law for technical communicators

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Peterborough Technical Communication

ISTC Meets, 7 December 2022




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how (especially) product liability law can affect the work of technical communicator . .

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but also allow technical communicators to add real value in their work for clients who manufacture or market hazardous products or processes

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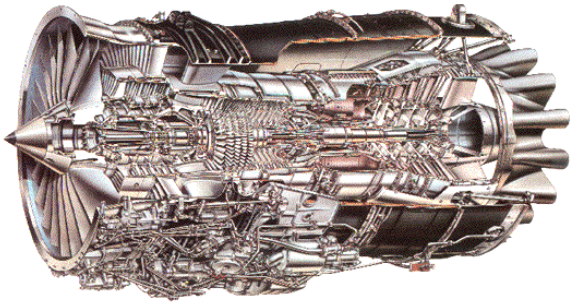
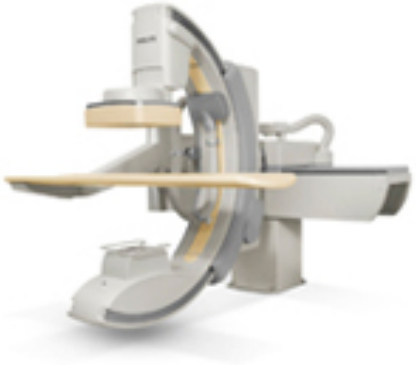



Aquarius
FlexFormer


YSD


SP-2000/X-Y



disclaimer . . .

Although I have studied law, I am not a lawyer and any statements that I make should not be taken as definitive statements of law. I am covering the position as it applies in all the EU states, the UK and the US, in one short talk. It is, therefore, impossible to describe the precise position within each jurisdiction. Similarly, it is impossible to give detailed advice that will hold good for all types of product.

If you are in any doubt as to how product safety or product liability matters might affect any aspect of your business or professional duties, you should seek advice in relation to the jurisdiction(s) and product(s) concerned. My firm offers such specialist advice.

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what we're up against . . .

- the "culture of the victim"
- *When Products Harm*
- increasing willingness and encouragement to seek redress (over real or imagined loss)
- the "compensation culture"
- tougher law and tougher interpretation
- perhaps competitors who set a lower standard

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overview . . .

- criminal, civil, regulatory and strict liability law
- advice about “instructions for use”
- product markings, especially in the US
- product support documentation (“helpware”)
- translation
- three case studies
- resources
- conclusions

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criminal law . . .

- function of the criminal law
- little specific applies to communicators
- consumer protection legislation
- health & safety legislation
- corporate manslaughter
- limits of the criminal law

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regulatory law . . .

- function of regulatory law
- EU “New Approach” Directives
- what they are and what they aren’t
- Machinery Safety Directive
- Medical Devices Directive
- apply throughout the European Economic Area
- and still in the UK . . .

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civil law . . .

- function of the civil law
- contract - founded on agreement; express and implied terms; unfair contract terms; pre and post contractual statements; limiting liability
- torts - the tort of negligence; duty of care and so-called “residual risks”
- eventually, “strict” product liability . . .

