Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 15 April 2021 [1]

Case C-65/20

VI
v
KRONE – Verlag Gesellschaft mbH & Co KG

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Consumer protection – Directive 85/374/EEC – Product liability – Concept of 'defective product' – Physical copy of a daily newspaper containing inaccurate health advice)

I. Introduction

1. Where a daily newspaper publishes inaccurate health advice in a daily column written by an independent newspaper columnist, can that newspaper be sued on the basis that it has distributed a defective product within the meaning of Council Directive 85/374/EEC [2] ('the Product Liability Directive') when a reader of the newspaper subsequently claims that she has suffered physical injury as a result of following that advice? This, in essence, is the novel issue concerning the interpretation of the Product Liability Directive which is posed by this reference for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria).

2. Before turning, however, to the facts and the specific legal issues, it is necessary first to set out the relevant legislative background.

1 Original language: English.

2 Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29), as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (OJ 1999 L 141, p. 20).

II. Legal framework

A. EU law

1. The Product Liability Directive

3. The first, third, fourth and sixth recitals of the Product Liability Directive have the following wording:

'… approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

…

… liability without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables;

… protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified;

…

… to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances.'

4. Article 1 of the Product Liability Directive contains the general rule that the producer shall be liable for damage caused by a defect in his product.

5. Article 2 and Article 3(1) and (2) of the Product Liability Directive define the terms 'product' and 'producer' and define who will be considered a 'deemed producer' under the directive. They provide as follows:

'Article 2

For the purpose of this Directive, "product" means all movables even if incorporated into another movable or into an immovable. "Product" includes electricity.

Article 3

1. “Producer” means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.

…’

6. Article 6 of the Product Liability Directive describes what is considered to be a defect for the purposes of the directive. Its first paragraph provides:

‘A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.

…’

B. Austrian law

7. Paragraph 1 of the Bundesgesetz vom 21. Jänner 1988 über die Haftung für ein fehlerhaftes Produkt (Produkthaftungsgesetz) (Federal Act of 21 January 1988 governing the liability for a defective product (‘the Product Liability Act’))[3] provides:

‘(1) If due to the defect of a product a person is killed, suffers an injury to his body or health, or if any tangible property other than the product is damaged, the following entities shall be liable to compensate the damage:

1. the entrepreneur by whom it was produced and put into circulation,

…’

8. Paragraphs 3, 4 and 5 of the Product Liability Act define the producer, the product and the concept of a defective product respectively. Those provisions are worded as follows:

‘§3. The term “producer” (Paragraph 1, subparagraph 1 point 1) shall mean the person who has manufactured the finished product, a raw material or component part, as well as anybody who presents himself as producer by affixing to the product his name, trade mark or other distinguishing feature.

§4. The term “product” shall mean any movable tangible property even if it is part of another movable property or combined with an immovable property, including energy.

3 BGBl. Nr. 99/1988, as last amended BGBl. I Nr. 98/2001.

§5. (1) A product shall be deemed defective if it does not provide the safety, which, taking all circumstances into account, may be reasonably expected, in particular with respect to:

1. the presentation of the product,

2. the use to which it can reasonably be expected that the product would be put,

3. the time when the product was put into circulation.

…'

III. The facts of the main proceedings and the question referred for a preliminary ruling

9. The issue arises in the following manner. The defendant is the proprietor [4] and (according to its assertion) publisher of a regional edition of the *Kronen-Zeitung*, a popular newspaper with perhaps the largest circulation of any daily tabloid newspaper in Austria. On 31 December 2016 the newspaper published an article under the heading 'Hing'schaut und g'sund g'lebt' ('Taking a look and living healthily') by 'Kräuterpfarrer Benedikt' ('Herbalist Priest Benedikt') entitled 'Schmerzfrei ausklingen lassen – Eine Auflage aus geriebenem Kren' ('End [the year] pain-free – apply a layer of grated horseradish').

10. The relevant article read as follows:

'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.'

11. According to the referring court the treatment time for applying the horseradish indicated in the article is incorrect: it should actually have stated that readers were advised to apply it for two to five *minutes* rather than for two to five *hours*. The column in question was written by a monastic priest who is a member of a religious order. He has taken the name 'Benedikt'. It appears – or, at least, the defendant so contends – that the priest in question is a recognised expert in the field of herbal medicine who has apparently written countless newspaper columns of this kind and has, in fact, published books on the topic of herbal medicine. The defendant states that it has thus far been able to rely on his expertise and that this is the first claim of this kind which it has encountered.

