Topics in our issue:

No-fault liability for incorrect newspaper content?

The European Court of Justice (ECJ) is currently ruling on the issue of whether dailies are liable for incorrect (health) tips given in their products regardless of fault. The ECJ ruling will considerably affect the media scene and, possibly, bloggers, influencers and similar professions, as well.

The case: A subscriber to an Austrian daily put her trust in health tips published in the daily's print issue – with disastrous consequences: The treatment instructions were incorrect with regard to the duration of the application. Instead of two to five minutes, it was recommended to apply grated horseradish for two to five hours. Applying the poultice for about three hours, the subscriber suffered grave bodily injuries due to a toxic contact reaction. She requested damages from the media owner, i.a. based on the Product Liability Act (PHG).

The PHG in turn is based on Directive 85/374/EEC on liability for defective products ("Product Liability Directive"). It stipulates that the producer is, as a rule, liable for any harm caused by the defectiveness of its product, i.e. when it does not offer the safety the user is entitled to expect, taking all circumstances into account, and results in a person being killed, physically injured or harmed in his/her health or when an item of property other than the defective product itself is damaged. This liability applies regardless of any fault of the producer.

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PRESLMAYR RECHTSANWÄLTE

No liability on the part of the tabloid?

The media owner refused to accept any liability towards the subscriber with regard to the incorrect content of its print issue. The courts of first and second instance concurred: it is generally known that the print product published by the media owner is a tabloid, which presents information in rather short articles of an entertaining nature in a simple and easy-to-understand manner rather than through pages of scientific treatises. Readers' expectations accordingly differ compared to a scientific article, magazine or book, so that it cannot be assumed that the correctness of the article in its content has been promised. The publisher accordingly is not liable for the incorrect information regarding the period of treatment as wrongly stated in the article. Both instances did not consider the no-fault liability of the PHG.

Pro and cons regarding liability under the PHG

The subscriber eventually appealed to the Austrian Supreme Court (OGH) which grappled with the PHG as the basis for the claim. No-fault product liability for wrong information provided by publishers has so far been rejected by the OGH. The case at issue offered the OGH an opportunity to have recourse to the ECJ in order to clarify whether physical copies of a daily newspaper are a product within the meaning of the Product Liability Directive.

As stated by the OGH, a point for liability on the part of the producer (of the book), media owner or publisher, including the content of the work, is the fact that the publication is bought for its content rather than as a stack of (albeit nicely compiled) paper. Consumers expect not only that the publication does not have any staples extending from it that might injure them, but that it supplies them with the advertised content. If a recipe in a book or newspaper erroneously states an unhealthy dosage for a given ingredient, it would be inconsistent not to award the victim with any damages while the erroneous admixture of the same excessive amount to a ready-made product or wrong instructions for use enclosed with it would certainly have consequences for its producer.

One point against liability, as outlined by the OGH, is the protective purpose of product liability, according to which liability is extended with regard to the hazardousness of a product and not for hazardous counselling of the user. Seen in this way, intellectual content generally is not a product within the meaning of the PHG, contrary to physical items. Since the legal issue cannot be clearly and definitely solved on the basis of the Product Liability Directive, the interpretation of which in turn is essential for judging liability under the PHG, the OGH applied to the ECJ, whose decision is eagerly expected.

Possible consequences

Considering the spread of fake news, the subject is highly charged. If the ECJ finds that publications are also subject to product liability, this would have far-reaching consequences for all publishers of print media; there would be further limits to the unchecked use of third-party content.

Given that product liability requires the product to be physical, it can be assumed that the innumerable blog entries are not subject to product liability. If, however, physical publications are found to be subject to product liability, it would be inconsistent to exempt so-called influencers – stars from the Instagram, Facebook & Co universe – from no-fault product liability for any damage caused by incorrect contributions, even though influencers reach millions with their videos, postings and blog entries and earn large amounts of money. This applies in particular to food blogs that may contain doubtful nutritional advice which might cause serious deficiencies and health problems.

If the ECJ should actually find that product liability covers the intellectual content of a physical publication, we need to consider whether such liability should be extended to (non-physical) contributions in the Internet. However, for the time being, attention focuses on the ECJ and its ruling.

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Legal entitlement to nursing care leave and part-time work for carers

Starting on 1 January 2020, employees in certain enterprises are entitled to long-term nursing care leave (Pflegekarenz) and part-time work for carers (Pflegeteilzeit).

