
**Forced Transplants**

The debate on ‘legal transplants’, begun by Alan Watson and joined by numerous comparative lawyers, tends (like this paragraph) to be conducted at a certain level of generality. Emphasis is placed on method and on a range of fairly broad topics such as ‘trusts’, ‘good faith’, ‘human dignity’, ‘jury trial’ and so on. The examples chosen and issues discussed often focus on the situation where the transplant is initiated by a host country which, rightly or wrongly, feels in need of some organ, institution, norm, or remedy.

But the European Union offers us numerous examples of forced transplantation. When its institutions launch a new Directive into the legal systems (and cultures) of twenty-five Member States, they say ‘this binds you as to the result to be achieved’, but the actual incorporation and assimilation of the new material is taken to be merely a matter of ‘form and method’ (EC 249.3). Yet, even assuming political and popular approval of any given Community measure, its adoption may be difficult for the national legal system, for a reason which is rather paradoxical: the more desirable the Directive’s ends the more likely is it that they will already have been attained, one way or another, by that system’s own devices. Simon Whittaker’s masterly study demonstrates clearly that when Community measures arrive in a Member State they may well land in occupied, indeed in overcrowded, territory. His chosen topic is complex, but his study is wide-ranging, subtle, perceptive, and profound. The work must have taken decades of wide reading and deep thinking, and the result is now set out with great clarity, a scrupulous scholarly apparatus, and no little wit.

We all know of the major EU initiatives in ‘private’ law, such as the Directives on Products Liability (85/374/EEC) and on Consumer Guarantees (1999/44/EC). These did not land in a national desert. In France, for instance, liability for damage caused by products already attracted numerous methods of redress in the ordinary courts, not to mention the possibilities offered, where appropriate, by criminal law and by administrative law. Indeed the notion that a Member State’s legal system may prove to be occupied, if not enemy, territory is reinforced by the *Cour de cassation*’s habit of saying that, outside the field of contract, the Civil Code’s few but very general delict articles reprennent leur empire.

In one sense the book is restricted, being limited to the laws of the EU and of one-and-a-half Member States, France and England/Wales (but not Scotland or Northern Ireland). In another way, however, Whittaker casts his net widely, thereby ensuring a much richer appreciation of the diversities in presuppositions, structure, approach, and results in the two national jurisdictions. First of all, he does not take the topic as covering only the liability of a producer for physical injury to a consumer. That is the basic approach of the 1985 Directive, but Whittaker argues that this can fail to reflect the patterns of liability within the national systems. Other factors play an important role: the relative attractiveness of suing one or other
potential defendants, and the means of recourse and apportionment of liability among potential defendants. These may include the seller of the product; its public supplier (such as the health service); its owner or user (its gardien); the public regulators of the particular products; and the insurance industry. The topic raises the distinction between solidarité and responsabilité in solidum, with the line between them drawn differently in French civil and administrative law: a topic which, as I vividly recall, used to make even Sir Otto Kahn-Freund shake his head in puzzlement.

The book’s first three parts (and fifteen chapters) describe the terrain into which the two Directives were dropped, that is the law both covering and surrounding responsibility for defective or damaging products in the two jurisdictions: private law, public law, the particular liability of regulatory or supervisory bodies, criminal responsibility and its relationship to compensation, insurance, and social security and other guarantee funds. If the product is harmless but in some respect unsatisfactory, both systems, of course, where appropriate, give contract claims. Where a product causes injury, the French victims may have six distinct ‘causes of action’ in private law alone. If the victim bought the product there are at least four different avenues in contract available against the seller or any in the chain of sellers, since their contractual obligations run with the product to any buyer. The victim who did not buy the product can sue in delict either under the general law of liability for faute or the much stricter regime of responsabilité du fait des choses. In England the contractual route is open to the buyer only against his or her immediate seller, though this latter may well have recourse claims up the chain of supply. Otherwise the victim will sue in tort (‘the common law at its most gothic’, p. 159) with attention focussed, not on the fact that a product is involved, but on the conduct of the defendant - was it ‘negligent’? In a very valuable section (p. 186ff.) Whittaker analyses the ways in which the English concept of negligence differs from the French notion of la faute. And he also draws attention to the very different procedural mechanisms involved in litigation: unlike the situation in France, in England each party’s attorney is the other’s confessor and inquisitor: the first because all relevant documents must be disclosed by one party to the other; the second because each can cross-examine the expert witnesses. On the other hand English law has no real counterpart to the pouvoir souverain du juge du fond.