12. The applicant, VI, is a subscriber to the *Kronen-Zeitung*. She contends that she read the article and followed the terms of the advice. She accordingly placed the layer of horseradish as described in the article to the ankle joint of her left foot. She left the dressing on for approximately three hours and removed it only once she had begun to experience severe pain. The strong mustard oils contained in the horseradish had caused a toxic contact reaction. She accordingly brought a claim for damages for pain and suffering seeking compensation in the sum of EUR 4 400 and a declaration that the defendant was liable for all the current physical injuries and future consequences of the incident in question.

4 'Medieninhaber' as per Paragraph 1(1)(8) of the Bundesgesetz über die Presse und andere publizistische Medien (Federal law on the Press and other journalistic media), of 12 June 1981, BGBl. Nr. 314/1981.

13. Her claim was rejected at first instance. The court of first instance, the Bezirksgericht für Handelssachen, Wien, (District Court for Commercial Matters, Vienna, Austria) found that the defendant had arranged for the article to be written by an expert in the field of herbal medicine who had published widely on the topic. The defendant had no reason to check the written texts submitted by that expert. Since, moreover, the author was a recognised expert, the court found that he could not be regarded as either a habitually unfit or a deliberately dangerous individual within the meaning of Paragraph 1315 of the Allgemeines bürgerliches Gesetzbuch (Austrian General Civil Code [5]).

14. If, on the other hand, the original article supplied by the author was correct, but the error had crept in during the course of the production process, the court held that the defendant was liable only where it had effectively guaranteed the accuracy of the content of its publication. It pointed out that the *Kronen-Zeitung* is a tabloid newspaper in which information is presented in short articles, written in an entertaining, simple, and easy-to-digest manner. The article could not, therefore, be viewed in the same way as if, for example, it had been published in a scientific journal.

15. The court further found that in a case of this kind, the expectation of the reader differs from that of a reader of a scientific article or a specialist journal or a work of non-fiction. Since a commitment to the accuracy of the article's contents could not therefore be assumed, it followed that the defendant was not liable for the incorrect treatment time which was indicated in the article. The appeal to the court of appeal, the Handelsgericht Wien (Commercial Court, Vienna, Austria), was rejected on procedural grounds. The court of appeal objected, inter alia, to VI relying on facts supporting a claim of strict liability on the part of the defendant for the first time in the action.

16. On appeal to the Oberster Gerichtshof (Supreme Court), the arguments based on the strict liability of the defendant under the Product Liability Act appear to have come more clearly into view. In its decision of 21 January 2020 that court rejected the argument that the requirements for examining strict liability under the Product Liability Act were not thereby satisfied, even though, during the course of the first-instance proceedings, the applicant had based her arguments specifically on the fault-based liability of the defendant.

17. That court then considered the arguments for strict liability under the Product Liability Act and, by extension, the Product Liability Directive. It pointed out that published works such as handbooks, manuals and maps are sold because the final consumer expects to obtain specific instructions from them. It further pointed out that, for example, if a recipe in a book or a newspaper misstated the correct amount of a particular ingredient in a manner which was injurious to human health, it would be anomalous that the person so harmed was left with no remedy under the Product Liability Directive, whereas if that same excessive quantity had been mistakenly added to a ready-made processed product purchased by a consumer, that consumer could then sue the manufacturer of the product on a strict liability basis under the Product Liability Directive.

18. The Oberster Gerichtshof (Supreme Court) then identified what it considered were four arguments against liability for incorrect information in cases of this kind. First, it considered that the protective purpose of product liability was to protect against danger posed by the object and not in respect of advice given. Second, intellectual products such as newspaper columns are not 'products' for the purposes of either the Austrian Product Liability Act or Article 2 of the Product Liability Directive, precisely because they are not physical objects as such. Third, any connection between product liability and the supply of tangible forms of information would be arbitrary and therefore, information should be excluded from the Product Liability Directive's scope. Finally, it raised concerns about the potentially unlimited and open-ended forms of liability which might arise if the word 'product' in Article 2 of that directive was given such a broad interpretation.

