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Green Paper and the Future of Product Liability Litigation in Europe

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Contents

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Green Paper and the Future of Product Liability Litigation in Europe

PART ONE: PRODUCT LIABILITY IN EUROPE AND THE ROLE OF THE EUROPEAN COMMISSION

Mr. James Wootton: There's a dramatic difference in cost between litigating in the United States and litigating in other countries. That cost is coming to the attention of policymakers and people who are responsible for litigation in major corporations.

An aggressive effort by U.S. trial attorneys to export our system, which is the costliest system in the world, is creating some anxiety in Europe and other areas of the world. The question is whether or not that anxiety is justified.

Ms. Leah Lorber: Before 1985 there was no strict liability for defective products in Europe. Each Member State had its own unique national system of law. These were primarily fault-based schemes of law, like negligence. Some of the Member States also had contractual liability for defective products, similar to warranty schemes. There were a few States that had specialized liability schemes for pharmaceuticals.

In 1985 the Council of the European Union adopted the first Directive on liability for defective products.[1] The Directive imposed strict liability for the first time—and it applied throughout much of Europe. The Member States didn't have to individually develop their laws of strict liability, as has happened in each of the United States over the past thirty years.

The point of the Directive was to bring the diverse laws of the Member States together to make them more uniform and to encourage the growth of the single Common Market in Europe. The Council wanted to make uniform certain consumer protections, remove barriers to the free movement of trade, and encourage predictability.

The Directive is essentially a treaty among the Member States that governs product liability law; each Member State needed to adopt its own legislation to implement it. The Directive is based somewhat on American strict liability law as it is explained in Section 402A of the American Law Institute's *Restatement (Second) of Torts*. The Directive provides that a producer will be liable for damage caused by a defect in his product. This was a substantial change from previous law, because instead of requiring the plaintiff to prove fault, manufacturers could be held liable for defects in their products whether or not the manufacturers were actually negligent. The existence of a "defect" is key, and "defect" is determined by the "consumer expectation" test. Under the consumer expectation test, a product is defective when it does not provide the safety a person is entitled to expect under the circumstances—taking into account such things as the marketing of the product, the instructions and warnings on a product, the reasonable use of the product, and the date the product was put on the market.

The Directive deals only with damages for personal injury, death, and property damage over 500 ECU (a commercial unit used before 1999), which were caused by a defective product. Under the Directive, even with strict liability, the plaintiff must prove damage, product defect, and causation. The Directive is targeted towards consumer products, although there's been some discussion about expanding it to include commercial products as well.

The Directive contains an optional development risk defense that was, and still is, fairly controversial. The development risk defense is like the state-of-the-art defense in the United States. There is no liability for the producer if the state of scientific or technical knowledge at the time the product was marketed made the defect in the product undiscoverable. Most Member States adopted

this defense, but the Council and the European Commission reviewed this particular provision very closely to see how it was affecting the implementation of strict liability among the Member States.

Also in 1985, the Directive instituted joint and several liability, but it didn't provide any rules for contribution or indemnification. Those were left to the national legal schemes. The Directive does, however, provide a three-year statute of limitations and a ten-year statute of repose. There is also an optional damages cap of seventy million ECU. Most states adopted it. There has been a proposal to double that cap.

The Directive is widely applicable; it may apply to manufacturers of finished goods, manufacturers of raw materials, manufacturers of component parts, people who import defective products into the Member States, and people who hold themselves out as product manufacturers by putting their name or trademark on a product. Initially the Directive didn't apply to unprocessed agricultural products, but since the mad cow disease scare in Europe the Directive was amended, in 1999, to include strict liability for damage to health caused by unprocessed agricultural products like meats.

It's important to remember that the Directive doesn't deal with claims for non-economic damages. It doesn't deal with pain and suffering damages or other non-economic damages, and it doesn't address punitive damages.

The 1985 Directive didn't fully harmonize the national laws and it doesn't change national fault-based or contractual liability rules. But it does lay a strict liability scheme over each Member State's liability rules. It allows plaintiffs to sue under the strict liability scheme as well as under the negligence schemes of their individual States.

It's important to remember that the Directive doesn't deal with claims for non-economic damages. It doesn't deal with pain and suffering damages or other non-economic damages, and it doesn't address punitive damages. That's left to the individual Member States. Member States also retain a fair amount of discretion in determining statute of limitations issues, although the Directive provides that the statute of limitations is supposed to start running when the plaintiff learns of the defect, the damage, and the identity of the producer. Effectively, this means that individual courts will determine exactly when the statute of limitations should be suspended.

The 1985 Directive also didn't alter national procedural rules, for instance the rules that governed burdens of proof, discovery rules, and multi-plaintiff actions. Consequently, the procedural rules in the different Member States differ on these issues. In fact, some states reverse the burden of proof, and force defendants to prove that they were *not* liable for a claim instead of making the plaintiffs prove that the defendant *is* liable for the claim.

On the other hand, most States do not have much of a discovery process, and only a few States require that producers turn over relevant information. Otherwise, the rule of thumb in most Member States is that plaintiffs don't have an opportunity to obtain information through discovery that may be crucial in proving their claim.

"Loser pays" rules are also relatively common: in some states the losing litigant pays the winning litigant's legal costs, attorney's fees, or both, although in some states, the governments provide legal aid for plaintiffs who want to sue.

The Directive provides a place to start for strict products liability, but there are still areas where changes can be made. The European Commission is supposed to review the Directive every five years to see how it's working and to propose any necessary changes. The European Commission is the body of the European Community that is responsible for proposing legislation, but it does not have the power to actually adopt or amend legislation. The Commission needs to make proposals to the Council of the European Union and the European Parliament, whose members then jointly decide whether to adopt any changes or not.

In 1999 the Commission issued a Green Paper about how the Directive was being implemented in the Member States, and made several proposals for change. Most of the changes were heavily plaintiff-oriented, although the Commission has said that it wants to balance consumer protection with preserving innovation, product development and availability, and protections for producers.

The proposed changes include flipping the burden of proof for strict liability cases—inferring that a defective product was the *cause* of the damage when the damage and defect are proved, or inferring that a prod-

uct that caused damage was defective when causation and damage are proved.

The Green Paper also suggested introducing market share liability, which weakens or tosses out the requirement of causation. Once a plaintiff proves that a product has caused damage, liability is imposed on all the manufacturers of that product according to their market share.

The best example of that is in the United States with the drug DES (diethylstilbestrol), which was marketed by a number of different producers but essentially was the same formulation no matter who made it. The producers were held liable for birth defects caused to children of mothers who took this drug, based on their share of the market.

The Green Paper also proposed abolishing the development risk defense, which again would hold producers liable for defects in their product that could not be discovered at the time the product was marketed.

The Green Paper also suggested introducing market share liability, which weakens or tosses out the requirement of causation. Once a plaintiff proves that a product has caused damage, liability is imposed on all the manufacturers of that product according to their market share.

Finally, the Green Paper has also proposed liberalizing discovery procedures, such as requiring the production of all useful information to the plaintiff—which would create a logistical nightmare for defendants—and requiring manufacturers to pay the fees of plaintiffs' experts with a refund if the plaintiffs lose.

When the Green Paper was issued in 1999, there was extensive opportunity for public commentary. Most comments came from consumer groups, manufacturing groups, governments, special interests, and lobbying groups for attorneys. Ultimately, however, most people believed that there was not enough information about the application of the Directive to be able to make any substantive suggestions for change. Some people felt the Directive worked well, and there was no need for change. Others believed the Directive did not provide enough consumer protection and pro-plaintiff changes were necessary.

A report on the European Commission's proposal is supposed to come out next month. Once the report is made, it goes to the Council for the European Union and European Parliament for joint decision-making. As a result, whatever the European Commission comes up with is not by any means a final answer.