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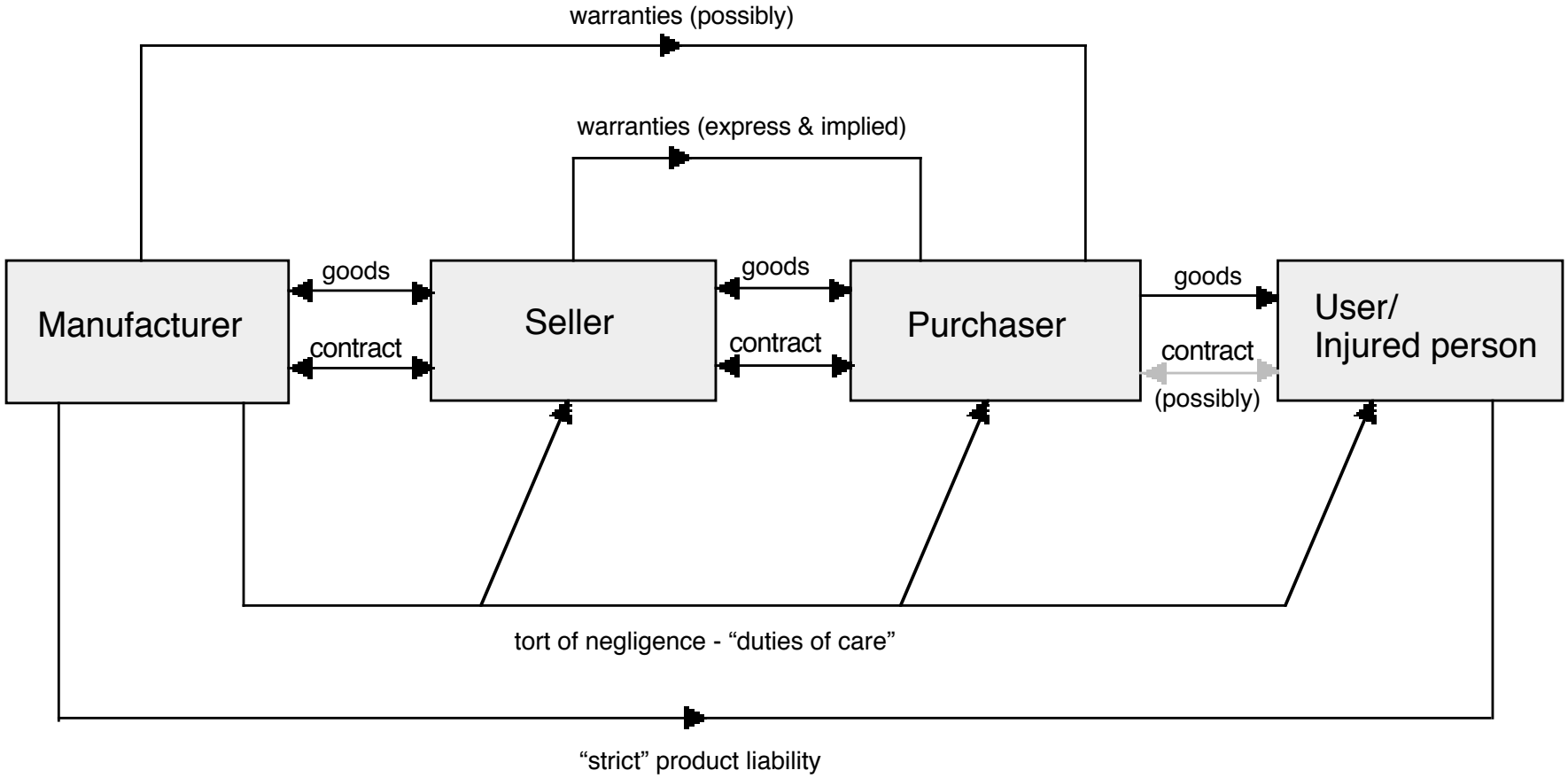

Product liability - a conceptual model with simplified linkages

strict product liability . . .

- short-circuits the process for the injured party
- (only) three essentials to be proved . . .
- a “defective” product (which has a new, non-intuitive, specific legal meaning
- personal injury
- causal link between the two
- negligence is not an issue

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product "defective" when . . .

- it does not provide the safety which a user is reasonably entitled to expect, taking all the circumstances into account including. . .
- the presentation of the product
- the use to which it could reasonably be expected that the product would be put (including foreseeable misuse)
- safety warnings - both on the product itself and in the accompanying "instructions for use"
- reasonable economic and performance cost
- concept of "residual risk"

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implications of strict liability . . .

- documentation is part of the product
- indeed, can even make the product defective
- civil law matter — Courts, arbitration, mediation
- generally more severe than regulatory law
- not about intent or conduct, but outcomes

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position in the United States . . .

- broadly similar legal concepts of contract, tort and strict liability to those in EEA states & UK
- but administration of justice quite different
- jury trials, contingency fees, each side pays
- Federal law and State law
- many claims, but judgements often overturned (or damages reduced) on appeal

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so what — surely this is all the client's problem?

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it depends . . .

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liability of communicators & firms

- if working for an employer
- if working for a client
- professional negligence
- how to protect yourself as a communicator
- but also how to provide a value-added, differentiated service

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some general advice . . .

- put everything in writing - protect your back -
- how would my role look to a Court?
- don't accept a commission where the funds and/or time are insufficient
- advise the client to have a poor source text improved before translation
- act ethically and professionally

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professional competence . . .