Part II turns to the question of possible liability for the failure to control product safety on the part of a public authority or other regulatory body. One of the major differences between the two systems is, of course, the fact that in France, but not in England, the administrative law of liability remains distinct from its private law. Executive power is seen as inherent in the system of governance, conferring extraordinary powers, and free from subservience to the Code civil and the ordinary courts, but subject to special control by the administrative jurisdictions. Compensation claims must be brought within a four-year limitation period, and do not benefit from the imposition of solidarité on the administration, which (until the tainted blood cases described at page 315ff.) was liable for injury caused by its activities only if guilty of faute lourde. In England, by contrast, the State is subject to the ordinary law; statute enacts that, in tort, the Crown bears ‘all those liabilities to which, if it were a private person of full age and capacity it would be subject’. So it might appear as if, bereft of the French safeguards, the English executive would be a relatively easy, and ever-solvent, target. In fact the English courts have found ways of protecting public bodies such as local authorities, often sued simply because they are richer than the private defendant. Whittaker concludes that ‘the law governing the liability of the administration has descended into an increasingly

The tainted blood affair appears again in Part III in the book’s treatment of criminal responsibility for unsafe products and its relation to compensation for the injuries they cause. Here Whittaker contrasts the role of the *partie civile* in the French criminal courts with the relatively feeble powers permitted by the English system. He also notes the apparent readiness of the French courts to find at least a fleck of fault in an otherwise guiltless accused, so as to permit them to award compensation to a victim.

Having mapped out the existing, crowded, legal terrain in the host jurisdictions Whittaker turns in Part IV to the Product Liability and Consumer Guarantees Directives and their treatment in the two countries. The first of these instruments gives us ‘a key example of the problems facing legal systems in implementing Directives in an area already broadly governed by national law’ (p. 431). It provides for the remedy of damages to those injured by defective products whether or not they were consumers and whether or not they bought the products; its legal basis was the EC’s competence to issue Directives ‘for the approximation of such legal provisions as directly affect the . . . Common Market’ (EC 100, now EC 94).

A penetrating and well-argued contention of the book is that

the idea that the EU legislature can, by requiring even a completely harmonised set of rules of liability for a particular class of defendant in relation to a particular type of claim thereby create a level playing field of costs arising from liability is fundamentally unconvincing . . . the burden on any category of person can be seen only in the context of wider patterns of distribution of liabilities and the pattern of their channelling within the system (p. 444).

In the 1990s the fears caused by the spread of BSE (‘mad cow disease’) prompted a number of major reviews and reports on the operation of the Directive. Its aim was the creation of a common basis of liability in order to achieve two purposes: the economic one of avoiding distortions in competition and the social one of avoiding different levels of consumer protection. From a close study of these reports and of relevant litigation, Whittaker finds it by no means clear that it achieved either of these aims, since as long as wider patterns of liability differ as between legal systems, the creation of a formally uniform basis of liability for one particular category of defendant can do little in terms of their relative costs. It seems, for instance, to have no impact on insurance premiums, a major element in the cost of liability to business.

The steps taken to implement the Products Liability Directive in the two jurisdictions show very different preconceptions. In the UK it was enacted by a statute of 1987 which was presented to the British public as a fine example of their own government’s concern for the welfare of the citizen and was called the Consumer Protection Act. The Directive formed Part I of this measure, with two other parts being devoted respectively to the provision for criminal sanctions and regulatory oversight of a new obligation of safety for all consumer products, and measures against misleading pricing. The common law of negligence, and the law of contract, were untouched. France, by contrast, was the last Member State before enlargement to implement the Directive, and seemed to find the process very difficult. It was not until 1998 that the delict articles of the Code civil were enlarged by the addition of no fewer than eighteen provisions (1386 – 1-18). But, since the *Tribunal des conflits* told us in 1873 (*Blanco*) that the Civil Code does not bind public authorities, an outsider is left uncertain as to the scope of application of this implementation.
Perhaps the finest chapter in this fine work is that on ‘patterns of liability’ (Chapter 18). This looks first at the impact of the implemented Directive on those governed by it: manufacturers, importers, and suppliers. Twenty years after the adoption of the Directive this is still difficult to pin down. One reason in France is the persistence of the garantie légale. If a buyer suffers damage he can claim against his own seller or any other up the chain of distribution: a business seller cannot escape liability by identifying his own supplier or the manufacturer (as he could under the Directive); but the buyer must prove that the defect existed when he bought, whereas under the Directive it is for the defendant to show that the product was sound when put into circulation. And the ‘development risks’ defence is not available to a seller sued under the garantie. ‘From the point of view of improving consumer protection it is difficult not to agree that from the French point of view the Directive was not worth the wait or the effort’ (p. 538). The injured English buyer from a business seller is also likely to prefer a contract claim under the terms implied by the Sale of Goods Act. These include a guarantee of safety and cannot be countered by identifying the seller’s supplier or manufacturer. If the product was supplied otherwise than by contract, however, (as by gift, or the statutory provision of medicines under the National Health Service) then the common law would generally require a person injured to prove negligence, and here the implemented Directive may improve his position.

The second pattern to be discussed concerns the liabilities of potential defendants other than those caught by the implemented Directive. In France, of course, the gargantuan gardien is the obvious target. A person injured by a product (whether defective or not) is almost always injured by ‘une chose’ and, if someone else had la garde, the victim may claim against them without having to prove any defect in the thing or any fault in its gardien. And the plaintiff has ten years, not three, in which to sue. If a motor-car was involved in the injury the special French regime for road accidents looks like a much easier avenue of recourse. The common law, by contrast, has no counterpart to these two regimes of liability: generally speaking, a victim must show that the injury was caused by the defendant’s careless conduct. Consequently the Directive may play a larger part in future litigation in England.