PART TWO: CONTENT AND FUTURE OF THE GREEN PAPER: A EUROPEAN PERSPECTIVE

Mr. Chris Hodges: As Leah Lorber has admirably set out, the product liability Directive is focused on strict product liability. National laws cover negligence liability and contract liability, and the Directive has not harmonized them.

Diligent efforts in Europe are beginning to organize common European principles of tort law and contract law. I expect that that work will take many years and will be rather difficult to do, because if one starts off with intrinsically different systems of common law, as in the United Kingdom and Ireland, and civil law, as in the rest of Europe with the Napoleonic Code, *et cetera*, it is rather difficult to mesh the two together. Undoubtedly, we will get there eventually as long as Europe stays together as one entity and the problems over a common currency do not derail us in the meantime.

Strict liability was relatively new and therefore could be harmonized through a directive. One should, of course, remember that claims could potentially be based on any theory. I typically see claims that are based on both negligence and strict liability. There are very good reasons for this since they obviously lead to different results.

The Directive is sometimes, in Europe at least, referred to as the "world standard". I haven't heard that phrase for a couple of years, and I don't actually believe that it is true. I believe that the work done in the United States is definitely more impressive, if not more correct as a standard. But it was the case that the European Directive, which is relatively brief and simple without many comments, has been adopted in many other countries, notably Australia's part 5A of the Trade Practices Act in the early nineties, and Japan in its law of 1995.

Japan is an interesting case because the Directive, as Leah said, essentially relates to personal injuries or

damage to personal property, and there it can also be claimed for damage to businesses or economic losses like a factory burning down. In Europe you don't need the extension of that theory because you have negligence theories or contract theories that apply to those instances.

This year China has introduced a product quality law that contains a number of different provisions including a specific provision on liability compensation for damage, and it is identical to the European Directive. It even includes a development risks defense, since China wished to protect their nationalized business entities through this means.

The development risk defense is one of the most controversial parts of the Directive. There are arguments about what it means, arguments about whether, in fact, it sets too high a standard for industry ever to satisfy. But it is at least an important symbolic concession since it encourages innovation. There is a great fear that if the Directive is changed, through the reversal of the burden of proof and by removing the development risks defense, there will suddenly be a very dramatic change in the balance of the law to favor plaintiffs. The Directive itself refers to a balance between the interests of consumer protection and the protection of innovation and industry. The question, then, is what is the correct weighting of these two objectives?

The development risk defense is one of the most controversial parts of the Directive. . . . But it is at least an important symbolic concession since it encourages innovation.

One case of the development risk defense that is of particular interest (as I said, there are very few decided cases, and very little litigation at the moment under the Directive's provisions) is a case from the Netherlands about HIV-contaminated blood. The Netherlands court said in the late 1990s that anything other than 100 percent virus-free blood was defective. That's a very high standard. It shows that the courts are taking a very strict approach towards consumer expectations and the definition of defect. However, on the facts of the case, they said that at the time the product was placed on the market, which was in the early to mid-1990s, the defect (the existence of the virus in the blood supply), was undiscoverable. A few months later science progressed and it became discoverable, but it was not at the time the injury occurred.

So, the development risk defense succeeded in that case. The judgment in the case is extremely brief and doesn't go into a great deal of philosophical justification. It just deals with the facts and presents a decision.

The big question is what is happening in regards to reform. Every five years the Commission has to undertake a formal review of the Directive as part of the compromise that was reached between consumers and industry. Other directives, such as the general product safety directive, also contained similar periodic review provisions. In 1995 there wasn't much to review because experience with the Directive was minimal, and many member-states had only recently transposed the Directive into national law. Consequently, the consensus at that time was that there was no need to change the Directive since there was very little evidence that mitigated for change, other than the usual rhetoric espoused by consumer groups and industry.

However, a very important phenomenon emerged in the mid-1990s in relation to food safety, in particular, "mad cows". Mad cow disease (BSE[2] and CJD[3]) has had and continues to have a profound effect on the European approach to product safety. It has lead to a complete review of European food safety regulation. A white paper was published on it earlier this year, and a European food agency is proposed to be established over the next two years.

In the area of product liability there was a movement in the European Parliament to remove the optional provision under which some countries can exclude producers of beef from liability. This recommendation was taken up, and it led to the Commission proposing to remove the optional provision that related to agricultural products. Consequently, it survived the legislative process and, in 1999, resulted in a minor amendment for most people, but a major amendment for producers or suppliers of beef.

It probably doesn't make a great deal of difference in practice, because in the typical situation in which someone suffers from mad cow disease (CJD) there is no way to tell which hamburger it was that the afflicted person consumed five years ago that contained the defect. However, as the amendment was being considered, the European Parliament, with a clear socialist majority and

a strong pro-consumer lobby, made a lot of noise about amending the Directive wholesale. Broader proposals emerged over the course of the legislative debate and supporters attempted to, effectively, hijack the original reform proposal that related only to food products. Luckily, they were ultimately defeated on the final vote in Parliament—but only by a fairly narrow margin.

Nonetheless, some movement did occur. The Commission decided to follow up this amendment with another report, published in December 2000. Beforehand, they organized a large public debate in order to gather all the relevant evidence. Initially, there were many questions to answer as to whether or not product liability was a problem in Europe. How many cases were there? Did the Directive lead to economic difficulties for producers or insurers; or did it lead, as consumer advocates would say, to instances where plaintiffs could not bring legitimate claims or legitimate claims failed because of certain litigation roadblocks?

So the Green Paper was issued, effectively trying to draw out answers to all the points that anyone had ever made in the previous twenty years when arguing that the Directive should be amended. And the Commission was very careful to leave nothing out.

Inevitably, it contains a pro-consumer list of amendments because only consumer groups proposed that the Directive should be amended. One should not misunderstand the role of the European Commission; the relevant Directorate General in the Commission has tried and, I believe, succeeded in being entirely neutral between the various lobbying groups. It is merely asking questions and seeking objective answers on the evidence provided.

These are, as they always were, the central issues: Should we reverse the burden of proof? Should we remove the development risks defense? Or should we only make it available for certain sectors and not others? Should the ten-year cut-off be extended? What about the seventy million ECU ceiling?

The proposal on psychological injury can be misunderstood. What the European Parliament originally meant by this was to allow claims for people who are afraid that they *might* develop CJD in the future. If that proposal passed, it would be extremely revolutionary and would mean that almost all of us could claim damages, which would obviously bring the entire European economic system to a grinding halt rather quickly. Consequently, it cannot be a sensible proposal. But insofar as one is enabled to claim for medically verified medical injury, including psychological injury, it is not revolutionary, because most member-states already allow it.

The proposal on psychological injury can be misunderstood. What the European Parliament originally meant by this was to allow claims for people who are afraid that they might develop CJD in the future.

There are a number of proposals in the Green Paper that have nothing to do with substantive law, but relate to issues of access to justice, funding for plaintiff lawyers, and procedural aspects of litigation, which are subject to the jurisdiction of national law and are not as yet covered by any directives. But, as I mentioned, those proposals are subject to very early review to see to what extent one can come up with common principles that might, in due course, be harmonized in some way. Make no mistake, we are years away from any such developments. But national governments are individually moving forward in ways that tend to suggest eventual convergence.

One other thing we should note is that since the BSE amendment passed we have a new European Commission and a new European Parliament from elections held last year. Although it is true that the majority of governments in Europe are essentially socialist, the European Parliament, perhaps to everyone's surprise, moved slightly more to the center-right.

Also, within the Commission there is great concern for consumer safety and rebuilding consumer confidence in European regulatory systems for food safety. It is possible that the Commission may want to do something serious or dramatic in relation to product liability as part of further regulatory changes. But the basic two questions in the Green Paper are: Does the law work as it stands today? And, if it doesn't, what would happen if any of these changes were made?

One must remember that the European Commission's brief is to come up with economic answers. They not only must come up with an economic system in which there is free trade, but also, under the EC treaty,

they must take into account safety of citizens and consumer protection issues.