- professional negligence
- generally stick to accepted, proven standards, codes of practice and the like
- need to be good reasons to depart from these
- danger of trying something new and untested
- Simplified Technical English?

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money rears its head . . .

- duty to warn if budget (or time) insufficient
- if a commission is accepted anyway, liability may still arise
- so a competent professional should refuse a commission if the funds are insufficient

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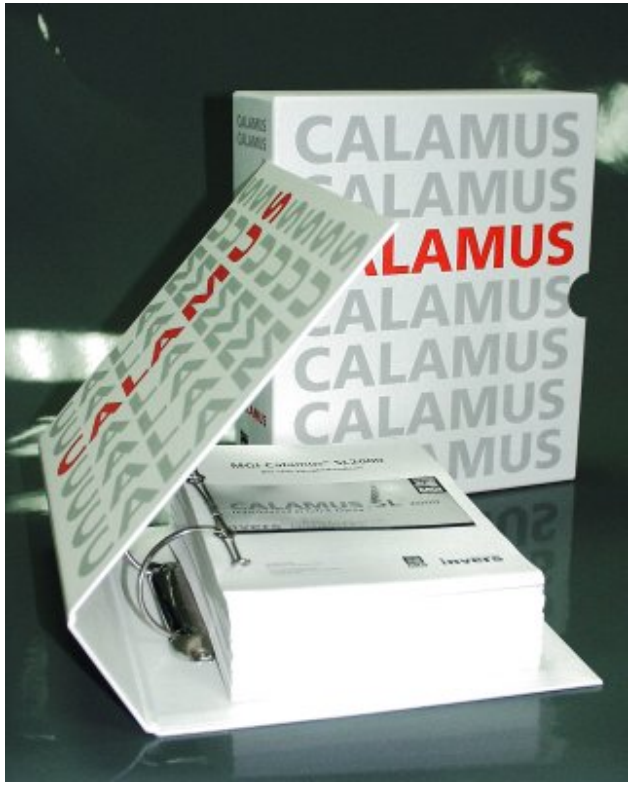
some more specific advice . . .



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product markings . . .

- alerting and information
- ISO 3864 and ANSI Z536 standards
- one symbol/icon: one clear message
- text should be only confirmatory
- as close as possible to the point of hazard
- repeat in “instructions for use”
- “read the manual” icon

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ISO . . .

prohibition

warning

safer condition

mandatory action

ANSI . . .

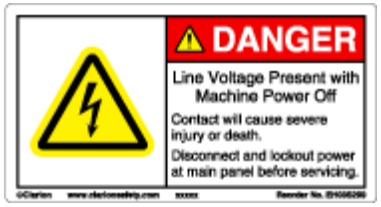

DANGER
HAZARDOUS VOLTAGE.
Contact may cause electric shock or burn.
Read and understand manual before servicing.


WARNING
HAZARDOUS VOLTAGE.
Disconnect power before servicing.


CAUTION
Laser Hazard
Visible and/or invisible laser radiation when opened.
Avoid eye and skin exposure to direct or scattered radiation.