At first glance, the amendment of Sections 14c and 14d AVRAG (Arbeitsvertragsrechts-Anpassungsgesetz; Act Governing Adjustments to Employment Law), effective since 1 January 2020, has not produced any changes regarding the option to agree a subsidisable spell of long-term nursing care leave or part-time work with one's employer. The requirements for such an agreement continue to be an employment relationship of at least three months, and care provided to a dependent family member who draws long-term care benefit of level 3 or higher (or starting from level 1 for dependants who suffer from dementia or are minors). Nursing care leave and part-time work for carers must be contracted between employer and employee in writing for a period of at least one month to up to three months. If part-time work is agreed, it must not be for less than ten hours per normal working week.

However, under Para 4a of Section 14c or Para 4a of Section 14d AVRAG, employees working in operations of more than five employees may, as of 1 January 2020, **unilaterally take nursing care leave or part-time work** for up to two weeks. The intent is to help the parties to agree on such nursing care leave or part-time work. If no agreement can be reached with the employer during this period, the employee is entitled to extend the leave or part-time work for up to two more weeks. Altogether, the entitlement may extend to four weeks of nursing care leave or part-time work, but is limited to one spell per dependant. If an agreement is reached, the spells taken due to this entitlement must be credited towards the statutory period of the agreed nursing care leave or part-time work.

The employee must inform the employer of the date of the commencement of the intended nursing care leave or part-time work as early as possible. No formal criteria are specified in the law, in contrast to the agreed nursing care leave or part-time work. Nevertheless, as it is still necessary to submit an agreement in order to claim long-term care leave benefit, it is advisable to agree everything in writing. If so requested by the employer, the employee is requested to attest, within one week, the nursing needs of the individual and to furnish *prima facie* evidence of such individual's dependency on the employee. Dependency is defined same as for nursing leave under Section 16 UrlG (Urlaubsgesetz; Holiday Act), and includes relatives not living in the same household, comprising siblings, parents-in-law, children-in-law, adoptive and foster parents, as well as the natural children of the spouse or partner, always on condition that the dependant receiving care is entitled to the specified level of long-term care benefit.

An employee taking nursing care leave does not receive any pay, while those on part-time work have their pay reduced on a *pro rata* basis; special bonus payments and holidays are similarly granted on a *pro rata* basis. Leave spells must not be credited to entitlements granted on the basis of employment duration. For an employee terminating their employment, calculation of the severance pay under the old severance pay scheme and holiday substitute pay must be based on the pay due for the last month prior to the start of the nursing care leave or part-time work for long-term carers. There is no special protection against dismissal, but employees are protected against motivated dismissal pursuant to Section 105 (3) 1 (i) ArbVG (Arbeitsverfassungsgesetz; Industrial Relations Act).

Long-term nursing care leave and part-time work for carers must not be confused with care leave under Section 16 UrlG (Pflegefreistellung; care leave), which continues to apply to temporary nursing needs of dependants (usually living in the same household).

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Data protection authority chooses double opt-in procedure as minimum standard for newsletter registration

In a recently published final decision, the data protection authority concludes, in summary, that because the appellee, an operator of dating portals, had failed to provide adequate data protection measures in line with the GDPR, personal data of the appellant (specifically its email address) were illegally processed which violated the appellant's basic right of secrecy under Section 1 (1) DSG (Datenschutzgesetz; Data Protection Act).

A possible data protection measure commensurate with Article 32 GDPR would be the use of the so-called double opt-in (or closed-loop opt-in) procedure which requires users to consent twice to the use of their personal data, once by registering and the second time by clicking the activation link sent to the email address given by them. In the case in point, users could use at least parts of the portal without clicking the link. In this way it was possible for a third party to use the appellant's email address to register, so that the appellant received sex spam messages without ever having registered.

In its most recent newsletter (1/2020), the authority confirmed this because *"it is only when the user reconfirms his registration – e.g. by clicking an activation link in the confirmatory email – that the enterprise has obtained a GDPR-compliant consent to using the user's personal data"*. In reverse conclusion, this means that registration without double opt-in or other comparable data security measures does not comply with the GDPR. Yet it remains open whether this applies to all registrations with user portals and newsletters or only to contents that, as is the case here, harbour a special risk (sending of messages with sexual content to minors).

For further information please contact kern@preslmayr.at

P) Inside

Christian Podoschek

We take great pleasure in the superb score accorded to us in the current **Juve "Insolvency and Restructuring" ranking**: once again we are among Austria's top law offices, both for insolvency management and debtor representation, and with regard to reorganisation and restructuring consulting. According to the ranking, our partners Matthias Schmidt and Christian Podoschek are among the most recommended insolvency law experts in Austria.

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