Consumer advocates, as you might expect, said everything should be changed, but they did not provide any justification. Industry, in a succession of replies to the Green Paper, put forward a consistent response (and the degree of consistency across different sectors of industry was remarkable). Their basic contention, which might have been controversial a few years ago, and even twenty years ago may not have been true, was that products are safe in Europe. And there is evidence to support this argument.

If you talk to product safety regulators and enforcement officials, they say that their major concerns in Europe focus on some consumer electronics, and some toys that are imported from the Far East. Products that are made within Europe or come from North America or Japan, or from companies that have their corporate base in those trading centers have, generally speaking, very high safety standards. This is because, over the past twenty years, industry has developed good safety mechanisms and quality control systems that have been disseminated and adopted internationally, coupled with increasing product regulation.

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Therefore, you would expect there to be very few defective products and very few people getting hurt by them. There are some statistics about the number of accidents, which one hears bandied about frequently, which seem to indicate that a large number of people are hurt in accidents, but authorities say that is because of the *way* the products are used, rather than product defect per se. Human behavior is the most important determinant in accidents, rather than bad design, or bad labeling, or bad manufacturing practices. Consequently, that is why you find very few claims for defective products in Europe. Generally, claims are settled satisfactorily, usually out of court through the insurance system, and there's no need for any change to encourage more litigation.

What would happen if a significant number of changes were introduced to increase consumer protection? If it were true that there are a relatively stable number of claims and a relatively stable number of safe products, one would not expect the number of claims to rise in a normal economic and legal system. But speculative claims would be encouraged, and the costs of unnecessary litigation would begin to spiral. This would increase costs to industry and have an adverse effect on innovation and competitiveness. Thankfully, the European Commission's major justification in considering revisions to its economic system is so that Europe can compete with the United States and Japan. It certainly doesn't want to fall behind thanks to burdensome litigation.

Finally, it has been observed that there is more product liability litigation in the United States than in Europe. The reason, the Europeans believe, is not because there is any real difference in substantive law, i.e. the definition of negligence or strict liability, but due to how Americans structure access to their civil justice system and encourage litigation.

In fact, there are many of structural differences, some subtle, some profound, that shape the legal culture in Europe. For instance, only a few of the fifteen states in Europe (basically the United Kingdom and Ireland) allow advertising by lawyers. In most other states advertising by lawyers is either illegal or prohibited under current bar rules. Frankly, I don't think that this restriction will continue for much longer, but it is the status quo. Furthermore, Europe does not have the polarized, heated exchanges between consumer groups, plaintiff's lawyers, and industry to the same extent as in the United States. Consequently, the identification of ideological positions is much more diffuse in Europe than in the United States.

Another major difference is the relative absence of contingency fees. A number of member-states permit contingency fees, but they are very rarely used, for a variety of good reasons. In the United Kingdom, there is a specific mechanism called a conditional fee agreement, which is too complex to describe here, but it essentially limits the amount of money a plaintiff lawyer can obtain under its aegis. (Other countries are looking at the U.K. system very carefully. South Africa has adopted a similar rule that it calls a contingency fee, but in fact it's the classic English conditional fee system.)

Perhaps more significantly, juries do not decide questions of liability and content in Europe. Those are decided by professionally appointed or career judges. The levels of damages that are generally available in Europe are lower than they are in the United States, although they do vary from country to country (Ireland, for example, is a particularly generous jurisdiction). On a related topic, there are no European states that I'm aware of that have punitive damages for product liability. There are claims by consumers that punitive damages should be introduced, along with jury awards, but there's no realistic prospect of any change other than on questions of contingency fees or conditional fees at the moment.

Lastly, many European jurisdictions have a loser pays rule, although the extent to which it operates can vary. Certainly in the United Kingdom the existence of the loser pays rule has a significant effect on inhibiting speculative litigation.

Outside of the context of litigation rules per se, national health care is a very important sociological difference between the United States and Europe, and influences many social policy questions. In Europe for the past fifty years, we have had systems under which individual health care is provided by the state or by private insurance schemes, and there is broader provision for social security in general. Therefore, the role a compensatory litigation regime would play in Europe is much more limited, and governments and judges don't feel pressured to dole out damage awards in fear that individuals are being left destitute by injury or disease. There are obviously enormous costs to this approach, but it does result in less, and less costly, litigation.

If we look at litigation procedures in the broader sense, there are some other rule changes occurring in multi-party actions or class actions. Internationally, the trend has been moving out from Rule 23 in Canada, and Australia in 1992. Spain is about to introduce a class action rule. The United Kingdom introduced one earlier this year. Germany is thinking about it. Sweden is thinking very seriously about it, in which case Norway and Finland would probably follow suit. These rules are nationally based, the Commission is not involved, and consequently every Member State will have a different approach to this issue.

There is quite a lot of misunderstanding, I think, amongst the governments and a number of the academics who are looking at these rules as to exactly what they're supposed to do and what effects they would have. Consequently, this issue seems to be diversifying unnecessarily.

Individual litigation claims aside, there are other mechanisms that are being introduced, mechanisms relating to consumer organizations having the ability to bring claims. In a number of countries (France, Portugal, Spain) one may find specific national rules under which consumer organizations can bring either regulatory style claims or, very rarely, compensation claims. That mechanism may be expanded. The United Kingdom may introduce some similar rules along these lines.

The European Commission has another directive that relates to the regulatory aspects of consumer trading (rules such as package holidays or advertising for medicines, and unfair contract terms) in which a consumer organization in one state can bring an injunction in another state. This cross-border element is quite interesting. But, most importantly, the role of consumer organizations may be the thin end of a wedge that may widen. Anyone who is concerned about these issues ought to look at these proposals rather carefully to see whether they are theoretically and practically a sensible route to take.

The statistics show that 93 percent of the individual claims that are involved in these pharmaceutical actions failed, at enormous public cost. In that situation, the normal rule that the loser pays is suspended, under the former English legal aid rules.

Other factors that the United Kingdom features are, for example, advertising by lawyers and conditional fee rules. Also legal aid as an alternative to conditional fees (that was how conditional fees came about; the government spent an enormous amount of money on legal aid starting in the 1980s). Consequently, there is a long history in the UK of unique multi-party actions mostly relating to medicines and health.

The interesting thing about these claims is, firstly, they were almost all funded by legal aid. Secondly, they almost all failed before trial. Individuals' claims were struck out as not being supportable or were withdrawn. The statistics show that 93 percent of the individual claims that are involved in these pharmaceutical actions failed, at enormous public cost. In that situation, the

normal rule that the loser pays is suspended, under the former English legal aid rules.

Therefore, the defendant manufacturers had enormous expenses in defending the claims and winning, and were unable to benefit from the normal rule that they would get their costs back. The plaintiffs had the emotional trauma of believing they had good claims and were advised, perhaps, that they had some chances of success, but then failed. The Treasury ended up paying an enormous amount of money to claimant lawyers and claimant experts. That led to a fairly scandalous situation, as a result of which Legal Aid was withdrawn and privatization was implemented through the conditional fee system.

The conditional fee system is rather complicated, but the current U.K. government has revolutionized quite a few aspects. At the same time, the English civil procedure rules have been completely revolutionized. They were criticized as being too complex, too costly, and too lengthy. Now a new system is in place introduced by Lord Woolf, who is now the Lord Chief Justice. It is based on international thinking, including some American thinking on judicial case management. Now cases are resolved much more quickly including, at an early stage, ADR mechanisms and mediation. Also the number of writs that have been issued has fallen dramatically. There are, however, uncertainties about development of multi-party actions that may continue with a mixture of private funding through conditional fees and public funding through the successor to Legal Aid. So they are at a crossroads.

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The English rules are, as I mentioned, being studied both in relation to funding changes and litigation procedural changes by many other jurisdictions. Some of them were copied from Singapore, but members of the Swedish government, for example, were in London recently thinking about whether they were going to copy them, and a number of others are doing the same thing.

