Product Liability, Safety Instructions and 17 Years of Beer Drinking: Educating the Consumer

Suggested Citation: *Product Liability, Safety Instructions and 17 Years of Beer Drinking: Educating the Consumer*, 2 German Law Journal (2001), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=36

[1] To which extent victims of (excessive) tobacco consummation ought to have a claim against the tobacco industry, *i.e. in concreto* the cigarette manufacturer, has been a widely discussed and disputed topic not only among lawyers. Against the background of what must be seen as counting among, indeed, *remarkable* judgments and settlements concerning injuries from hot coffee and cancer illnesses from long time smoking, courts are likely to remain confronted with just about every risk that we know from daily life. Just how much this intuition - that we *just know* that certain undertakings are risky and, eventually, injurious - is in fact the central focal point of a lot of tort jurisprudence these days is underlined by a recent case handed down by the Higher District Court of the German city of Hamm.(1) A man, after 17 years of drinking beer - allegedly only the defendant's! - and the herewith related loss of his wife, his employment as well as his driver's license, brings a suit against the beer brewer "Warsteiner". Plaintiff claims that all the misfortune he actually had to suffer was caused only by the fact that defendant had failed to indicate on its bottles the risks and dangers of drinking. The *Landgericht* (Lower District Court) rejected his suit, and the *Oberlandesgericht* (hereafter. "Court") affirmed the lower instance.

[2] The Court basically found that plaintiff cannot claim compensation for occurrences that are, in the Court's view, to a great part caused by plaintiff himself. While it is acknowledged and affirmed within existing tort law doctrine, that a product's manufacturer is obligated to warn the consumers of his goods by way of preventive information and warning and that the manufacturer's liability can build on his failure to do so, the Court held that there could be no room for such obligation when risks are concerned that are intelligible to "any reasonably thinking person". The manufacturer's obligation to inform the consumer of risks and dangers inherent to the use and consummation of the product mainly serves, the Court acknowledged, to facilitate, resp. to enable the consumer to exercise prudence and diligence with regard to the product in a self-responsible manner. In the Court's view, there simply was no cause for plaintiff as the risks involved were "in the consumer's awareness."(2) The Court reasoning builds on the assumption of a certain form of "reasonableness" standard within which there is no obligation for the manufacturer to inform the consumers/buyers and, correspondingly, no risk of liability. Only in what can be seen to be situated within a sphere lying beyond this reasonableness standard, the Court held, that there would be an obligation - and liability. In fact, only if the manufacturer would have reason to assume that his product would likely be used/consumed by persons not acquainted with the product's common risks, would there be grounds to assume such an obligation on the side of the manufacturer. The Court spelled out the scope of this reasonableness standard in referring to a "common knowledge" allegedly existing among certain consumer groups. It is, however, not likely that we could actually and easily assess *who* exactly is drinking and what his/her actual *frame of mind* is, and much of this is left open by the Court. The Court can refer to yet more jurisprudence handed down by the *Bundesgerichtshof* (Federal Court of Justice - FCJ)(3) , without, however, engaging in a more thorough inquiry into the persuasiveness of the reasonableness standard. Indeed, this might not seem necessary, as we would find it hard to actually believe in the absence of widely spread wisdom or awareness about the "effects" of beer and other alcohol. But if this is so simple and presents, really, no "hard case", what to think then of the crudely consumer oriented verdicts handed down in cases brought by long-time smokers? It is, indeed, not easy to decipher the state of our legal culture with regard to a commonly aspired level of protectionism or, alternatively, degree of empowerment and encouragement. We would, in fact, have to turn to more than just a circle of experienced tort lawyers in order to be able to say whether what we see on the horizon is - once more - consumer protection's prime time or merely the époque of final, half hearted battles, an altogether contingent and incoherent case-by-case jurisprudence.

[3] It is indeed misleading - from a wider perspective - to solely build on established case law when trying to assess the brewery's obligation to warn of the risks inherent to beer drinking. The established canon of what is risky and what is less or not risky, is in an by itself a *juridical alienation* from what we might call the underlying social reality. The legal assessment of risks, dangers and corresponding liabilities or images of self-responsibility is, as such, a purely legal invention. It is detached from the social reality as the law - naturally, one might say - must work with concepts that are taken not from social science but from itself. *Ad hoc* assessments of dangers and their intensities, qualifications of "risk" and its lingering explosivity on one hand and the assessment of awareness, ignorance, the "reasonable man" standard on the other form an overwhelmingly complete picture of our "risk society" (Ulrich Beck: 1986, transl. 1990). But, more often than not, the elements of this picture are gained through a self reproducing process of stare decisis and a momentary view from the bridge at what is "going on down there". In fact, we - as lawyers (and judges) - don't know how dangerous alcohol really is and there are no cases that provide us with a truly satisfying answer. What we do know, though, is how arbitrary and contingent a lot of legal fact finding and "reality" assessment is, when conducted within a tight schedule of a busy court house. We must, therefore, be cautious before