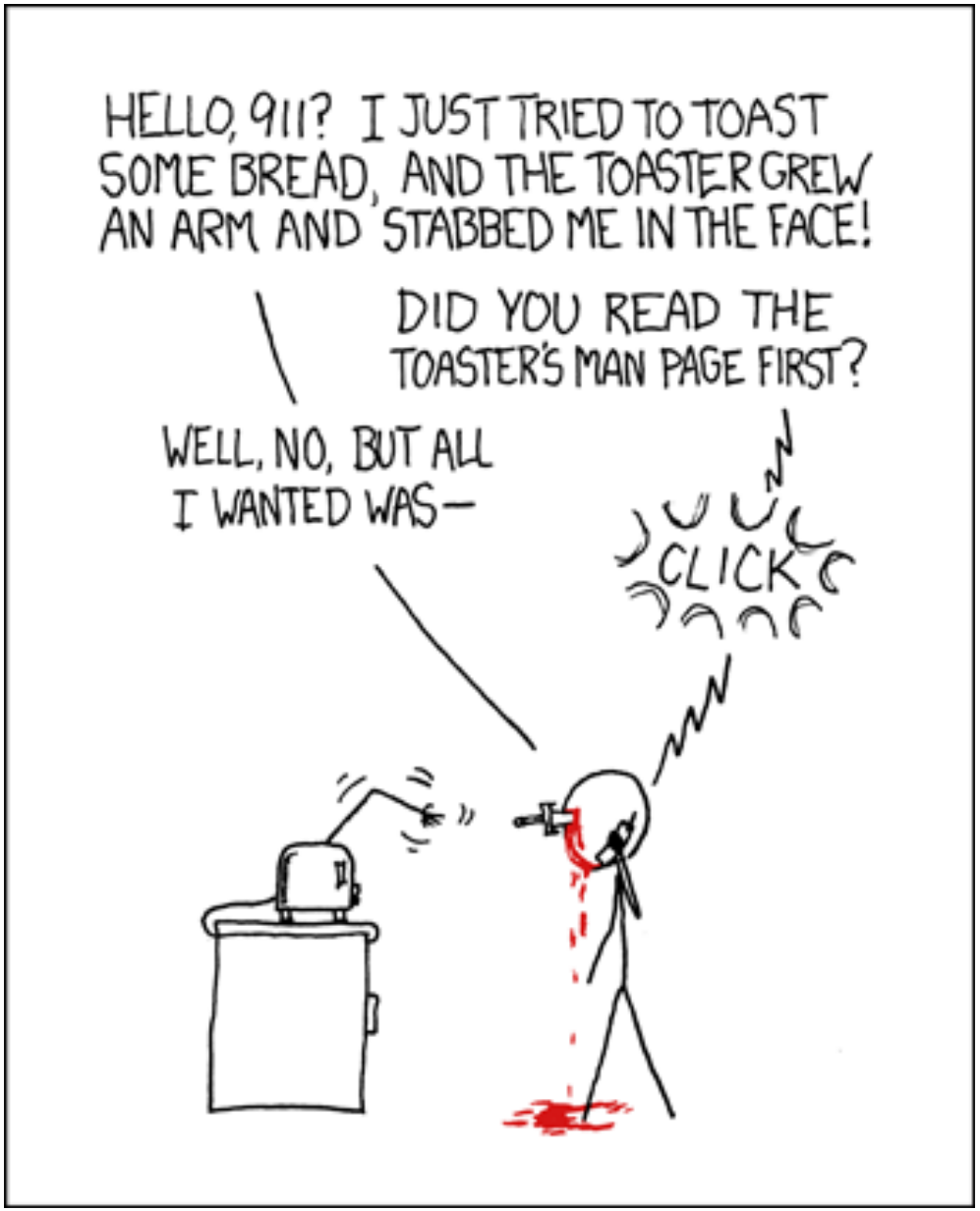

WARNING
Hazardous Voltage Enclosed
Voltage or current hazard sufficient to cause shock, burn, or death.
Disconnect and lockout power before servicing.


WARNING
Electrical and mechanical hazards.
Authorized personnel only.


DANGER
Line Voltage Present with Machine Power Off
Contact will cause severe injury or death.
Disconnect and lockout power at main panel before servicing.


DANGER
Severe shock hazard.
Only authorized personnel may service this equipment.
Turn power OFF before entry.


NOTICE
Seismic Tie Down


HELLO, 911? I JUST TRIED TO TOAST SOME BREAD, AND THE TOASTER GREW AN ARM AND STABBED ME IN THE FACE!
DID YOU READ THE TOASTER'S MAN PAGE FIRST?
WELL, NO, BUT ALL I WANTED WAS—
CLICK

clear table of contents listing . . .

- can be valuable as evidence
- “macro” information
- assumption that it will be looked at
- importance of active phraseology
- **SAFETY** section must stand out

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contents

Copyright
About this manual

SAFETY
Important safety information
Intended use and users
Warning signs used
Emergency shutdown
Manual Lifting safety
Electrical safety
Modifications
Further help and information

Description
BioSys Wash Station
Recycling Option

Installation
Time, skills and tools required
Checking the kit contents
Site preparation
Assembling the Wash Station Platform

Operation
Washing plant & tools
Obtaining consent to discharge
Draining oil
Discharging to a foul drain
Topping up the recycle tank

Maintenance
Cleaning materials
Weekly maintenance schedule
Monthly maintenance schedule
Annual maintenance schedule