The European Commission is looking at other matters. There are rules based on conventions of directives on mutual recognition and cross-border enforcement of judgments. Those are being upgraded. There may be a uniform commercial code before long. That, probably in relation to contract, will be easier to draft than for tort, but it shows that things are moving.

The European Commission is very strong on the policy of increasing consumer access to justice. It is all very well to have a lot of laws that are pro-consumer if consumers can't use them (package holidays, unfair contract terms, and consumer guarantees). The European Commission is very interested in doing something about some of the scandalous delays and gridlock in some national litigation systems, such as in Italy for instance.

Therefore, the European Commission issued a Green Paper on Legal Aid and is looking at various other procedural aspects. The Commission says: "Surely, access to justice can be facilitated by member-states making more legal aid available so people can bring claims." As I said, that collides with the national experience of governments in the United Kingdom and Sweden, who have just deconstructed legal aid. I expect that that collision, if it goes anywhere, would lead the governments to say, "Well, we're not paying for it. We'll privatize it through the conditional fee system." The question then is, will the governments put in place checks and balances? Will they put in place insurance policies? Will they make sure that the loser pays rule is given sufficient weight so as to stop a sudden raft of speculative claims?

Finally, there is a general trend in regulatory law to emphasize what's not yet in any directive. There have been hundreds of directives that regulate different product sectors (pharmaceuticals in 1965, cosmetics in 1968, motor vehicles, machinery, medical devices, and toys during the nineties). They all relate to the rules of placing a product on the market and they will set the standards by which they will be measured. If one falls below the regulatory standards and causes injury, then the consequences will be relatively straightforward and predictable thereafter.

The directives, however, do not cover enforcement aspects to a large extent, which are left to national provisions. In the consumer area, and in many other industrial areas, the Commission is looking very carefully at inadequate provisions relating to market surveillance and enforcement. The obvious example is BSE, where the rules about what to do with cattle and which bits were not to be put into the food chain were not observed. In this case the enforcement and surveillance mechanisms clearly were inadequate.

The same approach is being taken under the general product safety directive. This relates just to consumer products rather than to products that are used industrially, but this directive is being amended at the moment and is going to push boundaries further. In general, it includes four propositions: that producers must place safe products on the market and effectively have a system under which consumers can obtain information about the safety of the product in use in the marketplace, assess that information, and if necessary take appropriate action post-marketing. What might be appropriate is not specified at the moment, but I suspect that we will end up with much greater guidance in particular sectors (redesign, remanufacture, changing the labeling, positively contacting consumers, or instituting a recall).

The issues on this Directive are slightly complicated in relation to how it interrelates with specific vertical sectors. Pharmaceuticals, medical devices, and telecommunications terminal equipment are, for example, vertical directives that apply in any event. But the horizontal provisions of the general product safety directive apply to the extent to which they're not already included. The reforms that are currently being proposed extend post-marketing obligations. Thus, we see post-marketing changes in regulatory provisions. Many of these are based on existing practice in the United States. So there will be an obligation post-marketing to notify the authorities of a dangerous product, extended recall obligations, extended powers of recall by the authorities, and a ban (probably fairly limited) on exporting products outside Europe if they are considered to be dangerous within Europe.

There is a great deal of dispute as to exactly what the precautionary principle means. If one goes back to the question of mad cows, it is saying we don't want that to happen again, we must take precautions against such a potentially enormous and significantly dangerous risk. But that begs a few questions because one has to know how big the risk is. One has to know quite a lot of information. The Commission has said, well, okay, if there is scientific knowledge and scientific information, the scientists will look at it and review risk first. The precautionary principle only comes into effect where there is scientific uncertainty. The point about changes in the general product safety Directive for product liability is that there will be greater enforcement in Europe. It may not be dramatic, but resources are being put into it. And, therefore, one must expect that there will be further consequences.

There is a great deal of dispute as to exactly what the precautionary principle means. If one goes back to the question of mad cows, it is saying we don't want that to happen again, we must take precautions against such a potentially enormous and significantly dangerous risk.

There is one other mechanism that I think is worth mentioning. In many states you do not find product liability claims in the civil courts because another quasi-regulatory mechanism exists, which in France would be called the *partie civil* mechanism. A consumer can go to a consumer organization sometimes or a regulator or a local county or state official and say, "Hey, this is a dangerous product. I may have been hurt. Please investigate it." That gives the enforcement official the ability to use wide powers of investigation and overcomes the discovery process at no cost to the individual consumer. If the enforcement official decides that the case is worth continuing and starts proceedings against the manufacturer, the individual consumer can piggy-back on the effectively regulatory criminal proceedings and make a civil claim for compensation. It costs the consumer nothing. It's very simple.

But it does include an interesting balancing question since, while the regulator might investigate, it doesn't necessarily mean he is going to take enforcement or prosecution proceedings. This results in (I would argue) a more objective view as to whether or not to institute these proceedings in the first place. Many people, I believe, don't fully understand the impact of litigation, and why people don't automatically go down the route of bringing a compensation claim in the normal way in the first place.

I realize that this may seem to be a confusing situation to the outside observer. But civil justice issues and questions of reform of regulatory law and enforcement are very fluid situations. The Commission will go on considering these issues. National governments will do the same. I rather liken it to a boiling cauldron in which quite a number of factors may change. Maybe they won't

change, or they won't change much, but there is enormous potential for change at the moment. It is quite clear that whatever the Commission says in its report on the Directive is not the end of the story. I actually believe that that report will recommend almost no change. It is possible that there will be something nasty in it for the pharmaceutical industry and for the agricultural sector. But it is equally clear that the Commission will take up the European Parliament's suggestion that these matters should be studied further. Therefore the cauldron will continue to boil and everyone will be left to stew for a while longer. But any eventual change, whatever its origin or intent, could change the state of product liability claims quite dramatically.

PART THREE: CONTENT AND FUTURE OF THE GREEN PAPER: AN AMERICAN PERSPECTIVE

Mr. Victor Schwartz: Back in 1978 when I was at the Department of Commerce, I was asked to go over to Europe when the European product liability code was first being written. There was a gentleman named Hans Claudius Ficker who was in charge of writing the code and he was a very righteous and learned gentleman. He had come over to the United States to Northwestern University and studied tort law under the aegis of Marshall Shapo. Dr. Ficker brought back from Northwestern a concept that was put in the code. I mention it because I think it led in part to some of the problems and the need for change.

That concept was to have one uniform definition of defect. And Leah Lorber, my colleague, mentioned it. It is, in essence, a "consumer expectation" test, which was somewhat vague in its language but was meant to apply to all of product liability law. At the time it was discussed that product liability was not a uniform concept and that one rule was needed for design defects, a different rule for manufacturing defects, and a third rule for warnings. Nonetheless, as the code developed, that approach was not taken. The approach that was taken mimicked, to some extent, the *Restatement of Torts (Second)*, with it's singular definition of defect.

When mad cow disease spread in Europe there was great concern that people who might be injured might not be able to recover, or that the code provided too great a stumbling block for recovery.

When mad cow disease spread in Europe there was great concern that people who might be injured might not be able to recover, or that the code provided too great a stumbling block for recovery. The concept that we have in the United States of "manufacturing defect"—something's in a product that's not supposed to be there—was not spelled out in the code. If it had been spelled out in the code it would have been very clear that cases where people were injured because they ate food that contained deleterious matter would have been easy cases to solve. But this approach was not taken up in the Green Paper. The Green Paper put forth a variety of changes, all stemming from this incident, but in my opinion the cures put forth in that document never really address the disease.