5 The provision deals with the liability for acts of third parties.

19. The Oberster Gerichtshof (Supreme Court) finally observed that if the strict liability provisions of the Product Liability Directive were to apply in a case of this kind, then it considered that the defendant would, under the Product Liability Act, in principle be liable for any personal injuries caused to the applicant reader due to his or her following the incorrect advice.

20. In the light of its doubts in the matter, the Oberster Gerichtshof (Supreme Court) decided to refer the following question to the Court of Justice for preliminary ruling:

'Is Article 2 together with Article 1 and Article 6 of [Directive 85/374] to 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?'

21. The defendant, KRONE-Verlag, the German Government and the European Commission have lodged written observations before the Court.

IV. Analysis of the question referred

22. As I have indicated, the essential question for consideration here for the purposes of this reference for a preliminary ruling is whether a newspaper proprietor can be held liable under the Product Liability Directive in respect of an erroneous article of this kind.[6] In my view, it is perfectly clear from the language, objectives and context of that directive that it applies to the physical properties of products only, so that it is not applicable in a case of this kind.

23. According to the Court's established case-law, the interpretation of a provision of EU law requires that, in addition to the text of the relevant provision – which, 'having reference to the conventional principles of interpretation, is invariably the starting point and at the same time the limit of any interpretation'[7] – consideration must also be given to its context and the objectives pursued by the rules of which it is part.[8] I propose accordingly to look first at the actual text of the Product Liability Directive and then to examine the context and the objectives which it pursues.

24. Starting first with the actual language of the Product Liability Directive, it may be noted that Article 1 thereof provides that the producer shall be 'liable for damage caused by a defect in his product'. Article 2 then defines 'products' as meaning 'all movables even if incorporated into another movable or into an immovable'.[9] Article 3 defines a 'producer' as meaning 'the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer'. Article 6(1) of that directive further provides that a product is defective 'when it does not provide the safety which a person is entitled to expect, taking all circumstances into

6 The question of whether there can or should be liability under other provisions of Austrian law is, of course, quite a separate one and as this is entirely a matter for the referring court I naturally refrain from expressing any view on that separate issue. Such potential liability is clearly not excluded by the Product Liability Directive (see the thirteenth recital as well as Article 13 of the Product Liability Directive).

7 See to that effect the Opinion of Advocate General Trstenjak in *Agrana Zucker* (C-33/08, EU:C:2009:99, point 37).

8 See, to that effect, for example, judgments of 10 September 2014, *Holger Forstmann Transporte* (C-152/13, EU:C:2014:2184, paragraph 26) and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47).

9 Initially, the application of Directive 85/374 was limited to 'movables which have been industrially produced' (the third recital of that directive). Directive 1999/34 removed the exception for 'primary agricultural products' from the scope of the Product Liability Directive and, according to recital 8 of the former directive intended to cover 'all types of products', thus extending the scope of the directive beyond simply *industrially produced* products. This is confirmed by the Court's application of Directive 85/374 to a product that had clearly not been industrially produced in its judgment of 10 May 2001, *Veedfald* (C-203/99, EU:C:2001:258) which concerned a case where a kidney had been flushed prior to transplantation by means of a perfusion fluid and that fluid, produced in the dispensary of the hospital, proved to be defective which made the kidney unusable for the transplant.

account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation'. The language here relates to the production of physical things and the damage suffered as a result of a physical defect in that product.

25. Some legal writers have, however, suggested that a product does not even have to be tangible in this sense in order to qualify as a 'product' within the meaning of Article 2 of the Product Liability Directive.[10] This would open up the possibility of considering the *information contained in the newspaper* – rather than the newspaper as such – as the product. To my mind, however, such an interpretation is not possible in view of the language, objectives and context of that directive.

26. It is true, of course, that a conventional newspaper which is published in the traditional fashion is a physical thing and it is also a movable. It is perhaps possible to imagine circumstances in which the purchaser of an actual published newspaper might suffer personal injuries if, for example, he or she were injured as a result of a protruding staple or possibly by reason of the toxicity of the ink used in the printing process. The essence, nevertheless, of the present claim relates to an alleged defect in an *intellectual* content and not to a defect in a *physical* product as such. Therefore, what is actually at issue here is a service, not a product.