Troubleshooting
Clearing blockages
Responding to Alarms
Identifying pump failure

Disposal
Disposal for further use
Final disposal or scrapping

SAFETY section

- general warnings and cautions
- essential pre-use safety information
- often some standard texts and graphics
- intended use and who may use (and possibly who may not use — including **explicit** warning(s) against foreseeable misuse
- safety devices
- work positions

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- **SAFETY** section to deal with general safety matters
- **SAFETY** section to include vital pre-use safety information
- directions *back* from detailed operating procedures to vital pre-use safety information
- clear discrimination between descriptive and instructional text and graphics

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key pre-use safety information

- what operators must know before attempting to use a product
- sometimes includes **EMERGENCY STOP**
- clear graphics usually vital
- might include first aid
- how to summon assistance

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typical general safety topics . . .

- electrical safety
- mechanical safety
- biosecurity
- personal hygiene

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Further help and information

- helping users and helping
  to protect the producer
- training
- service and/or maintenance contracts
- modifications
- books, videos, websites *(internal and external)*

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general safety statement . . .

- at the start of each operating chapter/section or self-contained operating procedure
- reference back to the **SAFETY** section
- placing responsibility onto the reader: “if you don’t know/understand, then don’t use!”
- standard texts and graphics can often be used (but with care!)

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some authors' guidelines

- a product must not be "defective"
- even a "good" manual can never make a "defective" product "not defective"
- a poor manual can easily create a "defective" product *(for example, by suggesting that the product be used beyond its design limits)*
- never underestimate people's stupidity

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- the primary role of safety warning labels on the product itself
- the secondary role of product support documentation

- in giving instructions, respect the supremacy of local jurisdiction(s)
- avoid cluttering instructional text with too many undifferentiated safety warnings
- placing of (proper) responsibility on the user and the operator

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- SAFETY chapter to deal with general safety matters
- SAFETY chapter to include vital pre-use safety information
- directions *back* from detailed operating procedures to vital pre-use safety information
- clear discrimination between descriptive and instructional text

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- clear and consistent terminology, avoiding synonyms
- formal definitions of important safety-related terms (such as WARNING)
- all safety warning labels on the product itself must be reproduced and explained in the manual(s) for the machine

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- manuals must be supplied and be available
- operators must be directed to the manual(s) where important for safety (because simple icons often cannot explain everything)
- cannot contract to limit the liability in respect of an injured person in “instructions for use”
- good access structures essential to help readers navigate manuals

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text or graphics: which is "best"?

- both are valuable
- correct use of each medium is what's important
- substantial research base to inform/support decisions as to individual text/graphic choices and the overall mix
- Dynamics in Document Design
  K. Scriver, McGraw Hill

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what graphics are best at . . .

- spatial information
- movement
- identification / recognition
- straightforward concepts
- building confidence
- language-neutral

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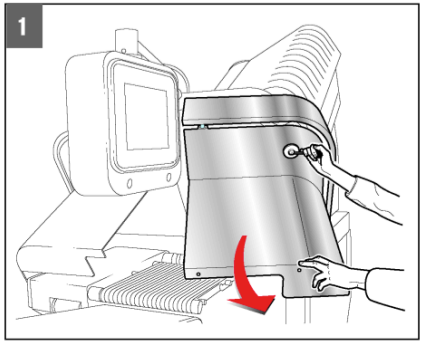
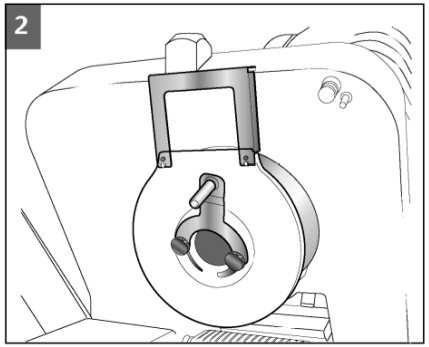
1