Some of the proposals that were put forth are quite far-reaching. However, to put these changes in context we must remember that changes in substantive law in Europe may not have as dramatic an effect as they do in the United States. As we heard earlier, they don't have juries in Europe, but the judges are very professional. There is a standing debate in the United States about elected versus appointed judges, but everything depends on the mechanism for selecting judges. The question is: Is that mechanism honest and effective? In Europe it generally is. Judges there are men and women who are there basically to do their job. In Europe there are no significant pain and suffering damages, and, for the most part, there is no contingency fee system or punitive damages—although significant attempts are going to be made to try to change that.

One of the proposals says that if the plaintiff proves that he has been hurt and that the product is defective, causation should be inferred. The burden should be on the defendant to show that his product *didn't* cause the harm. There has not been anything exactly like this in the United States. There is a doctrine called *res ipsa loquitur* which allows circumstantial evidence to be used to infer defectiveness of a product, and sometimes logical contortions have been made to jump over causation issues, but that proposal has never really taken root.

I tried to find out why this was so, and I met with a young professor from England who was championing this proposal and he said, "We need this change because

we do not have adequate provision for discovery from defendants. We do not have the system that you have in the United States where, in a personal injury case, a victim can obtain relevant documents from the defendant. So in light of that, let the defendant prove that his product didn't cause harm."

I made the suggestion that the real remedy for this problem would be to change their discovery rules. He said, "We're going to do that, too. We also want to have broader, more liberal discovery." That was his second recommendation. But he candidly said, "That's not within my jurisdiction. Because all I can do within my power in making changes in the code are to make substantive changes. So what I'm doing is to try to hurdle the problem we have with discovery by changing the substantive law. But I'm also calling for more liberal discovery, and that is a very important part of the Green Paper and that was probably not within the jurisdiction of the people who prepared it. But we are going to see in Europe, without doubt, pressures in many countries for more liberalized discovery."

We know from our experience that over-extensive discovery can be very costly and a terrific weapon to be used against people who represent defendants.

We know from our experience that over-extensive discovery can be very costly and a terrific weapon to be used against people who represent defendants. The costs involved in discovery can cause companies to settle cases that may have no merit at all, because the cost of paying defense lawyers to run their clocks is higher than the cost to settle the case.

Very careful attention has to be given to efforts to broaden discovery rules. Having absolute resistance to any change whatsoever may not be wise, because it could lead to changes in substantive law like the one previously mentioned, putting the burden on the company to prove that its product is innocent of causing the harm in question. But on the other hand, we should caution those involved and who would be affected by prospective changes in discovery rules in Europe that they do not give plaintiffs' attorneys *carte blanche* to issue endless requests for discovery until they find what they want, which sometimes occurs in the United States.

The absence of discovery rules or broad discovery also led to the suggestion that market share liability be broadly adopted. By market share liability in the Green Paper they meant when products are similar, and a plaintiff is unable to say who made the product that hurt him or her, then all of the people who made the product would share liability based on their market share, assuming that can be determined.

In the United States this concept first arose significantly through a case in California called *Sindell v. Abbott Laboratories*.[4] It was the best example utilizing that doctrine. The court assumed the drug diethylstilbestrol, or DES, was absolutely fungible. One DES pill was exactly the same as another. Whether that's true or not is a matter of debate, but that was the court's perspective.

The court's perspective was also that the plaintiff was absolutely unable to determine who made the product that injured her. The *Sindell* case involved not the person who took the drug, but daughters of the person who took the drug. It had been a long time since the product was sold, and there was, at least on the surface, great difficulty for the plaintiff to prove who made the product that injured her.

California has often been the beacon for legal change that sweeps through the United States, but *Sindell* has not been widely followed. Courts in the United States have been troubled with market share liability. They have determined that if a plaintiff works hard enough she can find out who made the product that injured her, and if you suspend that requirement it can lead to indolence on the part of the plaintiff.

When *Sindell* has been applied to other products like lead paint, courts have said the product lead paint is not fungible, and it doesn't meet the requirements of *Sindell*. So the United States has not seen a wide endorsement of market share liability. But in Europe, if discovery rules are left as they are, and there are almost insurmountable problems for a plaintiff to find out basic facts, there could be a resurrection of market share either through the EC Commission or in local jurisdictions.

A third idea was put forth in the Green Paper to have the producer (read in here "defendant") pay the cost of the plaintiff's experts. That was a new one. If at the end of the case the defendant lost, that cost would shift back to the defendant. Here the view is that the plaintiffs in these cases just don't have the armament to move for-

ward. The costs are a barrier to justice, and they deny access to justice.

On the one hand, there is no provision within this recommendation for a contingency fee lawyer. One has to pay his or her lawyer, often by the hour. On the other hand, the cost of experts to the person who is injured may be insurmountable. That's the context that makes this recommendation comprehensible. Once again, rather than stonewalling any change, some procedural reforms may be needed in some European countries to avoid proposals like this gaining legs and gaining ground. For now that one is dead. We submitted an extensive paper outlining the American experience to the Commission. We did it on behalf of DaimlerChrysler, but we went into these points in our paper, and concluded that this recommendation was not an appropriate approach to the problem.

One of the major changes that was called for was abolishing the so-called development risk defense. Back when this code was being established, in 1978, 1979 and 1980, we had many meetings about it. There was a very strong feeling that manufacturers of products should be liable, even if they neither knew nor could have discovered a risk, particularly with respect to pharmaceuticals and chemicals. Those were the key issues that were discussed in the late seventies and early eighties.

We have learned from our experience that abolishing the development risk defense has social consequences.

On the other hand, people from those industries and others said it was unfair to impose liability on a producer that neither knew nor could have discovered a particular risk. It would deter innovation and willingness to put new products on the market, particularly in the pharmaceutical area. In Europe they sort of split the baby. They put a development risk defense in the code, but said if a certain country didn't like it they didn't have to take it. Most of the countries adopted the development risk defense, and it continues to be under attack with the same fundamental policy issues. We can show in the United States that our experiment in getting rid of that defense failed.

The Supreme Court of New Jersey in a case called *Beshada v. Johns-Manville Products Corporation*[5] in the early eighties got rid of it. In the context of an asbestos case the Supreme Court of New Jersey said that a manufacturer could be subject to liability if it neither knew nor could have known about a risk. The Supreme Court of Louisiana, in a case called *Halphen v. Johns-Manville Sales Corporation*,[6] said the same thing. There was a decision in Montana[7] and a decision in Hawaii[8] that said the same thing.

Most of the cases were either retracted or confined to asbestos by the courts themselves, or legislatively overruled. The Supreme Court of New Jersey pulled back and confined it to asbestos,[9] and then its legislature came in and overruled it.[10] The same thing happened in Louisiana where a lower court attempted to apply the rule of *Halphen* to escalators, and all escalators in Louisiana came to a halt, and people who had difficulty climbing stairs had difficulty climbing stairs.

We have learned from our experience that abolishing the development risk defense has social consequences. We shared that experience with the Commission that put out the Green Paper. The wording of the defense as it is in the original code are not crafted with great precision, so arguments can be made about what is and what is not a development risk.

Development risk really has two parts. The European version of it doesn't. One part is what I mentioned, where you neither knew nor could have known about a risk. But there's another part. Suppose you know about a risk, a sugar producer, alcohol producer, or gun manufacturer, for instance. You know what the risks are, but there is no way to avoid that risk under current technology. Yet it's a lawful product. It's a product that is lawfully sold. In the United States and most of our courts that is a defense as well. It really means that under science there's a product that has certain risks but there is no knowledge of how to avoid them. It would seem helpful in Europe to have that concept in the law, too, but it is not there under the black letter as development risks are currently defined in the code, because when the code was established those who were crafting it did not want to address that issue.

In Europe there is an overall cap on liability for one type of harm of seventy million ECUs. There was discussion in the Green Paper to abolish that. I'm not going to go into details about that, other than to say that we don't generally have that in our law.