27. It is not, for example, suggested that the newspaper as such has injured VI: it was rather an injury that she has caused herself following incorrect advice that was published in that newspaper. The question therefore relates to whether a tangible product that contains such incorrect advice can be considered 'defective' in the sense in which this and cognate terms are used in the Product Liability Directive.

28. There is nothing whatsoever to suggest that the newspaper was defective due to what might be termed its 'external properties'. Some legal writers contend that the tangible medium cannot be divorced for this purpose from its actual content. Accordingly, it is suggested that the strict liability regime arising under the Product Liability Directive should be applied to defects in the product *qua* product as well as to its intellectual content.[11] Their arguments in support of this view are based primarily on the purpose of product liability legislation, which is to protect consumers. They further argue that there are situations covered by the Product Liability Directive which bear a strong resemblance to situations involving incorrect information leading to bodily harm. One example is the situation in which a product that is supposed to warn people of a particular danger – such as, perhaps, a smoke alarm – does not work correctly. The lack of warning prevents people from taking corrective action (by, for example, escaping from a burning building), which in turn leads to their being injured.[12] These commentators see a similar parallel to cases in which the instruction manual of a product contains incorrect information. As in the case of the incorrect information provided in a print medium, the danger in that case does not emanate from the physical quality of the product but rather from the fact that the readers follow the (incorrect) instructions contained therein.

10 The Commission argues that the definition of 'product' is broad (although, in its opinion it must be 'industrially produced'). It points out that, whereas Paragraph 4 of the Austrian Product Liability Act defines the product as 'any movable tangible property', the qualification 'tangible' is not contained in the wording of Article 2 of the Product Liability Directive. Electricity is also included by virtue of that provision in the concept of 'product' even though that is not a tangible thing.. This discussion is more prevalent when it comes to software where even the transfer by a tangible medium has become rare and the usual way in which it is transferred now is by downloading (for that opinion, see for example, Spindler, G., 'Verschuldensunabhängige Produkthaftung im Internet', *Multimedia und Recht*, Issue 3, 1998, pp. 119-124). The Commission in its Report of 19.2.2020 on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics, COM(2020) 64 final, p. 14, does not seem to go that far *de lege lata*, as it proposes: 'Although the Product Liability Directive's definition of product is broad, its scope could be further clarified to better reflect the complexity of emerging technologies …'

11 For examples of this approach, see, Foerste, U. and Graf von Westphalen, F., (eds.), *Produkthaftungshandbuch*, 3rd ed., Beck, Munich, 2012, p. 815, §47 subparagraph 16; Cahn, A., 'Produkthaftung für verkörperte geistige Leistungen', *Neue Juristische Wochenschrift*, Beck, 1996, pp. 2899 to 2905, at pp. 2901 to 2903; Meyer, A., 'Die Haftung für fehlerhafte Aussagen in wissenschaftlichen Werken', *Zeitschrift für Urheber- und Medienrecht*, Issue 3, 1997, pp. 26 to 34. For a view opposed to such an approach, see, Günther, A., *Produkthaftung für Informationsgüter*, Otto Schmidt Verlag, Cologne, 2001, pp. 623 to 627. All of these authors discuss German product liability law. This German law implements the Product Liability Directive, though the issues discussed are not specific to the German implementation.

12 Another example is the malfunction of a diagnostic device if that malfunction means that a medical condition remains undiagnosed and therefore untreated.

29. For my part, however, I find myself unpersuaded by those arguments. The wording of Article 6 of the Product Liability Directive relates clearly to a defect in the product itself within the meaning of Article 2 thereof. Moreover, Article 1 of that directive does not provide for strict liability for mere advice. Rather, liability has to be related to the putting into circulation of a product.[13] It requires a direct causal relationship between the defect in the product and the damage to the injured person, which is still present in the cases described in point 28 of the present Opinion, whereas there is no relation to the product in case of incorrect advice in a newspaper.[14] This also means that that directive does not apply to services.[15]

30. While it might be correct to state that it is increasingly difficult to distinguish between products and services due to technological advances,[16] such an assessment, which might lead a legislative body to act, nonetheless does not permit the Product Liability Directive to be applied in circumstances other than those in which, having regard to its clear language, it currently applies. This is particularly true as the extension of its application to cases where information is contained in a movable product would lead to other inconsistencies. Why, for example, would there be strict liability for information contained in a publication but not for advice given on radio or television?[17]

31. In my view, however, it is nonetheless perfectly clear from the language, context and objectives of the Products Liability Directive that the reference to a 'product' in that directive is confined to a tangible object. That, in essence, is why the present claim cannot succeed, at least so far as the Product Liability Directive is concerned, precisely because it does not concern an injury resulting from a physical defect contained in a product.

