IS ADVICE IN A NEWSPAPER A PRODUCT?

VI V KRONE – VERLAG GESELLSCHAFT MBH & CO KG (CASE C-65/20)

A Case Note from the 2TG Product Liability Team **Autumn 2021**

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Introduction

1. On 10 June 2021, the ECJ handed down its decision in *VI v KRONE – Verlag Gesellschaft mbH & Co KG* (Case C-65/20), holding that advice in a printed newspaper was not capable of being a (defective) product for the purposes of the Product Liability Directive ("the Directive").[1]

2. This case note summarises the decision reached by the ECJ and considers the significance of the decision for the English courts.

Background

3. On 31 December 2016, the Austrian newspaper, *Kronen-Zeitung*, published an article titled 'Hing'schaut und g'sund g'lebt' ('Taking a look and living healthily'). The author, who was an expert in the field of herbal medicine, provided the following advice:

> *"Alleviating rheumatic pain*
> *Fresh coarsely grated horseradish can help to reduce the pain experienced as a result of rheumatism. First rub a fatty vegetable oil or lard into the affected areas, before applying a layer of grated horseradish to them and applying pressure. You can leave this layer on for two to five hours before then removing it. Its application has a positive draining effect."*

4. The article contained a mistake. The author's advice should have been that the horseradish be left in place for two to five *minutes*, not two to five hours.

[1] Council Directive 85/374 EEC of 25 July 1985 (the Product Liability Directive)

5. TA reader, VI, followed the treatment set out in the article and applied horseradish to her ankle for around three hours, only removing it when she experienced suffered a toxic skin reaction. She brought proceedings against the publisher, KRONE – Verlag, in respect of her injuries.

6. Her claim was dismissed at first instance and on appeal. The Oberster Gerichtschof (Austrian Supreme Court) then referred the following question to the ECJ under Article 267 TFEU: *Must Article 2 of the Directive together with Article 1 and Article 6 thereof be interpreted as meaning that a physical copy of a daily newspaper containing a technically inaccurate health tip which, when followed, causes damage to health can also be regarded as a (defective) product?*

The Opinion of Advocate General Hogan

7. Advocate General Hogan ("the AG") delivered his opinion on 15 April 2021. The AG considered that VI's claim clearly fell outside the Product Liability Directive. It was "*essentially an action in a relation to the provision of a service – advice to consumers contained in a newspaper column – which [did] not concern a newspaper qua physical product*" (at [41]).

8. As the AG explained, the language used in the Directive was consistent with the production of physical things and the damage suffered as a result of a physical defect in that product (at [24]). While a newspaper could cause damage *qua* physical product – for instance if the claimant was injured by a protruding staple or toxic ink – the essence of this claim related to a defect in the *intellectual* content, not to a defect in the *physical* product (at [26]).

9. The objectives and context of the Directive, as set out in the recitals, also made it clear that the Directive was focused on tangible goods only (at [32]-[33]).

10. The AG noted that if it were otherwise, the path might be opened up to strict liability in respect of defective or negligent supply of services, such as inaccurate advice from a lawyer or accountant (at [34]). Moreover, if a newspaper could be made liable on a strict liability basis for poor or defective advice causing personal injury, this might have serious implications for the freedom of the press. If the Directive had been intended to produce such a result, said the AG, "*one would have expected that this would have been expressed in pellucidly clear and unmistakeable terms*" and the fact that it is not so expressed "*is in its own eloquent way testimony to the fact that the imposition of such liability in such circumstances was never intended by the EU legislature*" (at [36]).

11. The AG further considered that the case of *Dutrueux* (Case C-495/10) had made it clear that liability in respect of the provision of services which are separate from the defective physical product does not fall within the scope of the Directive. In that case a young boy suffered burns during surgery carried out in hospital. The burns were caused by a defect in the temperature control mechanism of a heated mattress which he had been laid on during surgery. The hospital had used a mattress it had acquired from a supplier, and in those circumstances was simply a service provider, and therefore not caught by the Directive (at [38]-[40]).

The ECJ's decision

12. The ECJ agreed with the AG and concluded that under the terms of the Directive, a printed newspaper containing inaccurate health advice could not constitute a defective product. In short, health advice was simply a service, and services were not caught by the Directive.

13. The ECJ went on to consider whether a service could be *incorporated* into a physical item, resulting in the newspaper itself being defective (at [32]). The court concluded that it could not. The ECJ said that the defective nature of a product is determined on the basis of certain characteristics inherent to the product itself, related to its presentation, use and the time it was put into circulation. The defect here – inaccurate advice – was unrelated to the to the printed newspaper and was not part of its inherent characteristics (at [36]).

14. The ECJ agreed with the AG that the fact that no provision is made in the Directive for the possibility of liability for defective products in respect of damage caused by a service, of which the product is only the medium, reflects the intentions of the EU legislature (at [37]). The liability of service providers and the liability of manufacturers constitute two distinct liability regimes (at [38]).

15. Were the position otherwise, said the ECJ, the distinction between goods and services would be severely eroded. Newspaper publishers could be strictly liable without it being possible to avoid that liability (at [40]).

Conclusion

16. The ECJ's decision in *VI v KRONE – Verlag* has made it clear, beyond doubt, that the scope of the Directive does not extend to defective advice included in a physical product. The language, objectives and context of the Directive all led inexorably to that conclusion. The floodgates would otherwise be opened to a slew of claims in respect of defective advice and ramifications for the newspaper industry would be significant.

17. In light of the UK's exit from the EU, decisions of the ECJ handed down after 31 January 2020 are persuasive only. Under section 6(2) of the European Union (Withdrawal) Act 2018 courts may "*have regard*" to ECJ decisions, so far as they are relevant. However, given the nature of the decision, it is very unlikely that English and Welsh courts would reach a different decision.

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Kate has a broad practice across all of Chambers' specialisms, with a developing focus on product liability, professional negligence, insurance disputes and employment law. Kate is particularly interested in cases involving issues of jurisdiction and conflicts of law.

In 2018-19, Kate was judicial assistant to Lord Justice Hamblen in the Court of Appeal, where she worked on cases including *Merricks v Mastercard* [2019] EWCA Civ 674 and *Manchester Building Society v Grant Thornton* [2019] EWCA Civ 40.

Before joining Chambers, Kate graduated from the University of Oxford with a First Class degree in History. She then taught History at GCSE and A Level in an Academy in South Croydon on the Teach First programme.

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