In the original European code the defense did get one win, so to speak. The code contains a ten-year statute of repose. Naturally, as expected, there came proposals to either abolish the statute of repose or essentially abolish airplanes, because of the impact of overwhelming long-term liability costs for planes that had flown safely for thirty and forty years. That was becoming a serious problem for the general aviation aircraft industry in the United States in the late 1980s and early 1990s. Since a federal statute of repose has been in place in the United States, those aircraft companies have resurrected their businesses. Over twenty-one thousand new jobs have been created, and there hasn't been a flood of cases suggesting that worn-out aircraft that are eighteen or twenty-five years old should have been the responsibility of the original manufacturer.

In Europe, when the challenge was made to the statute of repose, opponents had difficulty finding specific examples of where the statute of repose had done great harm to some individual. In other words, it was difficult showing that a product that was fifteen or sixteen years old had an original defect and should have resulted in liability. Maybe such products existed, and they have existed in some cases in the United States, but in Europe opponents weren't able to come forward with empirical evidence suggesting why the statute of repose had caused undue hardship, other than to verbalize that theoretically it could.

There was a proposal for mandatory insurance for all producers. This would be a new concept, just like mandatory automobile insurance was in the United States. Most states require people to have a certain amount of automobile liability insurance. The proposal in the Green Paper was to have mandatory insurance apply to manufacturers. We don't have any experience in the United States where laws have provided that Company A or Company B must have a certain amount of product liability insurance, for the most part our system has been able to bear liability. In some areas it hasn't. There are now twenty-five producers of products containing asbestos that are in bankruptcy, and there have been instances where injured persons have been unable to obtain relief. But in Europe, with the mandatory insurance proposal, there was not enough empirical evidence presented to the Commission, at least at this point, showing that this change was needed.

Finally, the most important change that is being suggested, and not simply through the proposed changes in the Directive, is class actions. The move to have class actions in Europe, a cousin of the United State class action system, is alive and well. Those of you who are interested in European legal developments should use due care in keeping track of these. We have had tremendous experience in the United States with class actions. Those who like them feel they give justice to the individual. Those who like them say that somebody with a relatively small claim—$100 or $200—can achieve justice. Those who like them say that class actions can cut down on unnecessary repeated litigation for the same injury.

One concern in Europe is that the little person who's been cheated, who's been harmed, may not get her day in court, particularly when Member States don't have the contingency fee system and where they have limited discovery, unless class actions are permitted.

Our duty in Europe is to assure that if class actions are allowed, they don't bring about the problems that some of us have seen in the United States, where judges certify class actions that don't meet fundamental class action requirements and allow plaintiffs' lawyers to group together cases more for the purposes of creating a settlement than creating justice, or creating a substantial fee for the person who's bringing them, rather than bringing about equity for the people that he or she represents.

This is a frontline item in Europe as well as the United States. And I close with it to share with you the fundamental lesson one gets from studying "live" issues in Europe. Many of the things we discuss in America are discussed similarly throughout Europe. When changes are made to the code in Europe, however, it is a trigger that goes throughout the whole continent and then throughout the world. Australia, Japan and, maybe even China tend to look to that code as their model for their laws.

PART FOUR: LITIGATORS REACT

Mr. Thomas Mueller: I think most manufacturers in Europe will agree that periodic review and assessment of the effects of the Directive on product liability litigation is a good thing. But I think they would also agree that any changes should be carefully considered and implemented. Minor alterations to the system can have far-reaching and sometimes unintended consequences.

An example of that would be, from our own jurisprudence, the class action mechanism: Class actions are

a powerful tool that have been and continue to be used for very worthwhile and notable ends, principally in the equal protection and civil rights areas. But class actions have also been the subject of much abuse. There are many anecdotal stories about companies having to pay exorbitant settlements merely because the risk of litigation in a class action is too high. Or companies actually being forced into bankruptcy because class action lawsuits of dubious merit, both on the legal side as well as on the scientific side, are being brought. Or of class action plaintiffs getting little or no compensation while class action lawyers earn substantial fees, sometimes in the millions and these days even the tens- or hundreds-of-millions of dollars. There's no question that class action litigation in the United States has become a big business, and a high volume business at that. Modern technology allows the entrepreneurial class action lawyer to bring more cases more quickly than ever before.

We've had a pretty good example of this in the class action lawsuits being brought against DaimlerChrysler in the securities context. It used to be that you would have a class action lawyer dependent on word of mouth and the print media to get information about cases and to advertise his services. In fact, even today many class action plaintiffs' lawyers will still issue a tried and true press release touting their role in a particular case and encouraging people to call, of course at no risk or obligation to the caller, for any information about the case.

The more sophisticated class action plaintiffs' lawyers these days, however, will use the internet, both to get information about cases, as well as to advertise their services. Within twenty-four hours after Mr. Kerkorian filed his lawsuit against DaimlerChrysler, there were two substantial plaintiffs' law firms that filed identical complaints or virtually identical complaints in Delaware, posted those complaints on their firms' websites, and also included a form that you could click on and fill out if you wanted to be represented by them.

Needless to say, most European manufacturers are very reluctant to support this kind of entrepreneurial legal system. Given the fact that the Directive has been in force in most countries for less than a decade, which, in the context of litigation that can take years to resolve from beginning to end, is really a pretty short time, most manufacturers view any changes in the Directive with extreme caution, and that's a very wise approach.

Needless to say, most European manufacturers are very reluctant to support this kind of entrepreneurial legal system.

Mr. Rod Hunter: I would echo a lot of the comments that Chris Hodges made about the process as well as the detailed requirements. But there are a couple of points I would make about the political context in which these proposals or amendments are being made in Brussels. A lot has changed since the original Directive was adopted back in 1985. I would disagree slightly with Chris on his observation that the European regulation is almost exclusively or largely economic. It's not really economic in focus. Rather, the EU is a political undertaking. There may be economic effects from European regulation, but the objectives are political.

This has been particularly so since the Single European Act, which came shortly after the 1985 Directive. Indeed, especially since the Maastricht treaty (the treaty is actually called the Treaty on European Union), the European Parliament has assumed a much greater role through various treaty amendments. The erstwhile EC was once a governmental system dominated exclusively by the executive, the European Commission, where the Eurocrats would propose the legislation to the national governments made up of executives, and they would sort out arrangements between them largely hidden from public scrutiny.

Now, and this is reflected in the attempts of the Parliament to hijack the minor modifications to the product liability Directive a couple years ago, the European Parliament prides itself on taking Commission proposals and expanding them and hence expanding the EU's power. And even though a purportedly center-right party controls the European Parliament, there are two things to keep in mind: First, the European center-right is probably center-left by American standards. Second, the European parliamentarians are, after all, parliamentarians and are very much interested in their own institutional authority. They do not feel any compunction about adding new provisions to legislation, whether it is product safety or product liability or any other type. It's entirely possible that the Parliament, even the center-right-controlled Parliament, will try to add significant provisions to the proposal.

Europe is going through something of a crisis of government. There is a general or popular sense of the incompetence of the governmental systems both in terms of litigation—lethargic, lengthy legal proceedings that last a decade—and enforcement of existing legislation, which is often ineffective. That has created a political demand or a fertile ground for access to justice provisions. There is a trend of "access to justice" provisions, which can be seen not only in the product liability discussions but also in environmental legislation. It is the thinking that one can ameliorate some of the incompetence of the executive and the courts if one gives NGOs subsidies so that one can fund their lobbying activities as well as their intervention in the legal system; one gives them rights of access to seek injunctions as contemplated in the Green Paper, and one allows for class actions. And I think you are right, Mr. Schwartz, that probably the single most important suggestion afoot is the introduction of class actions.

This is not surprising, given the problems with BSE and dioxin in Belgium, and other scandals. France has had its own scandals. But in Europe, little thought is given to the possibility that adding more regulation and liability might not be in consumers' interests. Obviously, in the case of regulation, when you increase regulation, roughly speaking, you increase costs and decrease choices, which might not be what the consumers would particularly prefer.

But in Europe, little thought is given to the possibility that adding more regulation and liability might not be in consumers' interests . . . when you increase regulation, roughly speaking, you increase costs and decrease choices, which might not be what the consumers would particularly prefer.