The third pattern covers the issues of recourse and ‘solidarity’ which arise where one person has been held liable in full and then claims contribution from some ‘co-auteur’. If gardiens have paid in full, to what extent can they claim against a supplier or producer of the thing which caused the damage under the Directive or against their supplier in contract? In these and similar cases if the primary victim chooses to sue someone other than the supplier of a defective product, the latter’s liability is a function of the combination of grounds of liability and the approach of French courts to the basis of apportionment of liability among co-authors. Once French administrative law is involved, the picture becomes even more complex as it normally denies any general rule of ‘solidary liability’; the public defendant may plead fait d’un tiers and thereby reduce or even exclude its liability. English law may be simpler here: as a general rule when two or more persons cause harm by conduct which calls for the imposition of liability, then each is fully liable to the victim and must claim what contribution he can from the other. There are three ways of doing this: by pointing to a contractual indemnity clause; or to a breach of some other relevant express or implied contractual term; or in general where a court thinks it ‘just and equitable having regard to the extent of [the other’s] responsibility for the damage in question’.

The key conclusion of this part of the study is that the Directive has harmonised neither the protection of victims nor the burden on producers. The first still have claims against suppliers or producers other than those provided by the Directive, and, on the basis of quite distinct
national laws, may well have more attractive means of redress against entirely different defendants. Here the two systems still show significant disparities. The French victim will often have a claim against a product’s gardien without the need to prove a defect, without the risk of one of the Directive’s defences, and with a longer prescription period. By contrast, the English victim may well find the Directive’s provisions more attractive than the common law of negligence. So from the point of view of a victim the law is not harmonised within just these two systems.

Nor has the burden been harmonised. Its impact on producers and suppliers overall depends on the incidence of liabilities in other persons. The existence in French law of their liability without fault tends to reduce the burden on producers; and where their liability for fault can be proved, the burden on producers is lifted. In English law, by contrast, the tendency is to channel liability to the manufacturer unless another person’s carelessness played a part in causing the harm. In sum the Directive ‘fundamentally misunderstands the way in which patterns of liability interrelate within legal systems and how this interrelationship affects the practical burden of liability of defendants’ (p. 564).

By the time the Consumer Guarantees Directive (1999/44/EC) was adopted its creator had acquired some competence to protect consumers (EC 95 and 153). The third recital in the preamble to this measure also adverts to the fact that the national laws on the sale of goods are somewhat disparate, so that competition among sellers may be distorted. The text was clearly influenced by the 1980 UN Convention on Contracts for the International Sale of Goods. On the one hand it adopts a unitary concept of ‘non-conformity to the contract’ to deal with problems covered in some civilian systems both by general contract law and, in the case of sale, by provisions derived from the aedilitian edicts on ‘latent defects’, and which, in the common law, are addressed by a combination of express and, by default, terms implied by statute. On the other hand the remedies offered by this Directive are based on the notion that the seller who has failed to deliver conforming goods still has the right to try again and to repair or replace them; only if these are impossible or too costly may the buyer cancel the deal or claim a reduction in price. It does not provide a remedy in damages but may to some extent be seen as the contractual counterpart to the Product Liability Directive. The latter covers the defendant who made things worse, the former the defendant who did not make things as good as promised.

In both France and England the commercial seller’s liability in respect of non-conforming goods was already the subject of considerable long-standing regulation: in France under the garantie légale and the more general requirement that the thing sold be marchande et loyale; in England under the obligation to deliver ‘merchantable’ - nowadays ‘satisfactory’ - goods. Whittaker gives a succinct but lucid account of the considerable efforts required in France to fit the Directive into the existing patterns. In the end they were preserved by the insertion of new provisions into the Code de la consommation, leaving intact the empire of the Code civil and in fact strengthening it by extending to two years the bref délai applicable to action under the garantie légale. The UK authorities likewise made it clear that implementation of the Directive would leave existing rules in place, and so the resulting Regulations of 2003 largely add the new remedies to the old. Whittaker provides a meticulous analysis of the resulting jig-saw in both jurisdictions. Only two points need be mentioned here. The first is that at common law the primary remedies for breach of contract are cancellation and damages; now there is added the provisions for repair and replacement which result in a layering of remedies that may well perplex the disappointed consumer. The second is that the new UK provisions lay down that the seller must comply with a buyer’s reasonable request that he repair or
replace them, and the court may make an order requiring specific performance of this obligation. Now the ultimate sanction for breach of such an order is, not the *astreinte* as in France, but imprisonment. The criminal norm says ‘jail *if* you do this’ but the consumer protection norm will say ‘jail *until* you do that’.

One topic this excellent work does not address, but any reader who has absorbed the lucid detail of the description and analysis is bound to wonder about it. All the studies, reports, conferences, debates, drafts, re-drafts, legislation, regulation, litigation, legal advice, academic commentary at European and twenty-five national levels: how much did all that cost in time, skill, patience, paper and bytes? Does the benefit outweigh the expense? Are things simpler now? Are they better? Is it all worth it?

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