Drinking water covered by product liability

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Introduction

The Supreme Court has established that drinking water is a product within the meaning of the Product Liability Act. Therefore, the determination of damages for municipalities and municipal companies which supply contaminated drinking water can be tried in accordance with this act.

The case will have considerable importance in the event of (for example) a disease outbreak or other diseases caused by contaminated drinking water. If a clear causal connection is established, it will be much easier for injured parties to obtain compensation from the municipality.

Facts

The plaintiffs sued in a district court a municipal company that supplied drinking water based on a violation of the Product Liability Act. The plaintiffs argued that the drinking water was defective since it was unsafe for consumption and therefore strict liability according to the Product Liability Act should apply.

The municipal company disputed the claim and argued that the Product Liability Act did not apply since the Public Water Services Act was exclusively applicable to damages from contaminated drinking water and therefore the environmental court should be the proper forum.

Supreme Court decision

The Supreme Court assessed whether drinking water is a product within the meaning of the Product Liability Act. The court noted that the act is based on the EU Product Liability Directive (85/374/EEC). Article 2 of the directive defines 'products' as "all movables", but movables are not defined. The court held that the scope of the directive may vary between EU member states and therefore applied Swedish law to define movables.

The Product Liability Act's preparatory works note that it covers mainly manufactured goods, but its definition of a 'product' is broader: natural products such as grains, fruit, berries and fish (even if they are unprocessed) are included, as well as gases and liquids (even if they are not produced industrially).

The court therefore considered drinking water to be a product within the meaning of the Product Liability Act.

Public Water Services Act

The Supreme Court then assessed whether the tort liability provisions in the Public Water Services Act (regulating the delivery of drinking water) were exclusive and excluded the application of the

Product Liability Act.

For property owners to claim compensation under the Public Water Services Act, the principal must have exceeded their rights or violated an obligation under the act. Therefore, it is more difficult to claim damages if the principal has not been negligent than when the liability is strict.

The court acknowledged that the Product Liability Act's preparatory works state that the act may apply at the same time as another tort liability law if it is not particularly inconvenient. This is an advantage for injured parties since they can choose which law to base their claim on.

Since neither the Public Water Services Act nor its preparatory works explicitly state that the act regulates tort issues exclusively, the court found that the Public Water Services Act did not exclude the Product Liability Acts' applicability to drinking water. It also found that the plaintiffs could base their damages claim due to contaminated water on the Product Liability Act.

Comment

The case is controversial for several reasons. First, the Supreme Court interpreted the concept of a 'product' in the Product Liability Act in accordance with national Swedish law. Since the Product Liability Act is based on the EU Product Liability Directive, EU law is applicable.

In *Wathelet* (C-149/15) the European Court of Justice (ECJ) stated that:

> *according to the Court's settled case-law, it follows from the need for a uniform application of EU law that, in so far as a provision thereof makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an independent and uniform interpretation throughout the European Union which must take into account the context of the provision and the objective pursued by the legislation in question.*

As the definition of a 'product' in the Product Liability Directive makes no reference to EU law, it should be considered an autonomous EU concept that is uniformly interpreted across the European Union. Therefore, the Supreme Court should have referred the question to the ECJ for a preliminary ruling.

Second, as the court deemed the Product Liability Act to be applicable, it will be much easier for injured parties to claim damages due to contaminated drinking water. Injured parties may choose to claim damages based on the Public Water Services Act or the Product Liability Act; however, the Product Liability Act is arguably preferable as negligence or norm violation are not required for compensation. Municipalities could therefore incur significant costs following (for example) a disease outbreak. In this regard, the Supreme Court has not sufficiently assessed whether it is suitable for drinking water to be covered by product liability.

Considering the above, it remains questionable whether drinking water should be covered by the Product Liability Act. However, under existing Swedish law, drinking water is covered by product liability and will remain so unless the legislature or the ECJ decide otherwise.

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