Similarly, in the case of liability, Europe has gone through the same trends that the United States has—i.e., a shift towards strict liability over the last fifty years. However, it is not clear that strict liability advances consumers' interests, and it is not clear that it lives up to its advance billing of cost internalization. For example, strict liability does not deter any better than fault liability, because you cannot deter what you cannot know or foresee. Strict liability does of course decrease activity levels, providing less of the products or services that consumers may want. Similarly, strict liability is not particularly good at risk spreading, one of its other principal justifications. It is basically a very inefficient one-size-fits-all insurance policy—I think we all know that first party insurance is probably a much more effective tool for dealing with moral hazard and adverse selection.

Finally, compensation might be the strongest argument for strict liability, because at least one finds a deep pocket. But there is something quite unjust about trying to find compensation wherever there happens to be a deep pocket. One might then go on and ask why shouldn't society, whether through the taxpayers or through taxing of particular products, be the one that pays for the compensation.

Businesses have been very reactive in responding to the Green Paper—that is, responding to the proposals that are put out by the Commission. But it would seem to me that it would be incumbent on businesses, if they are actually concerned about product liability risks, and I would argue that they need to be, to think more fundamentally about liability regimes. Indeed, market share issues, risk assumption issues, and many of the issues in the development risk defense are really manifestations arising from strict liability, as opposed to fault liability.

Perhaps now is a good time to be raising more fundamental issues. The European Commissioner that is responsible for this legislative policy is the Commission's only classical liberal. In American parlance, he might be called a conservative. He is the only real conservative among the commissioners and would probably be interested in these sorts of arguments.

Mr. Walter Olson (Moderator): From what I've heard this morning, the state of public opinion and debate in Europe is reminiscent of the way it was in the United States in the 1970s. Nearly all of the organized articulate opinion is in favor of expansion, lots more expansion of the right to sue. There is not any well-organized resistance to this.

They're throwing around slogans that had their heyday in the seventies, like "access to justice", which obscures the question of whom you're giving power to over whom. Yet at the same time it seems Europeans—through their press—have an image of America as the land of litigation in which life is made almost impossible

by the need to call a lawyer before doing anything. Do they connect these two at all? Do they connect the liberalization of the rules with the danger that that will happen to them? Or is it just that they can't have the hangover until they've gotten drunk?

Mr. Hodges: "Access to justice" is a slogan that is used by European-level politicians, national-level politicians, and consumer organizations. It's not actually that wide in currency outside a limited number of those players. There wouldn't be a big public debate. But it is used, I think, to justify policy in the broadest sense, and it is a useful political slogan because of its breadth and lack of precision, because it can mean many things.

Moderator: So you do see this being used by national governments in order to justify certain changes?

Mr. Hodges: I think a large number of people, both at grassroots level and in government, have a fairly negative view of U.S.–style litigation. I was surprised recently at a conference on class actions in Geneva that a member of the House of Lords judicial committee commented that the House of Lords simply did not want U.S.–style litigation because of the amount of money in the contingency fee system that distorts legal issues. He said they wanted to limit tort expansion and did not want a litigation-led society. He was one of the most liberal members of that judicial panel in England, and it was a great surprise to hear him say that.

Therefore, I think that view reflects quite a number of people at the grassroots level, that U.S.–style litigation has very bad press in Europe. Whether the debate has gone into sufficient detail on why U.S. litigation has certain pros and cons and what effects might be produced in Europe as a result of certain changes, I'm very dubious. The debate is at a very early stage, and it will continue.

Mr. Schwartz: There is great awareness of our system among at least the academics and practicing lawyers in Europe. They know the horror stories, although some of the stories get exaggerated. But they have four anchors that they think will keep their system from converting into ours: judges decide things, not juries; no extensive soft damages, like pain and suffering; no punitive damages; and no contingent fees. So with those four anchors, they feel that they can make changes without turning Europe into the Wild West of litigation.

Moderator: Great Britain has pulled up how many, two or three of the four anchors?

Mr. Schwartz: Their modification of the contingency fee, which they call a conditional fee, is not quite the same. They still don't have punitive damages and I don't think they'll ever have juries decide these cases.

It is true that most Europeans think American civil litigation is bonkers, but I am not sure they think that they could be so unreasonable. They just think it's an American aberration.

Moderator: They have quite a bit of soft damages in Britain, don't they?

Mr. Schwartz: Yes, they have soft damages, but nothing like the multipliers you find in American cases. You won't see verdicts with five, six, and seven times pain and suffering damages to economic damages. In fact, one of the things we showed with the help of Judy Pendell and others was the variation in Europe for the very same type of incident in the United States—one person gets $3,000 in pain and suffering and another one gets $100,000, for example. In Europe, they don't have those high-octane pain and suffering damages awards.

Mr. Hunter: It is true that most Europeans think American civil litigation is bonkers, but I am not sure they think that they could be so unreasonable. They just think it's an American aberration. Also, I would not put so much faith in the rationality of the European Community's legislative system. Maybe I have spent too much time in Brussels, but the EC legislature does do some pretty crazy things along the way and you can end up with some legislative changes that can have long-term effects.

I do not think it is likely that you will see the Community providing for punitive damages, which most Europeans see as a redundancy. But perhaps you could

find that in some of the member-states. And I think you are right that the outcome will be the consequence of an interplay of some of these provisions, particularly class actions, with these other mechanisms that fuel the product litigation machine.

Mr. Hodges: It's important that one doesn't over generalize about Europe. We have been discussing large-scale, high-level institutional change brought about through the European community institutions in Brussels, but one can find in a number of these instances changes at the national level. I've heard calls for the introduction of punitive damages in the United Kingdom for the past twenty years. It's never happened. I'd be surprised if it did happen. On the other hand, five years ago the Law Commission, which is the official independent law review committee, proposed that punitive damages should be introduced in the United Kingdom.

They'd never thought about the effects on product liability, they'd never considered it. They were thinking of a failure of regulatory mechanisms through other things, through landlords who just broke the law and policemen who beat people up, and the existing regulatory or criminal mechanisms were not enough. They wanted some extra deterrent.

It's significant that ever since that proposal was made that, along with a number of other proposals by the Law Commission, has never been implemented by the government.

Mr. Mueller: My experience is principally with German clients and I find, with some notable exceptions, there is the same disconnect. On the one hand there is an absolute horror about the U.S. litigation system, but then there is a lackadaisical attitude that it can't happen here. Whether that's because they have faith in these differences between the U.S. legal system and their own, or whether it's simply an inherent faith in their own rationality, I'm not sure. But there definitely is that disconnect.

Mr. Hodges: Because of the development of European law firms (in most countries lawyers in Europe are in small firms) they do not support one side or the other. They act for anyone who walks in from the street, whether it is a large corporation or an individual. That, of course, has changed quite dramatically, and some countries are remarkably behind the game and have to catch up very quickly. Germany is a good example where things are developing very rapidly.

The United Kingdom was in advance of the game and an identifiable plaintiffs' bar and defense bar has developed as a result of the large changes in the multiparty actions that I illustrated. All the leading characters in the United Kingdom who are well known and recognized and appear on TV and radio programs are members of ATLA, and there is cross-fertilization in the same way that other people are members of other organizations.

That is slowly beginning to spread to other countries. We certainly see U.S. lawyers taking an interest in European conferences and issues, for example the Geneva conference on class actions where there was an interesting and wide range of opinion. The fact that that had not taken place in the previous twenty years but is now taking place is illustrative of the way things are going.

Moderator: The next question is to what extent do European populations have a sort of legal culture with TV and other things that intensively cover cases, and to what extent are cases tried in the media, and are people specifically hired in order to get litigation messages into the media?

Mr. Hunter: My sense is it is much less sophisticated, although I should point out that many Europeans watch the same TV shows. Chris probably has a better read on that than I do.