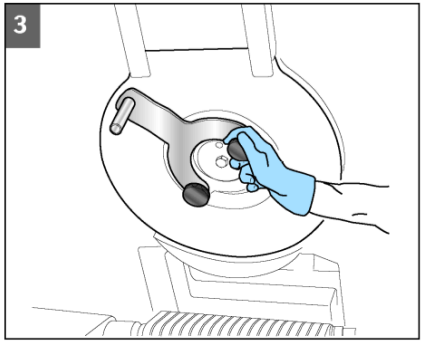
Open the outfeed cover

2



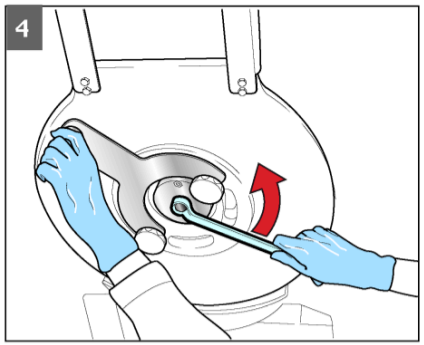
Suspend the blade mounting fixture

3



Screw in the star knobs

4

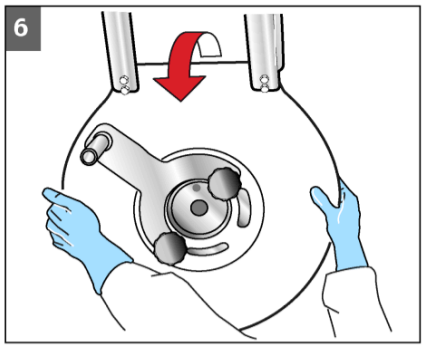


Lock the blade and open the blade shaft

5

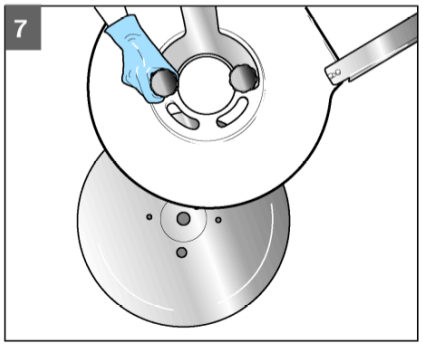
Screw off the lid

6



Remove blade support fixture

7



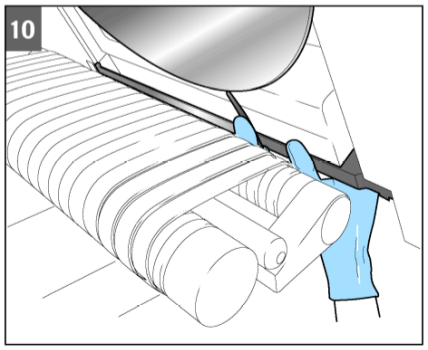
Unscrew the star knobs and remove the blade mounting fixture.

8 Change the blade.

9 Fit the blade in reverse order

tightening torque for the blade shaft screw = 60 Nm

10



Check the play .The separation must not be greater than 0,7 mm.

what text is best at . . .

- conceptual information
- complexity
- instructions where ambiguity would be hazardous or otherwise unacceptable
- confirmation of message in a graphic
- user interface instructions

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There is a foolish consistency running through much of contemporary interface design, a blind spot at the center of Silicon Valley's usually acute field of vision. In a world dominated by icons and visual metaphors, the role of text — letters and words, rather than images and animations — has come to seem like an afterthought, an obscure walk-on part in a grand Hollywood epic. Words, in this lopsided paradigm, are always inferior to images. Anyone who knows anything about the history of writing systems — specifically the shift from hieroglyphic-style pictograms to phonetic spelling — will sense something bizarre in this hierarchy.

Johnson, S. 1997 *How new technology transforms the way we create and communicate*, Harper-Collins, San Francisco, CA

DO NOT OPERATE this machine until you are sure that the operator routine checks described in Chapter 6 of this manual have been satisfactorily completed and that the routine preventive maintenance programme summarised in Chapter 7 is up-to-date. If *any* part of the machine is known (or suspected) to be defective or wrongly-adjusted DO NOT OPERATE the machine until a repair has been made. Operation of the machine with defective or wrongly-adjusted components could create safety hazards. This could lead to fatal or other serious personal injury.

translation . . .

- misinformation abounds in this area
- producer is responsible for the translated content
- comes down to: could injury arise because of a native user's inability to understand?
- consider Simplified English, Controlled English or Simplified Technical English
- use a translation bureau with translation support systems
- strategy for minimising cost and risk

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three case studies . . .

- medical diagnostic equipment
- broadcasting product
- agricultural machinery

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Universal Medical Systems . . .

