

COMMERCIAL COURIER
LEGAL DEVELOPMENTS AFFECTING YOUR BUSINESS

This column looks at new laws and regulations which will have an impact on your business.

LIABILITY FOR DEFECTIVE PRODUCTS

*by Dr. Frank Chetcuti Dimech**

*Partner, CDF Advocates (<http://www.cdf.com.mt> - Telephone 21223334, Mobile 79223334, Fax 21248594, e-mail: fcd@cdf.com.mt). CDF Advocates specialise in commercial law, company law, financial services, taxation, telecommunications, privatisation and alignment with EU law. This article is for information purposes and must not be relied upon as advice.

Introduction

Last month we took a break from our review of the Consumer Affairs Act to look at the Data Protection Act. This month we will resume analysing the Consumer Affairs Act by having a look at the new provisions governing liability for defective products. These provisions are expected to come into force very soon, perhaps even before we watch the World Cup Final, as part of the Government's commitment to align Maltese law with the EU *acquis communautaire*.

The source of the new Part VII of the Consumer Affairs Act is the EU Directive 85/374 on Liability for Defective Products. Since 1985, the Directive on liability for defective products introduced in the Community the principle of objective liability or liability without fault. According to it, and soon according to Maltese law, any producer of a defective movable must compensate any damage caused to the physical well-being or property of individuals, independently whether or not there is negligence on the part of the producer. This constitutes a revolutionary change in the way producers, suppliers and vendors of products will be held responsible for damages caused by the goods they put into circulation in Malta. The new provisions are a clear derogation from the normal rules of civil liability in the Civil Code. At least, however, the new rules will only apply to products which are put into circulation in Malta after the coming into force of the rules.

In the aftermath of the "mad cow" crisis, the European Commission presented a proposal to extend the principle of liability without fault for defective products, as foreseen under Directive 85/374, to primary agricultural products and game. Directive 99/343 obliged the EU Member States to extend the scope of strict product liability to unprocessed primary agricultural products, and this has also been incorporated into our law.

Reporting on the impact of the Directive in 2001, the European Commission noted that the number of claims based on defective products seems not to have increased. It is stated that the level of product safety increased considerably since the Directive was adopted in 1985. This situation results from the existence of a high safety level ensured by a strict regulatory framework, namely in certain product sectors, such as

pharmaceuticals, chemicals, machinery, electrical equipment, while the other sectors are covered by the Directive 92/59 on General Product Safety. Industry is said to take into account these safety features in design, production, labelling and post-marketing systems and uses extensively good practice standards. The Directive on Product Liability has a deterrent effect on manufacturers and suppliers and gives them a strong incentive, alongside the obligations under the afore-mentioned safety regulations, to improve the safety level.

In Malta, the Product Safety Act (Chapter 427) came into force on 1st March 2001, and various Legal Notices have been issued thereunder to establish safety standards for a wide range of products, although many more still have to be regulated. In fact, the test to determine a product “defective” under the Consumer Affairs Act is very similar to the requirement that consumer products should not be “dangerous” under the Product Safety Act.

Six Principles of Liability for Defective Products

The law on liability for defective products can be summarised in six principles:

The producer's civil liability is:

1. **objective** - no need to prove the fault,
2. **relative** - the producer is exempt from liability when he proves the existence of certain facts,
3. **limited in time** - the producer is not liable for an indefinite period, and
4. **liability that cannot be waived** at the wish of the parties;

The victim's rights and obligations are:

5. **he has to prove that damage has occurred**, that the product was defective and that there is a causal relationship between the defect and the damage suffered, and
6. **joint and several liability** - allowing the victim to approach any of those liable without prejudicing his right of complaint.

When is a Product Defective?

First of all the item in question must be a “product”, which is defined as any movable and includes (a) any movable incorporated into another product or into an immovable (e.g. a door, window, etc), (b) electricity, (c) gas, and (d) primary agricultural products. Liability is based on a *defective* product. A product is defective when it does not provide the safety that a person is entitled to expect, taking all the circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation. For instance, if a television spontaneously bursts into flame during the course of normal use, then clearly it is *prima facie* defective.