Mr. Hodges: Yes, it is very clear that there is a move towards greater public interest in the entertainment of law. We don't have anything approaching the O.J. Simpson case. We all watched that. It was great fun. I'm not sure what it had to do with law, but we just regarded it as entertainment and really rather extraordinary.

In Europe, you do find media concentrating on important issues of the day. Trial by media is discussed quite frequently, but the courts are quite independent and are not swayed to the same extent. Of course people who are involved in litigation may have independent public affairs or public relations consultants, but not many lawyers get involved in that. Our involvement depends on the issue and how high profile it is. It used to be that corporations, for example, didn't say much. Nowadays I think they have a very different attitude toward their public and their consumers. There is a difficult balance between providing useful information to people and

debating the issues in the wrong forum. But in Europe it's nowhere near as heated as in the United States.

It seems to me that obsessive public interest in ongoing trials was probably perfected not in the United States but in British divorce cases of the nineteenth century. It's probably toned down since that level, but here in the United States as in other areas, the rules of the game play a very important role. Lack of televising of court proceedings and ethical rules which used to restrain lawyers here from trying their cases in the press, and I suspect in many European countries, would continue to be invoked against some of the American practices.

Audience Member: Since very often in product liability cases there are some scientific questions that have a direct bearing on a case, how do scientific issues get dealt with in Europe?

Mr. Hodges: Pretty well. You have different systems, of course, in common law and civil law. In the common law countries experts for the two sides appear and the judge is extremely skeptical and scathing as to their credibility. In Europe there is no junk science problem because a scientific witness who is not objective, does not have good credentials, and is not obviously independent, simply would not be believed, would not have sufficient credibility.

I should, however, say that I have seen some judges in some countries, perhaps southern European countries, whose level of intellectual analysis is not all that might be required in the lower courts. In other words, they get it wrong. Whatever you think of the decision, they just get it wrong. But that's more to do with intellectual capacity and training and exposure to more commercial and complicated matters than others are concerned with. But by and large the general level throughout Europe is extremely high.

Moving to the civil law system, the court appoints the scientific expert. The expert may be a professor at a university who's appointed by the court, so you don't get questions of partisanship arising. He may turn out to be the wrong expert and may not have the sufficient technical knowledge to spotlight a problem, but that is usually not a problem.

Moderator: Of the litany of scientific issues where Peter Huber and others have charged the American courts have gotten it wrong, or at least have entertained wrong claims for much longer than they should have, how many of them have gotten very far in European courts? I'm thinking of silicon implants, Bendectin, sudden acceleration, and chemical immunosuppression claims. Have any of those had significant success in European courts?

Mr. Hodges: Almost none. As soon as you have a U.S. class action, if there are any serious claims involving Europeans or Australians they try and pile into the U.S. class action.

Of the examples that you mention, almost none of them have gone forward. It's significant that the English class actions for pharmaceuticals only took place because they were thrown out in the United States or people were advised that they wouldn't get jurisdiction there. In one instance the English plaintiffs' lawyers were actually in advance of, curiously, their European brethren and brought a large claim in England that would not have been brought and was not brought in the United States. It's usually the other way around. So it boils down to forum arguments.

The Commission has had most of the year to consider replies to the Green Paper and to take part in fairly extensive public consultations. The Commission started drafting its report in September. From November, the Commission was involved in what they call interservice consultation between the different directorate generals, what you might call the different ministries within the Commission who are responsible for this Directive, and who are also responsible for industry and industrial regulation, and health and consumer affairs, and which would push a consumer protection view.

During November, we do not know exactly what has happened, what the state of discussion is, whether that discussion leads to matters that will be disputed, and what the result will be. I would expect if we follow normal form that there would be a row between consumer affairs and everyone else. Where that will end up we do not know. The institutional mechanism for resolving the text and the policy of a paper such as this is with the College of Commissioners, who would all sit together and ultimately argue it out and reach a conclusion.

I have not heard, but I wouldn't expect to hear, quite frankly, at this stage whether they've agreed or not agreed. I imagine they're having a fairly robust row, but I expect it will end.

Now, if you want me to go on and speculate what is in the Green Paper, what will be in the report, that's rather difficult to do. First, there are a number of aspects of the Directive that could be improved as matters of wording. There are various aspects that, whatever you think of the political balance, simply could be written more clearly. Next, there are some aspects that are perhaps not very contentious, but they could be changed or developed.

Finally, there are the big-ticket items. I know that the Commission is concerned that if they kick off any proposals now, by the time it goes through the European Parliament, they do not know how things are going to end up. There is the opportunity for entirely new proposals to be made within Parliament or by anyone else, and it is uncertain where you end up at the end of the day.

So I think there is some reluctance on the part of the Commission actually to propose any change. Logically, they should at least deal with the first category, which is just improving it and drafting.

I also believe, as I said earlier, that the evidence supports no major change at the moment. And the Commission will go ahead and take up the suggestion of the European Parliament to do a very extensive academic and practical study on the Directive that will take most of next year. So therefore that would tend to lead you to the logical conclusion that at the moment the Commission will decide not to do anything too dramatic.

However, I know that the European governments and the Commission are concerned about ECU's like BSE/TSE, in which particular sectors, pharmaceuticals, and food, may come under scrutiny in relation to the development risk defense and the ten-year cutoff. It could be that the governments will find those issues to be sufficiently topical to be dealt with now rather than waiting a year or two for the further study. There are some difficult issues that arise out of that.

Moderator: I have a question about BSE or mad cow. As I understand it, many of the parts of the meat and animal feed industry were quite small and de-centralized in Britain. I didn't see, given the uncertainty as to which piece of beef caused the illness, where the suit would lie. I understand that they really want to sue somebody. But whom would they sue?

Mr. Hodges: There are a few answers to that. The logical legal analysis is that the primary responsibility lies on the producer of the product or, if you define the product as an ingredient, the producer of the ingredient. So the farmer would initially qualify as the producer.

However, you then have liability on all supplies in the chain if you can't identify the person above you in the chain who produced this. You also have liability as a producer if you brand the product—most people would tend to sue the supermarket chain on the basis that they branded it.

However, having said that, that would end up with enormous litigation by a lot of people against a lot of people, which is very difficult to control and gives rise to an awful lot of causation questions. If you also put things in negligence theories, you get all sorts of other difficult legal questions. Therefore one tends to look at potential responsibilities of regulators or governments. The U.K. government has just published the results of an independent inquiry by a House of Lords judge who went to great pains to say that he was not attempting to find fault with anyone. They were trying to find out what happened. But the press presented that as a number of ministers and government scientists having an awful lot of questions to answer.

That would tend to concentrate the litigation in a smaller number of defendants. You then have questions about whether specific ministers or civil servants should in fact owe a duty of care. They weren't involved in strict liability. They're not producers. So it would be a negligence claim. Whether as a matter of public policy such people should have a duty of care, which is not really resolved, different authorities go in different ways.

What you end up with, having considered all that, is the government thinking that it should make sure that it is not in the firing line, so to speak, and that responsibility and liability is limited to the private sector where insurance mechanisms can deal with the associated costs. And they may then, for certain sectors which are difficult to insure on an individual basis, like beef, want to go further and suggest some specific compensation arrangements, either before the event or *ex post facto.*

Endnotes

1. Directive 85/374/EEC.
2. Bovine Spongiform Encephalopathy
3. Creutzfeldt Jakob Disease
4. 163 Cal. Rptr. 132 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).
5. 447 A.2d 539 (N.J. 1982).
6. 484 So. 2d 110 (La. 1986).
7. *Sternhagen v. Dow Chem. Co.*, 935 P.2d 1139 (Mont. 1997).
8. *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548 (Haw. 1987).
9. *Feldman v. Lederle Labs.,* 561 A.2d 288 (N.J. 1984).
10. N.J.S.A. 2A:58C-3(a)(1) (West 2001).

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