caused by defective products, often on a 'strict' liability basis, local procedural and damages restrictions, together with local rules on attorneys' fees, substantially diminish the practical rights of injured persons in many nations to recover for their injuries. In such jurisdictions, products liability law in action may be much less useful than the law in theory, which brings to mind the admonition of Professor Jane Stapleton: 'Comparative products liability law is a dangerous business.' In this spirit, *The Law of Product Liability* addresses a number of distinctions among the differing legal systems it examines and so alerts lawyers to this important aspect of comparative products liability law.

In the twenty-first century, product liability law cannot be practiced or critiqued effectively without an appreciation of both the theory and doctrine of the underlying rules of liability and defence; or without a firm grasp of the inner workings of contract, negligence, or strict liability, and of the important role played by causation with respect to each such ground of liability; or without an appreciation of the litigation principles of jurisdiction, conflict of laws, and class actions; or without knowing the fundamentals of product

safety regulation and product liability insurance. A number of useful books are devoted to each of these aspects of product liability law, but none perhaps so successfully blends the many facets of this intriguing field as this new edition of *The Law of Product Liability*.

David Owen
February 2007

Preface to the Second Edition

In the Preface to the First Edition I mused whether European product liability lawyers would struggle to find cases to discuss or whether they will be deluged as in the United States. Well, although there has not been an avalanche, there does seem to be a snowball effect as across Europe the provisions of the Product Liability Directive begin to be litigated. This poses a challenge to the European harmonisation project for, as the Commission itself has noted in its Third Report of Product Liability, there is a tendency for the jurisprudence to diverge across Europe. Closer to home we have the problem of knowing how influential the decision of Burton J in *A v National Blood Authority* is likely to be. It is undoubtedly an ambitious judgment and will go down in the annals of legal history for its use of comparative law and academic writings (including citation of the first edition of this work!), but it has hardly been central to many of the subsequent judgments. Knowing how to fit this case into the prior academic writings and subsequent, albeit limited, case law has been one of the hardest writing tasks I have faced. I hope I have thrown some light on the issues, rather than adding confusion. However, as the jurisprudential basis of strict liability remains disputed I suspect we will all be debating core issues like the meaning of defectiveness and the scope of the development risks for many years to come. The Commission seems unenthusiastic about reforming the Directive; so if a central steer is to be given it is more likely to come from the European Court of Justice.

Many of the chapters have needed to be extensively rewritten. The influence of Europe has again been strong. Notably in the area of sales law the Consumer Sales Directive has required significant alteration of UK sales law. Many of these reforms affect quality defects rather than safety, but we felt they needed to be addressed. However, I hope the other contributors will forgive me if I dwell a while on the product safety chapter. The revised European General Product Safety Directive, implemented in the United Kingdom by Regulations in 2005, has the potential to bring about a dramatic change in the attitude of business to safety regulations. The balance of power has changed. Businesses are now required to notify authorities when they have supplied dangerous products. They need to take appropriate action, including where appropriate recalling products from consumers. In the final analysis public authorities can themselves recall products. This creates a new regulatory climate in which consumer safety has an increased priority.

Hopefully, strong regulation should reduce the number of consumers injured by defective products. For the unfortunate few injured by defective products the task of the law is to provide laws that provide fair redress. Of

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course a major challenge to society is to ensure that there is also access to justice to invoke those rights. That raises broader questions of the role of law in delivering social justice. It is clear, however, that the law will be central to products liability and safety and that this new edition seeks help those grappling with the complex conundrums it throws up.

Geraint Howells
Edgworth
15 February 2007

Preface to the First Edition

It was a pleasure and an honour to be invited to edit this book on product liability as part of the *Butterworths Common Law Series*. The task was made easier by the diligence of my fellow contributors who have managed to work to strict timetables and also by the publishers who have supported us throughout and shown their commitment to this book and the series.

The fact that product liability was chosen as one of the first areas to be covered in the series perhaps indicates the coming of age of this subject as a legal discipline. Product liability in the UK is still a young subject with only a handful of cases decided under Part I of the Consumer Protection Act 1987. However, it is a subject which has excited academic interest as it flirts with new concepts of civil (strict) liability. Its commercial importance extends beyond the few reported cases, because firms are conscious, as a result of the US experience, of the potential impact product liability can have on their business. Equally, claimants' lawyers are starting to become more pro-active and there is more litigation on-going than might be expected given the low number of reported cases.

There have been several books and many articles written about product liability since the 1985 EC Product Liability Directive was adopted. The challenge was to find a way this book could add a new dimension. Hopefully it does so in three ways. First, it tries to cover the issues in a systematic and comprehensive manner. Second, it takes a broad view of the subject matter. It does not restrict itself to strict liability, but also covers contract, negligence, causation, private international law, group action procedures, regulatory controls on product safety and insurance issues. Third, where relevant we have side-stepped the lack of UK case law by drawing on comparative materials.

The next years are likely to see increased product liability litigation. We hope this book will provide a reference point for those grappling with the difficult issues that are bound to emerge as old and new liability rules alike get tested by the new challenges thrown up by the tragedies resulting from everyday interaction with products.

Law books have a tendency to grow in size as laws become amended and case law becomes more developed. If this book is fortunate to pass into several editions it will be amusing to see if the European product liability lawyers of

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the future will also be struggling to find cases to discuss, or if, like their US counterparts, they will be suffering trying to keep up to-date with the deluge of cases.

Geraint Howells
18 October 2000

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