A product will not be considered defective only because a better product is subsequently put into circulation. However a product will be considered defective if it does not provide for the safety which is usually provided for by other models of the same type.

Whether a product is defective should in practice therefore depend on:

1. The extent of general public knowledge that a product is dangerous (for example, that it is a kitchen knife and therefore sharp or that it is a poison rather than confectionery).
2. The product information and warning supplied with or for the product, its labelling information and data sheet, marketing material and statements by sales representatives.
3. Any unintended use, misuse, abuse or re-use that could reasonably be expected (such as an overdose in relation to, for example, medicinal products).
4. Any expiry date given for the product.

Who is Liable?

Anyone involved in the production process is liable if his/her product is defective, as are importers of products into Malta or persons who present themselves as being involved in the production process by affixing their name, trade mark or other distinguishing feature to the product, or a person who supplies the product where the producer is not identified (“own branders”). The concept used in the law is that of a “producer”, which means:

- (a) the manufacturer of a finished or processed product, or
- (b) the manufacturer of a component part, or
- (c) the producer of any raw material, or
- (d) the producer of any products of the soil, of stock-farming and of fisheries and game, or
- (e) any person who, by putting his name, trade mark or other distinguishing feature on the product, presents himself as its producer, or
- (f) where the product is manufactured or produced outside Malta, any person who imports into Malta a product for sale, hire, leasing or any other form of distribution.

If a producer cannot be identified, each supplier is treated as a producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. It is, therefore, important for suppliers to keep records so as to be able to identify, in relation to each product supplied to each customer, the producer or previous supplier of the product.

The liability of a producer for defective products cannot be limited or excluded whether by any term of contract, by any notice or in any other manner whatsoever.

Burden of Proof

The injured party shall only have the onus of proving the damage, the defect and the causal relationship between the defect and the damage and shall not have the onus of proving the fault of the producer. Therefore the initial burden of proof of causation still rests with the injured person, who is required to prove that damage, the defect and the cause or relationship between the two. However, the burden of proving when the actual product which caused the damage was put into circulation shall lie on the producer.

It is also important to note that unlike in normal civil cases when the fees of an expert or referee are provisionally paid by the plaintiff or by the party who requests the referee, in the case of defective products the Court may order that the fees of a referee be provisionally paid or deposited by the producer if there is prima facie evidence that the damage was caused by a defect in the product.

Damages which can be claimed

Damages that may be recovered are (a) damages caused by death or by personal injury, or (b) loss of, damage to, or destruction of, any item of property other than the defective product itself, having a value of at least two hundred liri, or such other value that the Minister may prescribe, as long as (i) the item of property is of a type ordinarily intended for private use or consumption, and (ii) the item of property was used by the injured party mainly for his own private use or consumption. "Personal injury" includes any disease and any impairment of the physical or mental condition of a person. There is therefore no upper limit on the damages which can be claimed and these will have to be computed according to the normal rules of civil law and do not extend to moral damages.

Defences to a Claim

The law provides six specific defences for a producer:

- (a) that he did not put the product into circulation, or
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards, or
- (c) that the product was neither manufactured by him for sale or for any form of distribution for an economic purpose nor manufactured or distributed by him in the course of his business or trade, or
- (d) that the defect in question is due to compliance with a mandatory requirement imposed by law or by a public authority, or

(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered, or

(f) in the case of the manufacturer of a component or the producer of a raw material, that the defect is attributable to the design of the product in which the component has been fitted or the raw material has been incorporated or to the instruction given by the manufacturer of the product.

The most important defence, as far as most manufacturers are concerned, is the “state of scientific and technical knowledge” or “development risks” defence. This defence excludes a producer from liability, if he can prove that the state of scientific and technical knowledge, at the time when he put the product into circulation, was not such as to enable the existence of the defect to be discovered. As might be anticipated, this defence is particularly crucial to those manufacturers working in “state of the art” hi-tech industries, such as advanced computer software systems.