32. This is also borne out by a consideration of the objectives and context of the Product Liability Directive. The very first recital of that directive makes it clear that this was a harmonisation measure 'concerning the liability of the producer for damage caused by the defectiveness of his products' and that this measure was necessary because 'the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property'. This is clearly directed at tangible goods only and, as the Court has already had occasion to point out, 'the limits set by the European Union … legislature to the scope of the directive are the result of a complex balancing of, inter alia, those different interests'.[18]

33. All of this is underscored by the other recitals. Thus, for example, the third recital declares that no-fault liability 'should apply only to movables which have been industrially produced'. Although, as has been set out in footnote 9 of this Opinion, the scope of the provision has subsequently been extended beyond the scope of *industrially produced* products, there is no mention of mere

13 See, *a contrario*, Article 7(a) of the Product Liability Directive which exempts a producer from liability if it did not put the product into circulation. See also, Oechsler, J., *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen*, revised edition 2018, de Gruyter, Berlin, §2 ProdHaftG, paragraph 78, again with respect to the Produkthaftungsgesetz (German Product Liability Act).

14 See, to that effect, Günther, A., *Produkthaftung für Informationsgüter*, Verlag Dr Otto Schmidt, Cologne, 2001, pp. 650 and 651, who distinguishes between 'Instruktionshaftung' (liability for instruction) and 'Informationshaftung' (liability for information).

15 The Commission already stated in its Green Paper Liability for defective products (COM(1999) 396 final), page 7 that: 'Defective services are not covered by Directive 85/374/EEC'. This is in line with the fact that it had proposed a Council Directive on the liability of suppliers of services (COM(90) 482 final) (OJ 1991 C 12, p. 8). The draft was later withdrawn (COM(94) 260 final). Point 2.8 of the Economic and Social Committee's Opinion on the proposal for a Council Directive on the Liability of Suppliers of Services (OJ 1991 C 269, p. 40) shows particularly well the problems such a directive might pose: 'When one examines this proposal it is clear that its implementation would put a brake on any research and innovation in the fields of activity of the liberal professions. It would lead to defensive medicine, defensive legal, commercial and fiscal consultation, and defensive advisory work by architects, engineers and building contractors. This was not the aim which consumers had in view.'

16 This has also been commented on in the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics (COM(2020) 64 final), pp. 13 and 14.

17 See also *Münchener Kommentar zum BGB*, 8th ed., 2020, §2 ProdHaftG, paragraph 19, as well as Ulmer-Eilfort, C., and Obergfell, E. I., *Verlagsrecht*, 2nd edition, C.H. Beck, 2020, paragraph 1036.

18 Judgment of 21 December 2011, *Dutrueux* (C-495/10, EU:C:2011:869, paragraph 22 and the case-law cited).

information or advice being covered by the Product Liability Directive. The fourth recital further declares that effective consumer protection requires that 'all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective …'. The sixth recital states that in order to protect 'the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect …'. The reference to 'lack of safety' can again only be regarded, in the light of the context, as reference to a defect in a tangible product which is likely to cause harm.

34. All of this contextual material simply serves to reinforce the conclusion that the scope of the Product Liability Directive concerns the safety of physical products only and its chief objective is to provide a remedy on a strict liability basis where such products have been found to be defective. If it were otherwise then the way would potentially be open for a range of claims under that directive relating to, essentially, the defective or negligent supply of services. This might include, for example, the written advice prepared by an accountant or lawyer or a medical report prepared in writing, even though in such circumstances it would be totally artificial to contend, for example, that by signing such a report the professional concerned 'presents himself' or herself as the 'producer' of a 'finished product' so that he or she is a 'producer' for the purposes of Article 3(1) of the Product Liability Directive. [19]

35. As, moreover, the referring court itself seems to suggest in paragraph 4.2 of its request for a preliminary ruling, the imposition of liability under the Product Liability Directive in such a case might well also expose service providers to potentially open-ended liability on a strict liability basis to a large class of possible claimants. [20] It would be difficult to avoid the conclusion that the imposition of no-fault liability would thereby distort the limits to the scope of the Product Liability Directive, which, as we have seen above and as the Court noted in *Dutrueux*, [21] were the result of a complex balancing of different interests.