- non-obvious/non-intuitive risks
- professional negligence
- manual cannot make a product “not defective”

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CamStands . . .

- broadcast camera stands
- risk of injury through misuse
- increasing diversity of users
- manuals often separated from product
- so only clear warning labels will do, with the manual in only a supporting role

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Rhizome planter . . .

- farm machine used in the EU, the US and Canada
- again, range of users - sometimes only of limited intellect / language ability
- missing manuals
- *read the manual* labels

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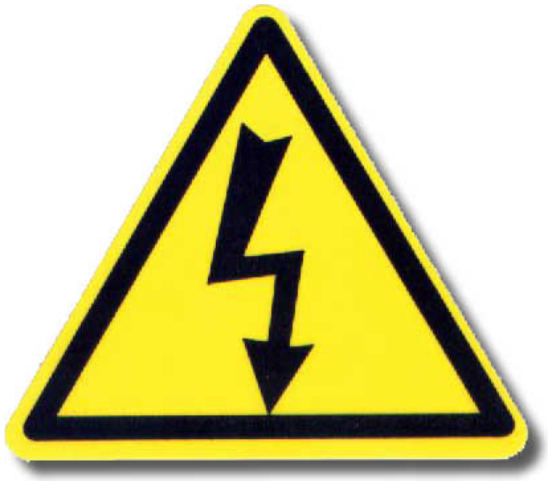
SAFETY INSTRUCTIONS

1. Read and make sure you understand the whole Operation and Maintenance Manual and all safety labels on both this machine and any attached tractor before operating either.
2. If you are in any doubt about your ability to work with the machine safely DO NOT ATTEMPT TO OPERATE OR MAINTAIN THE MACHINE.
3. Only a trained person is to be permitted to operate this machine. Training must include instruction in operation under both normal conditions and in emergency situations.
4. This machine is to be serviced only by trained and authorized personnel. Follow lockout procedures as described in the manual before servicing, maintenance, lubrication or cleaning.
5. Never reach into the machine for any reason unless the machine has come to a COMPLETE STOP.
6. Never leave the machine in such a manner that another operator can start or move the machine or an attached tractor while you are working on or within the machine.
7. Never attempt to change or defeat the function of any safety device.
8. Before starting this machine, check that:
   - all persons are clear of the machine;
   - no maintenance work is being performed on the machine;
   - all the protective guards are in place and secure.
9. Routine inspections and corrective/ preventative maintenance measures are to be conducted to ensure that all guards and safety features are retained and function properly.



⚠WARNING

Read and understand operator's manual before using this machine.

Failure to follow operating instructions could result in injury.

resources . . .

- technical communicators
- engineer/communicator?
- should not be too “close” to the product
- existing documentation standards
- testing and reviewing
- training
- consultancy on house standards

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(professional) negligence

- arises out of the tort of negligence
- “duty of care”
- traditionally, only duty to client
- standard of care – that of an ordinary, competent member of a profession
- the “Bolam test”

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When you get situations which involve the use of some special skill or competence, then the test as to whether there has been negligence or not, is not the test of the man on top of the Clapham omnibus, because he has not got that special skill. The test is the standard of the ordinary skilled man exercising and professing that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

Bolam v Friern Hospital Management Committee (1957)

- only the starting point
- case law – usually in narrow circumstances
- professionals who *cannot* guarantee a result
  for example, doctors, lawyers
- professionals who *do* warrant a result
  for example, structural engineers
- the second implies a higher standard

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This means, in my view, that the principle in Bolam's case is not strictly applicable. In the special circumstances of this case . . . it can be said that there was a higher duty imposed upon him than the law in general imposes on a medical or other professional . . .

Greaves & Co v Baynham Meikle (1974)

- technical communicators
- procurer has a duty to select a competent supplier (but that may be difficult)
- duty to spell out what seem obvious to the professional
- duty to warn if budget is unsufficient
- but if contractor goes ahead anyway, then liability may still arise
- so refuse if funds are insufficient

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conclusions . . .

- law (and its enforcement) is becoming tougher
- problems are infrequent, but can be expensive, disruptive and distressing - good practice is all about minimizing risk
- text and graphics are both valuable
- helping to protect users allows producers to minimize their potential product liability exposure
- not all doom and gloom: real marketing benefits
- use specialists to create and review the “helpware”

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