Limitation of Actions

The law specifies tight time limits after which strict liability actions may not be commenced. There is a limitation period of three years running from the day that the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. There is also a final cut-off date of ten years from the date on which, broadly speaking, the producer put into circulation the specific product that caused the damage, unless proceedings have been instituted meanwhile. This cut-off date may well turn out to be beneficial for manufacturers.

The practical impact of limitation rules concerns how long companies should keep particular types of record. There is no easy answer to this question, but consideration of relevant regulatory provisions is necessary, as well as an assessment of the risk and the commercial cost of storage.

Practical Risk Points

Product liability claims tend to be based on particular risks. These are:

1. **Defective design:** The product is inherently dangerous. These claims can sometimes be complex and difficult for claimants to prove.
2. **Defective manufacture:** A single product or a particular production batch does not conform to specification. This is essentially a quality control failure. It is now much easier and cheaper for claimants to succeed in some of these claims under strict liability than in negligence.
3. **Defective warnings:** This is a favourite area for claimant lawyers, but it can be difficult and expensive both to prove and to defend. Do the warnings and product information accurately reflect the level of safety to be expected, and the state of scientific and technical knowledge? Are they up to date? Do they comply with

regulatory requirements? Are they contradicted by statements in any advertising or made by sales representatives?

4. Negligent post-marketing surveillance or action by the company: Has the company responded in a reasonable and timely manner to information about the product's lack of safety in use, including misuse? Does the company have a satisfactory post-marketing surveillance and recourse system? Do the systems measure up to obligations on producers and distributors under the general products safety directive, quality systems such as ISO9000 and the state of the art?

Practical Steps for Reducing Risk

The following are some of the important steps that manufacturers and distributors should take to reduce the risk of product liability claims:

1. Take active steps to ensure that only safe products are designed, manufactured and marketed.
2. Monitor trade literature.
3. Review the operation of the quality management system.
4. Review product committees: These should be multidisciplinary (involving at least product managers, lawyers, marketing personnel and designers), and should approve all product liability features.
5. Pay particular attention to ensuring that the consumer or user is given complete and accurate information on the safe use of the product and on product risks and how to avoid them.
6. Warnings should be kept up to date and strengthened where appropriate.
7. Review design and safety features of your own and competitive products and their labelling.
8. Review the creation and retention of documents in product information.
9. Ensure that an effective post-marketing surveillance and reporting system is maintained to inform of problems arising in use, to assess and test information arising and returned products, and to take appropriate action.
10. Ensure that an effective crisis management plan and team is in place, which is able to respond immediately and which is regularly trained through simulated exercises; teams should include inside and, where necessary, outside experts in products, technology, management, PR, law and product recall; there should be an ability to identify customers and users, and effectively recall products or pass on safety information.
11. Review contractual warranties, indemnities and exclusion clauses. An attempt expressly to exclude liability for a safety matter, ordinarily implied by law in a contract for the sale of goods, will generally be unenforceable by a commercial seller against a consumer, either completely or at least to the extent that the exclusion is unreasonable.
12. Ensure that Customer Service Departments respond promptly and appropriately. For instance, consider increasing the level of a deductible under an insurance policy so that a reasonable level of claims in house can be settled. It would also make good sense for a manufacturer to review its level of insurance cover.

13. Establish good relations with the relevant regulatory and local enforcement authorities, to ensure they understand the factors relevant to the product and the company.
14. Recognize that control of litigation is important and that decisions are made in the commercial interests of manufacturers rather than their insurers; manufacturers and suppliers are increasingly negotiating insurance arrangements, possibly involving captives, under which they, not their insurers, retain control of litigation and the right to select their own lawyers.
15. Recognize the need to be aware of likely legislative reform proposals, and to have the ability and advisers to assess these and carry out effective lobbying at an early stage.

Conclusion

Product liability is no longer a simple or isolated matter. It is not simply a case of a manufacturer ensuring that he or she has complied with product-specific regulatory requirements. The mere fact that a product has been “CE marked” – let alone when it is not - is no guarantee that it is defect free. Rather, product liability is a minefield of complex law, litigation procedure and sophisticated tactics. The stakes can be high and defects can strike suddenly and require expert handling. Complacency is itself a risk. Make sure your company is prepared!