36. Such a conclusion could also lead to a situation where yet another aspect of newspaper publishing becomes fraught with unusual legal difficulties of its own. Most newspapers – ranging from the most serious to the more popular – provide for readers' columns of this kind, where advice is given by columnists in respect of a variety of issues, including medical, legal, gardening, parenting and personal problems. If a newspaper could be made liable on a strict liability basis for poor or defective advice which caused either personal injury, or (subject to the limits contained in Article 9 of the Product Liability Directive) damage to property, this would bring about a new hazard for publishers, which, as the defendant pointed out in its written submissions, might have serious implications in practical terms for the freedom of the press as safeguarded by Article 11(2) of the Charter of Fundamental Rights of the European Union (and, by extension, Article 10 of the European Convention on Human Rights). All of this is to say that if the Product Liability Directive had been intended to bring about such a result, one would have expected that this would have been expressed in pellucidly clear and unmistakeable terms. The very fact that that directive is pointedly silent on this matter 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.

19 See also footnote 15 of the present Opinion which cites the Opinion of the Economic and Social Committee to the proposal for a Council Directive on the Liability of Suppliers of Services (OJ 1991 C 269, p. 40).

20 See the famous cautionary comments of Cardozo, C.J., in *Ultramares Corporation v. Touche* 174 NE 441 (1931) to the effect that the law must avoid the prospect of potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.

21 Judgment of 21 December 2011 (C-495/10, EU:C:2011:869, paragraph 22).

37. It should be stressed, however, that questions of delictual liability and professional negligence in cases of this kind are governed by the national law of the individual Member States. It was never the intention of the EU legislature that they should be harmonised in this fashion, still less that claims of this kind should be shoehorned into the strict liability regime of the Product Liability Directive by means of an artificial and expansive interpretation of its terms. The Court has already held that that directive does not seek exhaustively to harmonise the sphere of liability for defective products beyond the matters regulated by it.[22]

38. While it is true that the point raised here is a novel one, it bears remarking that it finds no support in any of the existing case-law concerning the Product Liability Directive to date. Perhaps the closest case is the decision of the Court in case *Dutrueux*.[23] In this case a young boy suffered burns during surgery carried out at a hospital. The burns were, however, caused by a defect in the temperature-control mechanism of a heated mattress on which he had been laid during the surgery. The hospital had simply used the mattress which it had acquired from a hospital supplier.

39. The Court nevertheless held that 'such a user cannot be considered to be an operator in the production and marketing chain of the product in question' for the purposes of Article 3 of the Product Liability Directive.[24] It followed that the hospital was simply a provider of medical services for this purpose and where such a provider 'uses defective equipment or products of which it is not the producer within the meaning of Article 3 of [the Product Liability Directive] and thereby causes damage to the recipient of the service', then the liability of the service provider 'does not fall within the scope of that directive'.[25]

40. It is clear, therefore, from *Dutrueux*[26] 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 Product Liability Directive. In the present case, if anything, the claim is weaker because, to repeat what has been stated before, unlike the situation in that case, there was no defect in the physical product *qua* product.

41. Drawing all of these interpretative strands together, I cannot but conclude that a claim of this kind falls outside the scope of the Product Liability Directive. It is essentially an action in relation to the provision of a service – advice to consumers contained in a newspaper column – which does not concern a newspaper *qua* physical product. It cannot therefore be said that any physical injuries which VI suffered were the result of a defect in a product as those terms are used in the Product Liability Directive.

V. Conclusion

42. In light of the foregoing considerations, I would accordingly propose to the Court to answer the question referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

Article 2 together with Article 1 and Article 6 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products cannot 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' within the meaning of this directive.

22 See judgments of 4 June 2009, *Moteurs Leroy Somer* (C-285/08, EU:C:2009:351, paragraphs 24 and 25) and of 21 December 2011, *Dutrueux* (C-495/10, EU:C:2011:869, paragraph 21).

23 Judgment of 21 December 2011 (C-495/10, EU:C:2011:869).

24 Ibid., paragraph 28.

25 Ibid., paragraph 39.

26 Judgment of 21 December 2011 (C-495/10, EU:C:2011:869).