

Economic Analysis of Product Liability for Circular Economic Business Models

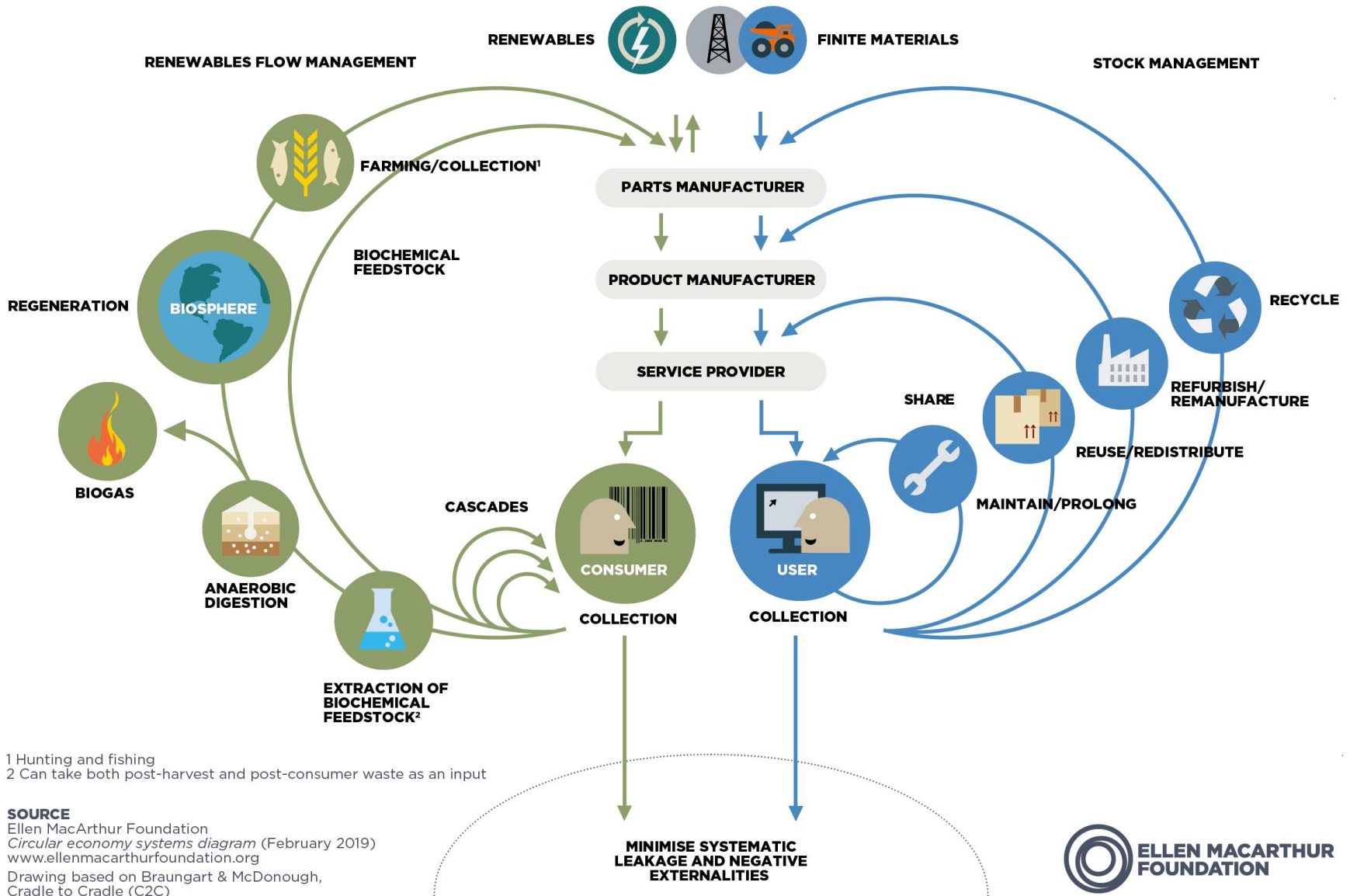
LAW & ECONOMICS SEMINAR – SPRING 2022

Elias Van Gool

02/24/2022

1. Introduction

- Product liability law and its economic analysis are based on a linear economic model
 - Manufacture → Distribute → Dispose
- Circular economic models in consumer goods sector (other than recycling):
 - Reuse (time and function) → Reselling
 - Repair; Refurbish; (Remanufacture)
 - Sharing
 - Product-as-a-Service ('PaaS')