believing too readily in what yet another court tells us about how well aware everyone really is of the dangers of this and that. To be sure: the Court was probably right to deny plaintiff's claim for a better life under the condition that defendant warned him of the dangers connected with the consummation of defendant's products. But, still, the Court's holding, in all of its first sight persuasiveness, appears to be far from self-evident. The certitude with which the Court repeatedly assumes that the dangers connected to the use of beer (or other alcohol) are common knowledge is startling in light of the existing gap between the laws and, possibly even more importantly, the *consciousness* governing the consummation of beer, driving and smoking in different countries. Least of all, the Court's assessment makes plaintiff appear like the real outsider: "How could he even think to stand a chance before this court with *such* a claim?", we are prompted to ask.

[4] It is, against this background that the short case runs some risk of gradually falling apart: whenever the Court implies the normality of all of us being aware of beer's dangers (and, consequently, the abnormality of plaintiff's life reality!) we can no longer simply nod our heads and reassure ourselves in rejecting beer and other drugs. When the Court says that we, "seriously, cannot be in doubt over the core problematics - albeit not the medical details - of alcoholic consumption", we ought to see the constructedness of this reasoning in all of its artificiality. Were it so, that common knowledge provides for the inner information about the risks and dangers of alcoholic beverages, we no longer ought to be able to find "hidden addictions" wherever we turn.

[5] Yet, certainly it would just be continuing to run down the one-way alley if we were to affirm the brewer's obligation to warn of the risks and, if he fails to do so, to hold him liable. Liable for what? The discrepancy between a legal obligation to indicate - by ways, *e.g.* of a small label - the dangers for health and life and the contingent circumstances of a person's life with all of its habits and compulsive behaviors are too obvious to apply a simple causation model. And, surely, tort law has learned a lot by moving from a subjective law paradigm focusing on intent onwards to objective theories that build on assessments of roles, functions, typifications and generalized expectations. Clearly, risk society's tort law cannot and has not stopped here. The backlash of the turn to objectivity was the growing awareness of the necessity to always update and critique the standards employed. Surely enough, objectivity is just as questionable in its absolute as is subjectivity and, in fact, one can seen as the doubtable flip side of the other. Where to go from here?

[6] The Court is quite diligent in making it clear that there ought to be a clear separation of the question concerning the manufacturer's obligation to inform and the matter of alcoholic beverages' easy seductiveness. The Court underlines that the label on the bottle can, indeed, not substitute the consumer's decision about whether or not to drink. In the Court's view, it can, instead, only provide the ground on which the consumer him-/herself will have to engage in a soul-search. Certainly, at this point, the question arises what to do with the less apt consumer that, on his/her own is not able to make prudent decisions. The Court denies tort law's role in this matter. In drawing a boundary between what the consumer can expect as public guidance and what he/she has to figure out alone as part of the organization of one's own life, the Court does, in fact, walk a thin line. It points to the illusion of autonomy and self-governance that the liberal legal order so firmly stands on, but it proceeds in a 2-world-argument when asked to assess the manufacturer's responsibility. One world, supposedly, is the consumer's life-world, his/her sphere of leading a meaningful life. Another world, then, seems to be characterized by the basic neediness of man/woman in taking these decisions concerning the meaningful life but concerning also basic matters of subsistence. These worlds, are constructs and, in fact, deeply intertwined. The respective characteristics of one are conducted in contrast, in negation of the other. As a result, when the Court rejects plaintiff's claim for compensation, it must absolutize each of these worlds in their extreme in order to find a, in the Court's view, coherent solution: the fact, the Court held, that today's society seems to accept the mere existence and availability of alcohol, implies the impossibility (for the law) to hold the manufacturer responsible for effects that his - socially accepted - products have on persons less astute in withstanding its inherent dangers. In nothing less than a swift switch back - within one and the same argument! - from an objective, generalizing reasoning to a subjective ratio, the Court raises and denies the question whether plaintiff provided sufficient evidence for his argument that he would, indeed, have reduced his consummation of beer. It is inherent to our "common knowledge" about the effects of alcohol that neither plaintiff nor anyone else would ever have been able to provide such evidence.

For more information : Decision of the Oberlandesgericht
Hamm of February 14, 2001 - 9 W 23/00, published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, P. 1654.