2. A slightly easier case for product liability in circular economy?

- Reuse and Repaired or Refurbished goods: less (and less clear) safety regulation
- Reselling, Sharing and PaaS: more problematic downstream communication or tailoring of safety information
- Reuse and Repaired or Refurbished goods: less market forces

2. A slightly easier case for product liability in circular economy?

- Reuse and Repaired or Refurbished goods: consumers even more likely to underestimate (or overestimate) product risks
→ bigger price-signalling benefit
- More injured third-parties
→ no market forces at all for deterrence and price-signalling
* redistribution from linear to circular consumers

2. A slightly easier case for product liability in circular economy?

- Voluntary warranties = inadequate alternative
 - do not protect injured third parties
 - multitude of actors affecting expected accident costs.
- ↔ Higher litigation costs
 - But safety regulation and insurance alternatives may also be costlier and less complete
- Conclusion:
 - repair > reuse and reselling > sharing > PaaS

3. Original manufacturer liability and circular economy

- Inherent tension
- Limitations
- General case seems stronger for strict liability than for negligence:
 - more deterrence
 - more price-signalling benefit
 - bigger risk-allocation benefit (if plaintiff is more risk-averse).

3. Original manufacturer liability and circular economy

- Circular economy arguments in favor of strict liability:
 - Higher chance of consumer misinformation
 - More costly to enforce standard of care of “reasonable product safety”
(\leftrightarrow more litigation?)
 - Risk-averse end-users but more risk-neutral original manufacturers
(\leftrightarrow FPA insurance efficiency > liability insurance)
 - More injured third parties
- Plaintiff behavior can also affect risk \rightarrow **strict liability with contrib/comp negligence.**

4. Liability of new circular actors

- **Professional Reseller liability:**

- \leftrightarrow rationale for seller liability in linear model
- Wear and tear + possible modifications after product left control of OM \rightarrow need for inspection (CPSA)
- Need for safety communication (CPSA)
- Moral hazard problem
- Literature on comparable “transfers of liability risks” (Segerson 1994; Choi 2007): buyer’s misperceptions of risk reasons for not transferring liability; seller unlikely to be more JPP than buyer

Strict liability (same) \leftrightarrow Negligence: lower chance of third party victims; less control over risks than manufacturer; heterogeneity of resold products; FPA > liability insurance.

4. Liability of new circular actors

- **Professional Service-provider liability**

- **Prosumer liability:**

- Hay & Spier 2005: Arguing for 'exclusive consumer liability' in case of heterogenous consumers (= prosumers in CE), otherwise 'residual manufacturer liability'.
- But solely imposing liability on prosumers may go too far:
 - Prosumers misperceive risks
 - Prosumers still take some care under J&S liability
 - High risk of prosumers being JPP → need to retain incentives for OM's care

5. Multitude of potential injurers

- Dispersed or centralized liability?
 - Coase theorem; litigation costs.
 - \leftrightarrow Transaction costs, especially in CE: actors may not know each other and more third party victims
- Contributory or comparative negligence?
 - Comparative negl. exacerbates risk that risk-affecting plaintiff who underestimates risk decides (i) not to comply with standard of care; (ii) not to purchase PFA insurance.
 - Reduction of incentives to take care under comparative negl. may be overstated, because consumers who do not meet standard of care rarely claim for accidental injuries.
 - Contributory negl. can remove safety incentives for other actors.

5. Multitude of potential injurers

- Joint & Several or Several-only liability?
 - Settlements: **S-only** because J&S discourages settlements
←→ not true in cases of low solvency (CE).
 - Deterrence:
 - Full solvency + negligence: **J&S** (under strict liability no difference)
 - Exogenous solvency: **J&S** ←→ only sometimes in CE
 - Fairness:
 - J&S redistributes from defendants to plaintiff: preferable if plaintiffs struggle to prove liab., not if liab. is uncertain
 - **S-only** because J&S places disproportionate burden on defendant with smallest liability share
 - **J&S** is more balanced for insolvency risk of defendant
 - Insurance: **S-only** because J&S raises uncertainty for insurers

6. Judgement proof problem

- In CE more low solvency/risk types of JPP
- Potential mitigation?
 - Vicarious liability: e.g. repair café.
 - Minimum asset requirements: crude, prevents participation → only for most risky activities by professionals
 - Criminal liability: *idem*
 - Regulation: see limitations and costs §1.
 - FPA insurance: both public and private.
 - Mandatory liability insurance: if insurers can sufficiently monitor conduct.
 - Prohibiting liability insurance: if they cannot.